

Centre State Relations in India

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Week 04: Legislative Relations: Territorial Jurisdiction; Distribution of Legislative Subjects and Related Areas

Lecture 13: Constitutional Provisions relating to Services between Union and Delhi

Greetings to all of you. We have been discussing administrative relations and what are the provisions under the Constitution which discusses administrative relations between the Centre and the States. We do have a provision under the Constitution to deal between the Centre and the national capital Delhi and because of the litigation going on between the Government of Delhi and the Union government it was thought that let there be one discussion on what Constitution provides for on the matter of governance of Delhi and the role of the Centre and how the administration of Delhi is required to be operate, to govern under the constitutional scheme. So, in today's session we will try to look at the issues of controlling the subject matters in relation to the governance of Delhi. We will try to understand legal disputes which have arisen between the Government of Delhi and the Union government what is the control of that what is the substance of that legal dispute.

We will also look at the constitutional provision which has been inserted to give a separate status or a special status to Delhi what it is all about. In pursuant to that constitutional provision what is the statutory framework let down for the administration of Delhi. Now when you look at the governance of a capital city it always brings in challenge because capital city of a country gets involved in more than one dimensions. The dimension of national interest, the orientation of national interest and the very framework to fulfill the aspirations of the people. Capital city of a country generally viewed as a power centre, power corridor because in that city the government of

the country sits. In that city headquarters of Ministries are there, headquarters of important agencies like armed forces are there and also it houses offices of embassies of different states.

Apart from that in the city ordinary people also resides, ordinary people having expectation from the government of addressing day to day challenges working for welfare of the residents of the capital city. The governance of a capital city brings up challenges of addressing the issue of nationalist interest and catering the needs of the people staying and residing there. So, one can very well visualize that when it comes to administering the capital city dual approach is required. Dual approach of ensuring national unity and uniformity because capital city symbolizes nation, at the same time it is also suggested that local issues, public provisioning, public services or the people should be addressed. If you look at how capital city is being governed in other jurisdictions, we try to bring in the framework of these three cities to substantiate the point that governance of capital cities has been not like governance of regions of the country in ordinary way.

For example, when you look at Washington DC, district of Columbia does not form the part of any constituent state. It has got a separate entity altogether and it falls under the exclusive control of the Federal government except in a case of health and welfare controlled by the Municipal Corporation. So, you can very well see that the capital city of the United States governs on a different framework. Same is the case with the capital city of Australia Canberra which you see it gets governed under a special law Australian Capital Territory (Self- Government) Act 1988 which provides for a Legislative Assembly with the Chief Minister. However, the power to the State government is limited and does not allow to make a law on the federal policing security and land management and planning issue. Looking at the governance of the capital of Japan, Tokyo, there is also two-tier government is there which talks about Municipality and Prefecture. The Prefecture for Tokyo is the Tokyo Metropolitan Government which manages basic amenities like water supply, sewage and coordinated with Municipality and the National government.

So, these instances very well establish this perspective that when it comes to the governance of capital city, one need not look at the governance on a very ordinary line of governance of a province and design a framework which operates between the Province and the Union. It requires a different arrangement all together and that is what was suggested in Balakrishnan Committee report which has given an elaborative recommendation on the governance in Delhi. Balakrishnan

Committee report of 1987 delves deeper into the issue of administration. It looked into different aspects of the governance of the capital city and it suggested significant measures for satisfying the dual approach. The report categorically rejected the idea of putting Delhi under the direct control of the Centre.

At the same time, it also negates the very demand of granting complete statehood to Delhi. If such statehood will be granted to Delhi, then there is a possibility of national interest or international interest in terms of foreign policies may get adversely affected. So midway was suggested that let there be a Legislative Assembly, let the people elect their representative we shall have the legislative power to make a law on the State subject and the Concurrent subject in so far if such matter deals with Union Territory. However, it is suggested that in the interest of the nation certain subject matters are to be kept away from the legislative domain of Delhi and suggestions were given that let public order, police and land let the subject matters be staying away. Now this Balakrishnan Report appears to be accepted and governance of Delhi has got under transformation with establishment of National Capital Territory under 69th Constitutional Amendment Act.

Because like other capital city Delhi also represents the interest of the nation and therefore necessary framework is required for maintaining that interest for serving that interest or for that advancing that interest. For the same time, it was also said that the expectation of the local population should also get accommodated and the measures for the same suggested was having an elected body. So 69th Constitutional Amendment Act of 1991 gave a constitutional status to the governance of Delhi. Now no denial that this governance brings in unorthodox unconventional arrangement between the Union and the quasi-State unit if I may say so and therefore the reading of the Constitution in the matter of the Centre in the State relations must be made not only on symmetrical parameter but also on asymmetrical parameter. It is not that that same size fit all model was adopted to govern different territories of the country accommodative approach was there.

So, it was suggested that let there be elected Legislative Assembly with the power to make laws on the matters on matters in the State and the Concurrent list. The exclusivity of the NCT or the Legislative Assembly of NCT may not be at par with other States. The 69th Constitutional Amendment Act introduced Article 239AA which governs Delhi it provides a special status to

Delhi wherein it was suggested that all the subject matters which are there for the State and the Concurrent subject matter. The subject matters can very well be looked into for the exercise of the legislative power by the Legislative Assembly of NCT Delhi. So subject matters can very well be employed can very well be taken into account for making the laws. Now when this was suggested the question raised was with regard to Services that Services shall be under whose control because services ordinarily are a subject matter under Entry 41 of List II of Schedule VII.

But then we know very well that in Union Territories Services are not there. So, on the matter of regulating services in 2015 a notification was issued by the Ministry of Home Affairs and stated that the Lieutenant Governor will have power over services. Now look at it how Article 239AA deals with different aspects Article 239AA(3)(a) states that NCT Delhi shall have the Legislative Assembly we shall have a power to make laws on the State subjects as well as matters applicable to Union Territories which are there in List III. Article 239AA(4) categorically says that LG shall go by the aid and advice given by the Council of Ministers. So, Council of Ministers were provided and they were given the responsibility to extend aid and advice to the Lieutenant Governor on the lines of ordinary States.

However, Article 239AA(4) proviso also allowed the Lieutenant Governor to refer a matter for the consideration of the President in a situation of conflict of opinion on a matter between the Lieutenant Governor and the Minister. So, in this scheme you can very well look at it and you can very well agree that Central government or the Union government was viewed as was given the responsibility as a final arbiter on a matter of conflict between the elected representative of Delhi the political executive of Delhi. If any conflict happens it is the President who shall look into it and President here would certainly mean the Central government. Now question has been raised which has become kind of focal point of dispute between the Central government and the Government of NCT is how shall we read this very expression which is there under Article 239AA(3)(a) in so far as any such matter is applicable to Union Territories. Would it mean that a subject matter is not there in the Union Territory then the State shall have a reduction if it is related to Union Territory then one has to look at it that whether it should go with the Centre or the States. On the matter of services both the Union government and the Government of NCT of Delhi presented claim. However Article 239AA(4) says that the LG shall refer the matter to the President for arbiter you can very well visualize that there is a deviation from the general scheme of

Governor going by the advice of the Council of Ministers if the request of Governor to reconsider the matter has not been heeded. This provision is not there in relation to Delhi that's what Article 239AA(4) says. Pursuant to Article 239AA a law was enacted in the year 1991. That law was enacted to strengthen the constitutional provision to operationalize the constitutional provision and in that Section 41 of the Act confers certain discretionary power on the Lieutenant Governor.

Lieutenant Governor has been given discretionary power on the matter which falls outside the legislative competence of the Legislative Assembly in respect of matters which powers are entrusted or delegated to him directly by the President where he is supposed to act on his own, where by law he is required to act as per his discretion or to exercise any judicial or quasi-judicial functions. These are the areas which are clearly kept out from the affairs of the Council of Ministers. So discretionary power has been vested and clearly that has been spilled out otherwise the Act says that Lieutenant Governor shall go by the aid and advice of the Council of Ministers on other matters. Section 42 says so that the aid and advice of the Council of Ministers shall guide the Lieutenant Governor to decide something which you can very well correlate on the lines of parliamentary legislation, parliamentary democracy, parliamentary system what we understand when you read Article 74 of the Constitution which deals about the relationship between the President and the Council of Ministers at the central level. Section 49 of the act states that the principle of "general control" of the President over the Lieutenant Governor and the Council of Ministers. This is in alignment with the overall idea of the governance of the capital city which we discussed right at the beginning that because national capital holds a distinguished and distinct positioning in political sphere on a geopolitical issue there is a need of having a special control by the President by the central government.

So, the Rules were being framed in pursuant to that Act of 1991 where it was suggested that in what circumstances the President shall excise the power under Section 44 of the Act under "general control". Now when you look at the pattern of litigation which has been happening between the Union government and NCT Delhi, it started on the matter of services where in 2016 the Supreme Court in Govt. of NCT of Delhi v. Union of India, 2016 says that services fall outside the purview of the Legislative Assembly of NCT Delhi. It falls outside the purview of Legislative Assembly because of the expression which is used that something which is connected with the Concurrent List which we have discussed a while ago that whether legislative power shall be extended even

to those subject matters which are not explicitly referred. How do we read that? Should we read it in an inclusive way or exclusive way? Now 2018 it was suggested in a case again Govt. of NCT of Delhi v. Union of India, by the Supreme Court that following the principles of parliamentary democracy, the Lieutenant Governor is required to act as per aid and advice of the Council of Minister except on the matters which are categorically excluded from the legislative domain of the NCT Delhi, that is land, police and public order. Now in 2020 another important development where on the matter of services the Supreme Court gave a divided view. Justice Sikri said that services shall fall within the purview of the Government of Delhi whereas Justice Bhushan said that it is outside the purview of Delhi government. They are reading it by looking at that inclusivity and exclusivity factor because Union Territories do not have Service Commissions. We know very well that bureaucracy in the Union Territories they get appointed through the Public Service Commission controlled by the Union government. In 2023 again the court has said that legislative and executive power over administrative services excluding matters relating to public order, police and land is there with the Government of Delhi, again going by 2016 judgment.

To nullify this judgment Union government has come up with an Ordinance - Government of NCT of Delhi (Amendment) Ordinance, 2023 wherein services has been now included as excluded criteria. Now this Ordinance has been challenged in the Supreme Court and they suggested that this matter shall be heard by Constitution Bench in order to give finality to the legal issue or constitutional matter. When it comes to understanding the legislative and executive power in 2018 judgment the court categorically says that power of the government under the Act of National Capital Territory of Delhi is co-terminus and co-extensive with the legislative power meaning there by it shall extend on all the matters on which Delhi Legislative Assembly can make law. But then the question has been raised with regard to the expression on the Concurrent List "*insofar as any such matter is applicable to Union Territories*". So, if the Service Commission and the services are not there in relation to Union Territories then it was alleged or it was argued that that such matter shall not be inferred that it is given to the State, it is still continuous with the Centre. Now 2018 judgment says the expression "*insofar as any such matter is applicable to Union Territories*" must be read in an inclusive term so that whatever is excluded is given effect to and rest everything should be included.

It says exclusive executive power of the Union over all the Entries in List I and Entries 1, 2 and 18 of List II and all the Entries in List II and List III excluded by phrase "*insofar as any such matter is applicable to Union Territories*". And non-exclusive executive power of the Union is all Entries in List II and List III of Schedule VII other than the Entries on police, land or public order. It is to be excised through the route which is given under Article 239AA(4) that is LG should work on the advice and if there is a dispute then the matter should be referred to the President. It was suggested that exclusive executive power under the Constitution is available only to the State and not to any Union Territory and non-exclusive executive power to Delhi it is suggested that Entries in List II and List III of the Schedule VII again other than those land, police and public order matter. They are non-exclusive with the government of Delhi. So, it is all about how do we read inclusivity and exclusivity on the subject matter which is applicable to Union Territories because they from there the point of contention is arising. In 2020 the court has said in a split verdict as I said that Justice Sikri says that in order to make the administration smooth in order to make the functioning of the government smooth you allow the government to also have a control over services.

Justice Sikri says that transfers and postings of officers of and above the rank of Joint Secretary are under the powers of LG other powers including DANICS officers are through the Chief Minister to LG. Justice Bhushan took a different view and said that services are not at all with the Delhi government because these are there with the Union Territory and to be directly taken care by the Centre. So, the question is that how the court has read and interpreted the expression "*insofar as any such matter is applicable to Union Territories*". Justice Bhushan says that legislative power of a State by referring to the phrase "*with respect to any matters enumerated in List II in the 7th Schedule*" in relation to Article 246(3) with that of phrase "*insofar as any such matter is applicable to Union Territories*" used in Article 239AA(4)(a)", meaning thereby that if the subject matter is not connected with the State let the legislative power not get extended.

In 2023 Constitution Bench comes up with the ruling and suggest that unless a subject matter is specifically excluded there has to be a kind of inclusive reading. It says that "*insofar as any such matter is applicable to Union Territories*" cannot be read further to exclude the legislative power, whatever is excluded that alone should be given effect not the otherwise. Let us not infer something additional to it because after all it is done for furthering the interest of parliamentary democracy.

There is an elected government which is accountable to the people which is there for catering the need of local population. The court said that when you look at National Capital Territory of Delhi it is a sui generis model and not to be seen as or no similarity should be drawn with Union Territories. As I said Ordinance has been introduced through that Ordinance a National Capital Civil Services Authority was created to make recommendations to LG regarding the transfer and posting of officers. The Ordinance has now been converted into the parliamentary legislation - Government of National Capital Territory of Delhi (Amendment) Act 2023.

The Act added a Part 4A (Section 45A – Section 45K) in the National Capital Territory Act where services were included. It was suggested that there shall be National Capital Civil Services Authority which shall deal with the issue of transfer posting and they will recommend it to the Lieutenant Governor. The Chief minister shall be the ex officio Chairperson, Chief Secretary and Principal Home Secretary will be the members of the same. It says that if there is any difference of opinion between the Lieutenant Governor and the Authority then the decision of the Lieutenant Governor shall prevail regarding transfers and posting of all group officers and officers of DANICS, regarding vigilance and non-vigilance matters for the purpose of initiation of disciplinary proceedings. It says that the Authority has the power to recommend to the LG barring officers handling the matter to public order, land and police. Further Section 45D deals with appointing authorities. It says that for body created under parliamentary law, the President shall have the authority, for body created under Legislative Assembly it is the National Capital Civil Service Authority shall have the recommending body.

The matter has been referred to the Constitution Bench. Here for challenging the constitutionality Article 239AA(7) has also been brought into contest where it says that Article 239AA(7) indicates that the law made by Parliament cannot alter the constitutional structure for Delhi under Article 239AA. However, reading of Article 239AA(7) denotes that the law can alter constitutional structure. So how this interpretation shall happen in relation to 2023 law to what extent Article 239AA(7) restricts the power of the Parliament for changing the structuring of Delhi that is what is the now an issue before the Constitution Bench we shall take up the constitutionality of the Amendment Act of 2023. These are the references for this session.

Thank you very much. Thank you.