

JURISDICTIONAL CONFLICT IN THE RUNNING OF DELHI

Relevant for: Indian Polity | Topic: Issues and Challenges Pertaining to the Federal Structure, Dispute Redressal Mechanisms, and the Centre-State Relations

“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 powers to legislate for the NCT of Delhi.” So said the Constitution Bench of the Supreme Court in *Government of NCT of Delhi vs. Union of India* (2018). The issue before the Supreme Court was the jurisdictional conflicts between the government of NCT and the Union Government and its representative, the Lieutenant Governor.

The judgment which runs into more than 1,000 pages analyses the contentious issues which hobbled the State government and attempts to resolve them. Very lofty principles concerning constitutional morality, co-operative federalism, constitutional conscience, pragmatic federalism, etc., have been enunciated in this judgment. It reminds the Lt. Governor what his real functions are. It tells the State government that it should remember that Delhi is a special category Union Territory and lays down the parameters to enabling the harmonious functioning of the government and the Lt. Governor.

The judgment clarified and settled many contentious issues such as the powers of the Lt. Governor *vis-à-vis* the elected government, his discretionary powers, the extent of the executive powers of the State government, etc. On the face of it, it did not very clearly delineate the issues in respect of which the Lt. Governor can refer a decision taken by the Council of Ministers to the President in the event of a difference of opinion between the Lt. Governor and the State government. Nevertheless, the Supreme Court has settled the law in regard to the ‘aid and advice’ of the Council of Ministers by affirming that the Lt. Governor is bound to act on the aid and advice except in respect of ‘Land’, ‘Public Order’ and the ‘Police’.

The Court has also made it clear that there is no requirement of the concurrence of the Lt. Governor and that he has no power to overrule the decisions of the State government. However, there is a catch here — in the operationalisation of Article 239AA (4) (*proviso*) which says that in the case of a difference of opinion between the Lt. Governor and his Ministers on any matter, the Lt. Governor shall refer it to the President for decision and act according to that decision.

In the meantime, if the Lt. Governor thinks that the matter is urgent he can take immediate action on his own. So, ultimately things are back to square one. If a Lt. Governor, for example, wants to frustrate the efforts of the government, he can declare that there is a difference of opinion on any issue decided by the elected government and refer it to the President which in reality means the Union Home Ministry. The Lt. Governor being its representative, it is easier for him to secure a decision in his favour. The State government will be totally helpless in such a situation.

The recent appointment of prosecutors for conducting the Delhi riot cases in the High Court is a case in point. As per the High Court and the Supreme Court, the appointment of prosecutors is exclusively within the purview of the State government. When the government decided to appoint them, the Lt. Governor referred it under *proviso* to Article 239AA (4) to the President stating that there is a difference of opinion between him and the government over this matter. In the meantime the Lt. Governor appointed all the prosecutors whose names were submitted by

the Delhi Police and thus the State government's list was rejected.

This episode clearly points to the fault lines which still exist in the power equations in the capital's administrative structure. The key question is whether the Lt. Governor can refer a routine administrative matter such as the appointment of prosecutors to the President.

A close reading of the Supreme Court judgment in the NCT Delhi case (supra) would reveal that he cannot. Just take a look at what the Supreme Court says. "The words 'any matter' employed in the *proviso* to Article 239AA (4) 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 Lt. Governor. Keeping in mind the standards of Constitutional trust and morality, the principles of collaborative federalism and the concept of Constitutional balance...."

The Court further says, "the Lieutenant Governor should not act in a mechanical manner without due application of mind so as to refer every decision of the Council of Ministers to the President." The highest judicial forum in the country in its own majestic style directs the Lt. Governor not to refer to the President normal administrative matters as that would disturb the concept of Constitutional governance, principles of collaborative federalism and the standards of Constitutional morality. Reference of the appointment of Prosecutors by the Lt. Governor to the President seems to be a negation of these principles.

There is another point which emerges from the judgment and attention needs to be paid to it. That is that the executive power of the Union does not extend to any of the matters which come within the jurisdiction of the Delhi Assembly. Parliament can legislate for Delhi on any matter in the State List and the Concurrent List but the executive power in relation to Delhi except the 'Police', 'Land' and 'Public Orders' vests only in the State government headed by the Chief Minister.

The Supreme Court says, "Article 239AA (3)(a) reserves the Parliament's legislative power on all matters in the State List and Concurrent List but clause (4) explicitly grants to the Government of Delhi executive powers in relation to matters for which the Legislative Assembly has powers to legislate." This statement of law by the Supreme Court implies that the Union Government is not empowered to exercise executive authority on a matter which comes within the exclusive jurisdiction of the State government like the appointment of Prosecutors. The only occasion when the Union Government can overrule the decision of the State government is when the Lt. Governor refers a matter to the President under the *proviso* to clause (4). But this *proviso* cannot totally override the executive decisions of the State government under clause (4).

The judgment of the Supreme Court resolves this apparent contradiction by enjoining the Lt. Governor to keep in mind while making a reference to the President the constitutional morality, principles of collaborative federalism, concept of constitutional governance, objectivity, etc. Although the Court did not specify the matters which can be referred by the Lt. Governor to the President, the high principles described above broadly indicate what can be referred and what cannot. In any case it is unambiguously clear that the executive decisions of the State government cannot be referred to the President merely because the Lt. Governor has a different personal opinion about some of them. The top court wants the Lt. Governor and the Council of Ministers to use in full the mechanism provided in the Government of NCT of Delhi Act and the Transaction of Business Rules to thrash out differences. The Court seems to elevate to a higher level the issues that can be referred to the President as distinct from the normal decisions taken in exercise of the executive powers of the State. The President is the highest Constitutional authority and his decision should be sought only on constitutionally important issues.

Finally, the Supreme Court gives wise advice to the Lt. Governor: “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 Lt. Governor as the nominee of the President on the other who are required to function in harmony within the Constitutional parameters. In the said scheme of things, the Lt. 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.”

So, when we analyse the reference by the Lt. Governor to the President the issue of appointment of prosecutors within the parameters laid down by the Supreme Court, we find that it is not in consonance with these principles enunciated by the Court. It is against constitutional morality which requires strict adherence to the constitutional principles of collaborative federalism, constitutional balance and the concept of constitutional governance. All these principles act as bulwark against the usurpation of powers of the State by the Union. When the Court declares the law and requires the constitutional authorities to follow it, they have to act in compliance and not in defiance.

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