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Essay

National Capital Territory of Delhi: Towards a Unique Diarchy (...and Away from a Monarchy)

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Lieutenant Governor Najeeb Jung administers the oath of office and secrecy to Delhi Chief Minister Arvind Kejriwal at Ramlila Maidan in New Delhi on February 2, 2015. File Photo: PTI

*In this essay, **Rajgopal Saikumar** argues that the inherent diarchy in capital cities globally has to be recognised. Demands for full statehood or greater central control are both untenable.*

Monsoon refusing to rain down on Delhi because it's not sure under whose jurisdiction it will fall - RushdieExplainsIndia(Twitter, June 20, 2015)

1. Balancing Inherent Tensions in Diarchies:

Capital cities in several parts of the world face tension between the national government operating in the capital and local representative bodies of the capital. Capital cities are symbolic of the entire nation; they are the seat of the national government and host national institutions such as the legislature, the judiciary, national museums, universities, foreign embassies etc. But capitals like Delhi are also city-States in themselves. With a population of over 1.67 crores, Delhi is more densely populated than several full-fledged States, such as Sikkim, Mizoram, Arunachal Pradesh etc ¹. It is one of the most diverse and multicultural regions in the country, a land of migrants, and a hotspot of industry, commerce, art and culture. On one hand, the capital represents an entire nation while on the other hand, the residents of the capital lay claim for greater self-governance and enfranchisement so as to ensure that their own grievances are democratically heard through proper and accountable channels of governance. Political and administrative design must aim at keeping this intricate balance between local governance of the city on one hand and its role as a home to the national government on the other. Delhi, by its very nature, occupies a position at this cusp, and hence, tensions are inherent to its being. A lot of the recent writings on the dispute between the Delhi Government and its Lieutenant Governor have tended to take black-and-white positions, either treating Delhi Government as a State Government or conflating it with other Union Territories. These conflations occlude the peculiar diarchy that a capital city like Delhi otherwise is. This essay is an urge to turn our focus back on to the diarchic nature of the capital, and carve out its “in-between-ness” so to speak, rather than occlude our perceptions with simplistic conflations such as demands for “full-statehood” or “greater centralised control”, both of which are untenable positions to take.

1.2: Recent Confrontations in Delhi

To be fair, debates over the status of Delhi began with the birth of the Indian republic, and this, as I suggested above, is because of the inherent nature of capital cities globally. But never before has the contestations turned bitter to the extent that basic civil and political rights of Delhi's residents have been at stake. The stand off between Chief Minister Arvind Kejriwal and Lieutenant Governor (LG) Najeeb Jung, which broke out over the appointment of a temporary Chief Secretary, had exploded into a full blown battle between Aam Aadmi Party (AAP) and the Bhartiya Janta Party (BJP). The LG's unilateral decision to appoint Shakuntala Gamlin as acting Chief Secretary was objected to by the Delhi Government on grounds that the LG did not have the power to make the appointment without ‘aid and advice’ of the Chief Minister and his Council of Ministers (CoM). Kejriwal politicised this largely legal issue by accusing the LG of strategically colluding with BJP at the centre to protect the corporates. This face off was immediately followed by a Home Ministry notification, dated May 21, to the Delhi Government restraining its Anti-Corruption Branch from acting against Central Government officials in the city. The AAP considered this to be a frontal attack on its core agenda of curbing corruption and crony capitalism. Kejriwal then issued a notification to all bureaucrats in the city to not take any orders from the LG without consulting his ministers, and even attempted impeachment proceedings against him at the Assembly. Adding to this chaos was the Delhi High Court judgment in *Anil Kumar v. GNCT of Delhi*, dated May 25, holding that the May 21 Home Ministry notification was ‘suspect’. The Supreme Court, on hearing the appeal, did not stay the High Court order, but observed that the ruling on the Home Ministry notification was not binding. Hence, the judicial intervention until now has only added to the confusion. The relation between the Centre and the Delhi Government took another bitter turn recently with the arrest of Delhi Law Minister Jitender Singh Tomar, who has been charged with obtaining a fake law degree from a

university in Bihar. The arrest was widely felt to be an excessive use of force, unjustified and unreasonable in law, and the AAP went further in claiming that the arrest was a “political settling of scores”² by a vindictive BJP.

1.3: Framing the Problem: Legislative, not Judicial

Given this confrontational relation between the local government and the national government, there are two ways to frame these recent problems:

Either each of these disputes maybe treated as an independent issue with *ad hoc* resolutions. For instance, whether the unilateral appointment of a temporary Chief Secretary by the LG was valid; whether the May 21 Home Ministry notification to Delhi is constitutional; what are the scope and powers of Delhi’s Anti-Corruption Board; whether the arrest of Delhi’s Law Minister was a misuse of power and an excessive use of force etc. This approach tends to usually lead to judicial interventions, which are ultimately a task of reinterpreting existing provisions, and hence a temporary solution at the most.

Or, the other approach is to see each of these above issues as evidence of a need to revamp and re-structure the political and administrative devolution of powers through fresh legislative intervention. This essay considers the latter approach as more fruitful in the long run. *First*, because the constitutional and statutory provisions governing Delhi are vague and unclear (elaborated in the next section); *Second*, judicial and purely legalistic interpretations will not tackle the crux of the problem- which is, not whether Delhi is a Union Territory or a State, but the precise, minor and specific administrative details on the exact mode of sharing of powers between the two; *Third*, judicial intervention is a more adversarial response, further stifling the relation between the centre and the local government; what is needed is cooperation and not conflict; and *finally*, a legislative intervention can be more comprehensive, with scope for unique and innovative new models devised specifically for the city.

2. Murky Laws: Rewriting, not Reinterpretation

The Supreme Court in *NDMC v. State of Punjab*³ observed that Delhi is an evolving Union Territory with trappings of a State. This places Delhi in a peculiar position, raising several constitutional conundrums having little precedent. This evolutionary quasi-status of Delhi is obvious from a bare reading of relevant constitutional and statutory provisions. Delhi is classified as a Union Territory in Schedule I of the Constitution. Yet it is not governed by Article 239 which covers Union Territories in general, but is covered by the special provision of Article 239AA. It has a Legislative Assembly [Article 239AA(2) and (3) read with Government of National Capital Territory of Delhi Act, 1991] and Council of Ministers to aid and advise the LG [Article 239AA(4)].

Relevant to issues such as whether the LG has the power to unilaterally appoint top bureaucratic positions such as the Chief Secretary hangs on a reading of Article 239AA(4), which reads as follows:

(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. (emphasis added)

The following points are clear from above:

(a) the LG will have to take decisions based only on the “aid and advice” of the CM in exercise of all matters on which the Legislative Assembly has power to make laws.

(b) Consequently, the legislative assembly of Delhi has power to make laws on all matters in the State List and the Concurrent List in the VII Schedule of the Constitution, except entries related to public order, police and land. (See, Article 239AA(3));

(c) for all other matters not in (a) and (b), the LG can act in his own discretion but only when there is a specific law conferring this discretion on him.

(d) all disputes between the LG and the Ministers shall be referred to the President.

The crucial question then is what is the nature of the “aid and advice” that the CoM gives the LG. If the advice is binding, then the LG cannot make unilateral appointments to posts such as the Chief Secretary. Some have argued that the LG is not bound by the aid and advice of the CoM based on a reading of *Devji Vallabhbhai Tandel v. Administrator of Goa* ⁴, where a three-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. Here the Supreme Court 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 matter is referred to the President for his decision ⁵. The other interpretation of “aid and advice” is that the advice of the CoM is binding on the LG. Senior lawyers like Indira Jaisingh ⁶ and Rajeev Dhavan ⁷ took this position by relying on *Shamsher Singh v. State of Punjab* ⁸.

Now Article 239AA is a badly framed provision precisely because both these interpretations are possible. It is arguable that *Devji* is not applicable because the facts pertain to Goa, while Delhi, being a national capital, is essentially different from other U.T. Relying completely on *Devji* will be faulty also because it does not properly account for the legislative intent (as will be discussed in the next part of the essay) behind re-introducing a Legislative Assembly and re-structuring the administration of Delhi in the early 1990 via the Constitutional amendment and the GNCT of Delhi Act, 1991. Similarly, a complete reliance on *Shamsher Singh* is also mistaken because that judgment pertains to States and not to quasi-States like Delhi.

Apart from Article 239AA(4), another instance of vagueness in the law governing Delhi is in the treatment of its police. The recent dispute over powers and jurisdiction of Anti-Corruption Branch (ACB) brings out this confusion. Article 239AA(3)(a) excludes from the powers of Delhi’s legislative assembly, entries relating to the police, public order and land. Although ‘police’ is excluded here, “Criminal Procedure” under Entry 2 of the Concurrent List has not been excluded from the powers of the Legislative Assembly of Delhi. There is little doubt that the Code of Criminal Procedure deals with powers assigned to the police in various ranks, for investigation, prevention, prosecution of offences etc. including corruption. Now if the Delhi government has no control over its police, then Entry 2 of the Concurrent list has no meaning. The lack of clarity is evident because the ACB can be excluded from Delhi Government’s scope by invoking the entry on ‘Police’ in State List, and it can be brought within the scope of the government by invoking the entry of ‘Criminal Procedure’ under Concurrent list.

The short point being made is that judicial interpretation of existing provisions will not suffice because the law itself is worded in vagueness and lacks clarity. Hence, it is not a reinterpretation of the provision but a rewriting of it that is needed.

3. Legal History and Legislative Intent:

Delhi was, prior to 1911, classified as a District in the State of Punjab. In 1911, with the transfer of capital from Calcutta to Delhi, the Governor-General took over the region and it was governed under Delhi Laws Act, 1912 and 1915. Later, under the Government of India Act, 1919 and 1935, Delhi was classified as a Chief Commissioner's Province. In fact, the history of Union Territories in India also harks back to the creation of these "Chief Commissioner's Provinces". So Delhi was a Chief Commissioner's Province, along with British Baluchistan, Ajmer-Merwara, Andaman & Nicobar Islands, Panth-Piploda and Coorg and these regions were administered by the Governor-General acting through a Chief Commissioner.

3.1 Delhi after Independence:

Debates on administrative structure, scope of powers and control over Delhi have been a matter of dispute right from the birth of the Indian republic ⁹. The Sitaramayya Committee report was in conflict with the Indian Constitution's Drafting Committee, and these differences were openly debated in the Constituent Assembly, the resolution of which was only to be postponed by Prime Minister Nehru's intervention. The Sitaramayya Committee was set up in July, 1947 to consider the constitutional changes required in the administration of Chief Commissioner's Provinces. With regards to Delhi, the Committee observed that the Centre had to take special responsibility for the governance and financial solvency of Delhi, yet it must "not be deprived of the right of self-government enjoyed by the rest of their countrymen living in the smallest of the villages...." But the Drafting Committee of the Indian Constitution differed from the Committee recommendations, holding that Delhi, as the capital of India, could not be placed under local administration but rather has to be treated as the national capital similar to that in the U.S., or in Australia. It is important to note that Delhi had a representative in the Constituent Assembly, Deshbandhu Gupta, who spoke for its residents. Gupta expressed his disapproval of the Drafting Committee's rejection of Sitaramayya Committee recommendations, and demanded more local governance and greater enfranchisement be seriously considered. But this clash remained unresolved due to Nehru's intervention, as he merely postponed the conundrum for a future resolution. On the Sitaramayya Committee report, Nehru suggested that it was no longer relevant as "ever since that Committee was appointed the world has changed; India has changed and Delhi has changed vitally." Nehru went on to say that he "sympathises greatly with those citizens of Delhi and representatives of Delhi" but "Delhi is not a static situation", it is constantly changing, it is therefore better to not put down provisions relating to its status in the Constitution, but leave it open for an Act of Parliament to be moulded per future circumstances. Consequently, Delhi was classified as a Part 'C' State (what later came to be known as Union Territories) and the Government of Part 'C' States Act, 1951 was enacted. Delhi had a unicameral, directly elected legislature, which lasted only until 1956. The State Reorganisation Commission, set up in 1953, reported that Part C States were neither financially viable nor functionally efficient, and should either be amalgamated with neighbouring States or made a centrally administered territory. Consequently the 7th Amendment to the Constitution was passed and "States" and "Union Territories", as we refer to them today, were created. As a result, Delhi's Legislative Assembly and Council of Ministers ceased to exist in 1956.

By the late-1980, demand for changes in Delhi's political and administrative structure started brewing once again. The Committee on Reorganisation of Delhi was set up in 1989 to take into account the vastly changing nature of the capital city. Accepting the recommendations of this committee, the Constitution (69th Amendment) Act, 1991,

was passed to insert Article 239AA in the Constitution, and the Government of NCT of Delhi Act, 1991, was enacted to give effect to the reforms.

It is a well settled common law principle that the object of interpretation of laws is to discern the intention of the legislature while enacting a law. As the statute was based primarily on the Committee report, the right judicial interpretations of Article 239AA and the Government of NCT of Delhi Act, 1991, depended on a close reading of this report and the parliamentary debates on it. To sum up: Parliament recognised the changing needs of Delhi and re-introduced a legislative assembly, and strengthened its representative democracy, but in the end, fell just short of granting it full-statehood. The recent debates and discussions arguing for greater dominance of the central government over Delhi have failed to adequately account for this aspect.

4. Way Forward:

Representative Democracy in Principle

The first step forward has to be a principled one: In a democracy, the legislature is the repository of the 'will of the people', and it is the 'will' that constitutes the nation-state through a Constitution. This principle is part of the basic structure of the Indian Constitution, reaffirmed in *S.R. Bommai v. Union of India* ¹⁰. So in balancing 'Delhi as a seat of the national government' and 'Delhi as self-governed polity', there can be no compromise on this basic democratic principle of protecting the 'will of the people' realised through its democratically elected government. Once this principle is firmly agreed upon, the way forward is more about pragmatism, efficiency, workability, trial-and-error etc.

Sadly, this principle has also been on shaky ground in the case of Delhi.

The status of the national capital came up in *NDMC v. State of Punjab* before a 9 judge Bench of the Supreme Court, and in *Delhi Bar Assn (Regd.) v. UoI* ¹¹. The apex court in these cases affirmed the inferiority of the Delhi Legislative Assembly to Parliament, holding that "in the NCT of Delhi the laws made by the Delhi Legislative Assembly are always subordinate to the laws of the Parliament..." As Senior Advocate Gopal Subramaniam's recent legal opinion to the Delhi Government suggests, these judgments of the Supreme Court violate the basic structure of the Constitution ¹². Even by common-sense, it seems absurd to think that BJP, which won only three seats in the Delhi elections this year, as opposed to the AAP winning 67 seats, gets to decide how Delhi is run and not the latter ¹³.

4.1 Comparing Global Capitals:

Once we affirm the basic structure that guides the Indian constitution, a comparative analysis of other capital cities might be useful. A template for such analysis can account for the following aspects ¹⁴: (a) National interest; (b) Fiscal capacity: to what extent does the national government compensate the capital city for serving its functions as a capital; (c) Local Government Autonomy: to what extent can the local elected government decide how to govern the city, balancing it with larger national interests such as security; (d) Local Fiscal Autonomy: to what extent can the capital city decide what to tax and how to use the money for local governance.

- In comparing Delhi with other capitals globally, the demographic size of the city has to be considered. For instance, in terms of demography, Canberra or Ottawa would be a poor comparison to make with Delhi, while cities like London or Mexico City will be more fruitful.

- “Political capitals” such as Washington, D.C. and Canberra are capital cities established purely for their political functions; while “multi-functional capitals” ¹⁵, like New Delhi, are megacities, with long histories and dominant economies, its political function as a capital city is only one of its various other features.

- Certain capitals like Canberra and Washington, D.C. are treated as ‘federal territories’ where the federal government has substantial control over the capital. Washington D.C. is a federally administered district established under the American Constitution. Legislative actions taken by the city are subject to approval by Congress, its budget must be approved by the Congress and the President, its finances have federal constraints, and as Hal Wolman and others point out, Washington, D.C. “stands out for the lack of representation its citizens have in the national political system” ¹⁶. Canberra similarly is located in the Australian Capital Territory (ACT), a federal territory governed by the National Capital Authority which is ultimately answerable to the Federal legislature. In Brussels as well, laws of the national government take precedence over laws of the local government, and all conflicts are to be resolved through arbitration at the Council of State level.

Hence these models of capital cities will not be of much use for understanding Delhi. Although Ottawa has only a population of about 8,83,391 (as opposed to the 1.7 crore population in Delhi), it has a fairly unique administrative mechanism that India can learn from. Although Ottawa is the capital of Canada, it continues to be a part of the Province of Ontario. Meaning, it has its own municipal government which functions under the provincial government (similar to State Government in India). In terms of governance, the Federal Government does not interfere with the Ottawa Municipal Government. It does not in any way exercise legislative or executive control over the region, but has set up a special body (National Capital Commission under the National Capital Act, 1960) to administer the region without disturbing the autonomy of the province.

What is evident from the above analysis of some of the capital cities in the West is that these models cannot easily be co-opted by India. Delhi is a very different socio-political unit when compared to Washington, D.C. or Canberra or Brussels etc. We need to come up with unique and innovative responses, closer to the Ottawa model, which acknowledges the need for greater local autonomy, opens up channels to hear grievances of its massive population, respects representative democracy, and clears up chaotic and unaccountable bureaucracies that Delhi today suffers from.

5. Conclusion:

Citizens have a right to be represented by a government that they voted into power, and only such a government is accountable to the people. If Delhi is administered by a bunch of bureaucrats, there will be a democratic crisis of accountability, with no one being directly held accountable to the demands of the people. In the first part of this essay, I argued that we have to recognise the inherent diarchy in capital cities globally. Demands for full statehood or greater central control are both untenable. The current crisis between the central government and the Delhi government has to be seen as evidence for legislative intervention, a fresh rewriting of laws rather than judicial reinterpretation of existing laws. In the second part, I attempted to show that the existing laws are vague, murky and lack clarity, thus making a case for rewriting of laws rather than reinterpretation of laws. The third part traced the legal history of Delhi’s Legislative Assembly in an attempt to understand the legislative intention behind the Constitution (69th Amendment) Act, 1991 and GNCT of Delhi Act, 1991. In part four, I argued that the way forward has to be firmly grounded in the basic structure of the Indian constitution, in acknowledgment of ‘the will of the people’ and their representative government. Once we are grounded in these constitutional principles, more innovative and unique models can be developed for governing Delhi. Falling back on U.S., Australia and other such systems may not be useful.

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- 3.^ NDMC v. State of Punjab (civil) 1388 of 1975
- 4.^ AIR 1982 SC 1029
- 5.^ This line of argument is taken by Sharddha Kulhari and Sujoy Chatterjee "Killing the Suspense over the Delhi Assembly" (Law and Other Things Blog) <http://lawandotherthings.blogspot.in/2014/06/killing-suspense-over-delhi-assembly.html> Accessed June 21,2015.
- 6.^ Document: [Text of Indira Jaisingh's legal opinion to Delhi Government](#) Accessed June 21,2015.
- 7.^ Rajeev Dhavan "Najeeb Jung is Subverting Democracy, But is He Acting Alone?", (The Wire, 20th May, 2015). Accessed June 21,2015.
- 8.^ AIR 1974 SC 2192
- 9.^ The legal history of Delhi's evolution has been discussed in detail in [NDMC v. State of Punjab Appeal \(civil\) 1388 of 1975](#) (9-Judge bench)
- 10.^ (1994)3 SCC 1
- 11.^ (2008) 13 SCC 628
- 12.^ See Generally;Venu Sundaram "[Delhi Turf-War Case May Turn on Reference to 11-judge SC Bench](#)" Accessed June 30,2015.
- 13.^ [Partywise Trends & Result](#)
- 14.^ Hal Wolman & Ors "Capital Cities and Their National Government: Washington, D.C. In Comparative Perspective" Working Paper No. 30 (GWIPP Working Paper Series, 2007)
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