

Control of ‘Services’ in Delhi The Centre Counters the Supreme Court

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Summary

Issues around functional autonomy and jurisdiction of the elected government of Delhi have evoked controversy from the very inception of the Assembly. From 1952, when it was first created, irrespective of the political dispensation, there has been constant bickering about the extent of functional autonomy that the elected government can exercise. The 1991 constitution amendment act inserted Article 239AA to provide a legislative assembly. However, issues regarding the control of ‘services’ in the government continued to create controversy. In a landmark judgement on 11 May 2023, the Supreme Court decreed that this power rests with the elected government. However, the central government has disagreed by issuing an ordinance to restore this power to the Lieutenant Governor. It appears this issue will continue to be contested in parliament and the court.

Introduction

Pre-independence, the British government had classified Delhi, under the Government of India Act 1919 and 1935, as the Chief Commissioner’s (CC) province. Delhi had several municipalities, and its administration was being looked after by the CC. This would be equivalent to a present-day union territory. Post-independence, the Delhi Legislative Assembly¹ was established on 7 March 1952 and constituted under the government – Part C States Act 1951. It created a ‘hybrid structure’ which has had a tumultuous history with its political and administrative set-up undergoing several changes. The 1952 Assembly consisted of 48 members. There was a provision for a Council of Ministers to aid and advise the CC in the exercise of his functions in relation to matters in which the State Assembly was given powers to make laws. The first Council of Ministers was headed by Brahm Prakash (Indian National Congress). However, very soon, differences developed between the Delhi administration, the CC and the Union Home Minister (G B Pant) concerning issues of functional autonomy and jurisdiction as a consequence of which Prakash resigned.

Thereafter, in pursuance of the recommendations of the States Reorganisation Commission (1955), Delhi ceased to be a Part C State with effect from 1 November 1956. The Delhi Legislative Assembly and the Council of Ministers were abolished, and Delhi became a Union Territory under the direct administration of the President. In accordance with another recommendation of the commission, the Delhi Municipal Corporation Act of 1957 was enacted constituting a Municipal Corporation for the whole of Delhi with members elected on the basis of adult franchise. However, there continued to be considerable pressure on public opinion for providing a democratic set-up and a responsive administration for Delhi.

¹ “Legislative Assembly of National Capital Territory of Delhi”,
<http://delhiassembly.nic.in/DYP/Docs/AboutDelhiAssembly.pdf>.

In partial fulfilment of this demand, and on the basis of recommendations of the Administrative Reforms Commission, the Delhi Administration Act of 1966 was enacted. This act provided for a deliberative body called the Metropolitan Council to have recommendatory powers. The Metropolitan Council was a unicameral democratic body comprising 56 elected members and five members nominated by the President

This body had no legislative powers and there was a constant demand across all political hues to grant statehood to Delhi. To address public opinion, the Sarkaria Committee² was appointed to recommend an appropriate administrative set-up for Delhi. The recommendations of this committee led to the parliament passing the constitution (69th Amendment) Act, 1991, which inserted Articles 239AA and 239BB in the constitution and provided for a legislative assembly in Delhi. The parliament also passed the Government of National Capital Territory of Delhi Act, 1991, to supplement the constitutional provisions relating to the legislative assembly and the council of ministers. The bill restored Delhi's status as a Union Territory with a legislative assembly, Council of Ministers and an elected Chief Minister. This structure first helped the Bharatiya Janata Party (BJP) and then the Congress to set up government in the Assembly. However, the peculiar feature of the demand for full statehood of Delhi has been that whilst political parties in opposition have constantly sought statehood, when they came into power, they kept that demand on the back burner. This applied to the Congress-led United Progressive Alliance government (2004-2014) and, subsequently, the BJP-led National Democratic Alliance government. In consonance with this pattern, the present Aam Aadmi Party (AAP) government in Delhi continues to vigorously agitate the demand to grant full statehood to Delhi from the time it came to power in 2015.

It is thus evident that differences between the Assembly leadership and the central government have prevailed from inception despite there having been a “double engine sarkar” (as the present central dispensation is fond of ‘type casting’ states which have the same political party in power as the centre) in the Assembly and central government at times.

The administrative structure of Delhi has been mapped quite similarly to other federal capitals such as Canberra in Australia, Washington DC in the United States and London in the United Kingdom. The territory of Washington DC is carved out of the states of Virginia and Maryland. Residents of Washington are empowered to vote in the presidential election but not for Congress.

As per the Constitution Amendment Act, 1991, the Delhi assembly comprises 70 elected members. The Assembly has the power to make laws with respect to all the matters in the State List or in the Concurrent List of the Constitution of India except public order, police and land. As is the provision in states for governors, the Lieutenant Governor (LG) has the power to summon, prorogue and dissolve the assembly.

² Post inception of the committee, Justice Sarkaria resigned, and the committee's findings and its report were completed and released under Justice S Balakrishnan.

Current Predicament

The present imbroglio between the central government and the Delhi government commenced immediately after the AAP came to power in Delhi. In that year, the Home Ministry issued an order stating that the LG would exercise control over services – implying that transfers and postings orders of, inter alia, Indian Administrative Service (IAS) officers serving in the Delhi government would be issued by the LG. This was unacceptable to the Delhi government which challenged the order in the High Court on the reasoning that a duly elected government must exercise power over its officers to ensure accountability. However, the High Court upheld the notification of the Home Ministry in 2017. The Delhi government went in and appealed to the Supreme Court. In the Supreme Court, a two-judge bench referred the issue to a larger bench. It was in 2018 that a five-judge bench presided over by the Chief Justice of India (CJI) Dipak Misra decided that the duly elected government was constitutionally empowered to exercise all executive powers. It maintained, “The scheme as delineated by the 1991 Act and 1993 Rules clearly indicates that the LG has to be kept informed of all agendas and decisions taken. The purpose of communication of all decisions is to keep him posted with the administration of Delhi. The communication of all decisions is necessary to enable him to go through so as to enable him to exercise the powers as conceded to him under proviso to sub-clause (4) as well as under the 1991 Act and 1993 Rules. The purpose of communication is not to obtain the concurrence of LG.”³

In a veiled reference to the constant public bickering between the CC and the LG, the Court added, “From persons holding high office, it is expected that they shall conduct themselves in faithful discharge of their duties so as to ensure smooth running of administration so that rights can be protected.”⁴

After deciding on the constitutional issues, this bench referred the specific issues to another bench. When these matters were placed before a two-judge bench, they delivered a split verdict and thus the matter was referred to a five-judge constitution bench.

A constitution bench presided over by the CJI delivered a landmark unanimous judgement on 11 May 2023 settling the dispute between the Delhi government and the Union government by establishing the primacy of federalism and duly elected representative government. The predominant theme of the judgement empowers an elected government in the spirit of the constitution and reiterates the ‘sui generis’ character of the Delhi government. In pointing to the ‘sui generis’ model of the Delhi government, the Court has clearly laid down that all Union Territories cannot be considered equal. It maintained that Union Territories with a legislature are more akin to states and thus their executive powers would extend to all matters on which the assembly can legislate. It upholds the principle that Delhi must be governed by its elected representatives. The judgement goes on to negate the plea taken by the Union government in the Court that the “one nation one government” characteristic will strengthen the political fabric of the country and observed

³ Government of NCT & Delhi vs. Union of India & Another, Supreme Court of India, Civil Appeal No. 2357 of 2017 (2017). https://main.sci.gov.in/supremecourt/2016/29357/29357_2016_Judgement_04-Jul-2018.pdf

⁴ Ibid.

that “recognizing regional aspirations strengthens the unity of the country and embodies the spirit of democracy”.⁵

In what has been an ungainly spat between the elected government and the LG , which seemed to have become more strident in the last year or so, over the agency to exercise control over IAS officers working in the Delhi government, the Supreme Court has made it clear that bureaucrats in that administration must be accountable to the elected Council of Ministers, except in matters related to police, public order and land. The Court ruled that the Delhi government has legislative and executive powers over administrative services in the national capital. It observed, “If a democratically elected government is not given the power to control the officers, the principle of accountability will be redundant. If the officers stop reporting to the ministers or do not abide by their directions, the principle of collective responsibility is affected.”⁶ This observation of the Court has squarely settled the contentious issue between the CC and the LG, wherein the Delhi government had constantly been bemoaning that LG Vinai Kumar Saxena transgressed his constitutional powers by issuing orders directly to officials, without the concurrence of ministers. On the other hand, the LG maintained that he was duly empowered to do so. The Court has put the final seal on the issue by observing, “It has to be ensured that governance of states is not taken over by the Union”.⁷

Referring to the provision in Article 239AA, the Court has opined that it specifically excludes land, police and public order from the purview of the legislative powers of the Delhi government. The Court observed, “The legislative and executive power of Delhi over Entry 41 (Services) shall not extend over to services related to public order, police and land. However, legislative and executive power over such services such as Indian administrative services, or joint card of services, which are relevant for the implementation of policies and vision of NCT of Delhi in terms of day-to-day administration of the region, shall live with Delhi.”⁸

Ordinance by the Central Government

The landmark judgement of the Supreme Court notwithstanding, it seems that this contentious issue has not reached finality. On 20 May 2023, the central government promulgated an Ordinance to circumvent the verdict of the court and provide the Centre/LG with over-riding powers on “services” in the Delhi government. The Ordinance sets up a National Capital Civil Service Authority. The authority’s only function is to recommend transfers, postings and disciplinary action for officers. The body is to be headed by the Chief

⁵ Government of NCT & Delhi vs. Union of India & Another, Supreme Court of India, Civil Appeal No. 2357 of 2017, Judgement (2017).

https://main.sci.gov.in/supremecourt/2016/29357/29357_2016_1_1501_44512_Judgement_11-May-2023.pdf.

⁶ Ananthakrishnan G, “Delhi unique among UTs: SC gives state government total control over services in NCT”, *The Indian Express*, 12 May 2023, <https://indianexpress.com/article/india/delhi-govt-centre-supreme-court-verdict-8603451/>.

⁷ Ibid.

⁸ Ibid.

Minister,⁹ with the chief secretary and principal secretary, home, and two secretaries from the central government, as members. All matters required to be decided by the authority are to be decided by a majority of votes of the members present and voting. In case of any difference between the members, the LG is to have the final say. Two members will comprise the quorum. The contentious issue that may arise is that on the one hand, a quorum of two would enable only the two secretaries to meet and take a decision even if the CM were not present. On the other hand, even if the CM was present, the two secretaries could take a unified stand and thus overrule the CM. This provision may thus run afoul of the Court.

Another feature in the Ordinance which has raised adverse comments is the insertion of a new section 3A, in the Government of National Capital Territory Act (1991), which begins with the words “notwithstanding anything contained in any judgement, order or decree of any court”. This would imply that the parliament can make any law nullifying a Supreme Court’s verdict. This goes counter to a verdict of the Court which had earlier held that the legislature has no power to declare that the decision given by the Court is not binding or is of no effect.¹⁰

The Ordinance obviously has not found acceptability by any other political party. It has been labelled as an attempt by the central government to continue to exercise powers at any cost even if they have to oppose a verdict by the supreme court. All opposition parties are gearing up to ensure that, besides contesting the Ordinance in the Court, the Bill to replace it in parliament is not allowed to pass. Though the BJP has a majority in the Lok Sabha, it is short of a majority in the Rajya Sabha where the attempt to block the Bill will be made. Thus evidently, we have not seen the end of this tussle yet.

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⁹ Jatin Anand and Mallica Joshi, “Supreme Court empowered Delhi govt, Centre gets ordinance to put bureaucrats over CM”, *The Indian Express*, 20 May 2023, <https://indianexpress.com/article/cities/delhi/delhi-govt-vs-l-g-centre-issues-ordinance-on-services-days-after-sc-verdict-8619010/>.

¹⁰ Peoples Union of Civil liberties (PUCL) vs Union of India (AIR 1997 SC 568) and another vs Union of India (AIR 2003 SC 2363).