Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2357 OF 2017

Government of NCT of Delhi ... Appellant

Versus

Union of India & Another ... Respondents

WITH

CONTEMPT PETITION (CIVIL) NO. 175 OF 2016
IN
WRIT PETITION (CRIMINAL) NO. 539 OF 1986
CIVIL APPEAL NO. 2358 OF 2017
CIVIL APPEAL NO. 2359 OF 2017
CIVIL APPEAL NO. 2360 OF 2017
CIVIL APPEAL NO. 2361 OF 2017
CIVIL APPEAL NO. 2362 OF 2017
CIVIL APPEAL NO. 2363 OF 2017
CIVIL APPEAL NO. 2364 OF 2017
AND
CRIMINAL APPEAL NO. 277 OF 2017

J U D G M E N T

Dipak Misra, CJI (for himself, A.K. Sikri and A.M. Khanwilkar, JJ.)

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A. <u>Prologue</u>:

The present reference to the Constitution Bench has its own complexity as the centripodal issue in its invitation of the interpretation of Article 239AA of the Constitution invokes a host of concepts, namely, constitutional objectivity navigating through the core structure with the sense and sensibility of having a real test of constitutional structure; the culture of purposive interpretation because the Court is concerned with the sustenance of glory of constitutional democracy in a

Democratic Republic as envisioned in the Constitution; and understanding the idea of citizenry participation viewed with the lens of progressive perception inherent in the words of a great living document emphasizing on the democratic theme to achieve the requisite practical goal in the world of reality. We may call it as pragmatic interpretation of a constitutional provision, especially the one that has the effect potentiality to metamorphose a workable provision into an unnecessary and unwarranted piece of ambiguity. In such a situation, the necessity is to scan the anatomy of the provision and lift it to the pedestal of constitutional ethos with the aid of judicial creativity that breathes essentiality of life into the same. It is the hermeneutics of law that works. It is the requisite constitutional stimulus to sustain the fundamental conception of participative democracy so that the real pulse is felt and further the constitutional promise to the citizens is fulfilled. It gets rid of the unpleasant twitches and convulsions. To put it differently, the assurance by the insertion of Article 239AA by the Constitution (Sixty-ninth Amendment) Act, 1991 by

exercise of the constituent power is not to be renounced with any kind of rigid understanding of the provision. It is because the exercise of constituent power is meant to confer democratic, societal and political powers on the citizens who reside within the National Capital Territory of Delhi that has been granted a special status.

2. The principal question is whether the inhabitants or voters of NCT of Delhi remain where they were prior to the special status conferred on the Union Territory or the amended constitutional provision that has transformed Delhi instills “Prana” into the cells. Let it be made clear that any ingenious effort to scuttle the hope and aspiration that has ignited the idea of “march ahead” among the inhabitants by any kind of linguistic gymnastics will not commend acceptation. The appellant claims that the status of the voters of NCT Delhi after the Sixty-Ninth Amendment has moved from notional to real but the claim has been negatived by the Delhi High Court. Learned counsel for the appellant criticize the judgment and order of the High Court by contending,

apart from other aspects, that the language employed in the entire Chapter containing Article 239AA, unless appositely interpreted, shall denude the appellant, the National Capital Territory of Delhi, of its status.

3. The criticism is founded on the base that the Constitution of India, an organic and continuing document, has concretised their desire and enabled the people to have the right to participate as a collective in the decision making process that shall govern them and also pave the path of their welfare. The participation of the collective is the vital force for larger public interest and higher constitutional values spelt out in the Constitution and the silences therein and the same are to be protected. It is the assertion that the collective in a democracy speak through their elected representatives seeking mitigation of the grievances.

4. This Court, being the final arbiter of the Constitution, in such a situation, has to enter into the process of interpretation with the new tools such as constitutional pragmatism having due regard for sanctity of objectivity, realization of the purpose

in the truest sense by constantly reminding one and all about the sacrosanctity of democratic structure as envisaged by our Constitution, elevation of the precepts of constitutional trust and morality, and the solemn idea of decentralization of power and, we must say, the ideas knock at the door to be invited. The compulsive invitation is the warrant to sustain the values of democracy in the prescribed framework of law. The aim is to see that in the ultimate eventuate, the rule of law prevails and the interpretative process allows the said idea its deserved space, for when the rule of law is conferred its due status in the sphere of democracy, it assumes significant credibility.

5. We would like to call such a method of understanding "confluence of the idea and spirit of the Constitution", for it celebrates the grand idea behind the constitutional structure founded on the cherished values of democracy.

6. As we have used the words "spirit of the Constitution", it becomes our obligation to clarify the concept pertaining to the same. The canon of constitutional interpretation that glorifies the democratic concepts lays emphasis not only on the

etymology of democracy but also embraces within its sweep a connotative expansion so that the intrinsic and innate facets are included.

7. A seven-Judge Bench of the Court in ***Keshvan Madhava Menon v. The State of Bombay***[1] observed:-

> "An argument founded on what is claimed to be the spirit of the Constitution is always attractive, for it has a powerful appeal to sentiment and emotion; but a court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view. Article 372(2) gives power to the President to adapt and modify existing laws by way of repeal or amendment. There is nothing to prevent the President, in exercise of the powers conferred on him by that article, from repealing, say the whole or any part of the Indian Press (Emergency Powers) Act, 1931. If the President does so, then such repeal will at once attract Section 6 of the General Clauses Act. In such a situation all prosecutions under the Indian Press (Emergency Powers) Act, 1931, which were pending at the date of its repeal by the President would be saved and must be proceeded with notwithstanding the repeal of that Act unless an express provision was otherwise made in the repealing Act. It is therefore clear that the idea of the preservation of past inchoate rights or liabilities and pending proceedings to enforce the same is not foreign or abhorrent to the Constitution of India. We are, therefore, unable to accept the contention

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[1] 1951 SCR 228

> about the spirit of the Constitution as invoked by the learned counsel in aid of his plea that pending proceedings under a law which has become void cannot be proceeded with. Further, if it is against the spirit of the Constitution to continue the pending prosecutions under such a void law, surely it should be equally repugnant to that spirit that men who have already been convicted under such repressive law before the Constitution of India came into force should continue to rot in jail. It is, therefore, quite clear that the court should construe the language of Article 13(1) according to the established rules of interpretation and arrive at its true meaning uninfluenced by any assumed spirit of the Constitution."
>
> [Emphasis is ours]

The aforesaid decision has to be understood in the context of the phraseology 'spirit of the Constitution'. As we understand, the Court has not negatived the concept as an alien one. It has laid emphasis on the support from the language used. It has not accepted the assumed spirit of the Constitution. Needless to say, there cannot be assumptions. Every proposition should have a base and the Constitution of India to be an organic and living one has to be perceived with progressive dynamism and not stuck with inflexibility.

Flexibility has to be allowed room and that is what we find in later authorities.

8. In ***Madhav Rao Jivaji Rao Scindia and others v. Union of India and another***[2], Hegde, J, in his concurring opinion, emphasized on the spirit of the Constitution. The learned Judge, while not accepting the exercise of power for collateral reasons, stated:-

> "Exercise of power for collateral reasons has been considered by this Court in several decisions as a fraud on that power — see *Balaji* v. *State of Mysore*. Breach of any of the Constitutional provisions even if made to further a popular cause is bound to be a dangerous precedent. Disrespect to the Constitution is bound to be broadened from precedent to precedent and before long the entire Constitution may be treated with contempt and held up to ridicule. That is what happened to the Weimar Constitution. If the Constitution or any of its provisions have ceased to serve the needs of the people, ways must be found to change them but it is impermissible to by-pass the Constitution or its provisions. Every contravention of the letter or the spirit of the Constitution is bound to have chain reaction. For that reason also the impugned orders must be held to be ultra vires Article 366(22)."
>
> [underlining is ours]

2(1971) 1 SCC 85

9. In ***State of Kerala and another v. N.M. Thomas and others***[3], Krishna Iyer, J., in his concurring opinion, opined thus:-

> "106. Law, including constitutional law, can no longer "go it alone" but must be illumined in the interpretative process by sociology and allied fields of knowledge. Indeed, the term "constitutional law" symbolises an intersection of law and politics, wherein issues of political power are acted on by persons trained in the legal tradition, working in judicial institutions, following the procedures of law, thinking as lawyers think. So much so, a wider perspective is needed to resolve issues of constitutional law. Maybe, one cannot agree with the view of an eminent jurist and former Chief Justice of India:
>
> > "The judiciary as a whole is not interested in the policy underlying a legislative measure."
>
> Moreover, the Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy. Its provisions can be comprehended only by a spacious, social-science approach, not by pedantic, traditional legalism. Here we are called upon to delimit the amplitude and decode the implications of Article 16(1) in the context of certain special concessions relating to employment, under the Kerala State (the appellant), given to scheduled castes and scheduled tribes (for short, hereinafter referred to as harijans) whose social lot and economic indigence are an Indian reality recognized by many articles of the

3(1976) 2 SCC 310

Constitution. An overview of the decided cases suggests the need to reinterpret the dynamic import of the "equality clauses" and, to stress again, beyond reasonable doubt that the paramount law, which is organic and regulates our nation's growing life, must take in its sweep "ethics, economics, politics and sociology". Equally pertinent to the issue mooted before us is the lament of Friedmann:

> "It would be tragic if the law were so petrified as to be unable to respond to the unending challenge of evolutionary or revolutionary changes in society."

The main assumptions which Friedmann makes are:

> "First, the law is, in Holmes' phrase, not a 'brooding omnipotence in the sky', but a flexible instrument of social order, dependent on the political values of the society which it purports to regulate . . . ."

107. Naturally surges the interrogation, what are the challenges of changing values to which the guarantee of equality must respond and how? To pose the problem with particular reference to our case, does the impugned rule violate the constitutional creed of equal opportunity in Article 16 by resort to a suspect classification or revivify it by making the less equal more equal by a legitimate differentiation? Chief Justice Marshall's classic statement in *McCulloch* v. *Maryland* followed by Justice Brennan in *Katzenbach* v. *Morgan* remains a beacon light:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited,

> but consist with the letter and spirit of the Constitution, are constitutional"."
>
> [Emphasis is added]

10. In ***Supreme Court Advocates-on-Record Association and another v. Union of India***[4], this Court observed that a fortiori any construction of the constitutional provisions which conflicts with the constitutional purpose or negates the avowed object has to be eschewed, being opposed to the true meaning and spirit of the Constitution and, therefore, being an alien concept.

11. We have referred to the aforesaid precedents to state that the spirit of the Constitution has its own signification. In the context of the case at hand, the democratic nature of our Constitution and the paradigm of representative participation are undoubtedly comprised in the "spirit of the Constitution". While interpreting the provisions of the Constitution, the safe and most sound approach is to read the words of the Constitution in the light of the avowed purpose and spirit of the Constitution so that it does not result in an illogical outcome which could have never been the intention of the

4(1993) 4 SCC 441

Constituent Assembly or of the Parliament while exercising its constituent power. Therefore, a constitutional court, while adhering to the language employed in the provision, should not abandon the concept of the intention, spirit, the holistic approach and the constitutional legitimate expectation which combinedly project a magnificent facet of purposive interpretation. The Court should pose a question to itself whether a straight, literal and textual approach would annihilate the sense of the great living document which is required to be the laser beam to illumine. If the answer is in the affirmative, then the constitutional courts should protect the sense and spirit of the Constitution taking aid of purposive interpretation as that is the solemn duty of the constitutional courts as the final arbiters of the Constitution. It is a constitutional summon for performance of duty. The stress has to be on changing society, relevant political values, absence of any constitutional prohibition and legitimacy of the end to be achieved by appropriate means. We shall refer to the aspect of purposive interpretation regard being had to the

context and other factors that gain primacy to be adverted to at a subsequent stage._

12. Having prefaced thus, we shall now proceed to state the controversy in brief since in this batch of appeals which has been referred to the Constitution Bench, we are required to advert to the issue that essentially pertains to the powers conferred on the Legislative Assembly of the National Capital Territory of Delhi and the executive power exercised by the elected Government of NCT of Delhi. The facts involved and the controversy raised in each individual appeal need not be dwelled upon, for we only intend to answer the constitutional issue.

13. The primordial adjudication, as is presently the requisite, commands our focus on the interpretation of Article 239AA of the Constitution of India. The said interpretation, be it noted, is not to be done in an exclusive compartment but in the context in which it has been introduced and also keeping in view the conceptual structure of the other relevant articles of the Constitution. Before we delve into the various facets of

Article 239AA and other provisions of the Constitution which have been pressed into service by the learned counsel appearing for the appellant and the learned Additional Solicitor General, we think it appropriate to narrate a brief history of Delhi.

14. On 12.12.1911, Delhi became the capital of India. Delhi Tehsil and Mehrauli Thana were separate from Punjab and annexed to Delhi headed by a Commissioner and it came to be known as the Chief Commissioner's province. In 1912, the Delhi Laws Act, 1912 came into force with effect from 01.10.1912 making certain laws prevalent in Punjab to be applicable to Delhi. The Delhi Laws Act, 1915 empowered the Chief Commissioner, Delhi to determine application of laws by issuing appropriate notification in the Gazette of India. The Government of India Act, 1919 and the Government of India Act, 1935 retained Delhi as a centrally administered territory. On coming into force of the Constitution of India on 26.01.1950, Delhi became a Part C State. In the year 1951, the Government of Part C States Act, 1951 was enacted

providing, inter alia, for a Legislative Assembly in Delhi. Section 21(1) of the 1951 Act empowered the Legislative Assembly to make laws on all matters of List II of the Seventh Schedule of the Constitution except (i) public order; (ii) police (including railway police); (iii) constitution and powers of municipal corporations and local authorities, etc.-public utility authorities; (iv) lands & buildings vested in/in possession of the Union situated in Delhi or New Delhi; (v) offences against laws about subjects mentioned from (i) to (iv); and (vi) jurisdiction of courts with respect to the above matters and court fee thereon.

15. On 19.10.1956, 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. In the

year 1953, the Government of Union Territories Act, 1963 was enacted to provide for Legislative Assemblies and Council of Ministers for various Union Territories but the provisions of the said Act were not made applicable to Delhi. The Delhi Administration Act, 1966 was enacted to provide for limited representative Government for Delhi through a Metropolitan Council comprising of 56 elected members and five nominated members. In the same year, on 20.08.1966, the Ministry of Home Affairs issued S.O. No. 2524 that provided, *inter alia*, that the Lieutenant Governor/Administrator/Chief Commissioner shall be subject to the control of the President of India and exercise such powers and discharge the functions of a State Government under the Commission of Inquiry Act, 1952 within the Union Territories. In the year 1987, the Balakrishnan Committee was set up to submit its recommendations with regard to the status to be conferred on Delhi and the said 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; and to ensure stability, appropriate constitutional measures should be taken to confer the National Capital a special status. The relevant portion of the Balakrishnan Committee report reads as follows:-

> "6.5.5 In paragraphs 6.5.2 and 6.5.3 we have briefly summarised the arguments for and against making Delhi a constituent State of the Union. After the most careful consideration of all the arguments and on an objective appraisal, we are fully convinced that most of the arguments against making Delhi a State of the Union are very substantial, sound and valid and deserve acceptance. This was also the view expressed before us by some of the eminent and knowledgeable persons whom we interviewed. As these arguments are self-evident we find it unnecessary to go into them in detail except those relating to constitutional and financial aspects covered by them.
>
> 6.5.6 The important argument from the Constitutional angle is based on the federal type of our Constitution under which there is a constitutional division of powers and functions between the Union and the State. If Delhi becomes a full- fledged State, there will be a constitutional division of sovereign, legislative and executive powers between the Union and the State of Delhi. One of the consequences will be that in respect of matters in the State List, Parliament will have no power on jurisdiction to make any law except in the special and emergency situations provided for under the Constitution and to that extent the Union

Executive cannot exercise executive powers or functions. The constitutional prohibition on the exercise of powers and functions will make it virtually impossible for the Union to discharge its special responsibilities in relation to the national capital as well as to the nation itself. We have already indicated in an earlier chapter the special features of the national capital and the need for keeping it under the control of the Union Government. Such control is vital in the national interest irrespective of whether the subject matter is in the State field or Union field. If the administration of the natural capital is divided into rigid compartments of State of field and Union field, conflicts are likely to arise in several vital matters, particularly if the two Governments are run by different political parties. Such conflicts may, at times, prejudice the national interest……

x x x

6.5.9 We are also impressed with the argument that Delhi as the national capital belongs to the nation as a whole and any constituent State of the Union of which Delhi will become a part would sooner or later acquire a predominant position in relation to other States. Sufficient constitutional authority for Union intervention in day-to-day matters, however vital some of, them may be, will not be available to the Union, thereby prejudicing the discharge of its national duties and responsibilities.

x x x

LT. GOVERNOR AND COUNCIL OF MINISTERS

6.7.19 As a necessary corollary to the establishment of a responsible Government for Delhi the structure

of the executive should be more or less on the pattern provided by the Constitution. Accordingly, there should be a Head of the Administration with a Council of Ministers answerable to the Legislative Assembly. As Delhi will continue to have the status of a Union territory, Article 239 will apply to it and so it will have an Administrator with such designation as may be specified. The present designation of the Lt. Governor may be continued and recognized in the Constitution itself. …

x x x

6.7.21 The Administrator should be expressly required to perform his functions on the aid and advice of the Council of Ministers. The expression "to aid and advice" is a well understood term of art to denote the implications of the Cabinet system of Government adopted by our Constitution. Under this system, the general rule is that the exercise of executive functions by the Administrator has to be on the aid and advice of his Council of Ministers which means that it is virtually the Ministers that should take decisions on such matters. However, for Delhi, the following modifications of this general rule will have to be adopted:

(i) Firstly, the requirement of acting on the aid and advice of the council of Ministers cannot apply to the exercise by the Administrator of any judicial or quasi-judicial functions. The reason is obvious because in respect of such functions there is no question of acting on the advice of another person.

(ii) Secondly, the requirement is only in relation to matters in respect of which the Legislative Assembly has the powers to make

laws. This power will be subject to the restrictions already dealt with earlier in the Report. Accordingly, the Council of Ministers will not have jurisdiction to deal with matters excluded from the purview of the Legislative Assembly.

(iii) Thirdly, there is need for a special provision to resolve differences between the Administrator and his Council of Ministers on any matter concerning the administration of Delhi. Normally, the general principle applicable to the system of responsible Government under the Constitution is that the Head of the Administration should act as a mere Constitutional figurehead and will have to accept the advice of the Council of Ministers except when the matter is left to his discretion. However, by virtue of Article 239 of the Constitution, the ultimate responsibility for good administration of Delhi is vested in the President acting through the Administrator. Because of this the Administrator has to take a somewhat more active part in the administration than the Governor of a State. It is, therefore, necessary to reconcile between the need to retain the responsibility of the Administrator to the Centre in this regard and the need to enforce the collective responsibility of the Council of Ministers to the Legislature. The best way of doing this is to provide that in case of difference of opinion which cannot be resolved between the Administrator and his Council of Ministers, he should refer the question to the President and the decision of the President thereon will be final. In cases of urgency, if immediate action is necessary, the Administrator may direct action to be taken

> pending such decision of the President. A provision of this kind was made for this very reason not only in the 1951 Act, but also in the 1963 Act relating to the Union territories as well as in the 1978 Bill."

16. As the chronology would show, after due deliberation, 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 239AA and 239AB in the Constitution to which we shall refer at an appropriate stage when we dwell upon the interpretative process.

B. <u>Rivalised Submissions</u>:

17. Now, we may note the rivalised submissions at the Bar. We have heard Mr. P. Chidambaram, Mr. Gopal Subramaniam, Dr. Rajiv Dhawan, Ms. Indira Jaising and Mr. Shekhar Naphade, learned senior counsel appearing on behalf of the Government of NCT of Delhi. Mr. Maninder Singh, learned Additional Solicitor General of India, has advanced arguments on behalf of the Union of India and the Lieutenant Governor of Delhi.

18. A common written submission has been filed on behalf of the Government of NCT of Delhi and Mr. Maninder Singh, learned Additional Solicitor General of India, has filed written submissions on behalf of both the Union of India and the Lieutenant Governor of NCT of Delhi.

19. An application for intervention being I.A. No. 10556 of 2017 was filed by the applicant, Reliance Industries Ltd. We have heard Dr. A.M. Singhvi, learned senior counsel on behalf of the said intervenor. Another application for intervention was filed by The Kapila and Nirmal Hingorani Foundation and we have heard Mr. Aman Hingorani, learned counsel on behalf of the said Foundation.

B.1 <u>Submissions on behalf of the appellant</u>:

20. It is submitted by learned senior counsel appearing on behalf of the appellant that the NCTD occupies a unique position in the constitutional scheme by virtue of the insertion of Articles 239AA and 239AB and the consequent enactment of the 1991 Act that has shaped the NCTD into a constitutional hybrid and has led Delhi to acquire certain

special characteristics solely attributed to full-fledged States under the Constitution. As per the appellant, the Government of NCT of Delhi enjoys far more power than the administrative set ups of other Union Territories especially after the constitutional amendment and coming into force of the 1991 Act.

21. After expansively referring to the constitutional history of the NCTD, it is urged on behalf of the appellant that the insertion of Article 239AA was intended to eradicate the hierarchical structure which functionally placed the Lieutenant Governor of Delhi in a superior position to that of the Council of Ministers, especially with respect to the executive powers and the Lieutenant Governor has to be treated as a titular head alone in respect of matters that have been assigned to the Legislative Assembly and the Council of Ministers.

22. The appellant has alluded to the nine-Judge Bench decision in ***New Delhi Municipal Corporation v. State of***

Punjab[5] to contend that the Union Territory of Delhi is a class by itself different from all other Union Territories which our Constitution envisages, and the larger Bench had no occasion to decide in what shape and form the NCTD is different from other Union Territories, for the said issue did not arise therein. Nevertheless, the majority opinion clearly rules as regards Delhi's unique constitutional status unlike other Union Territories by virtue of the constitutionally created Legislative Assembly, Council of Ministers and Westminster style cabinet system of government that have been brought by the Sixty-ninth Amendment and the 1991 Act.

23. It is further submitted by the appellant that the Sixty-Ninth Amendment to the Constitution and the consequent 1991 Act were passed with the aim to give the citizens of NCT of Delhi a larger say in the governance of NCTD. Democracy being one of the facets of the basic structure of the Constitution, the Sixty-ninth amendment was aimed at furthering democracy in Delhi and hence, Article 239AA

5(1997) 7 SCC 339

should be interpreted in the backdrop of the fact that Delhi has been conferred special status among various UTs and in such a way that democracy in its true sense is established in Delhi.

24. It is submitted that constitutional jurisprudence in the Indian context has undergone a sea change after the decisions in ***R.C. Cooper v. U.O.I***[6] and ***Maneka Gandhi v. U.O.I***[7]. Learned counsel for the appellant submit that this Court should adopt a more purposive and an organic method of interpretation as adopted by this Court in a catena of cases including the recent one in ***Justice K.S. Puttaswamy (Retd.) and another v. U.O.I. and others***[8] wherein the majority observed that the decisions of this Court prior to ***R.C. Cooper*** (supra) and ***Maneka Gandhi*** (supra) must be understood in their historical context.

25. Article 239AA has deliberately excluded the words "assist and advice" as were used in the 1963 and 1966 Acts, rather

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6AIR 1970 SC 564
7AIR 1978 SC 597
8(2017) 10 SCC 1

the said Article employs the expression "aid and advice" and, therefore, it consciously obviates the requirement of the Lieutenant Governor's concurrence on every matter. Thus, it is the proponement of the appellant that Article 239AA of the Constitution which has conferred a Westminster style cabinet system of government for the NCT of Delhi makes the Lieutenant Governor bound by the 'aid and advice' of the Council of Ministers. To buttress its argument, the appellant has referred to the judgments in ***Rai Sahib Ram Jawaya Kapur and Ors. v. State of Punjab***[9] and ***Shamsher Singh v. State of Punjab***[10] which, as per the appellant, though arose in the context of the State of Punjab, decided that since our Constitution has conferred a Westminster style cabinet system for the Government of State of Punjab, an executive Government established under the aegis of the Constitution should be able to exercise all executive powers necessary to fulfill the needs that the situation warrants and consequently, the Governor has to act in accordance with the aid and advice

9AIR 1955 SC 549
10AIR 1974 SC 2192

tendered by the Council of Ministers with the Chief Minister as its head.

26. It is further argued that GNCTD has the sole power to take executive actions on all matters on which the Delhi Legislature is competent to pass laws irrespective of whether or not the Legislature has actually passed a law on the subject. Emphasis is laid on the principle of collective responsibility to a democratically elected legislative body and, on that basis, it is proponed that the Lieutenant Governor of Delhi is bound by the aid and advice of the Council of Ministers of Delhi. It is put forth that such an interpretation can alone meet the purpose of constitutionally mandated governance in Delhi post insertion of Article 239AA in the Constitution.

27. It is the stand of the appellant that the extent of executive powers of the Government of NCT of Delhi can be understood by appositely juxtaposed reading of Article 239AA(3) with Article 239AA(4) which stipulates that the Government of NCT of Delhi has exclusive executive powers in

relation to matters which fall within the purview of Delhi Assembly's legislative competence. Article 239AA(3) gives the Delhi Legislative Assembly the legislative powers over all except three subjects in the State List and all subjects in the Concurrent List and as a natural corollary, Article 239AA(4) confers executive power on the Council of Ministers over all those subjects in respect of which the Delhi Legislative Assembly has the legislative power to legislate.

28. It is asserted by the counsel for the appellant that Article 239AA preserves the Parliament's legislative powers over all subjects in the State and the Concurrent Lists, but no such executive power is reserved for the Union. The appellant contends that there is conscious difference between the language of Article 239AA(3) which gives overriding legislative powers to the Parliament and that of Article 239AA(4) which refrains from doing the likewise in the context of executive powers. The Centre's executive power stems from Article 73 and would normally be co-extensive with the Parliament's legislative powers, but this is explicitly subject to other

provisions of the Constitution which has to include Article 239AA. Thus, Article 239AA has, in the case of Delhi, whittled down the executive power of the Centre to only the three reserved subjects falling outside the purview of the executive power of the Council of Ministers of Delhi.

29. The appellant has argued that though Article 73 of the Constitution lays down the principle that there may exist under the Constitution concurrent legislative powers between the Parliament and the State Legislative Assemblies, yet there can never be concurrent executive powers between the Central and the State Governments as such a situation would result in chaos in the absence of any responsibility/accountability for executive actions. This principle, as per the appellant, must apply equally in relation to matters contained in List II and List III of the Seventh Schedule and the effect of Article 239AA(3) is that all matters on which the Delhi Legislative Assembly has power to legislate are effectively equivalent to matters of the Concurrent List.

30. Article 239AB would become redundant if it is to be accepted that the Constitution allows the Union Government to override all executive actions/decisions of the GNCTD in the ordinary course of things, as in such a situation, it would never be necessary to invoke the special provision in the form of Article 239AB for the Union Government to take over the administration of Delhi. Further, Article 239AB stipulates that if the administration of Delhi is not carried out in accordance with Article 239AA, the President may suspend the operation of any part or whole of Article 239AA. This, as per the appellant, clearly shows that when an elected government is in place, the administration of Delhi has to be carried out in accordance with Article 239AA.

31. After quoting Dr. Ambedkar on federalism in the Constituent Assembly Debates dated 25.11.1949, the appellant has contended that Article 239AA is an example of the hallmark of federalism in our Constitution which reserves legislative primacy of the Parliament in certain limited areas but there is no such corresponding provision in the

Constitution which reserves the executive powers of the Central Government vis-a-vis GNCTD.

32. It is contended on behalf of the appellant that there is necessity for uniform and consistent interpretation of the phrase 'aid and advice' used in different articles of the Constitution such as Article 74, Article 163 and Article 239AA in the context of the functions of the President, the Governor and the Lieutenant Governor respectively. It is urged that the provisions of the Constitution being on a higher pedestal than ordinary statutory provisions require to be interpreted in a different manner and in view of the same, Article 239AA(4) deserves to be interpreted in a manner as other provisions of the Constitution and, hence, there is warrant for interpreting the phrase 'aid and advice' in a broad sense so that such 'aid and advice' is binding on the nominee of the President, i.e., the Lieutenant Governor. It would be an anathema to the constitutional philosophy to surmise that just because the Constitution permits a difference of opinion between the Lieutenant Governor and the Council of Ministers, the 'aid and

advice' tendered by the Council of Ministers is not binding upon the Lieutenant Governor.

33. The appellant has further submitted that under Article 239AA(4), the Government of NCT of Delhi and the Council of Ministers of the NCT of Delhi have exclusive power over all matters in relation to subjects under List II (excluding Entries 1, 2 and 18 thereof and Entries 34, 65 and 66 in so far as they apply to Entries 1, 2 and 18 thereof) and List III of the Seventh Schedule. According to the appellant, the substantive part of Article 239AA(4) itself lays down the exception to it, i.e., when the Lieutenant Governor is to act in his discretion under the law and not as per the advice of the Council of Ministers. The proviso to Article 239AA(4), as per the appellant, comes into play where the 'aid and advice' of the Council of Ministers transgresses the areas constitutionally prescribed to it and the proviso does not allow the Lieutenant Governor to have a different view on the merits of the 'aid and advice' that has been tendered by the Council of Ministers. According to the appellant, the proviso to Article 239AA(4) operates only in

exceptional situations and is not a general norm. Any attempt to expand the scope of the proviso beyond exceptional matters is not tenable as it would have the effect of rendering the main part of Article 239AA(4) otiose. To rely upon the proviso to Article 239AA(4) to say that the 'aid and advice' of the Council of Ministers is not binding upon the Lieutenant Governor in areas in which the Delhi Legislative Assembly has competence to legislate would defeat the purpose for which institutions necessary to operationalize democracy in Delhi were created. It is submitted by the appellant that the 1991 Act as well as the Rules themselves cannot be used to interpret the constitutional provisions inasmuch as they only reflect the scheme of governance.

B.2 <u>Submissions on behalf of the respondents</u>:

34. The submissions put forth by Mr. Maninder Singh, learned Additional Solicitor General of India, appearing on behalf of the respondents, Union of India and Lieutenant Governor of Delhi, revolve around the argument that although the insertion of Article 239AA envisages the constitution of a

Legislative Assembly for the National Capital Territory of Delhi, yet the President shall remain its Executive head, acting through the Lieutenant Governor, and that the powers of the Parliament in respect of the Union Territories shall not be derogated in any manner by the insertion of the said Article 239AA.

35. The respondents submit that the constitutional scheme envisaged for the Union Territories has been dealt with in ***New Delhi Municipal Corporation*** (supra) case and although the Court in this case had contemplated three categories of Union Territories, yet it had arrived at the conclusion that those surviving as Union Territories and not having acquired Statehood shall remain so and Delhi, now referred to as "National Capital Territory of Delhi", is still a Union Territory. The respondents further submit that once it has been determined that Delhi continues to be a Union Territory, its governance shall be regulated by the provision of Article 239 which stipulates that all Union Territories shall be

governed by the President of India and neither a plain textual reading nor a contextual reading of Article 239AA stipulates any vertically divided exclusive jurisdiction with the Legislative Assembly or the Council of Ministers.

36. The respondents, thereafter, in their submissions, after citing several authorities, have sought to impress upon this Court that Article 239AA be given its literal and true interpretation as there exists no ambiguity attracting the requirement of purposive interpretation. The respondents have also submitted that since it was on the recommendations made by the Balakrishnan Committee, which had been accepted in toto, that the Sixty-ninth amendment and the 1991 Act came into force, the Court should consider the report of the Committee and the reasons provided therein in order to ascertain the true intention of the exercise of the constituent power of the Parliament for bringing about the said amendment as well as the GNCTD Act.

37. It is also asserted by the respondents that Article 239 is an integral part of the Constitution and the foundation stone of Part VIII and that Article 239AA shall be read conjointly with Article 239 which provides that the ultimate administration with respect to Delhi shall remain with the President acting through its administrator.

38. The respondents also contend that although Article 239AA confers on the Legislative Assembly of Delhi the power to legislate with respect to subject matters provided in List II and List III of the Seventh Schedule, yet the said power is limited by the very same Article when it employs the phrase "in so far as any such matter is applicable to Union Territories...." and also by specifically excluding from the legislative power of the Assembly certain entries as delineated in Article 239AA(3)(a). This restriction, as per the respondents, limits the power of the Legislative Assembly to legislate and this restriction has to be understood in the context of conferment of special status.

39. To reiterate the position that the President remains the Executive head for all Union Territories, Mr. Singh has drawn the attention of the Court to Articles 53 and 73 read with Article 246(4) of the Constitution. It is further urged that nowhere in the Constitution, including Articles 239A or 239AA, it has been stipulated that the executive power of a Union Territory shall vest in the Council of Ministers/Legislative Assembly. It has been argued that the contention of the appellant that on the creation of Legislative Assembly, there was an automatic investiture of executive power on the said Assembly is flawed as the constitutional scheme does not envisage any conferment of automatic power on the Council of Ministers. Further, as the submission is structured, Article 239AA(4) employs the phrase "Lieutenant Governor and his Ministers" which implies that it is the "Lieutenant Governor" and not the "Council of Ministers" who is responsible for the administration of the Union Territory. That apart, the provisions of Articles 298, 299 and 239AB of the Constitution and Section 52 of the 1991 Act also reiterate

the position that the Constitution does not stipulate any automatic conferral of executive power and the same is echoed in the Balakrishnan Committee Report.

40. The respondents contend that the contention of the principle laid down in the judgment of ***Ram Jawaya Kapur*** (supra), that wherever there is existence of legislative power there is co-extensive existence of executive power, is with respect to only the Union and the States and is not applicable to Union Territories as the same would be against the constitutional mandate as laid down in its various provisions.

41. The respondents, to further advance their arguments, have pointed out the distinction between Articles 239AB and 356 of the Constitution and have submitted that Article 356 envisages that the President shall assume to himself the functions of the State Government and the powers vested in the Governor in case of failure of "constitutional machinery" but in the case of Union Territories, this clause would become inapplicable as the executive power of a Union Territory remains vested with the President. The respondents would

further submit that Article 239AB does not stipulate any "assumption of powers" by the President but merely provides for suspension of operation of Article 239AA in the NCT of Delhi in case the President is satisfied that it is necessary to do so for the proper administration of NCT of Delhi.

42. The respondents, in their submissions, also point out that a close reading of Article 239 with Article 239AA along with Section 44 of the GNCTD Act, 1991 would reveal that the expression "Executive action of the Lt. Governor" and not the "Executive action of NCT of Delhi" has been stipulated in the said provisions. The said intention can also be seen from the fact that the phrase Lieutenant Governor "with the Ministers" has been used in Section 44(1)(b) and further Article 239AA(4) also engages the phrase "his functions". This leads to the implication that the extent of contribution/participation to be made by the Council of Ministers is only to render aid and advice to the Lieutenant Governor.

43. It has been further submitted on behalf of the respondents that the aid and advice rendered by the Council

of Ministers is not binding upon the Lieutenant Governor and he is empowered to form an opinion that differs from the opinion of the Council of Ministers. In such a situation, the proviso to Article 239AA(4) comes into play which provides that in case of such difference of opinion, the decision of the President shall be final. Learned Additional Solicitor General has stressed that this is in recognition of the fact that the ultimate responsibility in relation to the administration of the Union Territories lies with the Union and there is clear demarcation of difference as regards the manner of governance between States and Union Territories whereby in case of the former, the Governor is bound by the advice tendered by the Council of Ministers.

44. The respondents further point out that a combined reading of Article 239AA(4) and Section 41(2) of the 1991 Act would suggest that when the question arises if a matter is one where the Lieutenant Governor shall exercise his discretion, the decision of the Lieutenant Governor shall be final. Article 239AA(4) and the proviso thereto is not an exception and,

hence, should not be given a restrictive meaning and the phrase "any matter" has been deliberately kept of the widest import. To bring home the point, reliance has been placed on the dictum laid down in ***Tej Kiran Jain and others v. N. Sanjiva Reddy and others***[11] where the word “anything” has been said to mean "everything". Therefore, the phrase "any matter" has to be interpreted to mean "every matter". The said interpretation, as per the respondents, would be in accord with the objective of the Constitution that the Union shall retain the ultimate authority to legislate on any matter with respect to the National Capital Territory of Delhi.

45. The respondents also submit that Article 239AA does not contemplate a new scheme and it is similar to that envisaged under Article 239A which pertains to the administration and governance of the Union Territory of Puducherry. A comparison of the scheme provided under Article 239, Article 239A read with the 1963 Act for Puducherry on one hand and Article 239, Article 239AA read with the 1991 Act for Delhi on

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11(1970) 2 SCC 272

the other hand would reveal that both the schemes are similar to the extent that the intention is to retain the continuing control of the President and the Parliament for the executive and legislative functioning of the Union Territories.

46. The respondents contend that Article 239AA, and in particular, clause 4 of the said provision, is not the first of its kind and a similar provision in the form of Section 44 existed in the Government of Union Territories Act, 1963 and that the issue of interpretation of this Section had come up before this Court in several cases wherein it has been laid down that the "State Government" with respect to Union Territory would mean "Central Government" in terms of Section 3(60) of the General Clauses Act. Hence, when a similar provision such as Article 239AA(4) has already been given a certain interpretation by this Court, then merely because of the fact that special provisions have been placed in the Constitution for the NCT of Delhi, which is not so in the case of other Union Territories, it shall not bar the Courts from adopting an

interpretation of Article 239AA which is similar to Section 44 of the 1963 Act.

47. The respondents finally submit that as per the constitutional mandate, the ultimate responsibility with respect to all matters governing the NCT of Delhi fall within the domain of the Union Government. To bolster the said stand, the respondents have placed reliance upon relevant portions of the Balakrishnan Committee Report and also various other provisions of the Constitution of India and the 1991 Act. Further, the respondents argue that to devolve exclusive legislative or exclusive executive power on the Legislative Assembly or Council of Ministers of the NCT of Delhi would result in elevating a Union Territory to the status of a State, a demand which has been rejected by the Constitution makers on several instances. That apart, it would be impermissible under any interpretation of the constitutional text and also contrary to the constitutional mandate.

48. Before we dwell upon the submissions, we are of the considered view that we should state certain principles and analyse certain constitutional concepts. Frankly speaking, we feel the necessity as we are really concerned with the interpretation of a constitutional provision having regard to its operational perspective in a democracy. We have said so in the prelude. We do not think and we are not persuaded to think that the present controversy can rest on either of the extremes propagated before us. We are convinced that a holistic approach has to be adopted from a constitutional vision which is bound to encapsulate crystalline realism.

C. I<u>deals/principles of representative governance</u>:

49. Representative Governance in a Republican form of democracy is a kind of democratic setup wherein the people of a nation elect and choose their law making representatives. The representatives so elected are entrusted by the citizens with the task of framing policies which are reflective of the will of the electorate. The main purpose of a Representative Government is to represent the public will, perception and the

popular sentiment into policies. The representatives, thus, act on behalf of the people at large and remain accountable to the people for their activities as lawmakers. Therefore, representative form of governance comes out as a device to bring to fore the popular will.

50. Bernard Manin in "The Principles of Representative Government"[12] has deliberated on the postulate that the concept of representation has its origin around the Middle ages in the context of the church and in the context of cities in their relation to the king or the emperor. The idea, as Manin says, was to send out delegates having power to connect to those who appointed them in the first place and there lies the kernel of the concept of representation. This technique then got transferred and used for other purposes.

51. Thomas Jefferson, in the United States Declaration of Independence (1776), highlights on the stipulation that governments derive their just powers from the consent of the governed. This idea, simply put, reflects the concept of

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12 Bernard Manin, The Principles of Representative Government, Cambridge University Press, 1997

representative governance. The cogent factors for constituting the representative form of government are that all citizens are regarded as equal and the vote of all citizens, which is the source of governing power, is assigned equal weight. In this sense, the views of all citizens carry the same strength and no one can impose his/her views on others.

52. 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***[13] has observed:-

> "...Besides providing a quasi federal system in the country and envisaging the scheme for distribution of legislative powers between the State and the center, 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

13(2000) 4 SCC 640

> is responsible. The legislature has been acknowledged to be a nerve center of the State activities. It is through parliament that elected representatives of the people ventilate people's grievances.
>
> [Emphasis is ours]

53. Thus perceived, the people are the sovereign since they exercise the power of adult franchise that ultimately builds the structure of representative democracy. That apart, every constituent of the sovereign is entitled to air his/her grievances through their elected representatives. The twin idea establishes the cornerstone of the precept of accountability to the public because there rests the origin of power and responsibility.

54. A representative form of government should not become a government by elites where the representatives so elected do nothing to give effect to the will of the sovereign. The elected representatives must not have an ulterior motive for representing their constituents and they should not misuse the popular mandate awarded to them by covertly transforming it into 'own rule'. The inherent value of public accountability can never be brushed aside.

55. Another ideal for representative governance is accessibility and approachability. Since responsiveness to the needs and demands of the people is the basic parameter for evaluating the effectiveness of representative governance, it is necessary that elected representatives develop a sense of belonging with their constituents. The sense of belonging has its limitation also. If the desire of the constituent is rational and draws strength from legal paradigms, it deserves to be given due acceptance but if the aspiration blows from some illogical or unacceptable proposition, the same should not be allowed any space. It is because in a representative form of government, aspirations and desires are canvassed and propounded on the bedrock of constitutional principles. Hence, we may say that inherent constitutional aspirations should draw inspiration from the Constitution. There can never be sacrifice of constitutional conscience.

56. Be it remembered, 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.

D. <u>Constitutional morality</u>:

57. Constitutional morality in its strictest sense of the term implies strict and complete adherence to the constitutional principles as enshrined in various segments of the document. When a country is endowed with a Constitution, there is an

accompanying promise which stipulates that every member of the country right from its citizens to the high constitutional functionaries must idolize the constitutional fundamentals. This duty imposed by the Constitution stems from the fact that the Constitution is the indispensable foundational base that functions as the guiding force to protect and ensure that the democratic setup promised to the citizenry remains unperturbed. The constitutional functionaries owe a greater degree of responsibility towards this eloquent instrument for it is from this document that they derive their power and authority and, as a natural corollary, they must ensure that they cultivate and develop a spirit of constitutionalism where every action taken by them is governed by and is in strict conformity with the basic tenets of the Constitution.

58. In this context, the observations made by Dr. B.R. Ambedkar are of great significance:-

> "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."[14]

59. Constitutional morality is that fulcrum which acts as an essential check upon the high functionaries and citizens alike, as experience has shown that unbridled power without any checks and balances would result in a despotic and tyrannical situation which is antithetical to the very idea of democracy. The following passage from ***Manoj Narula v. Union of India***[15] can aptly be quoted to throw some light on the idea:-

> "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[16]"

60. In the said case, it has been further observed:-

> "Regard being had to the aforesaid concept, it would not be out of place to state that

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14Constituent Assembly Debates 1989: VII, 38.
15 (2014) 9 SCC 1
16James Madison as Publius, Federalist 51

> institutional respectability and adoption of precautions for the sustenance of constitutional values would include reverence for the constitutional structure. It is always profitable to remember the famous line of Laurence H. Tribe that a Constitution is "written in blood, rather than ink"[17]."

61. Constitutional morality acts as a check against lapses on the part of the governmental agencies and colourable activities aimed at affecting the democratic nature of polity. In ***Krishnamoorthy v. Sivakumar and others***[18], it has been explained thus:-

> "Democracy, which has been best defined as the government of the people, by the people and for the people, expects prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmance of constitutional morality which is the pillar stone of good governance."

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

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17Laurence H. Tribe, THE INVISIBLE CONSTITUTION 29 (2008)
18(2015) 3 SCC 467

harmony with the constitutional impulse. We may give an example. When one is expressing an idea of generosity, he may not be meeting the standard of justness. There may be an element of condescension. But 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.

E. <u>Constitutional objectivity</u>:

62. 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.

63. The founding fathers of our Constitution had a vision for our Nation whose ultimate aim was to make right the upheaval that existed before setting up of the Constituent Assembly. The concept of constitutional objectivity is, by itself, inherent in this vision and it is incumbent upon the organs of the State to make comprehensive efforts towards realization of this vision. But, at the same time, they must remain true to the Constitution by upholding the trust which the Constitution places in them and thereby exhibit constitutional objectivity in its truest sense. In ***Indra Sawhney v. Union of India and others***[19], the Court observed:-

> "...Therefore, the permissible judicial creativity in tune with the Constitutional objectivity is essential to the interpretation of the Constitutional provisions so that the dominant values may be discovered and enforced. At the same time, one has to be very cautious and careful in approaching the issues in a very pragmatic and realistic manner."

19AIR 1993 SC 477

The aforesaid passage tells us in an illuminating manner how the Court is expected to proceed on the path of judicial creativity in consonance with constitutional objectivity having a keen sense of pragmatism.

64. 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. The decisions taken by constitutional functionaries, in the discharge of their duties, must be based on normative acceptability. Such decisions, thus, have to be in accord with the principles of constitutional objectivity which, as a lighthouse, will guide the authorities to take a constitutionally right decision. This action, needless to say, would be in the spirit of the Constitution. It may be further noted here that it is not only the decision itself but also the process adopted in such decision making which should be in tune with constitutional objectivity. A decision by a

constitutional functionary may, in the ultimate analysis, withstand scrutiny but unless the process adopted for arriving at such a decision is in tandem with the idea of constitutional objectivity, it invites criticism. Therefore, the decision making process should never by-pass the established norms and conventions which are time tested and should affirm to the idea of constitutionalism.

F. Constitutional governance and the conception of legitimate constitutional trust:

65. The concept of constitutional governance in a body polity like ours, where the Constitution is the supreme fundamental law, is neither hypothetical nor an abstraction but is real, concrete and grounded. The word 'governance' encapsulates the idea of an administration, a governing body or organization whereas the word 'constitutional' means something sanctioned by or consistent with or operating under the fundamental organic law, i.e., the Constitution. Thus, the word 'governance' when qualified by the term 'constitutional' conveys a form of governance/government which adheres to the concept of constitutionalism. The said form of governance

is sanctioned by the Constitution itself, its functions are consistent with the Constitution and it operates under the aegis of the Constitution.

66. According to Encyclopedia Britannica, "Constitutional Government" means:-

> "...the existence of a constitution—which may be a legal instrument or merely a set of fixed norms or principles generally accepted as the fundamental law of the polity—that effectively controls the exercise of political power. The essence of constitutionalism is the control of power by its distribution among several state organs or offices in such a way that they are each subjected to reciprocal controls and forced to cooperate in formulating the will of the state...."

67. It is axiomatic that the Constitution of India is the *suprema lex*, i.e., the paramount law of the land. All the three wings of the State, i.e., the legislature, the judiciary and the executive derive their power and authority from the Constitution. It is the Constitution which endows the requisite amount of oxygen and other necessary supplies which, in turn, enable these organs to work for the betterment of the nation and the body polity. In the context of the supremacy of

the Constitution, the Court in ***Kalpana Mehta and others v. Union of India and others***[20] has laid down:-

> "The Constitution of India is the supreme fundamental law and all laws have to be in consonance or in accord with the Constitution. The constitutional provisions postulate the conditions for the functioning of the legislature and the executive and prescribe that the Supreme Court is the final interpreter of the Constitution. All statutory laws are required to conform to the fundamental law, that is, the Constitution. The functionaries of the three wings, namely, the legislature, the executive and the judiciary, as has been stated in *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and another*[21], derive their authority and jurisdiction from the Constitution. The Parliament has the exclusive authority to make laws and that is how the supremacy of the Parliament in the field of legislation is understood. There is a distinction between parliamentary supremacy in the field of legislation and constitutional supremacy. The Constitution is the fundamental document that provides for constitutionalism, constitutional governance and also sets out morality, norms and values which are inhered in various articles and sometimes are decipherable from the constitutional silence. Its inherent dynamism makes it organic and, therefore, the concept of —constitutional sovereignty is sacrosanct. It is extremely sacred and, as stated earlier, the authorities get their powers from the Constitution. It is —the source.

20(2018) 7 SCALE 106
21AIR 1973 SC 1461 : (1973) 4 SCC 225

> Sometimes, the constitutional sovereignty is described as the supremacy of the Constitution.
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> [Emphasis is ours]

68. Thus, the concept of constitutional governance is a natural consequent of the doctrine of constitutional sovereignty. The writings of Locke and Montesquieu also throw light on the concept of constitutional governance. Locke lays stress on the fiduciary nature of public power and argues that sovereignty lies with the people. Montesquieu, on the other hand, in his postulate of constitutional governance, has laid more stress on the system of "checks and balances" and "separation of powers" between the executive, legislature and the judiciary. According to the ideas of Montesquieu, it can be said that constitutional governance involves the denial of absolute power to any one organ of the State and a system of checks and balances is the basic foundation of constitutional governance. In constitutional form of Government, power is distributed amongst the three organs of the State in such a way that the constitutional goal as set out in the Preamble of our Constitution is realised.

69. The postulates laid by Locke and Montesquieu are inherent in our constitutional scheme and have also been recognized by the Court. Therefore, it can safely be said that the nomenclature of constitutional governance has at its very base a Constitution which is the supreme law of the land and the conception, in its width, embraces two more ideas, i.e., fiduciary nature of public power and the system of checks and balances.

70. We may hasten to add that the Court, while interpreting various provisions of the Constitution on different occasions, has always been alive to the concept of constitutional governance. In ***B.R. Kapur v. State of T.N. and another***[22], the majority, while dealing with the issue of a writ of quo warranto, ruled that if a non-legislator could be sworn in as the Chief Minister under Article 164 of the Constitution, then he or she must satisfy the qualification of membership of a legislator as provided under Article 173. Recently, in ***Manoj***

22(2001) 7 SCC 231

Narula (supra), while interpreting Article 75(1) of the Constitution, the Court observed:-

> "...In a controlled Constitution like ours, the Prime Minister is expected to act with constitutional responsibility as a consequence of which the cherished values of democracy and established norms of good governance get condignly fructified. The framers of the Constitution left many a thing unwritten by reposing immense trust in the Prime Minister. The scheme of the Constitution suggests that there has to be an emergence of constitutional governance which would gradually grow to give rise to constitutional renaissance."
>
> [Emphasis is ours]

71. The provisions of the Constitution need not expressly stipulate the concepts of constitutionalism, constitutional governance or constitutional trust and morality, rather these norms and values are inherent in various articles of the Constitution and sometimes are decipherable from the constitutional silences as has been held in ***Kalpana Mehta*** (supra).

72. Having discussed about the concept of constitutional governance, in the obtaining situation, we may allude to the

conception of legitimate constitutional trust. In this regard, the speech of Dr. Ambedkar reflects his concern:-

> "I feel that the Constitution is workable; it is flexible and it is strong enough to hold the country together both in peacetime and in wartime. Indeed, if I may say so, if things go wrong under the new Constitution the reason will not be that we had a bad Constitution. What we will have to say is that Man was vile."

73. In ***Re: Dr. Ram Ashray Yadav, Chairman, Bihar Public Service Commission***[23], the Court discussed the role of the members of Public Service Commissions and, treating them as constitutional trustees, observed that the credibility of the institution of Public Service Commission is founded upon the faith of the common man on its proper functioning. The faith would be eroded and confidence destroyed if it appears that the Chairman or the Members of the Commission act subjectively and not objectively. In ***Subhash Sharma and others and Firdauz Taleyarkhan v. Union of India and another***[24], in the context of appointment of Judges, it has

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23(2000) 4 SCC 309
241990 (2) SCALE 836

been stated that it "is essentially a discharge of a constitutional trust of which certain constitutional functionaries are collectively repositories."

74. The framers of the Constitution also did recognize that the adoption of the Constitution would not *ipso facto*, like a magic wand, instill in the countrymen the values of constitutionalism. The founding fathers expected that constitutional functionaries who derive their authority from the Constitution shall always remain sincerely obeisant to the Constitution. The Court in ***Manoj Narula*** (supra), while highlighting the responsibility conferred on the Prime Minister under the Constitution, discussed the doctrine of constitutional trust and, in that context, reproduced what Edmund Burke had said centuries ago:-

> "All persons possessing any portion of power ought to be strongly and awfully impressed with the idea that they act in trust: and that they are to account for their conduct in that trust to the one great Master, Author and Founder of Society."

75. Thereafter, the Court went on to state:-

"This Court, in re Art. 143, Constitution of India and Delhi Laws Act (1912)[25], opined that the doctrine of constitutional trust is applicable to our Constitution since it lays the foundation of representative democracy. The Court further ruled that accordingly, the Legislature cannot be permitted to abdicate its primary duty, viz. to determine what the law shall be. Though it was stated in the context of exercise of legislative power, yet the same has signification in the present context, for in a representative democracy, the doctrine of constitutional trust has to be envisaged in every high constitutional functionary."

76. The Court further observed:-

"... we shall proceed to deal with the doctrine of "constitutional trust". The issue of constitutional trust arises in the context of the debate in the Constituent Assembly that had taken place pertaining to the recommendation for appointment of a Minister to the Council of Ministers. Responding to the proposal for the amendment suggested by Prof. K.T. Shah with regard to the introduction of a disqualification of a convicted person becoming a Minister, Dr. B.R. Ambedkar had replied: -

> "His last proposition is that no person who is convicted may be appointed a Minister of the State. Well, so far as his intention is concerned, it is no doubt very laudable and I do not think any Member of this House would like to differ from him on that proposition. But the whole question is this whether we should introduce all these qualifications and disqualifications in the Constitution itself. Is it

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25AIR 1951 SC 332

> not desirable, is it not sufficient that we should trust the Prime Minister, the Legislature and the public at large watching the actions of the Ministers and the actions of the Legislature to see that no such infamous thing is done by either of them? I think this is a case which may eminently be left to the good- sense of the Prime Minister and to the good sense of the Legislature with the general public holding a watching brief upon them. I therefore say that these amendments are unnecessary."

And again:-

> "98. From the aforesaid, it becomes graphically vivid that the Prime Minister has been regarded as the repository of constitutional trust. The use of the words "on the advice of the Prime Minister" cannot be allowed to operate in a vacuum to lose their significance. There can be no scintilla of doubt that the Prime Minister's advice is binding on the President for the appointment of a person as a Minister to the Council of Ministers unless the said person is disqualified under the Constitution to contest the election or under the 1951 Act, as has been held in *B.R. Kapur case*. That is in the realm of disqualification. But, a pregnant one, the trust reposed in a high constitutional functionary like the Prime Minister under the Constitution does not end there. That the Prime Minister would be giving apposite advice to the President is a legitimate constitutional expectation, for it is a paramount constitutional concern. In a controlled Constitution like ours, the Prime Minister is expected to act with constitutional responsibility as a consequence of which the cherished values of democracy and established norms of good governance get condignly

> fructified. The Framers of the Constitution left many a thing unwritten by reposing immense trust in the Prime Minister. The scheme of the Constitution suggests that there has to be an emergence of constitutional governance which would gradually grow to give rise to constitutional renaissance.
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> 100. Thus, while interpreting Article 75(1), definitely a disqualification cannot be added. However, it can always be legitimately expected, regard being had to the role of a Minister in the Council of Ministers and keeping in view the sanctity of oath he takes, the Prime Minister, while living up to the trust reposed in him, would consider not choosing a person with criminal antecedents against whom charges have been framed for heinous or serious criminal offences or charges of corruption to become a Minister of the Council of Ministers. This is what the Constitution suggests and that is the constitutional expectation from the Prime Minister. Rest has to be left to the wisdom of the Prime Minister. We say nothing more, nothing less."

77. 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. We shall elaborate the functional aspect of this principle when we scan the language employed under Article 239AA and other adjunct articles to decipher the true purpose of the said provision from the perspective of the workability of the Constitution in the sphere of governance.

G. <u>Collective responsibility</u>:

78. In the Constituent Assembly Debates, Dr. B.R. Ambedkar spoke thus on collective responsibility:-

> "I want to tell my friend Prof. K.T. Shah that his amendment would be absolutely fatal to the other principle which we want to enact, namely collective responsibility. All Members of the House are very keen that the Cabinet should work on the basis of collective responsibility and all agree that is a very

sound principle. But I do not know how many Members of the House realise what exactly is the machinery by which collective responsibility is enforced. Obviously, there cannot be a statutory remedy. Supposing a Minister differed from other Members of the Cabinet and gave expression to his views which were opposed to the views of the Cabinet, it would be hardly possible for the law to come in and to prosecute him for having committed a breach of what might be called collective responsibility. Obviously, there cannot be a legal sanction for collective responsibility. The only sanction through which collective responsibility can be enforced is through the Prime Minister. In my judgment collective responsibility is enforced by the enforcement of two principles. One principle is that no person shall be nominated to the Cabinet except on the advice of the Prime Minister. Secondly, no person shall be retained as a Member of the Cabinet if the Prime Minister says that he shall be dismissed. It is only when Members of the Cabinet both in the matter of their appointment as well as in the matter of their dismissal are placed under the Prime Minister, that it would be possible to realise our ideal of collective responsibility. I do not see any other means or any other way of giving effect to that principle.

Supposing you have no Prime Minister; what would really happen? What would happen is this, that every Minister will be subject to the control or influence of the President. It would be perfectly possible for the President who is no *ad idem* with a particular Cabinet, to deal with each Minister separately singly, influence them and thereby cause disruption in the Cabinet. Such a thing is not impossible to imagine. Before collective responsibility was introduced in the British

> Parliament you remember how the English King used to disrupt the British Cabinet. He had what was called a Party of King's Friends both in the Cabinet as well as in Parliament. That sort of thing was put a stop to by collective responsibility. As I said, collective responsibility can be achieved only through the instrumentality of the Prime Minister. Therefore, the Prime Minister is really the keystone of the arch of the Cabinet and unless and until we create that office and endow that office with statutory authority to nominate and dismiss Ministers there can be no collective responsibility."

79. In ***State of Karnataka v. Union of India and another***[26], the Court, after reproducing a few passages from Sir Ivor Jennings and Mr. Joseph Chamberlain, observed:-

> "...The following discussion on the subject in "Representative and Responsible Government" by A. H. Birch will be found useful in this connection:-
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> > "Ministerial accountability to Parliament has two aspects : the collective responsibility of Ministers for the policies of the Government and their individual responsibility for the work of their departments. Both forms of responsibility are embodied in conventions which cannot be legally enforced. Both conventions were developed during the nineteenth century, and in both cases the practice was established before the doctrine was announced (page 131).""

26(1978) 2 SCR 1

80. In "Government and Law" by T. C. Hartley and J.A.G. Griffith[27], the position in regard to the collective responsibility of Ministers to the Legislature is tersely stated as under:-

> "Ministers are said to be collectively responsible. This is often elevated by writers to the level of a 'doctrine' but is in truth little more than a political practice which is commonplace and inevitable. Ordinarily, Ministers form the governmental team, all being appointed by the Prime Minister from one political party. A Cabinet Minister deals with his own area of policy and does not normally have much to do with the area of other Ministers. Certainly no Cabinet Minister would be likely to make public statements which impinged on the work of another Minister's department. On a few important issues, policy is determined by the Cabinet after discussion. Collective responsibility means that Cabinet decisions bind all Cabinet Ministers, even if they argued in the opposite direction in Cabinet. But this is to say no more than a Cabinet Minister who finds himself in a minority must either accept the majority view or resign. The team must not be weakened by some of its members making clear in public that they disapprove of the Government's policy. And obviously what is true for Cabinet Ministers is even more true for other Ministers. If they do not like what the team is doing, they must either keep quiet or leave."

81. Speaking on collective responsibility, the Court in the case of ***R.K. Jain v. Union of India and***

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27 Hartley T.C. and Griffith J.A.G., Government and Law; an introduction to the working of the Constitution in Britain 2nd edition, 1981 London; Weidenfeld and Nicholson

others[28] has opined that each member of the Cabinet has personal responsibility to his conscience and also responsibility to the Government. Discussion and persuasion may diminish disagreement, reach unanimity, or leave it unaltered. Despite persistence of disagreement, it is a decision, though some members like less than others. Both practical politics and good government require that those who like it less must still publicly support it. If such support is too great a strain on a Minister's conscience or incompatible with his/her perceptions of commitment and he/she finds it difficult to support the decision, it would be open to him/her to resign. So, the price of acceptance of Cabinet office is the assumption of responsibility to support Cabinet decisions and, therefore, the burden of that responsibility is shared by all.

82. In ***Common Cause, A Registered Society v. Union of India and others***[29], the Court, explaining the concept of collective responsibility, stated:-

> "30. The concept of "collective responsibility" is essentially a political concept. The country is

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28(1993) 3 SCR 802
29(1999) 6 SCC 667

> governed by the party in power on the basis of the policies adopted and laid down by it in the Cabinet Meeting. "Collecting Responsibility" has two meanings : The first meaning which can legitimately be ascribed to it is that all members of a Govt, are unanimous in support of its policies and would exhibit that unanimity on public occasions although while formulating the policies, they might have expressed a different view in the meeting of the Cabinet. The other meaning is that Ministers, who had an opportunity to speak for or against the policies in the Cabinet are thereby personally and morally responsible for its success and failure."

83. 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 representative government.

H. <u>Federal functionalism and democracy</u>:

84. Democracy is a form of government where the people rule. Aristotle viewed democracy as a form of government in which the supreme powers are in the hands of freemen and where people form a majority in an elected sovereign government to exercise some role in decision making. Thomas Jefferson defined democracy as a "government by its citizens in mass, acting directly and personally, according to rules established by the majority". Abraham Lincoln defined democracy as “a government of the people, by the people, and for the people”. The Black's Law Dictionary defines democracy as:-

> "That form of government in which the sovereign power resides in and is exercised by the whole body of free citizens; as distinguished from a monarchy, aristocracy, or oligarchy. According to the theory of a pure democracy, every citizen should participate directly in the business of governing, and the legislative assembly should comprise the whole people."[30]

30Black's Law Dictionary 6th Edition Pg. 432

85. The Preamble to our Constitution, at the outset, proclaims that India is a sovereign democratic republic. The citizens of India are the sovereign and participate in the process of governance by exercising their virtuous right to vote under the system of universal adult suffrage. The citizens elect their representatives and send them to the Parliament and State Legislatures for enacting laws and shaping policies at the Union and State level respectively which are reflective of the popular will of the collective.

86. The parliamentary form of democracy as envisaged by the Constitution has at its very base the power bestowed upon people to vote and make the legislature accountable for their functioning to the people. If the legislature fails to transform the popular will of the people into policies and laws, the people in a democracy like ours have the power to elect new representatives by exercise of their vote. The political equality makes people aware of their right in unison and there is a consistent endeavour to achieve the same.

87. In this context, we may turn to a passage from ***Mohinder Singh Gill and another v. Chief Election Commissioner, New Delhi and others***[31] wherein Krishna Iyer, J. quoted with approval the statement of Sir Winston Churchill which is to the following effect:-

> "At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper - no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point."

88. Thus, democratic set up has its limbs firmly entrenched in the ability of the people to elect their representatives and the faith that the representatives so elected will best represent their interest. Though this right to vote is not a fundamental right, yet it is a right that lies at the heart of democratic form of government. The right to vote is the most cherished value of democracy as it inculcates in the people a sense of belonging. In ***Raghbir Singh Gill v. S. Gurcharan Singh Tohra***[32], the learned Judges, after referring to ***Mohinder Singh Gill's*** case,

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31AIR 1978 SC 851
32AIR 1980 SC 1362

stated that nothing can diminish the overwhelming importance of the cross or preference indicated by the dumb sealed lip voter. That is his right and the trust reposed by the Constitution in him is that he will act as a responsible citizen in choosing his representatives for governing the country.

89. The aforesaid situation warrants for reciprocative functionalism by thought, action and conduct. It requires the elected representatives to uphold the faith which the collective have reposed in them. Any undue interference amounts to betrayal of the faith of the collective in fulfilment of their aspirations of democratic self-governance. In ***Kesavananda Bharati*** (supra), it has been observed that the two basic postulates of democracy are faith in human reason and faith in human nature and that there is no higher faith than faith in democratic process. The Court further stated that democracy on adult suffrage is a great experiment with its roots in the faith in the common man. P. Jaganmohan Reddy, J., in his opinion, stated that the republican and democratic form of government is a part of the basic structure of the Constitution

and the Parliament has no power to abrogate or emasculate the basic elements or fundamental features of the Constitution such as the sovereignty of India and the democratic character of our polity. Further, he stated that the framers of the Constitution adopted a sovereign democratic republic to secure for the citizens of India the objectives of justice, liberty and equality as set out in the Preamble to our Constitution.

90. Dealing with the concept of democracy, the majority in ***Indira Nehru Gandhi v. Raj Narain***[33] ruled that 'democracy' as an essential feature of the Constitution is unassailable. The said principle has been reiterated in ***T.N. Seshan, CEC of India v. Union of India and others.***[34] and ***Kuldip Nayar v. Union of India others.***[35]. When it is conceived that democracy is a part of the basic structure of the Constitution, the essential value of democracy has to be condignly understood and that is why we have referred to certain precedents. The correctness or fallacy of the interpretation of

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33AIR 1975 SC 2299
34(1995) 4 SCC 611
35AIR 2006 SC 3127

Articles 239 to 239AB would depend upon our appreciation of democratic form of government in a mature body polity.

91. The Court in ***Manoj Narula*** (supra), while delineating the concept of democracy, stated that democracy has been best defined as the Government of the People, by the People and for the People, which expects prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmance of constitutional morality which is the pillar stone of good governance. Further, it is stated that democracy in India is a product of rule of law which aspires to establish an egalitarian social order and that it is not only a political philosophy but also an embodiment of constitutional philosophy. Democracy being a cherished constitutional value needs to be protected, preserved and sustained and for that purpose, instilment of certain norms in the marrows of the collective is absolutely necessitous. In the said case, the Court, while emphasizing that good governance is a *sine qua non* for a healthy democracy, stated thus:-

> "In a democracy, the citizens legitimately expect that the Government of the day would treat the public interest as primary one and any other interest secondary. The maxim *Salus Populi Suprema Lex,* has not only to be kept in view but also has to be revered. The faith of the people is embedded in the root of the idea of good governance which means reverence for citizenry rights, respect for Fundamental Rights and statutory rights in any governmental action, deference for unwritten constitutional values, veneration for institutional integrity, and inculcation of accountability to the collective at large. It also conveys that the decisions are taken by the decision making authority with solemn sincerity and policies are framed keeping in view the welfare of the people, and including all in a homogeneous compartment. The concept of good governance is not an Utopian conception or an abstraction. It has been the demand of the polity wherever democracy is nourished. <u>The growth of democracy is dependant upon good governance in reality and the aspiration of the people basically is that the administration is carried out by people with responsibility with service orientation</u>."
>
> [Emphasis supplied]

92. Now, we shall proceed to discuss the concept of federalism in the context of the Constitution of India. Encyclopedia Britannica defines federalism as:-

> "Federalism, mode of political organization that unites separate states or other polities within an overarching political system in such a way as to allow each to maintain its own fundamental political integrity. Federal systems do this by requiring that

> basic policies be made and implemented through negotiation in some form, so that all the members can share in making and executing decisions. The political principles that animate federal systems emphasize the primacy of bargaining and negotiated coordination among several power centres; they stress the virtues of dispersed power centres as a means for safeguarding individual and local liberties."

93. In 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?"[36]

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[36]Prof. K.C. Wheare, Federal Government, 1963 Edn. at page 33

94. 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.

95. The framers of our Constitution, during debates in the Constituent Assembly on the draft Constitution, held elaborate discussions on whether to adopt a unitary system of government or federal system of government. During the Constituent Assembly debates, Shri T.T. Krishnamachari said:-

> "...Are we framing a unitary Constitution? Is this Constitution centralizing power in Delhi? Is there any way provided by means of which the position of people in various areas could be safeguarded, their voices heard in regard to matters of their local administration? I think it is a very big charge to make that this Constitution is not a federal Constitution, and that it is a unitary one. We should not forget that this question that the Indian Constitution should be a federal one has been settled by our Leader who is no more with us, in the Round Table Conference in London eighteen years back."
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> "I would ask my honourable friend to apply a very simple test so far as this Constitution is concerned to find out whether it is federal or not. The simple

> question I have got from the German school of political philosophy is that the first criterion is that the State must exercise compulsive power in the enforcement of a given political order, the second is that these powers must be regularly exercised over all the inhabitants of a given territory; and the third is the most important and that is that the activity of the State must not be completely circumscribed by orders handed down for execution by the superior unit. The important words are 'must not be completely circumscribed', which envisages some powers of the State are bound to be circumscribed by the exercise of federal authority. Having all these factors in view, I will urge that our Constitution is a federal Constitution. I urge that our Constitution is one in which we have given power to the Units which are both substantial and significant in the legislative sphere and in the executive sphere."

96. In this context, Dr. B.R. Ambedkar, speaking on the floor of the Constituent Assembly, said:-

> "There is only one point of Constitutional import to which I propose to make a reference. A serious complaint is made on the ground that there is too much of centralization and that the States have been reduced to Municipalities. It is clear that this view is not only an exaggeration, but is also founded on a misunderstanding of what exactly the Constitution contrives to do. As to the relation between the Centre and the States, it is necessary to bear in mind the fundamental principle on which it rests. The basic principle of Federalism is that the legislative and executive authority is partitioned between the Centre and the States not by any law to be made by the Centre but the Constitution itself. This is what the Constitution does. The States, under our Constitution, are in no way dependent

> upon the Centre for their legislative or executive authority. The Centre and the States are co-equal in this matter. It is difficult to see how such a Constitution can be called centralism. It may be that the Constitution assigns to the Centre too large a field for the operation of its legislative and executive authority than is to be found in any other Federal Constitution. It may be that the residuary powers are given to the Centre and not to the States. But these features do not form the essence of federalism. The chief mark of federalism, as I said lies in the partition of the legislative and executive authority between the Centre and the Units by the Constitution. This is the principle embodied in our Constitution."

97. The Court in ***In re: Under Article 143, Constitution of India, (Special Reference No. 1 of 1964)***[37] observed that the essential characteristic of federalism is the distribution of limited executive, legislative and judicial authority among bodies which are coordinate with and independent of each other. Further, the Court stated that 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

37AIR 1965 SC 745

prepared to merge their individuality in a unity. This supremacy of the Constitution, the Court stated, is protected by the authority of an independent judicial body to act as the interpreter of a scheme of distribution of powers and, thus, the dominant characteristic of the British Constitution cannot be claimed by a Federal Constitution like ours.

98. Gajendragadkar, C.J., in the said case, observed that our Constitution has all the essential elements of a federal structure as was the case in the Government of India Act 1935, the essence of federalism being the distribution of powers between the federation or the Union and the States or the provinces. In ***State of Karnataka v. Union of India*** (supra), Untwalia, J. (speaking for Justice Singhal, Justice Jaswant Singh and for himself) observed that the Constitution is not of a federal character where separate, independent and sovereign States could be said to have joined to form a nation as in the United States of America or as may be the position in some other countries of the world. It is because of this reason

that sometimes it has been characterized as quasi-federal in nature.

99. In ***Shamsher Singh*** (supra), this Court held that our founding fathers accepted the parliamentary system of quasi-federalism while rejecting the substance of Presidential style of Executive. Dr. Ambedkar stated on the floor of the Constituent Assembly that the Constitution is "both unitary as well as federal according to the requirement of time and circumstances". He further stated that the Centre would work for the common good and for the general interest of the country as a whole while the States would work for the local interest. He also refuted the plea for exclusive autonomy of the States.

100. In ***S.R. Bommai v. Union of India***[38], the Court considered the nature of federalism under the Constitution of India. A.M. Ahmadi, J. (as the learned Judge then was) observed:-

> "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

38(1994) 3 SCC 1

> for a body of States which desire Union but not unity. Federalism is, therefore, a concept which unites separate States into a Union without sacrificing their own fundamental political integrity. Separate States, therefore, desire to unite so that all the member-States may share in 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."

101. P.B. Sawant, J. (on behalf of himself and Kuldip Singh, J.) opined that the States are constitutionally recognised units and not mere convenient administrative divisions as both the Union and the States have sprung from the provisions of the Constitution. After quoting extensively from H.M. Seervai's commentary - Constitutional Law of India, he expressed thus:-

> "99. The above discussion thus shows that the States have an independent constitutional existence and they have as important a role to play in the political, social, educational and cultural life of the people as the Union. They are neither satellites nor agents of the Centre. The fact that during emergency and in certain other eventualities their powers are overridden or invaded by the Centre is not destructive of the essential federal nature of our Constitution. The invasion of power in such circumstances is not a normal feature of the Constitution. They are exceptions and have to be

resorted to only occasionally to meet the exigencies of the special situations. The exceptions are not a rule.

100. For our purpose, further it is really not necessary to determine whether, in spite of the provisions of the Constitution referred to above, our Constitution is federal, quasi-federal or unitary in nature. It is not the theoretical label given to the Constitution but the practical implications of the provisions of the Constitution which are of importance to decide the question that arises in the present context, viz., whether the powers under Article 356(1) can be exercised by the President arbitrarily and unmindful of its consequences to the governance in the State concerned. So long as the States are not mere administrative units but in their own right constitutional potentates with the same paraphernalia as the Union, and with independent Legislature and the Executive constituted by the same process as the Union, whatever the bias in favour of the Centre, it cannot be argued that merely because (and assuming it is correct) the Constitution is labeled unitary or quasi-federal or a mixture of federal and unitary structure, the President has unrestricted power of issuing Proclamation under Article 356(1)."

102. K. Ramaswami, J., in paragraphs 247 and 248 of his separate judgment, observed:-

"247. Federalism envisaged in the Constitution of India is a basic feature in which the Union of India is permanent within the territorial limits set in Article 1 of the Constitution and is indestructible. The State is the creature of the Constitution and the law made by Articles 2 to 4 with no territorial integrity, but a permanent entity with its

> boundaries alterable by a law made by Parliament. Neither the relative importance of the legislative entries in Schedule VII, Lists I and II of the Constitution, nor the fiscal control by the Union per se are decisive to conclude that the Constitution is unitary. The respective legislative powers are traceable to Articles 245 to 254 of the Constitution. The State qua the Constitution is federal in structure and independent in its exercise of legislative and executive power. However, being the creature of the Constitution the State has no right to secede or claim sovereignty. Qua the Union, State is quasi-federal. Both are coordinating institutions and ought to exercise their respective powers with adjustment, understanding and accommodation to render socio-economic and political justice to the people, to preserve and elongate the constitutional goals including secularism.
> 248. The preamble of the Constitution is an integral part of the Constitution. Democratic form of Government, federal structure, unity and integrity of the nation, secularism, socialism, social justice and judicial review are basic features of the Constitution."

103. B.P. Jeevan Reddy, J., writing a separate opinion (for himself and on behalf of S.C. Agrawal, J.), concluded in paragraph 276 thus:-

> "276. 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 their 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. It is a matter of common knowledge that over the last several decades, the trend the world over is towards strengthening of Central Governments be it the result of advances in technological/scientific fields or otherwise, and that even In USA the Centre has become far more powerful notwithstanding the obvious bias in that Constitution in favour of the States. All this must put the court on guard against any conscious whittling down of the powers of the States. Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle the outcome of our own historical process and a recognition of the ground realities. This aspect has been dealt with elaborately by Shri M.C. Setalvad in his Tagore Law Lectures "Union and State relations under the Indian Constitution" (Eastern Law House, Calcutta, 1974). The nature of the Indian federation with reference to its historical background, the distribution of legislative powers, financial and administrative relations, powers of taxation, provisions relating to trade, commerce and industry, have all been dealt with analytically. It is not possible nor is it necessary for the present purposes to refer to them. It is enough to note that our Constitution has certainly a bias towards Centre vis-a-vis the States..."

104. In ***ITC Ltd. v. Agricultural Produce Market Committee***[39], the Court observed that the Constitution of India deserves to be interpreted, language permitting, in a

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39(2002) 9 SCC 23

manner that it does not whittle down the powers of the State Legislature and preserves federalism while also upholding the central supremacy as contemplated by some of its articles.

105. In ***Kuldip Nayar*** (supra), the Court, while dealing with the question of state domicile for elections to the Rajya Sabha, opined that it is true that the federal principle is dominant in our Constitution and the said principle is one of its basic features but it is equally true that federalism under the Indian Constitution leans in favour of a strong Centre, a feature that militates against the concept of strong federalism. Some of the provisions that can be referred to in this context include the power of the Union to deal with extraordinary situations such as during emergency and in the event of a proclamation being issued under Article 356 that the governance of a State cannot be carried on in accordance with the provisions of the Constitution; the power of the Parliament to legislate with respect to a matter in the State List in the national interest in case there is a resolution of the Council of States supported by prescribed majority; the power of the Parliament to provide for

the creation and regulation of All India Services common to the Union and the States in case there is a resolution of the Council of States supported by not less than two-thirds majority; the existence of only one citizenship, namely, the citizenship of India; and, perhaps most important, the power of the Parliament in relation to the formation of new States and alteration of areas, boundaries or names of States.

106. From the foregoing discussion, it is clear as day that 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.

107. It is self-evident that there is a meaningful orchestration between the concepts of federalism and nature of democracy present in our Constitution. It would not be a fallacious metaphor if we say that just as in a fusion reaction two or more atomic nuclei come together to form a bigger and heavier nucleus, the founding fathers of our Constitution envisaged a fusion of federalism and democracy in the quest for achieving an egalitarian social order, a classical unity in a contemporaneous diversity. The vision of diversity in unity and the perception of plurality in eventual cohesiveness is embedded in the final outcome of the desire to achieve the accomplished goal through constitutional process. The meeting of the diversity in unity without losing identity is a remarkable synthesis that the Constitution conceives without even permitting the slightest contrivance or adroitness.

I. <u>Collaborative federalism</u>:

108. The Constituent Assembly, while devising the federal character of our Constitution, could have never envisaged that the Union Government and the State Governments would work in tangent. It could never have been the Constituent Assembly's intention that under the garb of quasi-federal tone of our Constitution, the Union Government would affect the interest of the States. Similarly, the States under our constitutional scheme were not carved as separate islands each having a distinct vision which would unnecessarily open the doors for a contrarian principle or gradually put a step to invite anarchism. Rather, the vision enshrined in the Preamble to our Constitution, i.e., to achieve the golden goals of justice, liberty, equality and fraternity, beckons both the Union Government and the State Governments, alike. The ultimate aim is to have a holistic structure.

109. The aforesaid idea, in turn, calls for coordination amongst the Union and the State Governments. The Union and the States need to embrace a collaborative/cooperative federal architecture for achieving this coordination.

110. Corwin, an eminent thinker, in the context of the United States, coined the term 'Collaborative Federalism' and defined it as:-

> "...the National Government and the States are mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government."[40]

111. The U.S. Supreme Court in ***Carmichael v. S. Coal & Coke Co.***[41] propounded that a State Unemployment Statute had not been coerced by the adoption of the Social Security Act and the United States and the State of Alabama are not alien governments but they coexist within the same territory. Unemployment within it is their common concern. The U.S. Supreme Court further observed that the two statutes embody a cooperative legislative effort by the State and National governments for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other and the Constitution does not prohibit such cooperation.

40Edward S. Corwin, The Passing of Dual Federalism, 36 VA.L.REV. 1, 4 (1950)
41301 U.S. 495, 525 – 26 (1937)

112. Geoffrey Sawer proposes that cooperative federalism is evidenced by the following characteristics: *'each of the parties to the arrangement has a reasonable degree of autonomy, can bargain about the terms of cooperation, and at least if driven too hard, decline to cooperate*'[42].

113. Later, Cameron and Simeon described "collaborative federalism," as:-

> "[T]he process by which national goals are achieved, not by the federal government acting alone or by the federal government shaping provincial behavior through the exercise of its spending power, but by some or all of the governments and the territories acting collectively."[43]

Although the said statement of law may not be strictly applicable, yet the need for co-operation to sustain the federal structure has its own importance as an idea.

114. Thus, the Union and the State Governments should always work in harmony avoiding constitutional discord. In such a collaboration, the national vision as set out in the Preamble to our Constitution gets realized. The methods and

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42 Geoffrey Sawer, Modern Federalism (Pitman Australia, 1976), 1.

43 Cameron, D. and Simeon, R. 2002. Intergovernmental relations in Canada: The emergence of collaborative federalism. Publius , 32(2):49–72

approach for the governments of the Union and the States may sometimes be different but the ultimate goal and objective always remain the same and the governments at different levels should not lose sight of the ultimate objective. This constitutional objective as enshrined in the Constitution should be the guiding star to them to move on the path of harmonious co-existence and interdependence. They are the basic tenets of collaborative federalism to sustain the strength of constitutional functionalism in a Welfare State.

115. In a Welfare State, there is a great necessity of collaborative federalism. Martin Painter, a leading Australian proponent of collaborative federalism, lays more stress on negotiations for achieving common goals amongst different levels of governments and, thus, says:-

> "The practical exigencies in fulfilling constitutionally sanctioned functions should bring all governments from different levels together as equal partners based on negotiated cooperation for achieving the common aims and resolving the outstanding problems." [44]

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44 Martin Painter, Collaborative federalism: Economic reform in Australia in the 1990s. Cambridge University Press, 2009.

116. In the Australian context, Prof. Nicholas Aroney in his book[45] has said:-

> "Rather than displaying a strictly defined distribution of responsibility between two or more "co-ordinate" levels of government, federal systems tend in practice to resemble something more like a "marble cake", in which governmental functions are shared between various governmental actors within the context of an ever-shifting set of parameters shaped by processes of negotiation, compromise and, at times, cooperation."

117. Thus, 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

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45 Prof. Nicholas Aroney, The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution, 2009

should exhibit sincere concern to avoid any conflict. This concept has to be borne in mind when both intend to rely on the constitutional provision as the source of authority. We are absolutely unequivocal that both the Centre and the States must work within their spheres and not think of any encroachment. But in the context of exercise of authority within their spheres, there should be perception of mature statesmanship so that the constitutionally bestowed responsibilities are shared by them. Such an approach requires continuous and seamless interaction between the Union and the State Governments. We may hasten to add that this idea of collaborative federalism would be more clear when we understand the very essence of the special status of NCT of Delhi and the power conferred on the Chief Minister and the Council of Ministers on the one hand and the Lieutenant Governor on the other by the Constitution.

118. The idea of cooperative/collaborative federalism is also not new to India. M.P. Jain in his book[46], in a different manner, sets forth the perception thus:-

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[46]M.P. Jain, Some aspects of Indian federalism, 1968

> "Though the Constitution provides adequate powers to the Centre to fulfil its role, yet, in actual practice, the Centre can maintain its dynamism and initiative not through a show of its powers — which should be exercised only as a last resort in a demonstrable necessity — but on the cooperation of the States secured through the process of discussion, persuasion and compromises. All governments have to appreciate the essential point that they are not independent but interdependent, that they should act not at cross- purposes but in union for the maximisation of the common good."

119. In ***State of Rajasthan and others v. Union of India***[47], the Court took cognizance of the concept of cooperative federalism as perceived by G. Austin and A.H Birch when it observed:-

> "Mr. Austin thought that our system, if it could be called federal, could be described as "cooperative federalism." This term was used by another author, Mr. A.H. Birch (see: Federalism, Finance and Social Legislation in Canada, Australia and the United States p. 305), to describe a system in which:
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> > "...the practice of administrative cooperation between general and regional governments, the partial dependence of the regional governments upon payments from the general governments and the fact that the general governments, by the use of conditional grants, frequently promote developments in matters which are constitutionally assigned to the regions"... "

47 (1978) 1 SCR 1

120. We have dealt with the conceptual essentiality of federal cooperation as that has an affirmative role on the sustenance of constitutional philosophy. We may further add that though the authorities referred to hereinabove pertain to Union of India and State Governments in the constitutional sense of the term "State", yet the concept has applicability to the NCT of Delhi regard being had to its special status and language employed in Article 239AA and other articles.

J. <u>Pragmatic federalism</u>:

121. In this context, we may also deal with an ancillary issue, namely, pragmatic federalism. To appreciate the said concept, we are required to analyse the nature of federalism that is conceived under the Constitution. Be it noted, the essential characteristics of federalism like duality of governments, distribution of powers between the Union and the State Governments, supremacy of the Constitution, existence of a written Constitution and most importantly, authority of the

Courts as final interpreters of the Constitution are all present under our constitutional scheme. But at the same time, the Constitution has certain features which can very well be perceived as deviations from the federal character. We may, in brief, indicate some of these features to underscore the fact that though our Constitution broadly has a federal character, yet it still has certain striking unitary features too. Under Article 3 of the Constitution, the Parliament can alter or change the areas, boundaries or names of the States. During emergency, the Union Parliament is empowered to make laws in relation to matters under the State List, give directions to the States and empower Union officers to execute matters in the State List. That apart, in case of inconsistency between the Union and the State laws, the Union Law shall prevail. Additionally, a Governor of a State is empowered to reserve the bill passed by the State Legislature for consideration of the President and the President is not bound to give his assent to such a bill. Further, a State Legislature can be dissolved and President's rule can be imposed in a State either on the report

of the Governor or otherwise when there is failure of the constitutional machinery in the State.

122. We have referred to the above aspects to lay stress on the 'quasi-federal' nature of our Constitution which has been so held by the Court in many a decision. We may state that these theoretical concepts are to be viewed from the practical perspective. In ***S.R. Bommai's*** case, while interpreting Article 356, the Court observed:-

> "That is why the Constitution of India is differently described, more appropriately as 'quasi-federal' because it is a mixture of the federal and unitary elements, leaning more towards the latter but then what is there in a name, what is important to bear in mind is the thrust and implications of the various provisions of the Constitution bearing on the controversy in regard to scope and ambit of the Presidential power under Article 356 and related provisions."

123. Thus, the need is to understand the thrust and implication of a provision. To put it differently, the acceptance of 'pragmatic federalism' is the need of the day. One aspect needs to be clarified. The acceptance of the said principle should not be viewed as a simplistic phenomenon entrenched

in innocence. On the contrary, it would require disciplined wisdom on the part of those who are required to make it meaningful. And, the meaning, in essentiality, shall rest on pragmatic orientation.

124. The expression 'pragmatic federalism' in the Indian context has been used by Justice A.M. Ahmadi in ***S.R. Bommai*** (supra) wherein he observes:-

> "It would thus seem that the Indian Constitution has, in it, not only features of a pragmatic federalism which, while distributing legislative powers and indicating the spheres of Governmental powers of State and Central Governments, is overlaid by strongly 'unitary' features, particularly exhibited by lodging in Parliament the residuary legislative powers, and in the Central Government the executive power of appointing certain Constitutional functionaries including High Court and Supreme Court Judges and issuing appropriate directions to the State Governments and even displacing the State Legislatures and the Government in emergency situations, vide Articles 352 to 360 of the Constitution."

125. The concept of pragmatic federalism is self explanatory. It is 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.

126. 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.

K. <u>Concept of federal balance</u>:

127. Another complementary concept in this context, we think, is "federal balance". Federalism in contradistinction to centralism is a concept which envisions a form of Government where there is a distribution of powers between the States and the Centre. It has been advocated by the patrons of the federal theory that the States must enjoy freedom and independence as much as possible and at the very least be on an equal footing with the Centre. The Indian Constitution prescribes a federal structure which provides for division of powers

between the States and the Centre, but with a slight tilt towards the Centre. This unique quasi-federal structure is inherent in the various provisions of the Constitution as it was felt by the framers of our Constitution keeping in mind the needs of independent India and that is why, the residuary powers in most, if not all, matters have remained with the Centre. This, however, is not unconditional as the Constitution has provided for a federal balance between the powers of the Centre and the States so that there is no unwarranted or uncalled for interference by the Centre which would entail encroachment by the Centre into the powers of the States. The need is for federal balance which requires mutual respect and deference to actualize the workability of a constitutional provision.

128. Sawer's 'federal principles' reiterate this concept of federal balance when he states:-

> "power of the centre is limited, in theory at least, to those matters which concern the nation as a whole. The regions are intended to be as free as possible to pursue their own local interest."

129. The interest of the States inherent in a federal form of government gains more importance in a democratic form of government as it is absolutely necessary in a democracy that the will of the people is given effect to. To subject the people of a particular State/region to the governance of the Union, that too, with respect to matters which can be best legislated at the State level goes against the very basic tenet of a democracy. The principle of federal balance which is entrenched in our Constitution has been reiterated on several instances holding that the Centre and the States must act within their own spheres. In ***In re: Under Article 143, Constitution of India, (Special Reference No. 1 of 1964)*** (supra), the Constitution Bench observed:-

> "...the essential characteristic of federalism is the distribution of limited executive, legislative and judicial authority among bodies which are coordinate with and independent of each other'. 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. This supremacy of the Constitution is protected by the authority of an independent judicial body to act as the interpreter of a scheme of distribution of powers."
>
> [Underlining is ours]

130. In ***UCO Bank v. Dipak Debbarma***[48], the Court has made several observations on the federal character of our Constitution and the need to maintain the federal balance which has been envisaged in our Constitution to prevent any usurpation of power either by the Centre or the States. We reproduce the same with profit:-

> "The federal structure under the constitutional scheme can also work to nullify an incidental encroachment made by the Parliamentary legislation on a subject of a State legislation where the dominant legislation is the State legislation. An attempt to keep the aforesaid constitutional balance intact and give a limited operation to the doctrine of federal supremacy can be discerned in the concurring judgment of Ruma Pal, J. in ITC Ltd. vs. Agricultural Produce Market Committee and Ors., wherein after quoting the observations of this Court in the case of S.R. Bomai v. Union of India (para 276), the learned Judge has gone to observe as follows (para 94 of the report):
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> > "276. 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.

48(2017) 2 SCC 585

> Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their 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.""

131. Thus, the role of the Court in ensuring the federal balance, as mandated by the Constitution, assumes great importance. It is so as the Court is the final arbiter and defender of the Constitution.

L. <u>Interpretation of the Constitution</u>:

132. We have already said that both the parties have projected their view in extremes. The issue deserves to be adjudged regard being had to the language employed in the various articles in Chapter VIII, the context and various constitutional concepts. If the construction sought to be placed by the appellant is accepted, such an acceptation would confer a status on NCT of Delhi which the Parliament in exercise of its constituent power has not conceived. The respondents, per contra, highlight that by the constitutional amendment, introduction of the 1991 Act and the Rules of Business, the Lieutenant Governor functions as the administrator in the

truest sense as the contemporaneous documents leading to the amendment would show. They would submit that though Delhi has been conferred a special status, yet that does not bring any new incarnation. The submission, as we perceive, destroys the fundamental marrows of the conception, namely, special status. It, in fact, adorns the Lieutenant Governor with certain attributes and seeks to convey that NCT of Delhi remains where it was. The approach in extremes is to be adjudged and the adjudication, as it seems to us, would depend upon the concepts we have already adumbrated and further we have to carefully analyse the principles of the interpretation of the Constitution.

133. The task of interpreting an instrument as dynamic as the Constitution assumes great import in a democracy. The Constitutional Courts are entrusted with the critical task of expounding the provisions of the Constitution and further while carrying out this essential function, they are duty bound to ensure and preserve the rights and liberties of the citizens without disturbing the very fundamental principles which form

the foundational base of the Constitution. Although, primarily, it is the literal rule which is considered to be the norm which governs the courts of law while interpreting statutory and constitutional provisions, yet mere allegiance to the dictionary or literal meaning of words contained in the provision may, sometimes, annihilate the quality of poignant flexibility and requisite societal progressive adjustability. Such an approach may not eventually subserve the purpose of a living document.

134. In this regard, we think it appropriate to have a bird's eye view as to how the American jurists and academicians have contextually perceived the science of constitutional interpretation. The most important aspect of modern constitutional theory is its interpretation. Constitutional law is a fundamental law of governance of a politically organised society and it provides for an independent judicial system which has the onerous responsibility of decisional process in the sphere of application of the constitutional norms. The resultant consequences do have a vital impact on the well-

being of the people. The principles of constitutional interpretation, thus, occupy a prime place in the method of adjudication. In bringing about constitutional order through interpretation, the judiciary is often confronted with two propositions — whether the provisions of the Constitution should be interpreted as it was understood at the time of framing of the Constitution unmindful of the circumstances at the time when it was subsequently interpreted or whether the constitutional provisions should be interpreted in the light of contemporaneous needs, experiences and knowledge. In other words, should it be historical interpretation or contemporaneous interpretation.[49] The theory of historical perspective found its votary in Chief Justice Taney who categorically stated in ***Dred Scott v Sanford***[50] that as long as the Constitution continues to exist in the present form, it speaks not only in the same words but also with the same meaning and intent with which it spoke when it came from the hands of the framers. Similar observations have been

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49 *Bodenheimer, Edgar,* Jurisprudence,(Universal Law Publishing Co.Pvt. Ltd,
Fourth Indian Reprint, 2004) p 405

50 60 U.S. (19 How.) 393 (1857)

made by Justice Sutherland[51]. Propagating a different angle, Chief Justice Marshall in ***McCulloch v Maryland***[52] has observed that the American Constitution is intended to serve for ages to come and it should be adopted to various crises of human affairs. Justice Hughes in ***State v. Superior Court***[53] observed that the constitutional provisions should be interpreted to meet and cover the changing conditions of social life and economic life. Justice Holmes observed that the meaning of the constitutional terms is to be gleaned from their origin and the line of their growth.[54] Cardozo once stated:-

> "A Constitution states or ought to state not rules for the passing hour but principles for an expanding future."[55]

It would be interesting to note that Justice Brandeis tried to draw a distinction between interpretation and application of

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51 Home Building and Loan Association v Blaisdell, 290 U.S. 398 (1934) see West Coast Hotel Co., v Parrish, 300 US 379 (1937) where he observed, the meaning of the Constitution does not change with the ebb and flow of economic events that (if)the words of the Constitution mean today what they did not mean when written is to rob that instrument of the essential element...

52 17 US (4Wheat) 316 (1819)

53 State v Superior Court (1944) at 547

54 Gompers v US 233 (1914)

55 Benjamin N. Cardozo, The Nature of the Judicial Process, Yale University Press, 1921

constitutional provisions[56]. The Constitution makers in their wisdom must have reasonably envisaged the future needs and attempted at durable framework of the Constitution. They must not have made the Constitution so rigid as to affect the future. There is a difference between modification and subversion of the provisions of the Constitution through interpretation. The view is that there is sufficient elasticity but fundamental changes are not envisaged by interpretation. Thus, there is a possibility of reading into the provisions certain regulations or amplifications which are not directly dealt with. There is yet another angle that the libertarian's absolutism principle never allows for restrictions to be read into the liberties which are not already mentioned in the Constitution.[57]

135. Our Constitution, to repeat at the cost of repetition, is an organic and living document. It contains words that potentially do have many a concept. It is evident from the

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56Burnett v Coronado Oil and Gas Co., 285 US (1932)

57 The activist libertarians like Justice Black and Douglas never allowed reading such restrictions. See *American Communication Association v Douds* 339 US (1950) and dissenting in *Poulos v New Hamshire,* 345 US(1953)

following passage from ***R.C. Poudyal v. Union of India and others***[58]:-

> "In the interpretation of a constitutional document, "words are but the framework of concepts and concepts may change more than words themselves". The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth. It is aptly said that "the intention of a Constitution is rather to outline principles than to engrave details"".

136. Professor Richard H. Fallon has, in his celebrated work[59], identified five different strands of interpretative considerations which shall be taken into account by judges while interpreting the Constitution. They read thus:-

> "Arguments from the plain, necessary, or meaning of the constitutional text; arguments about the intent of the framers; arguments of constitutional theory that reason from the hypothesized purposes that best explain either particular constitutional provisions or the constitutional text as a whole; arguments based on judicial precedent; and value arguments that assert claims about justice and social policy."[60]

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58 AIR 1993 SC 1804

59 Richard H. Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation", Harvard Law Review Association, 1987

60 100 HARV. L. REV. 1189, 1189-90 (1987).10

137. Comparing the task of interpretation of statute to that of interpretation of musical notes, Judge Hand in the case of ***Helvering v. Gregory***[61] stated:-

> "The meaning of a sentence may be more than that of the separate words, as a melody is more than the words."

138. Jerome N. Frank[62], highlighting the corresponding duty of the public in allowing discretion to the Judges, has observed:-

> "a "wise composer" expects a performer to transcend literal meaning in interpreting his score; a wise public should allow a judge to do the same."

139. The room for discretion while interpreting constitutional provisions allows freedom to the Judges to come up with a formula which is in consonance with the constitutional precepts while simultaneously resolving the conflict in issue. The following observations made in ***S.R. Bommai's case***, throw light on the aforesaid perception:-

> "Constitutional adjudication is like no other decision-making. There is a moral dimension to every major constitutional case; the language of the text is not necessarily a controlling factor. Our

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61 69 F. 2d 809, 810-II (1934)

62 Jerome N. Frank, "Words and Music: Some remarks on Statutory Interpretation," *Columbia Law Review* 47 (1947): 1259-1367

> Constitution works because of its generalities, and because of the good sense of the judges when interpreting it. It is that informed freedom of action of the judges that helps to preserve and protect our basic document of governance."

140. It 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.

141. In ***Supreme Court Advocates-on-Record Association*** (supra), this Court, acknowledging the *sui generis* nature of the Constitution, observed thus:-

> "The constitutional provisions cannot be cut down by technical construction rather it has to be given liberal and meaningful interpretation. The ordinary rules and presumptions, brought in aid to interpret the statutes, cannot be made applicable while interpreting the provisions of the Constitution. In

> Minister of Home Affairs v. Fisher (1979) 3 AER 21 dealing with Bermudian Constitution, Lord Wilberforce reiterated that a Constitution is a document "sui generis, calling for principles of interpretation of its own, suitable to its character""

142. Dickson, J., in ***Hunter v. Southam Inc***[63], rendering the judgment of the Supreme Court of Canada, expounded the principle pertaining to constitutional interpretation thus:-

> "The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts 'not to read the provisions of the Constitution like a last will and testament lest it become one'."

63[1984] 2 SCR 145

143. The Supreme Court of Canada also reiterated this view when it held that the meaning of 'unreasonable' cannot be determined by recourse to a dictionary or, for that matter, by reference to the rules of statutory construction. The Court pointed out that the task of expounding a Constitution is crucially different from that of construing a statute, for a statute defines present rights and obligations and is easily enacted and as easily repealed whereas a Constitution is drafted with an eye to the future and its function is to provide a continuing framework for the legitimate exercise of governmental power. Further, the Court observed that once enacted, constitutional provisions cannot easily be repealed or amended and hence, it must be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers and the judiciary, being the guardian of the Constitution, must bear these considerations in mind while interpreting it. The Court further stated that the judges must take heed to the warning of Professor Paul Freund when he said that the role of the

judges is “not to read the provisions of the Constitution like a last will and testament, lest it becomes one”.

144. This idea had pervaded the legal system way back in 1930 when the Privy Council through Lord Sankey LC in ***Edwards v Attorney General for Canada***[64] had observed that the Constitution must be approached as “a living tree capable of growth and expansion within its natural limits”.

145. Professor Pierre-André Côté in his book[65] has highlighted the action based approach by stating that it must be kept in mind that the end goal of the process of legal interpretation is resolution of conflicts and issues. It would be apt to reproduce his words:-

> “Legal interpretation goes beyond the mere quest for historical truth. The judge, in particular, does not interpret a statute solely for the intellectual pleasure of reviving the thoughts that prevailed at the time the enactment was drafted. He interprets it with an eye to action: the application of the statute. Legal interpretation is thus often an "interpretive operation”, that is, one linked to the resolution of concrete issues.”

M. <u>Purposive interpretation</u>:

64[1930] AC 124, 136

65 Pierre-André *Côté, The Interpretation of Legislation in Canada 2nd Ed* (Cowansville. Quebec:Les Editions Yvon Blais. Inc. 1992)

146. Having stated the principles relating to constitutional interpretation we, as presently advised, think it apt to devote some space to purposive interpretation in the context, for we shall refer to the said facet for understanding the core controversy. It needs no special emphasis that the reference to some precedents has to be in juxtaposition with other concepts and principles. As it can be gathered from the discussion as well as the authorities cited above, 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 Judicial Committee in ***Attorney General of Trinidad and Tobago v. Whiteman***[66] has observed:-

> "The language of a Constitution falls to be construed, not in a narrow and legalistic way, but

66[1991] 2 AC 240, 247

> broadly and purposively, so as to give effect to its spirit…"

147. In ***S.R. Chaudhuri v. State of Punjab and others***[67], a three-Judge Bench has opined that constitutional provisions are required to be understood and interpreted with an object-oriented approach and a Constitution must not be construed in a narrow and pedantic sense. The Court, while holding that the Constituent Assembly debates can be taken aid of, observed the following:-

> "The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve."
> (Emphasis is ours)

148. The Court further highlighted that the Constitution is not just a document in solemn form but a living framework for the government of the people exhibiting a sufficient degree of cohesion and its successful working depends upon the democratic spirit underlying it being respected in letter and in spirit.

67(2001) 7 SCC 126

149. We have duly noted in the earlier part of the judgment that the judiciary must interpret the Constitution having regard to the spirit and further by adopting a method of purposive interpretation. That is the obligation cast on the judges. In ***Ashok Kumar Gupta and another v. State of U.P. and others***[68], the Court observed that while interpreting the Constitution, it must be borne in mind that words of width are both a framework of concepts and means to the goals in the Preamble and concepts may keep changing to expand and elongate the rights. The Court further held that constitutional issues are not solved by mere appeal to the meaning of the words without an acceptance of the line of their growth and, therefore, the judges should adopt purposive interpretation of the dynamic concepts of the Constitution and the Act with its interpretative armoury to articulate the felt necessities of the time. Finally, the Court pointed out:-

> "To construe law one must enter into its spirit, its setting and history."

68(1997) 5 SCC 201

150. In ***Indian Medical Association v. Union of India and others***[69], referring to the pronouncement in ***M. Nagaraj v. Union of India***[70], the Court said:-

> "In M. Nagaraj, Kapadia J., (as he then was) speaking for the Court, recognized that one of the cardinal principles of constitutional adjudication is that the mode of interpretation ought to be the one that is purposive and conducive to ensure that the constitution endures for ages to come. Eloquently, it was stated that the "Constitution is not an ephemeral legal document embodying a set of rules for the passing hour"."
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> (Emphasis is ours)

151. The emphasis on context while interpreting constitutional provisions has burgeoned this shift from the literal rule to the purposive method in order that the provisions do not remain static and rigid. The words assume different incarnations to adapt themselves to the current demands as and when the need arises. The House of Lords in ***Regina (Quintavalle) v. Secretary of State for Health***[71] ruled:-

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69(2011) 7 SCC 179
70 (2006) 8 SCC 202

71(2003) UKHL 13 : (2003) 2 AC 687 : (2003) 2 WLR 692 (HL)

> "The pendulum has swung towards purposive methods of construction. This change was not initiated by the teleological approach of European Community jurisprudence, and the influence of European legal culture generally, but it has been accelerated by European ideas: see, however, a classic early statement of the purposive approach by Lord Blackburn in River Wear Commissioners v. Adamson (1877) LR 2 AC 743 at p. 763 (HL). In any event, nowadays the shift towards purposive interpretation is not in doubt. The qualification is that the degree of liberality permitted is influenced by the context. ..."
>
> [Emphasis is supplied]

152. Emphasizing on the importance of determining the purpose and object of a provision, Learned Hand, J. in ***Cabell v. Markham***[72] enunciated:-

> "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

72148 F 2d 737 (2d Cir 1945)

153. The components of purposive interpretation have been elucidated by Former President of the Supreme Court of Israel, Aharon Barak, who states:-

> "Purposive interpretation is based on three components: language, purpose, and discretion. Language shapes the range of semantic possibilities within which the interpreter acts as a linguist. Once the interpreter defines the range, he or she chooses the legal meaning of the text from among the (express or implied) semantic possibilities. The semantic component thus sets the limits of interpretation by restricting the interpreter to a legal meaning that the text can bear in its (public or private) language."[73]

154. As per the observations made by Aharon Barak, judges interpret a Constitution according to its purpose which comprises of the objectives, values and principles that the constitutional text is designed to actualize. Categorizing this purpose into objective and subjective purpose, he states[74]:-

> "Subjective component is the goals, values, and principles that the constituent assembly sought to achieve through it, at the time it enacted the constitution. It is the original intent of the founding fathers. Purposive interpretation translates such

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73Aharon Barak, Purposive Interpretation in Law, Princeton University Press, 2005 - Law

74*ibid*

> intent into a presumption about the subjective purpose, that is, that the ultimate purpose of the text is to achieve the (abstract) intent of its authors. There is also, however, the objective purpose of the text - the goals, values, and principles that the constitutional text is designed to achieve in a modern democracy at the time of interpretation. Purposive interpretation translates this purpose into the presumption that the ultimate purpose of the constitution is its objective purpose."
>
> [Emphasis supplied]

155. It is also apt to reproduce the observations made by him in the context of the ever changing nature of the Constitution:-

> "A constitution is at the top of a normative pyramid. It is designed to guide human behavior for a long period of time. It is not easily amendable. It uses many open ended expressions. It is designed to shape the character of the state for the long term. It lays the foundation for the state's social values and aspirations. In giving expression to this constitutional uniqueness, a judge interpreting a constitution must accord significant weight to its objective purpose and derivative presumptions. Constitutional provisions should be interpreted according to society's basic normative positions at the time of interpretation."

156. He has further pointed out that both the subjective as well as the objective purposes have their own significance in the interpretation of constitutional provisions:-

> "The intent of the constitutional founders (abstract subjective intent" remains important. We need the past to understand the present. Subjective purpose confers historical depth, honoring the past and its importance. In purposive interpretation, it takes the form of presumption of purpose that applies immediately, throughout the process of interpreting a constitution. It is not, however, decisive. Its weight is substantial immediately following the founding, but as time elapses, its influence diminishes. It cannot freeze the future development of the constitutional provision. Although the roots of the constitutional provision are in the past, its purpose is determined by the needs of the present, in order to solve problems in the future. In a clash between subjective and objective purposes, the objective purpose of a constitution prevails. It prevails even when it is possible to prove subjective purpose through reliable, certain, and clear evidence. Subjective purpose remains relevant, however, in resolving contradictions between conflicting objective purposes."[75]

N. <u>Constitutional culture and pragmatism</u>:

157. "Constitutional culture" is inherent in the concepts where words are transformed into concrete consequences. It is an interlocking system of practices, institutional arrangements, norms and habits of thought that determine what questions

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75ibid

we ask, what arguments we credit, how we process disputes and how we resolve those disputes.[76]

158. The aforestated definition of 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.

159. The responsibility of fostering a constitutional culture falls on the shoulders of the State and the populace. The allegiance to promoting a constitutional culture stems from the crying need of the sovereign to ensure that the democratic nature of our society remains undaunted and the fundamental tenets of the Constitution rest on strong platform.

160. The following observations made by the Court in ***R.C. Poudyal*** (supra) throw light on this duty cast upon the functionaries and the citizens:-

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76 Andrew M. Siegel, Constitutional Theory, Constitutional Culture, 18 U.PA.J. Const. L. 1067 (2016)

> "Mere existence of a Constitution, by itself, does not ensure constitutionalism or a constitutional culture. It is the political maturity and traditions of a people that import meaning to a Constitution which otherwise merely embodies political hopes and ideals."

161. The Constitutional Courts, while interpreting the constitutional provisions, have to take into account the constitutional culture, bearing in mind its flexible and evolving nature, so that the provisions are given a meaning which reflect the object and purpose of the Constitution.

162. History reveals that in order to promote and nurture this spirit of constitutional culture, the Courts have adopted a pragmatic approach of interpretation which has ushered in an era of "constitutional pragmatism".

163. In this context, we may have some perspective from the American approach. The perception is that language is a social and contextual enterprise; those who live in a different society and use language differently cannot reconstruct the original meaning. Justice Brennan observed:-

> "We current Justices read the Constitution in the only way that we can: as Twentieth-Century Americans. We look to the history of the time of

> framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time."[77]

164. In ***Supreme Court Advocates-on-Record-Association and others v. Union of India***[78], the Court, while emphasizing on the aspect of constitutional culture that governs the functioning of any constitutional body, has observed:-

> "The functioning of any constitutional body is only disciplined by appropriate legislation. Constitution does not lay down any guidelines for the functioning of the President and Prime Minister nor the Governors or the Chief Ministers. Performance of constitutional duties entrusted to them is structured by legislation and constitutional culture. The provisions of the Constitution cannot be read like a last will and testament lest it becomes one."

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77 William J. Brennan, Jr., The Constitution of the United States: Contemporary Ratification, in Interpreting The Constitution: The Debate Over Original Intent at 23, 27 (Jack N. Rakove ed., 1990)

78(2016) 5 SCC 1

165. Further, the Court also highlighted that a balance between idealism and pragmatism is inevitable in order to create a workable situation ruling out any absurdity that may arise while adopting either one of the approaches:-

> "The rule of law envisages the area of discretion to be the minimum, requiring only the application of known principles or guidelines to ensure non-arbitrariness, but to that limited extent, discretion is a pragmatic need. Conferring discretion upon high functionaries and, whenever feasible, introducing the element of plurality by requiring a collective decision, are further checks against arbitrariness. This is how idealism and pragmatism are reconciled and integrated, to make the system workable in a satisfactory manner.
>
> xxx xxx xxx
>
> It is this pragmatic interpretation of the Constitution that was postulated by the Constituent Assembly, which did not feel the necessity of filling up every detail in the document, as indeed it was not possible to do so."

166. In ***The State of Karnataka and another v. Shri Ranganatha Reddy and another***[79], the Court had laid stress on the obligation and the responsibility of the judiciary not to limit itself to the confines of rigid principles or textualism and rather adopt an interpretative process which takes into

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79AIR 1978 SC 215

consideration the constitutional goals and constitutional culture:-

> “When cryptic phrases expressive of constitutional culture and aspirational future, fundamental to the governance of the nation, call for interpretative insight, do we merely rest content to consult the O.E.D. and alien precedents, or feel the philosophy and share the foresight of the founding fathers and their telescopic faculty? Is the meaning of meanings an artless art?”

And again,

> “There is a touch of swadeshi about a country's jurisprudence and so our legal notions must bear the stamp of Indian Developmental amplitude linked to constitutional goals.”

167. Laying emphasis on the need for constitutional pragmatism, the Court in ***Indra Sawhney*** (supra) noted the observations made by Lord Rockill in his presidential address to the Bentham Club at University College of London on February 29, 1984 on the subject "Law Lords, Reactionaries or Reformers?" which read as follows:-

> “Legal policy now stands enthroned and will I hope remain one of the foremost considerations governing the development by the House of Lords of the common law. What direction should this development now take? I can think of several occasions upon which we have all said to ourselves

"this case requires a policy decision - what is the right policy decision?" The answer is, and I hope will hereafter be, to follow that route which is most consonant with the current needs of the society, and which will be seen to be sensible and will pragmatically thereafter be easy to apply. No doubt the Law Lords will continue to be the targets for those academic lawyers who will seek intellectual perfection rather than imperfect pragmatism. But much of the common law and virtually all criminal law, distasteful as it may be to some to have to acknowledge it, is a blunt instrument by means of which human beings, whether they like it or not, are governed and subject to which they are required to live, and blunt instruments are rarely perfect intellectually or otherwise. By definition they operate bluntly and not sharply.""

[Emphasis is ours]

168. The Court also observed:-

"Be that as it may, sitting as a Judge one cannot be swayed either way while interpreting the Constitutional provisions pertaining to the issues under controversy by the mere reflexes of the opinion of any section of the people or by the turbulence created in the society or by the emotions of the day.

We are very much alive to the fact that the issues with which we are now facing are hypersensitive, highly explosive and extremely delicate. Therefore, the permissible judicial creativity in tune with the Constitutional objectivity is essential to the interpretation of the Constitutional provisions so that the dominant values may be discovered and enforced. At the same time, one has to be very cautious and careful in approaching the issues in a very pragmatic and realistic manner.

> Since this is a constitutional issue it cannot be resolved by clinches founded on fictional mythological stories or misdirected philosophies or odious comparisons without any regard to social and economic conditions but by pragmatic, purposive and value oriented approach to the Constitution as it is the fundamental law which requires careful navigation by political set up of the country and any deflection or deviation disturbing or threatening the social balance has to be restored, as far as possible, by the judiciary."
>
> [Emphasis is supplied]

169. Earlier, in ***Union of India v. Sankalchand Himatlal Sheth and another***[80], the Court had observed that:-

> "...in a dynamic democracy, with goals of transformation set up by the Constitution, the Judge, committee to uphold the founding faiths and fighting creeds of the nation so set forth, has to act heedless of executive hubris, socio-economic pressures and die-hard obscurantism. This occupational heroism, professionally essential, demands the inviolable independence woven around the judiciary by our Constitution. Perfection baffles even the framers of a Constitution, but while on statutory construction of an organic document regulating and coordinating the relations among instrumentalities, the highest Court must remember that law, including the *suprema lex, is a principled, pragmatic, holistic recipe* for the behavioral needs and norms of life in the raw-of individuals, instrumentalities and the play of power and freedom"

80(1978) 1 SCR 423

170. The aforesaid passages set two guidelines. First, it permits judicial creativity and second, it mentions one to be conscious of pragmatic realism of the obtaining situation and the controversy. That apart, there is a suggestion to take note of the behavioural needs and norms of life. Thus, creativity, practical applicability and perception of reality from the societal perspective are the warrant while engaging oneself with the process of interpretation of a constitutional provision.

O. <u>Interpretation of Articles 239 and 239A</u>:

171. To settle the controversy at hand, it is imperative that we dig deep and perform a meticulous analysis of Articles 239, 239A, 239AA and 239AB all of which fall in Part VIII of the Constitution bearing the heading, 'The Union Territories'. For this purpose, let us reproduce the aforesaid Articles one by one and carry out the indispensable and crucial task of interpreting them.

172. Article 239 provides for the administration of Union Territories. It reads as follows:-

> ***"239. Administration of Union Territories.***—(1) Save as otherwise provided by Parliament by law,

> every Union territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify.
>
> (2) Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the administrator of an adjoining Union territory, and where a Governor is so appointed, he shall exercise his functions as such administrator independently of his Council of Ministers."
>
> (Emphasis is ours)

173. The said Article was brought into existence by the Constitution (Seventh Amendment) Act, 1956. Clause (1) of Article 239, by employing the words 'shall', makes it abundantly clear that every Union territory is mandatorily to be administered by the President through an administrator unless otherwise provided by Parliament in the form of a law. Further, clause (1) of Article 239 also stipulates that the said administrator shall be appointed by the President with such designation as he may specify.

174. Clause (2) thereafter, being a non-obstante clause, lays down that irrespective of anything contained in Part VI of the Constitution, the President may appoint the Governor of a

State to act as an administrator of a Union Territory which is adjacent and/or contiguous to the State of which he is the Governor. The Governor of a State who is so appointed as an administrator of an adjoining UT shall exercise his functions as an administrator of the said UT independently and autonomously and not as per the aid and advice of the Council of Ministers of the State of which he is the Governor.

175. In this regard, the Court, in the case of ***Shamsher Singh*** (supra), has observed thus:-

> "The provisions of the Constitution which expressly require the Governor to exercise his powers in his discretion are contained in Articles to which reference has been made. To illustrate, Article 239(2) states that where a Governor is appointed an Administrator of an adjoining Union Territory he shall exercise his functions as such administrator independently of his Council of Ministers."

176. Again, the Court, while interpreting Article 239 in ***Union of India and others v. Surinder S***[81], observed:-

> "The unamended Article 239 envisaged administration of the States specified in Part C of the First Schedule of the Constitution by the President through a Chief Commissioner or a Lieutenant Governor to be appointed by him or

81 (2013) 1 SCC 403

through the Government of a neighbouring State. This was subject to other provisions of Part VIII of the Constitution. As against this, amended Article 239 lays down that subject to any law enacted by Parliament every Union Territory shall be administered by the President acting through an Administrator appointed by him with such designation as he may specify. In terms of Clause (2) of Article 239 (amended), the President can appoint the Governor of a State as an Administrator of an adjoining Union territory and on his appointment, the Governor is required to exercise his function as an Administrator independently of his Council of Ministers. The difference in the language of the unamended and amended Article 239 makes it clear that prior to 1.11.1956, the President could administer Part C State through a Chief Commissioner or a Lieutenant Governor, but, after the amendment, every Union Territory is required to be administered by the President through an Administrator appointed by him with such designation as he may specify. In terms of Clause 2 of Article 239 (amended), the President is empowered to appoint the Governor of State as the Administrator to an adjoining Union Territory and once appointed, the Governor, in his capacity as Administrator, has to act independently of the Council of Ministers of the State of which he is the Governor."

177. Now, let us proceed to scan Article 239A of the Constitution which deals with the creation of local legislatures or Council of Ministers or both for certain Union Territories. It reads as follows:-

> **"239A. Creation of local Legislatures or Council of Ministers or both for certain Union territories**. —(1) Parliament may by law create for the Union territory of Puducherry—
>
> (a) a body, whether elected or partly nominated and partly elected, to function as a Legislature for the Union territory, or
>
> (b) a Council of Ministers, or both with such constitution, powers and functions, in each case, as may be specified in the law.
>
> (2) Any such law as is referred to in clause (1) shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending this Constitution."

178. The aforesaid Article was brought into force by the Constitution (Fourteenth Amendment) Act, 1962. Prior to the year 1971, under Article 239A, the Parliament had the power to create by law legislatures and/or Council of Ministers for the then Union territories of Himachal Pradesh, Tripura, Manipur, Goa and Daman and Diu. Thereafter, on 25th January, 1971, Himachal Pradesh acquired statehood and consequently, Himachal Pradesh was omitted from Article 239A. Subsequently, on 21st January 1972, Tripura and

Manipur were granted statehood as a consequence of which both Manipur and Tripura were omitted from Article 239A.

179. Likewise, with the enactment of the Goa, Daman and Diu Reorganisation Act, 1987 on 30th May 1987, both Goa and Daman and Diu were omitted from Article 239A. The Parliament, under the Government of Union Territories Act, 1963, created legislatures for the then Union Territories and accordingly, even after 30th May, 1987, the applicability of Article 239A stands limited to UT of Puducherry.

180. As a natural corollary, the Union Territory of Puducherry stands on a different footing from other UTs of Andaman and Nicobar Islands, Daman and Diu, Dadar and Nagar Haveli, Lakshadweep and Chandigarh. However, we may hasten to add that Puducherry cannot be compared with the NCT of Delhi as it is solely governed by the provisions of Article 239A.

P. <u>Interpretation of Article 239AA of the Constitution</u>

181. We shall now advert to the interpretation of Articles 239AA and 239AB of the Constitution which are the gravamen of the present batch of appeals. The said Articles require an

elaborate interpretation and a thorough analysis to unearth and discover the true intention of the Parliament while inserting the said Articles, in exercise of its constituent power, by the Constitution (Sixty-ninth Amendment) Act, 1991. The said articles read as follows:-

> "**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.
>
> (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.
>
> (b) The total number of seats in the Legislative Assembly, the number of seats reserved for Scheduled Castes, the division of the National Capital Territory into territorial constituencies (including the basis for such division) and all other matters relating to the functioning of the Legislative Assembly shall be regulated by law made by Parliament.
>
> (c) The provisions of articles 324 to 327 and 329 shall apply in relation to the National Capital Territory, the Legislative Assembly of the National

Capital Territory and the members thereof as they apply, in relation to a State, the Legislative Assembly of a State and the members thereof respectively; and any reference in articles 326 and 329 to "appropriate Legislature" shall be deemed to be a reference to Parliament.

(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 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.

(5) The Chief Minister shall be appointed by the President and other Ministers shall be appointed by the President on the advice of the Chief Minister and the Ministers shall hold office during the pleasure of the President.

(6) The Council of Ministers shall be collectively responsible to the Legislative Assembly.

(7) (a) Parliament may, by law, make provisions for giving effect to, or supplementing the provisions contained in the foregoing clauses and for all matters incidental or consequential thereto.

(b) Any such law as is referred to in sub-clause (a) shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending, this Constitution.

(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 Puducherry, the administrator and its Legislature, respectively; and any reference in that article to "clause (1) of article 239A" shall be deemed to be a reference to this article or article 239AB, as the case may be.

239AB. Provision in case of failure of constitutional machinery.—If the President, on receipt of a report from the Lieutenant Governor or otherwise, is satisfied—

(a) that a situation has arisen in which the administration of the National Capital Territory cannot be carried on in accordance with the provisions of article 239AA or of any law made in pursuance of that article; or

(b) that for the proper administration of the National Capital Territory it is necessary or expedient so to do, the President may by order suspend the operation of any provision of article 239AA or of all or any of the provisions of any law made in pursuance of that article for such period

> and subject to such conditions as may be specified in such law and make such incidental and consequential provisions as may appear to him to be necessary or expedient for administering the National Capital Territory in accordance with the provisions of article 239 and article 239AA."
>
> [Emphasis supplied]

182. We deem it appropriate to refer to the Statement of Objects and Reasons for the amendment which reads thus:-

> "The question of re-organisation of the Administrative set-up in the Union territory of Delhi has been under the consideration of the Government for some time. The Government of India appointed on 24-12-1987 a Committee to go into the various issues connected with the administration of Delhi and to recommend measures inter alia for the streamlining of the administrative set-up. The Committee went into the matter in great detail and considered the issues after holding discussions with various individuals, associations, political parties and other experts and taking into account the arrangements in the national Capitals of other countries with a federal set-up and also the debates in the Constituent Assembly as also the reports by earlier Committees and Commissions. After such detailed inquiry and examination, it recommended that Delhi should continue to be a Union territory and provided with a Legislative Assembly and a Council of Ministers responsible to such Assembly with appropriate powers to deal with matters of concern to the common man. The Committee also recommended that with a view to ensure stability and permanence the arrangements should be incorporated in the

> Constitution to give the National Capital a special status among the Union territories.
>
> 2. The Bill seeks to give effect to the above proposals."

The aforesaid, as we perceive, really conceives of conferring special status on Delhi. This fundamental grammar has to be kept in view when we penetrate into the interpretative dissection of Article 239AA and other articles that are pertinent to understand the said provision.

Q. Status of NCT of Delhi:

183. The first proposition that has been built centering around the conferment of special status on NCT of Delhi is that it is a State for all purposes except the bar created pertaining to certain legislative matters. The bedrock has been structured by placing heavy reliance on the purpose of the constitutional amendment, the constitutional assurance to the inhabitants of Delhi and the language employed in sub-article 3(a) of Article 239AA of the Constitution. We have already referred to the

historical background and also the report submitted by the Balakrishnan Committee.

184. Mr. Maninder Singh, learned Additional Solicitor General, would contend that the aid and assistance of the Committee Report can be taken into consideration to interpret the constitutional provisions and also the statutory provisions of the 1991 Act. He has referred to certain authorities for the said purpose. We shall refer to the said authorities at a later stage. First, we think it seemly to advert to the issue whether the NCT of Delhi can be called a State in the sense in which the Constitution expects one to understand. The said maze has to be cleared first.

185. We may now focus on the decision in ***Shamsher Singh*** (supra). The issue centered around the role and the constitutional status of the President. In that context, it has been held that the President and the Governor act on the aid and advice of the Council of Ministers and the Constitution does not stipulate that the President or the Governor shall act personally without or against the aid and advice of the Council

of Ministers. Further, the Court held that the Governor can act on his own accord in matters where he is required to act in his own discretion as specified in the Constitution and even while exercising the said discretion, the Governor is required to act in harmony with the Council of Ministers. We may hasten to add that the President of India, as has been held in the said case, has a distinguished role on certain occasions. We may, in this context, reproduce below certain passages from the opinion of Krishna Iyer, J.:-

> "The omnipotence of the President and of the Governor at State level — is euphemistically inscribed in the pages of our Fundamental Law with the obvious intent that even where express conferment of power or functions is written into the articles, such business has to be disposed of decisively by the Ministry answerable to the Legislature and through it vicariously to the people, thus vindicating our democracy instead of surrendering it to a single summit soul whose deification is incompatible with the basics of our political architecture — lest national elections become but Dead Sea fruits, legislative organs become labels full of sound and fury signifying nothing and the Council of Ministers put in a quandary of responsibility to the House of the People and submission to the personal decision of the head of State. A Parliamentary-style Republic like ours could not have conceptualised its self-liquidation by this process. On the contrary,

democratic capital-formation to strengthen the people's rights can be achieved only through invigoration of the mechanism of Cabinet-House-Elections.

We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House; (b) the dismissal of a Government which has lost its majority in the House, but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the constitutional proprieties in these predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory. We have no doubt that de Smith's statement regarding royal assent holds good for the President and Governor in India:

> "Refusal of the royal assent on the ground that the Monarch strongly disapproved of a Bill or that it was intensely controversial would nevertheless- be unconstitutional. The only

> circumstances in which the withholding of the royal assent might be justifiable would be if the Government itself were to advise such a course — a highly improbable contingency — or possibly if it was notorious that a Bill had been passed in disregard to mandatory procedural requirements; but since the Government in the latter situation would be of the opinion that the deviation would not affect the validity of the measure once it had been assented to. prudence would suggest the giving of assent."
>
> [Emphasis supplied]

186. That apart, A.N. Ray, C.J., in ***Shamsher Singh*** (supra), has stated thus:-

> "Article 163(1) states that there shall be a Council of Ministers with the Chief Minister at the head to aid and advice the Governor in the exercise of Was functions, except in so far as he is by or under this Constitution, required to exercise his functions or any of them in his discretion. Article 163(2) states that if any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final and the validity of anything done by the Governor shall not be called in question on the ground that ought or ought not to have acted in his discretion. Extracting the words "in his discretion" in relation to exercise of functions, the appellants contend that the Council of Ministers may aid and advise the Governor in Executive functions but the Governor individually and personally in his discretion will exercise the constitutional functions of appointment and

removal of officers in State Judicial Service and other State Services. It is noticeable that though in Article 74 it is stated that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions, there is no provision in Article 74 comparable to Article 163 that the aid and advice is except in so far as he is required to exercise his functions or any of them in his discretion. It is necessary to find out as to why the words, in his discretion' are used in relation to some powers of the Governor and not in the case of the President. Article 143 in the Draft Constitution became Article 163 in the Constitution. The draft constitution in Article 144(6) said that the functions of the Governor under Article with respect to the appointment and dismissal of Ministers shall be exercised by him in his discretion. Draft Article 144(6) was totally omitted when Article 144 became Article 164 in the Constitution. Again Draft Article 153(3) said that the functions of the Governor under clauses (a) and (c) of clause (2) of the Article shall be exercised by him in his discretion. Draft Article 153(3) was totally omitted when it became Article 174 of our Constitution. Draft Article 175 (proviso) said that the Governor "may in his discretion return the Bill together with a message requesting that the House will reconsider the Bill". Those words that "the Governor may in his discretion" were omitted when it became Article 200. The Governor under Article 200 may return the Bill with a message requesting that the House will reconsider the Bill. Draft Article 188 dealt with provisions in case of grave emergencies, clauses (1) and (4) in Draft Article 188 used to words "in his discretion in relation to exercise of power by the Governor. Draft Article 188 was totally omitted Draft Article 285(1) and (2) dealing with composition and staff of Public

> Service Commission used the expression "in his discretion" in relation to exercise of power by the Governor in regard to appointment of the Chairman and Members and making of regulation. The words "in his discretion" in relation to exercise of power by the Governor were omitted when it became Article 316. In Paragraph 15 (3) of the Sixth Schedule dealing with annulment or suspension of acts or suspension of acts and resolutions of District and Regional Councils it was said that the functions of the Governor under the Paragraph shall be exercised by him in his discretion. Subparagraph 3 of Paragraph 15 of the Sixth Schedule was omitted at the time of enactment of the Constitution.
>
> It is, therefore, understood in the background of these illustrative draft articles as to why Article 143 in the Draft Constitution which became Article 163 in our Constitution used the expression "in his discretion" in regard to some powers of the Governor."
>
> [Emphasis supplied]

187. Thereafter, A.N. Ray, C.J. discussed the provisions of the Constitution as well as a couple of paragraphs of the Sixth Schedule wherein the words "in his discretion" are used in relation to certain powers of the Governor to highlight the fact that a Governor can act in his discretion only when the provisions of the Constitution so permit.

188. In this context, we may refer with profit to the authority in ***Devji Vallabhbhai Tandel and others v. Administrator***

of Goa, Daman and Diu and another[82]. In the said case, the issue that arose for consideration was whether the role and functions of the Administrator stipulated under the Union Territories Act, 1963 is similar to those of a Governor of a State and as such, whether the Administrator has to act on the "aid and advice" of the Council of Ministers. The Court considered the relevant provisions and after comparing the language of Articles 74 and 163 of the Constitution with the language of Section 44 of the Union Territories Act, 1963, it observed that the Administrator, even in matters where he is not required to act in his discretion under the Act or where he is not exercising any judicial or quasi-judicial functions, is not bound to act according to the advice of the Council of Ministers and the same is manifest from the proviso to Section 44(1). The Court went on to say:-

> "It transpires from the proviso that in the event of a difference of opinion between the Administrator and his Ministers on any matter, the Administrator shall refer the matter to the President for decision and act according to the decision given thereon by the President. If the President in a given situation agrees with what the Administrator opines contrary

82 (1982) 2 SCC 222

to the advice of the Council the Administrator would be able to override the advice of the Council of Ministers and on a reference to the President under the proviso, obviously the President would not according to the advice of the Council of Ministers given under Article 74. Virtually, therefore, in the event of a difference of opinion between the Council of Ministers of the Union territory and the Administrator, the right to decide would vest in the Union Government and the Council of Ministers of the Union territory would be bound by the view taken by the Union Government. Further, the Administrator enjoys still some more power to act in derogation of the advice of the Council of Ministers. The second limb of the proviso to Section 44(1) enables the Administrator that in the event of a difference of opinion between him and the Council of Ministers not only he can refer the matter to the President but during the interregnum where the matter is in his opinion so urgent that it is necessary for him to take immediate action, he has the power to take such action or to give such directions in the matter as he deems necessary. In other words, during the interregnum he can completely override the advice of the Council of Ministers and act according to his light. Neither the Governor nor the President enjoys any such power. This basic functional difference in the powers and position enjoyed by the Governor and the President on the one hand and the Administrator on the other is so glaring that it is not possible to hold on the analogy of the decision in Shamsher Singh's case that the Administrator is purely a constitutional functionary bound to act on the advice of the Council of Ministers and cannot act on his own."

[Emphasis supplied]

189. Be it noted, ***Devji Valabhbhai Tandel*** (supra) depicts a pre Sixty-ninth amendment scenario. On that foundation, it is submitted by the learned counsel for the appellant to buttress the submission that after the amendment, the status of NCT of Delhi is that of State and the role of the Lieutenant Governor is equivalent to that of the Governor of State who is bound by the aid and advice of the Council of Ministers.

190. Now, let us allude to the post Sixty-ninth amendment nine-Judge Bench decision in ***New Delhi Municipal Corporation*** (supra) wherein B.P. Jeevan Reddy, J., speaking for the majority after taking note of the rivalised submissions pertaining to "Union Taxation", referred to the decisions in ***Sea Customs Act, Re***[83] and came to hold thus:-

> "152. ... In the year 1991, the Constitution did provide for a legislature for the Union Territory of Delhi [National Capital Territory of Delhi] by the Sixty-Ninth (Amendment) Act (Article 239-AA) but even here the legislature so created was not a full-fledged legislature nor did it have the effect of — assuming that it could — lift the National Capital Territory of Delhi from Union Territory category to the category of States within the meaning of Chapter I of Part XI of the Constitution. All this

83 AIR 1963 SC 1760 : (1964) 3 SCR 787

necessarily means that so far as the Union Territories are concerned, there is no such thing as List I, List II or List III. The only legislative body is Parliament — or a legislative body created by it. Parliament can make any law in respect of the said territories — subject, of course, to constitutional limitations *other than* those specified in Chapter I of Part XI of the Constitution."

And again:-

"155. ... it is necessary to remember that all the Union Territories are not situated alike. There are certain Union territories (i.e., Andaman and Nicobar Islands and Chandigarh) for which there can be no legislature at all-as on today. There is a second category of Union Territories covered by Article 239-A (which applied to Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu and Pondicherry - now, of course, only Pondicherry survives in this category, the rest having acquired Statehood) which have legislatures by courtesy of Parliament. The Parliament can, by law, provide for Constitution of legislatures for these States and confer upon these legislatures such powers, as it may think appropriate. The Parliament had created legislatures for these Union territories under the "The Government of India Territories Act, 1963", empowering them to make laws with respect to matters in List-II and List-Ill, but subject to its over-riding power. The third category is Delhi. It had no legislature with effect from November 1, 1956 until one has been created under and by virtue of the Constitution Sixty-Ninth (Amendment) Act, 1991 which introduced Article 239-AA. We have already dealt with the special features of Article 239-AA and need not repeat it. Indeed, a reference to Article 239-B read with Clause (8) of Article 239-AA shows

> how the Union Territory of Delhi is in a class by itself but is certainly not a State within the meaning of Article 246 or Part-VI of the Constitution. In sum, it is also a territory governed by Clause (4) of Article 246. ..."
>
> [Emphasis supplied]

191. Thus, ***New Delhi Municipal Corporation*** (supra) makes it clear as crystal that all Union Territories under our constitutional scheme are not on the same pedestal and as far as the NCT of Delhi is concerned, it is not a State within the meaning of Article 246 or Part- VI of the Constitution. Though the NCT of Delhi partakes a unique position after the Sixty-Ninth Amendment, yet in sum and substance, it remains a Union Territory which is governed by Article 246(4) of the Constitution and to which the Parliament, in the exercise of its constituent power, has given the appellation of the 'National Capital Territory of Delhi'.

192. For ascertaining the binding nature of aid and advice upon the President and the Governor on one hand and upon the Lieutenant Governor of Delhi on the other, let us conduct a comparative analysis of the language employed in Articles 74 and 163 on one hand and Article 239AA on the other. For

this purpose, we may reproduce Articles 74 and 163 which read thus:-

> **"74. Council of Ministers to aid and advise President**
> (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice:
>
> Provided that the President may require the council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.
>
> (2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.
>
> **163. Council of Ministers to aid and advise Governor's**
>
> (1) There shall be a council of Ministers with the chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this constitution required to exercise his functions or any of them in his discretion.
>
> (2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question

> on the ground that he ought or ought not to have acted in his discretion
>
> (3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court."

193. It is vivid from Article 74 that the President is always bound by the aid and advice of the Union Council of Ministers except a few well known situations which are guided by constitutional conventions. The Constitution, however, does not lay down any express provision which allows the President to act as per his discretion.

194. The Governor of a State, as per Article 163, is bound by the aid and advice of his Council of Ministers in the exercise of his functions except where he is, by or under the Constitution, required to exercise his functions or any of them in his discretion. Thus, the Governor may act in his discretion only if he is so permitted by an express provision of the Constitution.

195. As far as the Lieutenant Governor of Delhi is concerned, as per Article 239AA(4), he is bound by the aid and advice of his Council of Ministers in matters for which the Delhi Legislative Assembly has legislative powers. However, this is

subject to the proviso contained in Clause (4) of Article 239AA which gives the power to the Lieutenant Governor that in case of any difference between him and his Ministers, he shall refer the same to the President for a binding decision. This proviso to clause (4) has retained the powers for the Union even over matters falling within the legislative domain of the Delhi Assembly. This overriding power of the Union to legislate qua other Union Territories is exposited under Article 246(4).

196. In the light of the aforesaid analysis and the ruling of the nine-Judge Bench in ***New Delhi Municipal Corporation*** (supra), it is clear as noon day that by no stretch of imagination, NCT of Delhi can be accorded the status of a State under our present constitutional scheme and the status of the Lieutenant Governor of Delhi is not that of a Governor of a State, rather he remains an Administrator, in a limited sense, working with the designation of Lieutenant Governor.

R. <u>Executive power of the Council of Ministers of Delhi</u>:

197. We may note here that there is a serious contest with regard to the appreciation and interpretation of Article 239AA

and Chapter VIII where it occurs. The learned counsel for the appellant would submit that the Government of NCT of Delhi has been conferred the executive power that co-exists with its legislative power and the role of the Lieutenant Governor is controlled by the phrase 'aid and advice' of the Council of Ministers. The learned counsel for the respondents would submit with equal force that the Lieutenant Governor functions as the administrator of NCT of Delhi and the constitutional amendment has not diminished his administrative authority.

198. Analysing the provision, it is submitted by Dr. Dhawan and other senior counsel that the Government of Delhi is empowered under the Constitution to aid and advise the Lieutenant Governor in the exercise of its functions in relation to matters in respect of which the Delhi Legislative Assembly has the legislative power to make laws and the said aid and advice is binding on the Lieutenant Governor. Commenting on the proviso, it is earnestly canvassed that the words 'difference on any matter' has to be restricted to the field of

any legislation or, at best, the difference in relation to the three excepted matters. For the said argument, inspiration has been drawn from Articles 73 and 163 of the Constitution. Elaborating the argument, it is contended that the reference of the matter to the President is made where there is doubt as to whether the aid and advice touches the realm of the excepted entries as stipulated under Article 239AA(3)(a) and nothing beyond. To buttress the point, heavy reliance has been laid on ***Ram Jawaya Kapur*** (supra) wherein the Court, while interpreting the provisions of Article 162 of the Constitution and delineating on the issue of the extent of the executive powers of the State, observed:-

> "7. Article 73 of the Constitution relates to the executive powers of the Union, while the corresponding provision in regard to the executive powers of a State is contained in article 162. The provisions of these articles are analogous to those of section 8 and 49 respectively of the Government of India Act, 1935 and lay down the rule of distribution of executive powers between the Union and the States, following the same analogy as is provided in regard to the distribution of legislative powers between them. Article 162, with which we are directly concerned in this case, lays down :

"Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws :

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

Thus under this article the executive authority of the State is exclusive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by the Parliament. Similarly, article 73 provides that the executive powers of the Union shall extend to matters with respect to which the Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to be State it would be open to the Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also.

Neither of these articles contains any definition as to what the executive function is and what activities would legitimately come within its scope. They are concerned primarily with the distribution of the executive power between the Union on the one hand and the States on the

> other. They do not mean, as Mr. Pathak seems to suggest, that it is only when the Parliament or the State Legislature has legislated on certain items appertaining to their respective lists, that the Union or the State executive, as the case may be, can proceed to function in respect to them. On the other hand, the language of article 162 clearly indicates that the powers of the State executive do extend to matters upon which the state Legislature is competent to legislate and are not confined to matters over which legislation has been passed already. The same principle underlies article 73 of the Constitution..."
>
> [Underlining is ours]

199. Drawing an analogy 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.

200. The legislative power conferred upon the Delhi Legislative Assembly is to give effect to legislative enactments as per the needs and requirements of Delhi whereas the executive power is conferred on the executive to implement certain policy decisions. This view is also strengthened by the fact that after the Seventh Amendment of the Constitution by which the words 'Part C States' were substituted by the words 'Union Territories', the word 'State' in the proviso to Article 73 cannot be read to mean Union Territory as such an interpretation would render the scheme and purpose of Part VIII (Union Territories) of the Constitution infructuous.

S. <u>Essence of Article 239AA of the Constitution</u>:

201. It is perceptible that the constitutional amendment conceives of conferring special status on Delhi. This has to be kept in view while interpreting Article 239AA. Both the Statement of Objects and Reasons and the Balakrishnan Committee Report, the relevant extracts of which we have already reproduced in the earlier part of this judgment, serve as an enacting history and corpus of public knowledge relative

to the introduction of Articles 239AA and 239AB and would be handy external aids for construing Article 239AA and unearthing the real intention of the Parliament while exercising its constituent power.

202. At the outset, we must declare that the insertion of Articles 239AA and 239AB which specifically pertain to NCT of Delhi is reflective of the intention of the Parliament to accord Delhi a *sui generis* status from the other Union Territories as well as from the Union Territory of Puducherry to which Article 239A is singularly applicable as on date. The same has been authoritatively held by the majority judgment in the ***New Delhi Municipal Corporation case*** to the effect that the NCT of Delhi is a class by itself.

203. The Legislative Assembly, Council of Ministers and the Westminster style cabinet system of government brought by the Sixty-ninth amendment highlight the uniqueness attributed to Delhi with the aim that the residents of Delhi have a larger say in how Delhi is to be governed. The real purpose behind the Constitution (Sixty-ninth Amendment)

Act, 1991, as we perceive, is to establish a democratic setup and representative form of government wherein the majority has a right to embody their opinion in laws and policies pertaining to the NCT of Delhi subject to the limitations imposed by the Constitution. For paving the way to realize this real purpose, it is necessary that we give a purposive interpretation to Article 239AA so that the principles of democracy and federalism which are part of the basic structure of our Constitution are reinforced in NCT of Delhi in their truest sense.

204. 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 power to legislate for the NCT of Delhi.

205. Further, the Statement of Objects and Reasons for the Constitution (Seventy-fourth Amendment) Bill, 1991 which

was enacted as the Constitution (Sixty-ninth Amendment) Act, 1991 also lends support to our view as it clearly stipulates that in order to confer a special status upon the National Capital, arrangements should be incorporated in the Constitution itself.

206. We may presently carefully peruse each clause of Article 239AA for construing the meaning. A cursory reading of clause (1) of Article 239AA shows that on 1st February, 1992, the Union Territory of Delhi was renamed as the National Capital Territory of Delhi and it was to be administered by a Lieutenant Governor from the date of coming into force of the Sixty-ninth Amendment Act.

207. Sub-clause (a) of clause (2) specifies that the National Capital Territory of Delhi shall have a Legislative Assembly, the seats of which shall be filled by members chosen by direct election from territorial constituencies in the National Capital Territory of Delhi. Sub-clause (b) of clause (2) stipulates that the total number of seats in the Legislative Assembly of the National Capital Territory of Delhi so established under sub-

clause (a), the number of seats reserved for Scheduled Castes in the said Legislative Assembly, the division of the National Capital Territory of Delhi into territorial constituencies (including the basis for such division) and all other matters relating to the functioning of the said Legislative Assembly shall be regulated by law made by Parliament. Thereafter, sub-clause (c) of clause (2) simply provides that the provisions of Articles 324 to 327 and 329 which pertain to elections and fall under Part XV of the Constitution shall also apply to the National Capital Territory of Delhi, its Legislative Assembly and the members thereof in the same manner as the said provisions apply to the States. Further, sub-clause (c) provides that the phrase "appropriate legislature" in Articles 326 and 329 shall, in the context of the National Capital Territory of Delhi, mean the Parliament.

208. We must note here the stark difference in the language of Article 239A clause (1) and that of Article 239AA clause (2). Article 239A clause (1) uses the word 'may' which makes it a mere directory provision with no obligatory force. Article 239A

gives discretion to the Parliament to create by law for the Union Territory of Puducherry a Council of Ministers and/or a body which may either be wholly elected or partly elected and partly nominated to perform the functions of a Legislature for the Union Territory of Puducherry.

209. On the other hand, Article 239AA clause (2), by using the word 'shall', makes it mandatory for the Parliament to create by law a Legislative Assembly for the National Capital Territory of Delhi. Further, sub-clause (a) of clause (2) declares very categorically that the members of the Legislative Assembly of the National Capital Territory of Delhi shall be chosen by direct election from the territorial constituencies in the National Capital Territory of Delhi. Unlike Article 239A clause (1) wherein the body created by the Parliament by law to perform the functions of a Legislature for the Union Territory of Puducherry may either be wholly elected or partly elected and partly nominated, there is no such provision in the context of the Legislative Assembly of the NCT of Delhi as

per which members can be nominated to the Legislative Assembly. This was a deliberate design by the Parliament.

210. We have highlighted this difference to underscore and emphasize the intention of the Parliament, while inserting Article 239AA in the exercise of its constituent power, to treat the Legislative Assembly of the National Capital Territory of Delhi as a set of elected representatives of the voters of the NCT of Delhi and to treat the government of the NCT of Delhi as a representative form of government.

211. The Legislative Assembly is wholly comprised of elected representatives who are chosen by direct elections and are sent to Delhi's Legislative Assembly by the voters of Delhi. None of the members of Delhi's Legislative Assembly are nominated. The elected representatives and the Council of Ministers of Delhi, being accountable to the voters of Delhi, must have the appropriate powers so as to perform their functions effectively and efficiently. This is also discernible from the Balakrishnan Committee Report which recommended that though Delhi should continue to be a Union Territory, yet

it should be provided with a Legislative Assembly and a Council of Ministers responsible to such Assembly with appropriate powers to deal with matters of concern to the common man.

212. Sub-clause (a) of clause (3) of Article 239AA establishes the power of the Delhi Legislative Assembly to enact laws for the NCT of Delhi with respect to matters enumerated in the State List and/or Concurrent list except in so far as matters with respect to and which relate to entries 1, 2 and 18 of the State List.

213. Sub-clause (b) of clause (3) lays down that the Parliament has the powers to make laws with respect to any matter for a Union Territory including the NCT of Delhi or any part thereof and sub-clause (a) shall not derogate such powers of the Parliament. Sub-clause (c) of clause (3) gives the Parliament the overriding power to the effect that where any provision of any law made by the Legislative Assembly of Delhi is repugnant to any provision of law made by the Parliament, then the law made by the Parliament shall prevail and the law

made by the Delhi Legislative Assembly shall be void to the extent of repugnancy.

214. Thus, it is evident from clause (3) of Article 239AA that the Parliament has the power to make laws for the NCT of Delhi on any of the matters enumerated in the State List and the Concurrent List and at the same time, the Legislative Assembly of Delhi also has the legislative power with respect to matters enumerated in the State List and the Concurrent List except matters with respect to entries which have been explicitly excluded from Article 239AA(3)(a).

215. Now, it is essential to analyse clause (4) of Article 239AA, the most important provision for determination of the controversy at hand. Clause (4) stipulates a Westminster style cabinet system of government for the NCT of Delhi where there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Lieutenant Governor in the exercise of his functions in relation to maters with respect to which the Delhi Legislative Assembly has power to enact laws except in

matters in respect of which the Lieutenant Governor is required to act in his discretion.

216. The proviso to clause (4) stipulates that in case of a difference of opinion on any matter between the Lieutenant Governor and his Ministers, the Lieutenant Governor shall refer it to the President for a binding decision. Further, pending such decision by the President, in any case where the matter, in the opinion of the Lieutenant Governor, is so urgent that it is necessary for him to take immediate action, the proviso makes him competent to take such action and issue such directions as he deems necessary.

217. A conjoint reading of Article 239AA (3) (a) and Article 239AA(4) reveals that the executive power of the Government of NCT of Delhi is co-extensive 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.

218. Article 239AA(3)(a) reserves the Parliament's legislative power on all matters in the State list and Concurrent list, but clause (4) nowhere reserves the executive powers of the Union with respect to such matters. On the contrary, clause (4) explicitly grants to the Government of Delhi executive powers in relation to matters for which the Legislative Assembly has power to legislate. The legislative power is conferred upon the Assembly to enact whereas the policy of the legislation has to be given effect to by the executive for which the Government of Delhi has to have co-extensive executive powers. Such a view is in consonance with the observation in the case of ***Ram Jawaya Kapur*** (supra) which has been discussed elaborately in the earlier part of the judgment.

219. Article 239AA(4) confers executive powers on the Government of NCT of Delhi whereas the executive power of the Union stems from Article 73 and is co-extensive with the Parliament's legislative power. Further, the ideas of pragmatic

federalism and collaborative federalism will fall to the ground if we are to say that the Union has overriding executive powers even in respect of matters for which the Delhi Legislative Assembly has legislative powers. Thus, it can be very well said that the executive power of the Union in respect of NCT of Delhi is confined to the three matters in the State List for which the legislative power of the Delhi Legislative Assembly has been excluded under Article 239 AA (3) (a). Such an interpretation would thwart any attempt on the part of the Union Government to seize all control and allow the concepts of pragmatic federalism and federal balance to prevail by giving the NCT of Delhi some degree of required independence in its functioning subject to the limitations imposed by the Constitution.

220. Another important aspect is the interpretation of the phrase 'aid and advise' in Article 239AA(4). While so interpreting, the authorities in ***Shamsher Singh*** (supra) and ***Devji Ballabhbhai Tandel*** (supra) have to be kept in mind. Krishna Iyer, J., in ***Shamsher Singh*** (supra), has

categorically held that the President and the Governor, being custodians of all executive powers, shall act only upon and in accordance with the aid and advice of their Ministers save in a few well known exceptional situations. ***Devji Ballabhbhai Tandel*** (supra), on the other hand, has observed that there is a functional difference in the powers and the position enjoyed by the President and Governor on one hand and the Administrator on the other hand. It has also been observed that it is not possible to hold to the view laid down in ***Shamsher Singh*** (supra) in the context of Governor and President to mean that the Administrator is also purely a constitutional functionary who is bound to act on the 'aid and advice' of the Council of Ministers and cannot act on his own.

221. It is necessary to note with immediacy that ***Devji Ballabhbhai Tandel*** (supra) represents a pre—Sixty-ninth Amendment view and that too in the context of a Union Territory which does not have a unique position as the NCT of Delhi does. Presently, the scheme of Article 239AA(4) is different. It requires the Lieutenant Governor to act as per the

'aid and advice' of the Council of Ministers with respect to all matters for which the Legislative Assembly of Delhi has the power to enact laws except what has been stated in the proviso which requires a thoughtful interpretation.

222. The language employed in the proviso has to be understood keeping in view the concepts which we have elaborately adumbrated hereinbefore. As noted earlier, the submission of the learned counsel for the appellant is that the Lieutenant Governor can only exercise the power or take refuge to the proviso to Article 239AA(4) where the said 'aid and advice' of the Council of Ministers transgresses the area constitutionally prescribed to them by virtue of Article 239AA(3)(a).

223. We may note here that a narrow or restricted meaning in respect of the words, namely, "on any matter" as is suggested by the appellant, takes away the basic concept of interpretative process, for the said expression does not remotely convey that it is confined to the excepted legislative fields. Similarly, a broad or unrestricted interpretation of the

term to include every difference would obstruct the idealistic smooth stream of governance. Therefore, the Court has the duty to place such a meaning or interpretation on the phrase that is workable and the need is to establish the norm of fine constitutional balance.

224. The counsel for the respondents has sought to impress upon this Court that the term "any" occurring in the proviso to clause (4) of Article 239AA should be given widest import in order to include everything within its ambit and for the said purpose, reliance has been placed upon ***Tej Kiran*** (supra). It has been highlighted in the earlier part of this judgment that while interpreting a constitutional provision and construing the meaning of specific word(s) occurring in a constitutional provision, the Court must read the same in the context in which the word(s) occurs by referring to the annexing words of the said provision and also bearing in mind the concepts that we have adverted to. As regards the importance of context while deciphering the true meaning and importation of a term, Austin has made the following observations:-

> "When I see the word "any" in a statute, I immediately know it's unlikely to mean "anything" in the universe. Any" will have a limitation on it, depending on the context. When my wife says, "there isn't any butter." I understand that she's talking about what is in our refrigerator, not worldwide. We look at context over and over, in life and in law."[84]

225. In this context, the observations made in the case of ***Small v. United States***[85] are relevant to be noted:-

> "The question before us is whether the statutory reference "convicted in any court" includes a conviction entered in a foreign court. The word "any" considered alone cannot answer this question. In ordinary life, a speaker who says, "I'll see any film," may or may not mean to include films shown in another city. In law a legislature that uses the statutory phrase "'any person'" may or may not mean to include "'persons'" outside "the jurisdiction of the state."

226. Further, words of wide import must be construed by placing reliance upon the intention with which the said words have been used. Elucidating the importance of intention, Marshall, C.J. of the Supreme Court of U.S. in the case of ***United States v. Palmer***[86] observed:-

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84 J.L Austin, How to do things with words, The William James Lectures delivered at Harvard University, 1955

85 544 U.S. 385 (2005)

86 16 U.S. 3 Wheat .610610(1818)

> "The words "any person or persons" are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them. Did the legislature intend to apply these words to the subjects of a foreign power who in a foreign ship may commit murder or robbery on the high seas?
>
> The 8th section also commences with the words "any person or persons." But these words must be limited in some degree, and the intent of the legislature will determine the extent of this limitation. For this intent we must examine the law"."

227. At home, it has also been acknowledged that the word 'any' can have different meanings depending on the context in which it has been used and the Courts must not mechanically interpret it to mean 'everything'. In ***Shri Balaganesan Metals v. M.N. Shanmugham Chetty and others***[87], this Court has observed:-

> "The word "any" has the following meaning:-
>
> Some; one out of many; an indefinite number. One indiscriminately of whatever kind or quantity."
>
> Word "any" has a diversity of meaning and may be employed to indicate "all" or "every" as well as "some" or "one" and its meaning in a given statute

87 (1987) 2 SCC 707

> depends upon the context and the subject matter of the statute."
>
> It is often synonymous with "either", "every" or "all". Its generality may be restricted by context; (Black's Law Dictionary; Fifth Edition)."

228. In ***Kihoto Hollohan v. Zachillhu and others***[88], the Court has stated:-

> "...the words "any direction" would cost it its constitutionality' does not commend to us. But we approve the conclusion that these words require to be construed harmoniously with the other provisions and appropriately confined to the objects and purposes of the Tenth Schedule. Those objects and purposes define and limit the contours of its meaning. The assignment of a limited meaning is not to read it down to promote its constitutionality but because such a construction is a harmonious construction in the context. There is no justification to give the words the wider meaning."

229. In ***A.V.S. Narasimha Rao and Ors. v. The State of Andhra Pradesh and another***[89], while interpreting the expressions "any law" and "any requirement", the Court has refused to give a wide import to the said phrases. The observations in that regard read thus:-

> "The words 'any requirement' cannot be read to warrant something which could have been said

88AIR 1993 SC 412
89(1969) 1 SCC 839

> more specifically. These words bear upon the kind of residence or its duration rather than its location within the State. We accept the argument of Mr. Gupte that the Constitution, as it stands, speaks of a whole State as the venue for residential qualification and it is impossible to think that the Constituent Assembly was thinking of residence in Districts, Taluqas, cities, towns or villages. The fact that this clause is an exception and came as an amendment must dictate that a narrow construction upon the exception should be placed as indeed the debates in the Constituent Assembly also seem to indicate. We accordingly reject the contention of Mr. Setalvad seeking to put a very wide and liberal construction upon the words 'any law' and any requirement'. These words are obviously controlled by the words 'residence within the State or Union territory' which words mean what they say, neither more nor less. It follows, therefore, that Section 3 of the Public Employment (Requirement as to Residence) Act, 1957, in so far as it relates to Telengana (and we say nothing about the other parts) and Rule 3 of the Rules under it are ultra vires the Constitution."

230. To lend support to this view, we can refer to the observations made by Lindley LJ in ***Warburton v. Huddersfield Industrial Society***[90] wherein he has stated:-

> "I cannot myself avoid coming to the conclusion that 'any lawful purpose' in sub-s (7) means any lawful purpose which is consistent with the rules. It cannot mean anything inconsistent with the rules...can it mean 'any lawful purpose' under the sun', or is it 'any lawful purpose of the society? If

90 [1892] 1 QB 817, pp 821-22

> you look at the context, that which precedes and that which follows, I do not think 'anybody, certainly (I do not think any lawyer would construe any lawful purpose, in the wide way in which Mr Cohen invites us to construe it."

231. That apart, the Court in ***Workmen of Dimakuchi Tea Estate v. The Management of Dimakuchi Tea Estate***[91] held:-

> "A little careful consideration will show, however, that the expression "any person" occurring in the third part of the definition clause cannot mean anybody and everybody in this wide world. First of all. the subject matter of dispute must relate to (i) employment or non-employment or (ii) terms of employment or conditions of labour of any person; these necessarily import a limitation in the sense that a person in respect of whom the employer-employee relation never existed or can never possibly exist cannot be the subject matter of a dispute between employers and workmen. Secondly, the definition clause must be read in the context of the subject matter and scheme of the Act, and consistently with the objects and other provisions of the Act."

232. From the foregoing discussion, it is clear that the words 'any matter' occurring in the proviso to Article 239AA(4) does not necessarily need to be construed to mean 'every matter'. As highlighted in the authorities referred to hereinabove, the

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word ‘any’ occurring in a statute or constitutional provision is not to be mechanically read to mean 'every' and the context in which the word has been used must be given due weightage so as to deduce the real intention and purpose in which the word has been used.

233. It has to be clearly understood that though ‘any’ may not mean ‘every’, yet how it should be understood is extremely significant. Let us elaborate. 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. There has to be some valid grounds for the Lieutenant

Governor to refer the decision of the Council of Ministers to the President in order to protect the interest of the NCT of Delhi and the principle of constitutionalism. As per the 1991 Act and Rules of Business, he has to be apprised of every decision taken by the Council of Ministers. He cannot change the decision. That apart, there is no provision for concurrence. He has the authority to differ. But it cannot be difference for the sake of difference. It cannot be mechanical or in a routine matter. The power has been conferred to guide, discuss and see that the administration runs for the welfare of the people and also NCT of Delhi that has been given a special status. Therefore, the word 'any' has to be understood treating as a guidance meant for the constitutional authority. He must bear in mind the constitutional objectivity, the needed advice and the realities.

234. The proviso to Article 239AA(4), we say without any fear of contradiction, cannot be interpreted in a strict sense of the mere words employed treating them as only letters without paying heed to the thought and the spirit which they intend to

convey. They are not to be treated as bones and flesh without nerves and neurons that make the nerves functional. We feel, it is necessary in the context to read the words of the provision in the spirit of citizenry participation in the governance of a democratic polity that is republican in character. We may hasten to add that when we say so, it should not be construed that there is allowance of enormous entry of judicial creativity, for the construction one intends to place has its plinth and platform on the Preamble and precedents pertaining to constitutional interpretation and purposive interpretation keeping in view the conception of sense and spirit of the Constitution. It is, in a way, exposition of judicial sensibility to the functionalism of the Constitution. And we call it constitutional pragmatism.

235. The authorities in power should constantly remind themselves that they are constitutional functionaries and they have the responsibility to ensure that the fundamental purpose of administration is the welfare of the people in an ethical manner. There is requirement of discussion and

deliberation. The fine nuances are to be dwelled upon with mutual respect. Neither of the authorities should feel that they have been lionized. They should feel that they are serving the constitutional norms, values and concepts.

236. Interpretation cannot ignore the conscience of the Constitution. That apart, when we take a broader view, we are also alive to the consequence of such an interpretation. If the expressions “in case of difference” and “on any matter” are construed to mean that the Lieutenant Governor can differ on any proposal, the expectation of the people which has its legitimacy in a democratic set up, although different from States as understood under the Constitution, will lose its purpose in simple semantics. The essence and purpose should not be lost in grammar like the philosophy of geometry cannot be allowed to lose its universal metaphysics in the methods of drawing. And that is why, we deliberated upon many a concept. Thus, the Administrator, as per the Rules of Business, has to be apprised of each decision taken by a Minister or Council of Ministers, but that does not mean that

the Lieutenant Governor should raise an issue in every matter. The difference of opinion must meet the standards of constitutional trust and morality, the principle of collaborative federalism and constitutional balance, the concept of constitutional governance and objectivity and the nurtured and cultivated idea of respect for a representative government. The difference of opinion should never be based on the perception of "right to differ" and similarly the term "on any matter" should not be put on such a platform as to conceive that as one can differ, it should be a norm on each occasion. The difference must meet the concept of constitutional trust reposed in the authority and there has to be objective assessment of the decision that is sent for communication and further the rationale of difference of opinion should be demonstrable and it should contain sound reason. There should not be exposition of the phenomenon of an obstructionist but reflection of the philosophy of affirmative constructionism and a visionary. The constitutional amendment does not perceive a situation of constant friction

and difference which gradually builds a structure of conflict. At the same time, the Council of Ministers being headed by the Chief Minister should be guided by values and prudence accepting the constitutional position that the NCT of Delhi is not a State.

T. The Government of National Capital Territory of Delhi Act, 1991 and the Transaction of Business of the Government of National Capital Territory of Delhi Rules, 1993

237. Our attention, in the course of the proceedings, has also been drawn to the Government of National Capital Territory of Delhi Act, 1991 (for brevity, "the 1991 Act') which came into force with effect from 2nd January, 1992. The 1991 Act was enacted by the Parliament by virtue of the power conferred upon it by clause (7)(a) of Article 239AA. We think it appropriate to refer to the Statement of Objects and Reasons of the said enactment. It is as follows:-

> "**STATEMENT OF OBJECTS AND REASONS**
>
> Under the new article 239-AA proposed to be inserted by the Constitution (Seventy-fourth Amendment) Bill, 1991, a Legislative Assembly and Council of Ministers will be established for the National Territory. Clause (7) (a) of the said article provides that Parliament may by law make

provisions for giving effect to or supplementing the provisions contained in that article and for all that matters incidental or consequential thereto.

2. In pursuance of the said clause, this bill seeks necessary provisions in respect of the legislative Assembly and its functioning including the provisions relating to the Speaker, Deputy Speaker, qualifications or disqualifications for membership, duration, summoning, prorogation or dissolution of the House privileges, legislative procedures, procedure in financial matters, adders by the Lieutenant Governor to the Legislative Assembly, constitution of Consolidated Fund for the National Capital Territory, Contingency Fund. etc. These are on the; lines of the provisions made in respect of a legislative Assembly of a State with suitable modifications.

3. Under the bill the delimitation of constituencies will be made by the Election Commission in accordance with the Procedure set out therein. Having regard to the special conditions prevailing in Delhi, it has been provided that in respect of the frost constitution of the Assembly, such delimitation will be on the basis of provisional figures of population in relation to 1991 census, if final figures of population in relation to 1991 census, if final figures have not been published by them.

4. The Bill seeks to give effect to the above proposals."

238. From the aforesaid, it is clear as crystal that the 1991 Act was conceived to be brought into existence for supplementing the constitutional provision and also to take care of incidental matters that are germane to Article 239AA.

239. Upon scanning the anatomy of the 1991 Act, we find that the Act contains fifty six Sections and is divided into five Parts, each dealing with different fields. Now, we may refer to some of the provisions contained in Part IV of the 1991 Act titled 'Certain Provisions relating to Lieutenant Governor and Ministers' which are relevant to the case at hand. Section 41 deals with matters in which the Lieutenant Governor may act in his discretion and reads thus:-

> "**Section 41- Matters in which Lieutenant Governor to *act in his discretion.***-(l) The Lieutenant Governor shall act in his discretion in a matter-
>
> (i) which falls outside the purview of the powers conferred on the Legislative Assembly but in respect of which powers or functions are entrusted or delegated to him by the President; or
>
> (ii) in which he is required by or under any law to act in his discretion or to exercise any judicial or quasi-judicial functions.
>
> (2) If any question arises as to whether any matter is or is not a matter as respects which the Lieutenant Governor is by or under any law required to act in his discretion, the decision of the Lieutenant Governor thereon shall be final.
>
> (3) If any question arises as to whether any matter is or is not a matter as respects which the

> Lieutenant Governor is required by any law to exercise any judicial or quasi- judicial functions, the decision of the Lieutenant Governor thereon shall be final."

240. A careful perusal of Section 41 of the 1991 Act shows that the Lieutenant Governor can act in his discretion only in matters which fall outside the legislative competence of the Legislative Assembly of Delhi or in respect of matters of which powers are entrusted or delegated to him by the President or where he is required by law to act in his discretion or to exercise any judicial or quasi-judicial functions and, therefore, it is clear that the Lieutenant Governor cannot exercise his discretion in each and every matter and by and large, his discretionary powers are limited to the three matters over which the legislative power of the Delhi Legislative Assembly stand excluded by clause (3)(a) of Article 239AA.

241. Section 42 deals with the aid and advice tendered by the Council of Ministers to the Lieutenant Governor and reads as under:-

> ***"Section 42 Advice by Ministers:***-The question whether any. and if so what, advice was tendered by

> Ministers to the Lieutenant Governor shall not be inquired into in any court."

242. The wordings and phraseology of Section 42 of the 1991 Act is identical to that of clause (2) of Article 74 of the Constitution which also is an indication that the expression 'aid and advice' should receive a uniform interpretation subject to other constitutional provisions in the form of the proviso to clause (4) of Article 239AA of the Constitution of India. In other words, the 'aid and advice' given by the Council of Ministers is binding on the Lieutenant Governor so long as the Lieutenant Governor does not exercise the power conferred upon him by the proviso to clause (4) of Article 239AA and refer the matter to the President in exercise of that power for his ultimate binding decision.

243. Section 44 that deals with the conduct of business in the NCT of Delhi reads thus:-

> "**Section 44 Conduct of business.--**(1) the President shall make rules -
>
> (a) for the allocation of business to the Ministers in so far as it is business with respect to which the Lieutenant Governor is required to act on the aid and advice of his Council of Ministers; and

(b) for the more convenient transaction of business with the Ministers, including the procedure to be adopted in the case of a difference of opinion between the Lieutenant Governor and the Council of Ministers or a Minister.

(2) Save as otherwise provided in this Act, all executive action of the Lieutenant Governor whether taken on the advice of his Ministers or otherwise shall be expressed to be taken in the name of the Lieutenant Governor.

(3) Orders and other instruments made and executed in the name of the Lieutenant Governor shall be authenticated in such manner as may be specified in rules to be made by the Lieutenant Governor and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Lieutenant Governor."

244. Section 44 of the 1991 Act has made it mandatory for the President to frame rules for the allocation of business to the Ministers and also the procedure to be adopted in case of a difference of opinion between the Lieutenant Governor and the Council of Ministers.

245. In exercise of the powers conferred under the aforesaid provision, the President has framed the Transaction of Business of the Government of National Capital Territory of

Delhi Rules, 1993 (for brevity, 'TBR, 1993'). The 1991 Act and the TBR, 1993, when read together, reflect the scheme of governance for the NCT of Delhi. We will scrutinize and analyze the relevant rules from the TBR, 1993 after analyzing the other relevant provisions of the 1991 Act.

246. Now, Section 45 deals with the duties of the Chief Minister of Delhi regarding furnishing of information to the Lieutenant Governor and reads as below:-

> "**Section 45. Duties of Chief Minister as respect the furnishing of information to the Lieutenant Governor, etc.** - ***It shall be the duty of the Chief Minister*** -
>
> (a) to communicate to the Lieutenant Governor all decisions of the Council of Ministers relating to the administration of the affairs of the Capital and proposals for legislation;
>
> (b) To furnish such information relating to the administration of the affairs of the Capital and proposals for legislation as Lieutenant Governor may call for; and
>
> (c) If the Lieutenant Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council."

247. Again, Section 45 of the 1991 Act is identical and analogous to Article 167 of the Constitution which makes it

obligatory for the Chief Minister of the NCT of Delhi to communicate to the Lieutenant Governor all decisions of the Council of Ministers relating to the administration of the affairs of the NCT of Delhi and proposals for legislation. Having said that, the real purpose of such communication is not to obtain concurrence of the Lieutenant Governor on all decisions of the Council of Ministers relating to the administration of the affairs of the NCT of Delhi and on proposals for legislation, but in actuality, the objective is to have the Lieutenant Governor in synergy, to keep him in the loop and to make him aware of all decisions of the Council of Ministers relating to the administration of the affairs of the NCT of Delhi and proposals for legislation so as to enable the Lieutenant Governor to exercise the power conferred upon him by the proviso to clause (4) of Article 239AA.

248. Another important provision is Section 49 of the 1991 Act which falls under Part V of the Act titled 'Miscellaneous and Transitional Provisions" and stipulates the relation of the

Lieutenant Governor and his Ministers to the President. Section 49 reads thus:-

> ***"Section 49. Relation of Lieutenant Governor and his Ministers to President:*** Notwithstanding anything in this Act, the Lieutenant Governor and his Council of Ministers shall be under the general control of, and comply with such particular directions, if any, as may from time-to-time be given by the President."

249. Section 49 of the 1991 Act discloses that the set up in the NCT of Delhi is one where the Council of Ministers headed by the Chief Minister on one hand and the Lieutenant Governor on the other are a team, a pair on a bicycle built for two with the President as its rider who retains the general control. Needless to say, the President, while exercising this general control, acts as per the aid and advice of the Union Council of Ministers.

250. Let us, in the obtaining situation, refer to the various rules in TBR, 1993 which are necessary for dealing with the present case and for discerning the real intention of the Parliament for inserting Articles 239AA and 239AB. Rule 4

of the TBR, 1993 very categorically underscores the collective responsibility of the Council of Ministers:-

> "Rule 4(1) The Council shall be collectively responsible for all the execution orders issued by any Department in the name of the Lieutenant Governor and contracts made in the name of the President in connection with the administration of the Capital whether such orders or contracts are authorised by an individual Minister in respect of a matter pertaining to the Department under his charge or as a result or discussions at a meeting of the Council."

251. Chapter III of the TBR, 1993 deals with 'Disposal of Business allocated among Ministers'. Rule 9 falling under Chapter III provides for circulation of proposals amongst the Council of Ministers and reads as under:-

> "Rule 9(1) The Chief Minister may direct that any proposal submitted to him under rule 8 may. instead of being placed for discussion in a meeting of the Council, be circulated to the Ministers for opinion, and if all the Ministers are unanimous and the Chief Minister is of the opinion that discussions in a meeting of the Council is not required, the proposal shall be treated as finally approved by the Council. In case. Ministers are not unanimous or if the Chief Minister is of the opinion that discussions in a meeting is required, the proposal shall be discussed in a meeting of the Council.
>
> (2) If it is decided to circulate any proposal, the Department to which it belongs, shall prepare a

> memorandum setting out in brief the facts of the proposal, the points for decision and the recommendations of the Minister in charge and forward copies thereof to the Secretary to the Council who shall arrange to circulate the same among the Ministers and simultaneously send a copy thereof to the Lieutenant Governor."
>
> [Emphasis supplied]

Rule 9(2) stipulates that if it is decided that a proposal is to be circulated, the department to which it belongs shall prepare a memo setting out in brief its facts, points for decision and recommendations of the Minister-in-charge. The said memo has to be forwarded to the Secretary to the Council who shall circulate the same amongst the Ministers and at the same time send its copy to the Lieutenant Governor.

252. Rule 10, which is relevant, is reproduced below:-

> "Rule 10. (1) While directing that a proposal shall be circulated, the Chief Minister may also direct, if the matter be of urgent nature, that the Ministers shall communicate their opinion to the Secretary to the Council by a particular date, which shall be specified in the memorandum referred to in rule 9.
> (2) If any Minister fails to communicate his opinion to the Secretary to the Council by the date so specified in the memorandum, it shall be assumed that he has accepted the recommendations contained therein.

> (3) If the Minister has accepted the recommendations contained in the memorandum or the date by which he was required to communicate his opinion has expired, the Secretary to the Council shall submit the proposal to the Chief Minister.
>
> (4) If the Chief Minister accepts the recommendations and if he has no observation to make, he shall return the proposal with his orders thereon to the Secretary to the Council.
>
> (5) On receipt of the proposal, the Secretary to the Council shall communicate the decision to the Lieutenant Governor and pass on the proposal to the Secretary concerned who shall thereafter take necessary steps to issue the orders unless a reference to the Central Government is required in pursuance of the provisions of Chapter V.
>
> [Underlining is ours]

Rule 10(5) stipulates that when a decision has been taken by the Council of Ministers on a proposal as per the preceding sub-rules of Rule 10, then the Secretary to the Council shall communicate the decision to the Lieutenant Governor and pass on the proposal to the Secretary concerned for taking necessary steps to issue the orders unless the Lieutenant Governor decides to refer the decision to the Central Government in pursuance of the provisions of Chapter V of the TBR, 1993.

253. Rule 11 of the TBR, 1993 states thus:-

> "Rule 11. When it has been decided to place a proposal before the Council, the Department to which it belongs, shall, unless the Chief Minister otherwise directs, prepare a memorandum indicating precisely the salient facts of the proposal and the points for decision. Copies of the memorandum and such other documents, as are necessary to enable the proposal to be disposed of shall be forwarded to the Secretary to the Council who shall arrange to circulate the memorandum to the Ministers and simultaneously send a copy thereof to the Lieutenant Governor."
>
> [Emphasis added]

Basically, Rule 11 of the TBR, 1993 deals with the procedure to be adopted for placing a proposal before the Council of Ministers. The said rule stipulates that the proposal shall be forwarded to the Secretary to the Council who shall arrange to circulate a memorandum indicating the salient facts of the proposal and the points for decision to the Ministers and simultaneously send a copy thereof to the Lieutenant Governor.

254. The procedure is further detailed in Rule 13 which stipulates as under:-

> "Rule 13 (1) The council shall meet at such place and time as the Chief Minister may direct.

(2) Except with the permission of the Chief Minister, no case shall be placed on the agenda of a meeting unless papers relating thereto have been circulated as required under rule 11.

(3) After an agenda showing the proposals to be discussed in a meeting of the Council has been approved by the Chief Minister, copies thereof, together with copies of such memoranda as have not been circulated under rule 11, shall be sent by the Secretary to the Council, to the Lieutenant Governor, the Chief Minister and other Ministers, so as to reach them at least two days before the date of such meeting. The Chief Minister may, in case of urgency, curtail the said period of two days.

(4) If any Minister is on tour, the agenda shall be forwarded to the Secretary in the Department concerned who, if he considers that the discussion on any proposal should await the return of the Minister may request the Secretary to the Council to take the orders of the Chief Minister for a postponement of the discussion on the proposal until the return of the said Minister.

(5) The Chief Minister or in his absence any other Minister nominated by the Chief Minister shall preside at the meeting of the Council.

(6) If the Chief Minister so directs, the Secretary of the Department concerned may be required to attend the meeting of the Council.

(7) The Secretary to the Council shall attend all the meetings of the Council and shall prepare a record of the decisions. He shall forward a copy of such record to Ministers and the Lieutenant Governor."

[Emphasis supplied]

Rule 13, thus, deals with the meeting of Council of Ministers and sub-rule (3) of Rule 13 stipulates that the

agenda of the proposals to be discussed in the meeting of the Council shall be sent by the Secretary to the Lieutenant Governor amongst others.

255. Again, Rule 14 states as below:-

> "Rule 14 (1) The decision of the Council relating to each proposal shall be separately recorded and after approval by the Chief Minister, or the Minister presiding, shall be placed with the records of the proposal. After approval by the Chief Minister or the Minister presiding, the decision of the Council as approved, shall be forwarded by the Secretary to the Council to the Lieutenant Governor.
> (2) Where a proposal has been approved by the Council and the approved record of the decision has been communicated to the Lieutenant Governor, the Minister concerned shall take necessary action to give affect to the decision."
>
> [Underlining is ours]

Rule 14 deals with the decision of the Council on different proposals. Sub-rule (1) of Rule 14 provides that once a decision of the Council has been approved by the Chief Minister or the Minister presiding, the said approved decision shall be forwarded by the Secretary to the Council to the Lieutenant Governor.

256. Rule 23, elaborating on the classes of proposals or matters, enumerates as under:-

"Rule (23) The following classes of proposals or matters shall essentially be submitted to the Lieutenant Governor through the Chief Secretary and the Chief Minister before issuing any orders thereon, namely:

(i) matters which affect or are likely to affect the peace and tranquility of the capital;

(ii) matters which affect or are likely to affect the interest of any minority community. Scheduled Castes and backward classes;

(iii) matters which affect the relations of the Government with any State Government , the Supreme Court of India or the High Court of Delhi;

(iv) proposals or matters required to be referred to the Central Government under the Act or under Chapter V;

(v) matters pertaining to the Lieutenant Governor's Secretariat and personnel establishment and other matters relating to his office;

(vi) matters on which Lieutenant Governor is required to make order under any law or instrument in force;

(vii) petitions for mercy from persons under sentence for death and other important cases in which it is proposed to recommend any revision of a judicial sentence;

(viii) matters relating to summoning, prorogation and dissolution of the Legislative Assembly, removal of disqualification of voters at elections to the Legislative Assembly, Local Self Government Institutions and other matters connected with those: and

(ix) any other proposals or matters of administrative importance which the Chief Minister may consider necessary."

Rule 23 lays down a list of proposals or matters which are essential to be submitted to the Lieutenant Governor through the Chief Secretary and the Chief Minister before issuing any orders.

257. Rule 25 of the TBR, 1993 states thus:-

> "Rule 25. The Chief Minister shall:
> (a) cause to be furnished to the Lieutenant Governor such information relating to the administration of the Capital and proposals for legislation as the Lieutenant Governor may call for: and
> (b) if the Lieutenant Governor so requires, submit for the consideration of the Council any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

Sub-rule (a) of Rule 25 requires the Chief Minister to furnish to the Lieutenant Governor information relating to the administration of the Capital and proposals for legislation as the Lieutenant Governor may call for.

258. Further, Rule 42 prescribes the procedure after a Bill is passed by the Legislative Assembly. It reads as under:-

"Rule 42. (1) When a Bill has been passed by the Legislative Assembly it shall be examined in the Department concerned and the Law Department and shall be presented to the Lieutenant Governor with:-

(a) A report of the Secretary of the Department concerned as to the reason, if any, why the Lieutenant Governor's assent should not be given: and

(b) A report of the Law Secretary as to the reasons, if any, why the Lieutenant Governor's assent should not be given or the Bill should not be reserved for consideration of the President."

Rule 42 basically stipulates that when a bill has been passed by the Legislative Assembly of Delhi, the same shall be presented to the Lieutenant Governor along with a report of the Secretary of the department concerned and a report of the Law Secretary.

259. It is also pertinent to refer to Rules 49 and 50 falling under Chapter V titled 'Referring to Central Government' which read as follows:-

"**CHAPTER-V**

Referring to the Central Government

Rule 48 ***(Omitted)***

Rule 49 In case of difference of opinion between the Lieutenant Governor and a Minister in regard to any matter, the Lieutenant Governor shall endeavour bv

> discussion on the matter to settle any point on which such difference of opinion has arisen. Should the difference of opinion persist, the Lieutenant Governor may direct that the matter be referred to the Council.
>
> ***Rule 50*** In case of difference of opinion between the Lieutenant Governor and the Council with regard to any matter, the Lieutenant Governor shall refer it to the Central Government for the decision of the President and shall act according to the decision of the President."

260. Rule 49 stipulates the procedure to be adopted in case of difference of opinion between the Lieutenant Governor and a Minister in regard to any matter. In such a scenario, as per Rule 49, the Lieutenant Governor shall endeavour by discussion on the matter to settle any point on which such difference of opinion has arisen. If such an approach and attempt to settle a point of difference by discussion turns out to be futile and the difference of opinion persists, then the Lieutenant Governor may direct the matter to be referred to the Council. Rule 49 shows that settlement can be achieved by way of discussion. It further highlights how, by discussion and dialogue, a conflict can be avoided by

adopting an ideology of harmonious co-existence which would again be in tune with the concepts of collaborative federalism, pragmatic federalism, federal balance and constitutional objectivity.

261. Rule 50, on the other hand, provides the procedure to the effect that in case of difference of opinion between the Council and the Lieutenant Governor with regard to any matter, the Lieutenant Governor is required to refer it to the Central Government for the decision of the President and shall act according to the decision of the President.

262. The approach of dialogue, settlement by discussion and suppressing conflicts by harmonious co-existence as delineated by Rule 49 should also be adopted in case of difference of opinion between the Lieutenant Governor on one hand and the Council on the other. Such an approach would not only result in acceptance of the role of the Lieutenant Governor but also help the NCT of Delhi to cherish the fruits of a responsive government as intended by the Sixty-ninth Constitutional Amendment.

263. We have referred to the relevant rules of TBR, 1993 which require that the Lieutenant Governor has to be apprised and kept in the loop of the various proposals, agendas and decisions taken by the Council of Ministers. However, a careful perusal of these rules nowhere suggests that the communication to the Lieutenant Governor is to obtain his concurrence or permission. The TBR, 1993 simply reflect the scheme envisaged for the governance of NCT of Delhi wherein just as an administrator in other UTs has to be apprised, likewise the Lieutenant Governor in Delhi is also to be informed and notified about the business being conducted.

264. The idea behind the aforesaid rules is just to keep the Lieutenant Governor notified of the proposals, agendas and decisions so that he is acquainted with the business carried out by the Council of Ministers. The said view is evident from the various rules which employ the words 'send a copy thereof to the Lieutenant Governor', 'forwarded to the Lieutenant Governor', 'submitted to the Lieutenant Governor and 'cause to be furnished to the Lieutenant Governor'.

265. Thus, the irresistible conclusion is that the Council is only required to communicate and inform its various proposals, agendas and decisions to the Lieutenant Governor so as to keep him apprised and to enable him to scrutinize the said proposals, agendas and decisions in order to exercise his powers as bestowed upon him under clause (4) of Article 239AA of the 1991 Act read with Rule 50 of the TBR, 1993.

266. It has to be clearly stated that requiring prior concurrence of the Lieutenant Governor would absolutely negate the ideals of representative governance and democracy conceived for the NCT of Delhi by Article 239AA of the Constitution. Any view to the contrary would not be in consonance with the intention of the Parliament to treat Delhi Government as a representative form of government.

267. The said interpretation is also in tune with our constitutional spirit which ensures that the voice of the citizens does not go unrecognized while making laws and this is only possible if the agency enacting and enforcing the laws comprises of the elected representatives chosen by the free

will of the citizens. It is a well recognized principle of a true democracy that the power shall not remain vested in a single person and it is absolutely essential that the ultimate say in all matters shall vest with the representative Government who are responsible to give effect to the wishes of the citizens and effectively address their concerns.

268. A conjoint reading of the 1991 Act and the TBR, 1993 formulated in pursuance of Section 44 of the 1991 Act divulges that the Lieutenant Governor of Delhi is not a titular head, rather he enjoys the power of that of an administrator appointed by the President under Article 239AA. At the cost of repetition, we may reiterate that the constitutional scheme adopted for the NCT of Delhi conceives of the Council of Ministers as the representatives of the people on the one hand and the Lieutenant Governor as the nominee and appointee of the President on the other, who are required to function in harmony within the constitutional parameters. In the said scheme of things, the Lieutenant Governor should not emerge

as an adversary having a hostile attitude towards the Council of Ministers of Delhi, rather he should act as a facilitator.

269. We had earlier stated that Mr. Maninder Singh, learned Additional Solicitor General, had urged that the report of the Balakrishnan Committee should be taken aid of to interpret the constitutional provision and for the said purpose, he had placed reliance on ***Maumsell v. Olins***[92], ***Eastman Photographic Materials Company v. Comptroller-General of Patents, Designs and Trademarks***[93], ***Tikri Banda Dullewe v. Padma Rukmani Dullewe***[94], ***Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg***[95], ***R.S. Nayak v. A.R. Antulay***[96], ***Shrimant Shamrao Suryavanshi v. Pralhad Bhairoba Suryavanshi***[97] and ***TMA Pai Foundation v. State of Karnataka***[98]. He had laid emphasis on paragraph 34 of the

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92 [1975] AC 373
93 (1989) AC 571
94 (1969) 2 AC 313
95 (1975) AC 591
96 (1984) 2 SCC 183
97 (2002) 3 SCC 676
98 (2002) 8 SCC 481

judgment in ***A.R. Antulay*** (supra). The relevant part of the said paragraph reads as follows:-

> "34. ...the basic purpose underlying all canons of construction is the ascertainment with reasonable certainty of the intention of Parliament in enacting the legislation. Legislation is enacted to achieve a certain object. The object may be to remedy a mischief or to create some rights, obligations or impose duties. Before undertaking the exercise of enacting a statute, Parliament can be taken to be aware of the constitutional principle of judicial review meaning thereby the legislation would be dissected and subjected to microscopic examination. More often an expert committee or a joint parliamentary committee examines the provisions of the proposed legislation. But language being an inadequate vehicle of thought comprising intention, the eyes scanning the statute would be presented with varied meanings. If the basic purpose underlying construction of a legislation is to ascertain the real intention of the Parliament, why should the aids which Parliament availed of such as report of a special committee preceding the enactment, existing state of law, the environment necessitating enactment of legislation, and the object sought to be achieved, be denied to court whose function is primarily to give effect to the real intention of the Parliament in enacting the legislation. Such denial would deprive the Court of a substantial and illuminating aid to construction. Therefore, departing from the earlier English decisions we are of the opinion that reports of the committee which preceded the enactment of a legislation, reports of joint parliamentary committee, report of a commission set up for collecting

> information leading to the enactment are permissible external aids to construction."

270. There can be no quarrel about the proposition that the reports of the Committee enacting a legislation can serve as an external aid for construing or understanding the statute. However, in the instance case, as we have elaborately dealt with the meaning to be conferred on the constitutional provision that calls for interpretation, there is no necessity to be guided by the report of the Committee.

U. <u>Constitutional renaissance</u>:

271. Before we proceed to record our conclusions, we think it apposite to reflect on a concept that illumines the basic tenet of constitutional governance having requisite veneration for constitutional philosophy and its applicability in the present context.

272. Though ordinarily the term 'renaissance' is used in the context of renewed activity especially pertaining to art and literature, yet the said word is not alien to the fundamental meaning of life in a solid civilized society that is well cultivated

in culture. And, life, as history witnesses, gets entrenched in elevated civilization when there is fair, appropriate, just and societal interest oriented governance. In such a situation, no citizen feels like a subject and instead has the satisfaction that he is a constituent of the sovereign. When the citizens feel that there is participatory governance in accordance with the constitutionally envisaged one, there is prevalence of constitutional governance.

273. This prevalence is the recognition and acceptance of constitutional expectation from the functionaries created by it. It is to remain in a constant awakening as regards the text, context, perspective, purpose and the rule of law. Adherence to rationality, reverence for expected pragmatic approach on the bedrock of the constitutional text, context and vision and constant reflection on the valid exercise of the power vested tantamounts to resurgent constitutionalism. It may be understood in a different manner. Our Constitution is a constructive one. There is no room for absolutism. There is no space for anarchy. Sometimes it is argued, though in a

different context, that one can be a "rational anarchist", but the said term has no entry in the field of constitutional governance and rule of law. Fulfillment of constitutional idealism ostracizing anything that is not permissible by the language of the provisions of the Constitution and showing veneration to its spirit and silence with a sense of reawakening to the vision of the great living document is, in fact, constitutional renaissance.

274. Let us come to the present context and elaborate the concept. The said concept garners strength when there is rational difference by the Lieutenant Governor on a constitutional prism, any statutory warrant, executive disharmony between the Centre and NCT of Delhi on real justifiable grounds, when an executive decision runs counter to the legislative competence and the decision of the Council of Ministers defeats the national interest. These are only a few illustrations. The Constitution does not state the nature of the difference. It leaves it to the wisdom of the Council of Ministers who have the collective responsibility and the Lieutenant

Governor. That is the constitutional trust which expects the functionaries under the Constitution to be guided by constitutional morality, objective pragmatism and the balance that is required to sustain proper administration. The idea of obstinance is not a principle of welfare administration. The constitutional principles do not countenance a nomadic perception. They actually expect governance for the betterment of society, healthy relationship and mutual respect having an open mind for acceptance.

275. The goal is to avoid any disharmony and anarchy. Sustenance of constitutionally conferred trust, recognition and acceptance of the principle of constitutional governance, adherence to the principles and norms which we have discussed earlier and the constitutional conduct having regard to the elevated guiding precepts stated in the Preamble will tantamount to realization of the feeling of constitutional renaissance. When we say renaissance, we do not mean revival of any classical note with a sense of nostalgia but true blossoming of the constitutional ideals, realization and

acceptance of constitutional responsibility within the boundaries of expression and silences and sincerely accepting the summon to be obeisant to the constitutional conscience with a sense of reawakening to the constitutional vision.

276. That is why, the 1991 Act and the TBR, 1993 conceive of discussion, deliberation and dialogue. The exercise of entitlement to differ has to be based on principle and supported by cogent reasons. But, the primary effort has to be to arrive at a solution. That is the constitutional conduct of a constitutional functionary.

V. **The conclusions in seriatim:**

277. In view of our aforesaid analysis, we record our conclusions in seriatim:-

(i) While interpreting the provisions of the Constitution, the safe and most sound approach for the Constitutional Courts to adopt is to read the words of the Constitution in the light of the spirit of the Constitution so that the quintessential

democratic nature of our Constitution and the paradigm of representative participation by way of citizenry engagement are not annihilated. The Courts must adopt such an interpretation which glorifies the democratic spirit of the Constitution.

(ii) In a democratic republic, the collective who are the sovereign elect their law making representatives for enacting laws and shaping policies which are reflective of the popular will. The elected representatives being accountable to the public must be accessible, approachable and act in a transparent manner. Thus, the elected representatives must display constitutional objectivity as a standard of representative governance which neither tolerates ideological fragmentation nor encourages any utopian fantasy, rather it lays stress on constitutional ideologies.

(iii) 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. In order to realize our constitutional vision, it is indispensable that all citizens and high functionaries in particular inculcate a spirit of constitutional morality which negates the idea of concentration of power in the hands of a few.

(iv) All the three organs of the State must remain true to the Constitution by upholding the trust reposed by the Constitution in them. The decisions taken by constitutional functionaries and the process by which such decisions are taken must have normative reasonability and acceptability. Such decisions, therefore, must be in accord with the principles of constitutional objectivity and symphonious with the spirit of the Constitution.

(v) The Constitution being the supreme instrument envisages the concept of constitutional governance which has, as its twin limbs, the principles of fiduciary nature of public power and the system of checks and balances. Constitutional governance, in turn, gives birth to the requisite constitutional trust which must be exhibited by all constitutional functionaries while performing their official duties.

(vi) Ours is a parliamentary form of government guided by the principle of collective responsibility of the Cabinet. The Cabinet owes a duty towards the legislature for every action taken in any of the Ministries and every individual Minister is responsible for every act of the Ministry. This principle of collective responsibility is of immense significance in the context of 'aid and advice'. If a well deliberated legitimate decision of the Council of Ministers is not given effect to due to an attitude to differ on the part of the Lieutenant Governor, then

the concept of collective responsibility would stand negated.

(vii) Our Constitution contemplates a meaningful orchestration of federalism and democracy to put in place an egalitarian social order, a classical unity in a contemporaneous diversity and a pluralistic milieu in eventual cohesiveness without losing identity. Sincere attempts should be made to give full-fledged effect to both these concepts.

(viii) The constitutional vision beckons both the Central and the State Governments alike with the aim to have a holistic edifice. Thus, the Union and the State Governments must embrace a collaborative federal architecture by displaying harmonious co-existence and interdependence so as to avoid any possible constitutional discord. Acceptance of pragmatic federalism and achieving federal balance has become a necessity requiring disciplined wisdom on the part of the Union and the

State Governments by demonstrating a pragmatic orientation.

(ix) The Constitution has mandated a federal balance wherein independence of a certain required degree is assured to the State Governments. As opposed to centralism, a balanced federal structure mandates that the Union does not usurp all powers and the States enjoy freedom without any unsolicited interference from the Central Government with respect to matters which exclusively fall within their domain.

(x) There is no dearth of authorities with regard to the method and approach to be embraced by Constitutional Courts while interpreting the constitutional provisions. Some lay more emphasis on one approach over the other, while some emphasize that a mixed balance resulting in a unique methodology shall serve as the best tool. In spite of diverse views on the said concept, what

must be kept primarily in mind is that the Constitution is a dynamic and heterogeneous instrument, the interpretation of which requires consideration of several factors which must be given their due weightage in order to come up with a solution harmonious with the purpose with which the different provisions were introduced by the framers of the Constitution or the Parliament.

(xi) In the light of the contemporary issues, the purposive method has gained importance over the literal approach and the Constitutional Courts, with the vision to realize the true and ultimate purpose of the Constitution not only in letter but also in spirit and armed with the tools of ingenuity and creativity, must not shy away from performing this foremost duty to achieve constitutional functionalism by adopting a pragmatic approach. It is, in a way, exposition of judicial sensibility to the functionalism of the Constitution which we call

constitutional pragmatism. The spirit and conscience of the Constitution should not be lost in grammar and the popular will of the people which has its legitimacy in a democratic set up cannot be allowed to lose its purpose in simple semantics.

(xii) In the light of the ruling of the nine-Judge Bench in ***New Delhi Municipal Corporation*** (supra), it is clear as noon day that by no stretch of imagination, NCT of Delhi can be accorded the status of a State under our present constitutional scheme. The status of NCT of Delhi is *sui generis*, a class apart, and the status of the Lieutenant Governor of Delhi is not that of a Governor of a State, rather he remains an Administrator, in a limited sense, working with the designation of Lieutenant Governor.

(xiii) With the insertion of Article 239AA by virtue of the Sixty-ninth Amendment, the Parliament envisaged a representative form of Government for

the NCT of Delhi. The said provision intends to provide for the Capital a directly elected Legislative Assembly which shall have legislative powers over matters falling within the State List and the Concurrent List, barring those excepted, and a mandate upon the Lieutenant Governor to act on the aid and advice of the Council of Ministers except when he decides to refer the matter to the President for final decision.

(xiv) The interpretative dissection of Article 239AA(3)(a) reveals that the Parliament has the power to make laws for the National Capital Territory of Delhi with respect to any matters enumerated in the State List and the Concurrent List. At the same time, the Legislative Assembly of Delhi also has the power to make laws over all those subjects which figure in the Concurrent List and all, but three excluded subjects, in the State List.

(xv) A conjoint reading of clauses (3)(a) and (4) of Article 239AA divulges that the executive power of the Government of NCTD is co-extensive with the legislative power of the Delhi Legislative Assembly and, accordingly, the executive power of the Council of Ministers of Delhi spans over all subjects in the Concurrent List and all, but three excluded subjects, in the State List. However, if the Parliament makes law in respect of certain subjects falling in the State List or the Concurrent List, the executive action of the State must conform to the law made by the Parliament.

(xvi) As a natural corollary, the Union of India has exclusive executive power with respect to the NCT of Delhi relating to the three matters in the State List in respect of which the power of the Delhi Legislative Assembly has been excluded. In respect of other matters, the executive power is to be exercised by the Government of NCT of Delhi. This,

however, is subject to the proviso to Article 239AA(4) of the Constitution. Such an interpretation would be in consonance with the concepts of pragmatic federalism and federal balance by giving the Government of NCT of Delhi some required degree of independence subject to the limitations imposed by the Constitution.

(xvii) The meaning of 'aid and advise' employed in Article 239AA(4) has to be construed to mean that the Lieutenant Governor of NCT of Delhi is bound by the aid and advice of the Council of Ministers and this position holds true so long as the Lieutenant Governor does not exercise his power under the proviso to clause (4) of Article 239AA. The Lieutenant Governor has not been entrusted with any independent decision-making power. He has to either act on the 'aid and advice' of Council of Ministers or he is bound to implement the decision

taken by the President on a reference being made by him.

(xviii) The words “any matter” employed in the proviso to clause (4) of Article 239AA cannot be inferred to mean “every matter”. The power of the Lieutenant Governor under the said proviso represents the exception and not the general rule which has to be exercised in exceptional circumstances by the Lieutenant Governor keeping in mind the standards of constitutional trust and morality, the principle of collaborative federalism and constitutional balance, the concept of constitutional governance and objectivity and the nurtured and cultivated idea of respect for a representative government. The Lieutenant Governor should not act in a mechanical manner without due application of mind so as to refer every decision of the Council of Ministers to the President.

(xix) The difference of opinion between the Lieutenant Governor and the Council of Ministers should have a sound rationale and there should not be exposition of the phenomenon of an obstructionist but reflection of the philosophy of affirmative constructionism and profound sagacity and judiciousness.

(xx) The Transaction of Business Rules, 1993 stipulates the procedure to be followed by the Lieutenant Governor in case of difference between him and his Ministers. The Lieutenant Governor and the Council of Ministers must attempt to settle any point of difference by way of discussion and dialogue. By contemplating such a procedure, the TBR, 1993 suggest that the Lieutenant Governor must work harmoniously with his Ministers and must not seek to resist them every step of the way. The need for harmonious resolution by discussion is recognized especially to sustain the representative

form of governance as has been contemplated by the insertion of Article 239AAA.

(xxi) The scheme that has been conceptualized by the insertion of Articles 239AA and 239AB read with the provisions of the GNCTD Act, 1991 and the corresponding TBR, 1993 indicates that the Lieutenant Governor, being the Administrative head, shall be kept informed with respect to all the decisions taken by the Council of Ministers. The terminology “send a copy thereof to the Lieutenant Governor”, “forwarded to the Lieutenant Governor”, “submitted to the Lieutenant Governor” and “cause to be furnished to the Lieutenant Governor” employed in the said rules leads to the only possible conclusion that the decisions of the Council of Ministers must be communicated to the Lieutenant Governor but this does not mean that the concurrence of the Lieutenant Governor is required. The said communication is imperative so as to keep

him apprised in order to enable him to exercise the power conferred upon him under Article 239AA(4) and the proviso thereof.

(xxii) The authorities in power should constantly remind themselves that they are constitutional functionaries and they have the responsibility to ensure that the fundamental purpose of administration is the welfare of the people in an ethical manner. There is requirement of discussion and deliberation. The fine nuances are to be dwelled upon with mutual respect. Neither of the authorities should feel that they have been lionized. They should feel that they are serving the constitutional norms, values and concepts.

(xxiii) Fulfillment of constitutional idealism ostracizing anything that is not permissible by the language of the provisions of the Constitution and showing veneration to its sense, spirit and silence is constitutional renaissance. It has to be remembered

that our Constitution is a constructive one. There is no room for absolutism. There is no space for anarchy. Sometimes it is argued, though in a different context, that one can be a "rational anarchist", but the said term has no entry in the field of constitutional governance and rule of law. The constitutional functionaries are expected to cultivate the understanding of constitutional renaissance by realization of their constitutional responsibility and sincere acceptance of the summon to be obeisant to the constitutional conscience with a sense of reawakening to the vision of the great living document so as to enable true blossoming of the constitutional ideals. The Lieutenant Governor and the Council of Ministers headed by the Chief Minister are to constantly remain alive to this idealism.

278. The Reference is answered accordingly. Matters be placed before the appropriate regular Bench.

.....CJI
(Dipak Misra)

.....J.
(A.K. Sikri)

.....J.
(A.M. Khanwilkar)

New Delhi;
July 04, 2018