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## Killing the suspense over the Delhi Assembly: Part I

**Guest Bloggers: Shraddha Kulhari and Sujoy Chatterjee**

Post the 2014 General Elections, there has been renewed interest in the political developments surrounding the Delhi Legislative Assembly, kept in suspended animation since mid-February 2014. However, irrespective of the political fortunes of the fifth Delhi Assembly, there are legal issues involved which require deliberation. We believe that these issues are *de hors* the present political developments, inasmuch as the constitutional principles involved are universally applicable for posterity and are not constrained or influenced by the vagaries of electoral politics. Therefore, an informed opinion on the hows and whys of keeping the Assembly in suspended animation should be formed by considering the relevant legal principles, and not the ultimate fate of the fifth Assembly.

In this post, we discuss the limited point of how Delhi's unique governance structure, coupled with the role of its Lt. Governor, may have contributed to the suspended animation episode.

### Status of Delhi

Delhi's position in our constitutional scheme has over the years undergone numerous changes. Its historical evolution is described eruditely by a 9-judge Bench of the Supreme Court ("SC") in *NDMC v. State of Punjab* [pp.47-48]. Relevant for the purposes of this post is its present status, specifically the following:

- i. Delhi is a Union Territory ("UT") administered by the Union through an Administrator called the Lt. Governor of Delhi [Schedule I of the Constitution read with Article 239A(1) and Article 239(1)];
- ii. It has a Legislative Assembly [Article 239AA(2) & (3) read with Part II of the [Government of National Capital Territory of Delhi Act, 1991](#) ("GNCTD Act")]; and
- iii. It has a Council of Ministers ("CoM") to aid and advise the Lt. Governor of Delhi in the exercise of his functions [Article 239AA(4) read with Part IV of the GNCTD Act].

*NDMC* had noted that "various UTs are in different stages of evolution" and that "some are on their way to full Statehood" [p.59]. In other words, while all the UTs in existence today fall within point (i), Delhi and Puducherry are the only UTs which exhibit points (ii) and (iii) and Delhi is the only UT which has been conferred points (ii) and (iii) through Constitutional provisions [pp.5-6]. However, *NDMC* also cautioned that in spite of its

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evolutionary one-upmanship over the other UTs, Delhi remains a UT and should not be equated with a State [p.31].

The analysis of *NDMC* regarding Delhi's partial evolution towards Statehood, i.e., exhibiting certain trappings of Statehood (having a Legislative Assembly and a CoM) and yet being subordinate to the Union by virtue of its status as a UT, is amply borne out by a bare reading of Article 239AA(3), Article 246(4) and Section 49 of the GNCTD Act. We believe that this partial evolution has resulted in certain 'mutant'<sup>1</sup> constitutional conundrums which are peculiar to Delhi.<sup>2</sup> A ripe example of a latent mutation manifesting itself in the recent past is *Navendra Kumar v. Union of India*, where a *prima facie* absurd consequence (i.e., the Union's competence to create an investigating agency for the entire country through a law enacted specifically for Delhi) was successfully challenged before the Gauhati High Court.<sup>3</sup> The suspended animation episode has thrown up a more patent 'mutant', which has expressed itself through the role of the Lt. Governor of Delhi as envisioned under Article 239AA(4).

### Position of the Lt. Governor

Article 239AA(4) provides that a CoM will aid and advise the Lt. Governor of Delhi in the discharge of his functions. The proviso to Article 239AA(4) reads as follows:

*"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."*

(emphasis added by authors)

Article 239AA(4) expressly recognises the possibility of the Lt. Governor disagreeing with the recommendations of his CoM. However, unlike the proviso to Article 74(1), the proviso to Article 239AA(4) apparently has enough significance to colour the lead provision itself. In *Devji Vallabh bhai Tandel v. Administrator of Goa*, a 3-judge Bench of the SC was considering the powers of the Administrator of a UT vis-à-vis his CoM in the context of Section 44(1) of the *Government of Union Territories Act, 1963* (which is analogous to Article 239AA(4) including its proviso). The SC held that the Administrator of a UT is never bound by the advice of his CoM, and that in the event of a disagreement between the Administrator and his CoM on any matter, the Administrator is required to refer the matter to the President for his decision [p.7].

Since Section 44(1) is textually analogous to Article 239AA(4), there is no reason for the rationale of *Tandel* to be inapplicable in the context of Article 239AA(4) and the Lt. Governor of Delhi. Therefore, *Tandel* suggests that the Lt. Governor is empowered to disagree with his CoM on any issue. However, two piquant questions arise at this juncture, on which *Tandel* is starkly silent:

- i. When the Lt. Governor has a difference of opinion with his CoM's recommendations, is it an expression of his own disagreement or the Union's disagreement which is voiced through him?; and
- ii. Merely because the Lt. Governor *can* disagree with his CoM on any issue, is there no legal fetter on *when* he can disagree?

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## Game-Maker/Game-Breaker

On point (i), the GNCTD Act provides some guidance. This Act, which supplements the provisions of the Constitution relating to the Delhi Assembly and its CoM, specifically mentions actions which the Lt. Governor can take only after prior approval of the Union [Sections 7(5), 19, 30(1)(b), 33(1) and 43(1)]. Interestingly, disagreeing with the CoM's recommendation is not a specific part of this category. Does this imply that when the Lt. Governor disagrees with his CoM on any matter which is not covered by the Sections mentioned above, it is his own disagreement and not the disagreement of the Union which results in the matter being referred to the President for the Union's opinion?<sup>4</sup> If that be so, it would mean that when erstwhile Chief Minister Arvind Kejriwal submitted the Delhi CoM's recommendation to dissolve the Assembly, it was Lt. Governor Najeeb Jung's disagreement with this recommendation and not the disagreement of the Union CoM which led to the matter being referred to the President.

In that case, point (ii) is of critical importance. The absence of any fetters on when the Lt. Governor can disagree with his CoM would imply that he can disagree with his CoM's recommendations at will. Such an interpretation places the Lt. Governor in the position of a game-maker who decides when the Delhi CoM's recommendation needs to be approved or trumped by the Union CoM. Of course, it may be argued that Article 14, which predicates against unreasonable and arbitrary action, mandates that the Lt. Governor temper his decisions with rationality and apply his mind to the relevant facts and circumstances of every recommendation before disagreeing with his CoM. Whether applying one's mind to the prevailing political circumstances in Delhi could justifiably have led to the Lt. Governor disagreeing with his CoM's recommendation for dissolving the Assembly requires a separate discussion and we have not covered those aspects in this post.

However, the above analysis seems to suggest that Delhi's present governance structure places the Lt. Governor on a pedestal which is very different from that of the President or the Governor. Keeping political considerations aside, the suspended animation episode has provided us a wonderful opportunity to understand the contours of this hitherto not-so-prominent 'mutant'.

1 These issues, much like the mutants from the comic series X-Men, exhibit traits which are different from the conventional, thrive within the organic framework which created them and may not always be understood for who/what they are, but need not necessarily be treated as vices and sought to be cured unless their potential is abused.

2 Theoretically, Puducherry should also manifest such mutations. However, being the national capital of India makes Delhi a more thriving environment for mutants.

3 The correctness of *Navendra Kumar* is beyond the scope of this post.

4 Section 49 of the GNCTD Act may theoretically come into play here, since this provision allows the President to give directions to the Lt. Governor. However, unless there is a singular sweeping direction under Section 49 that covers every conceivable recommendation of the Delhi CoM, the Lt. Governor will more often than not have a free hand.

(The authors are advocates based out of New Delhi. Part Two of the post will appear tomorrow)

Posted by [V.Venkatesan](#) at 3:31 PM



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