

THE *SUI GENERIS* EXECUTIVE OF THE NCT OF DELHI: AN EXPLORATION IN THE BACKDROP OF THE GOVERNMENT OF NCT OF DELHI (AMENDMENT) ACT, 2023

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Abstract

Historically, the legislative device of abrogation is a tool which facilitates the interference of the legislature into the domain of other organs of governance and their supremacy. In light of its constitutional implications, the device is one which is not adopted on a day-to-day basis. Ordinarily speaking, the rationale behind the enactment of the 'validating' legislation is to nullify the ineffectiveness apparent in the existing legislation in question, on the basis of which the judicial pronouncement was passed. The Government of NCT of Delhi (Amendment) Act, 2023, coloured as the 'validating' legislation, has the effect of dodging the judicial pronouncement striking down the notification of the Ministry of Home Affairs, through which the scope of power of the Union Legislature was expanded when compared to the existing ambit prescribed by the Constitution vis-à-vis Article 239-AA. In essence, the Supreme Court identified the defect in this notification but not in the constitutional provision. On the contrary, the Parliament, through the Act of 2023, has sought to nullify the hypothetical 'defect' in a constitutional provision. However, when the Parliament attempts to do so, it no longer remains a 'legislative device of abrogation' rather falls within the domain of constitutional amendments. This 'convenient bypass' of the amendment procedure prescribed within the Constitution is coupled with the breakdown of the triple chain of accountability. The chain of accountability remains quintessential to the functioning of a democratic structure since the rate of successfully accommodating the will of the people depends upon this multi-linked chain of accountability. Parliamentary overruling and destruction of the triple chain of accountability together reflect the intention of the Union legislature to revoke the 'sui generis' status granted to the NCT of Delhi.

Keywords: Colourable Legislation, Collective Responsibility, Federalism, Parliamentary Overruling, Triple Chain of Accountability, Validating Legislation

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I. INTRODUCTION

The Legislative Assembly, Council of Ministers, and the Westminster-style Cabinet System of Government were introduced by Articles 239-AA and 239-AB in 1991 through an amendment in the Constitution of India ('*Constitution*') to reflect the uniqueness attributed to Delhi when compared with the other Union Territories.¹ The sole purpose behind the insertion of the said Articles in the Constitution was to ensure the establishment of a representative and democratic form of Government.² The amendment, in line with the recommendations made by the Balakrishnan Committee, ensured that the governmental set-up in Delhi does not fetter or hamper the discharge of special responsibilities by the Union in relation to the administration of the national capital.³ As recognised by S. Balakrishnan himself, the task before the Committee was to synchronise the competing claims, that is, the effective administration of the national capital, vital for the discharge of the National Government's responsibilities; and the legitimate demand of the population of Delhi for their democratic right of participation in the Government.⁴ For balancing such competing interests, the '*sui generis*' status was conferred upon the National Capital Territory ('*NCT*') of Delhi and for the sole purpose of upholding the democratic ideals of the Constitution as enunciated in its Preamble.⁵ In light of the will of the electorate on one hand, and that of the Union Government on the other, the amendment reserved some areas under the State List for the exclusive domain of the Parliament.⁶ The underlying factor to be considered is that such a list of areas has been laid down expressly in Article 239-AA⁷, and any alteration of the list would be construed as an amendment of the Constitution. The authors shall argue that the Parliament adopts the 'legislative device of abrogation', which is colloquially referred to as 'parliamentary overruling', to override the Supreme Court's pronouncement. The Supreme Court upheld the proposition that the Union Government in the administration of the NCT of Delhi is limited by constitutional provisions and any further expansion would be contrary to the constitutional scheme of governance.⁸

¹ *State (NCT of Delhi) v Union of India* (2018) 8 SCC 501, [208].

² *ibid.*

³ Balakrishnan Committee on Reorganization of Delhi Set-up, Report Part – I (1989), ch 6 [6.7.2].

⁴ *State (NCT of Delhi)* (n 1), [539].

⁵ *ibid.*, [388]-[389].

⁶ The Constitution of India, art 239-AA(3).

⁷ *Government of NCT of Delhi v Union of India* (2023) 9 SCC 1, [68] & [179.3].

⁸ *ibid.*, [174].

The authors shall elaborate upon the plethora of constitutional implications instigated by the enactment of the Parliament. The Act of 2023 was initially introduced as an Ordinance merely ten days after the Supreme Court's pronouncement, and thereafter, a Bill was introduced in the Parliament, which was eventually passed as the Government of National Capital Territory of Delhi (Amendment) Act, 2023 ('Act of 2023').⁹ The broad framework of the Act of 2023 appears to confer wider powers upon the Union Government and the officers appointed thereby. For instance, the LG has been empowered to exercise powers in his 'sole' discretion thereby, making the doctrine of 'aid and advice' of Council of Ministers inapplicable;¹⁰ the Union Government has been empowered to make rules in relation to the matters specified in List II of the Seventh Schedule;¹¹ and with the establishment of the National Capital Civil Service Authority ('NCCSA'), the Union Government has retained control over the appointment, transfer, and remuneration of civil servants operating within the territory of NCT of Delhi.¹²

Therefore, it remains apparent that the provisions of the so-called 'validating legislation' are at 'loggerheads' with the constitutional provisions. The Supreme Court pointed out the defect in the Notification passed by the Ministry of Home Affairs in 2015 on the basis of Article 239-AA.¹³ The authors shed light on how the Parliament attempts to give the Act of 2023 the colour of a 'validating legislation.' However, as shown through the course of this paper, the said enactment would be opposed to the rule of law and separation of powers because the legislation has been enacted with the intention to defy the judicial pronouncement.

The authors have undertaken a systematic literature review to discover the gap in the prevailing literature. The authors hereby adopt the objective of bringing out the infirmities inherent in the Act of 2023 and highlight the 'convenient bypass' of the constitutional provisions. The current literature fails to address a crucial matter regarding the validity of amending the Constitution through ordinary legislation enacted pursuant to Article 239-AA(7)(a). This becomes the central

⁹ PRS Legislative Research, 'The Government of National Capital Territory of Delhi (Amendment) Bill, 2023', (PRS) <<https://prsindia.org/billtrack/the-government-of-national-capital-territory-of-delhi-amendment-bill-2023>> accessed 09 July 2024.

¹⁰ The Government of National Capital Territory of Delhi (Amendment) Act 2023, s 3.

¹¹ The Government of National Capital Territory of Delhi (Amendment) Act 2023, ss 45C & 45D.

¹² The Government of National Capital Territory of Delhi (Amendment) Act 2023, s 45E.

¹³ *Government of NCT of Delhi* (n 7), [106].

theme of the present paper, which is supplemented with the incidental administrative law matter in the form of destruction of the 'triple chain of accountability.'

The succeeding sections of the paper deal with the arguments put forth by the authors in greater detail. Section II elucidates the history behind the conferment of a special status to the NCT of Delhi. The significance of this section lies in understanding the intention of the then legislators behind the insertion of Articles 239-AA and 239-AB, and this becomes crucial in simplifying the implications behind the 'legislative device of abrogation.' Section III presents the contention of the authors that Article 239-AA is a comprehensive code in itself. The said section flows from the well-established fact that Delhi is a Union Territory and is a class in itself, and therefore, the demarcation of the State Government and Union Government's power is to be construed in light of the said provision. Section IV specifically illustrates the violation of the basic structure of the Constitution by the Act of 2023, which, as argued by the authors, is a 'colourable legislation', and Section V, in furtherance of the preceding section, elucidates upon the adoption of the 'legislative device of abrogation' by the Parliament to defy the judicial pronouncement by the Supreme Court. Section VI enunciates upon another significant implication of the Act of 2023, that is, the breakdown of the triple chain of accountability. Section VII concludes the assertions made by the authors and leaves the fora open by making a reference to the challenge pending before the five-judge Bench of the Supreme Court.

II. HISTORY OF THE 'SPECIAL STATUS' OF DELHI

The constitutional entrenchment of a Legislative Assembly, Council of Ministers, and Westminster-style Cabinet form of Government by way of Article 239-AA of the Constitution imputes the attributes of a representative form of Government for the NCT of Delhi.¹⁴ This entrenchment arises from the report submitted by a Committee set up by the Union Government on 24th December 1987, headed by S. Balakrishnan (*'Balakrishnan Committee/Committee'*).¹⁵ The Balakrishnan Committee (formerly known as the *'Sarkaria Committee on set-up of*

¹⁴ Constitution of India, art 239-AA.

¹⁵ Government of National Capital Territory of Delhi, 'Report of Legislative Assembly of National Capital Territory of Delhi' (2018) <https://delhiassembly.delhi.gov.in/sites/default/files/dlas/pdf/aboutdelhiassembly_1.pdf> accessed 01 June 2024.

Delhi) was tasked with the duty to study drawbacks, if any, in the then existing administrative and municipal set-up of Delhi (presently known as '*NCT of Delhi*') with the intention of addressing the concerns faced by the 'common man'.¹⁶ Such concerns included, *inter alia*, lack of elementary democratic right of citizens, to decide the laws to be enacted to meet their particular social and economic aspirations through their elected representatives;¹⁷ significant delays in finalisation of legislative business which led to discontent and frustration among the citizens;¹⁸ and the inability of the erstwhile Executive Council to exercise effective control over the members of the Delhi Administration due to which the general public associated the elected representatives with the default of the official machinery.¹⁹ Therefore, the responsibility to make recommendations for amendments to the existing laws was cast upon the Committee. The Union Government expected the Committee to carve out solutions that would streamline the administrative and municipal set-up of Delhi. The Report submitted on 14th December 1989 included the recommendations made by the Committee. The Report, *inter alia*, recommended the retention of the Union Territory status accorded to Delhi in a manner that Delhi would constitute a class in itself, thereby having a '*sui generis*' status.²⁰ By virtue of the '*sue generis*' status, the constitution of a Legislative Assembly and Council of Ministers was recommended by the Report.²¹

The Constitution (Sixty-ninth Amendment) Act, 1991 (*'Amendment Act of 1991'*) accorded a special status to Delhi, which subsequently came to be known as 'National Capital Territory of Delhi' by the insertion of Article 239-AA and Article 239-AB in the Constitution.²² The objectives achieved by the insertion were two-fold: *firstly*, to give effect to the recommendations made by the Balakrishnan Committee; and *secondly*, to ensure stability and permanence to the arrangements

¹⁶ Rajya Sabha, 'Sarkaria Committee on set-up of Delhi', (Rajya Sabha Debates) <https://rsdebate.nic.in/bitstream/123456789/276391/2/IQ_148_241_11988_U1614_p71_p72.pdf> accessed 01 October 2024.

¹⁷ *Balakrishnan Committee Report* (n 3), [4.1.2].

¹⁸ *Balakrishnan Committee Report* (n 3), [4.1.3].

¹⁹ *Balakrishnan Committee Report* (n 3), [4.1.11].

²⁰ *Balakrishnan Committee Report* (n 3), [6.5.6]–[6.5.11].

²¹ *Balakrishnan Committee Report* (n 3), [6.6.10]; Malavika Parthasarathy, 'Special Status of Delhi: A Timeline' (*Supreme Court Observer*, April 29 2022), <<https://www.scobserver.in/journal/special-status-of-delhi-a-timeline/>> accessed 10 August 2024.

²² The Constitution (Sixty-ninth Amendment) Act 1991, s 2.

which would, in turn, confer a special status upon NCT of Delhi among the Union Territories.²³ The Legislative Assembly (*'Assembly'*) thus instituted was entrusted by the people of the NCT of Delhi to usher in policies and laws over which the Assembly had power as per the provisions of the Constitution.²⁴ Subsequently, the Parliament supplemented the constitutional provisions by enacting the Government of National Capital Territory of Delhi Act, 1991 (*'Act of 1991'*). The Act of 1991 included provisions on the functioning of the Legislative Assembly, Council of Ministers, and the LG.

The Ministry of Home Affairs through a Notification dated 21st May 2015 (*'Notification of 2015'*) expanded the role of the LG to exercise powers and discharge functions on part of the Union Government in respect of matters related to 'Services' apart from the LG's already-existing role in relation to 'Public Order'; 'Police'; and 'Land.'²⁵ The expansion of powers of the LG makes the *'sui generis'* status granted to the NCT of Delhi less 'special.' With the Notification of 2015, there is room for subsequent notifications to be issued in relation to other matters enumerated under List II²⁶ of the Seventh Schedule of the Constitution. Consequently, the day when NCT of Delhi becomes just like one of the other Union Territories is not distant.

The Supreme Court in the *Government of NCT of Delhi v. Union of India* (*'2023 Judgment'*) struck down the notification passed by the Ministry of Home Affairs and held that the NCT of Delhi has legislative and executive power with respect to 'Services.'²⁷ The Court categorically stated that the LG shall be deemed to act on behalf of the Government of NCT of Delhi in relation to 'Services.'²⁸ Further, the Supreme Court stated that:

*“164. g.the phrase 'insofar as any such matter is applicable to Union Territories' in Article 239AA(3) cannot be read to further exclude the legislative power of NCTD over entries in the State List or Concurrent List, over and above those subjects which have been expressly excluded....”*²⁹

²³ Ibid, Statement of Objects and Reasons.

²⁴ *NDMC v State of Punjab* (1997) 7 SCC 339.

²⁵ Government of India Ministry of Home Affairs, 'Notification S.O. 1368 (E)' (2015) <https://www.mha.gov.in/sites/default/files/video_87.pdf> accessed 01 May 2024.

²⁶ Constitution of India, sched VII, It II.

²⁷ *Government of NCT of Delhi* (n 7), [156]-[157].

²⁸ *Government of NCT of Delhi* (n 7), [162].

²⁹ *Government of NCT of Delhi* (n 7), [164.g].

(emphasis supplied)

The Parliament, in response to the aforementioned judicial pronouncement, enacted the Act of 2023 and effectively granted the Union Government the power to make rules in relation to 'Services.'³⁰ Therefore, the Act of 2023 effectively overrides the decision of the Supreme Court. The authors succinctly describe, over the course of the paper, the erosion of express constitutional provisions that disrespect the principles propounded by the judiciary, thereby raising serious concerns in relation to the basic structure³¹ of the Constitution.

III. ARTICLE 239-AA: A COMPREHENSIVE CODE

The drafters of the Constitution achieved the objective of dividing powers between the Central and the State Legislature through the promulgation of three lists: List I (Union List), List II (State List), and List III (Concurrent List) under the Seventh Schedule of the Constitution.³² The pivotal point of a federal structure lies in this division of powers between the two levels of government present at the Union and State levels. The federal nature of the Constitution hinges upon this express distinction of powers between the Parliament and the Legislature of the States.³³ Article 246 of the Constitution confers exclusive power upon the Parliament and the Legislature of States to legislate upon the matters falling within their domain.³⁴

The centralising tendency of the federal structure adopted by the drafters is apparent from Clause (2) of Article 246³⁵ of the Constitution. The power to legislate upon matters enumerated under List III is vested in both the Parliament and the Legislature of States; however, in an event where the laws enacted by the Central Legislature and the State Legislature are at 'loggerheads' with each other, the law promulgated by the former prevails.³⁶ The power of the Parliament to override the laws made by the Legislature of a State remains disguised under the concepts of 'uniformity of law throughout the country' or 'subjects of national importance.'³⁷

³⁰ The Government of National Capital Territory of Delhi (Amendment) Act 2023, s 45C-45D.

³¹ *Kesavananda Bharti v State of Kerala* (1973) 4 SCC 225.

³² Constitution of India, sched VII.

³³ MP Jain, *Indian Constitutional Law* (8th edn, Lexis Nexis 2018).

³⁴ Constitution of India, art 246.

³⁵ Constitution of India, art 246, cl. 2.

³⁶ Constitution of India, art 254.

³⁷ MP Jain, *Indian Constitutional Law* (8th edn, Lexis Nexis, 2018).

Ordinarily, the doctrine of repugnancy is applicable in such situations and not the doctrine of legislative competence.³⁸

Article 246(4) of the Constitution confers power upon the Parliament to legislate on the matters enumerated under List II for any part of the territory of India not included in that of a State.³⁹ The inference which can be reasonably drawn from the provision is that the Parliament has the power to make laws on any matter enumerated under the State List for a Union Territory.⁴⁰ The Supreme Court in *Mithan Lal v. Delhi* laid down the proposition of law in the following manner:-

*“.....under Article 246(4) it is Parliament that has the power to legislate for Part C States, and that power is untrammelled by the limitations prescribed by Article 246, clauses (2) and (3) and Entry 54 of List II, and is plenary and absolute, subject only to such restrictions as are imposed by the Constitution.....”*⁴¹

(emphasis supplied)

As per Section 3(58) of the General Clauses Act, 1897, a 'State' includes a State specified under the First Schedule of the Constitution and shall include Union Territories as well.⁴² In *T.M. Kanniyar v. ITO*, the Supreme Court adopted an interpretation according to which the aforementioned definition of a 'State' would not be applicable to Article 246 of the Constitution. The rationale behind this determination of the Supreme Court has been reproduced hereinafter:-

*“4.if the inclusive definition of 'State' in Section 3(58) of the General Clauses Act were to apply to Article 246(4), Parliament would have no power to legislate for the Union Territories with respect to matters enumerated in the State List and until a legislature empowered to legislate on those matters is created under Article 239-A for the Union Territories, there would be no legislature competent to legislate on those matters.....such a construction is repugnant to the subject and context of Article 246. It follows that in view of Article 246(4), Parliament has plenary powers to make laws for Union Territories on all matters.....”*⁴³

³⁸ Sujit Chaudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2017) 472.

³⁹ *Constitution of India*, art 246, cl. 4.

⁴⁰ *Re Sea Customs*, AIR 1963 SC 1760.

⁴¹ *Mithan Lal v State of Delhi* AIR 1958 SC 682.

⁴² The General Clauses Act 1897, s 3(58).

⁴³ *T.M. Kanniyar v ITO* 1967 SCC OnLine SC 43.

(emphasis supplied)

The premise upon which the Supreme Court has passed the aforementioned judgments remains that for Union Territories, there is an absence of a competent authority to legislate upon the matters enumerated under List II, for the Union Territories. In light of such absence, the Parliament is regarded as one of the primary contenders for legislating upon such matters. This ideology may be true in relation to Union Territories where a separate Legislature has not been established. However, the scepticism arises in relation to Union Territories such as Puducherry and the NCT of Delhi, which have a separate Legislature competent for legislating on matters enumerated under List II of the Constitution. The Legislature of these Union Territories is reflective of the will of the people residing within the respective territories because such Assemblies consist of representatives elected by the people themselves. The Parliament's overriding power to legislate on matters enumerated under List II may have the effect of undermining the democratic structure instituted within such territories and strike at the root of the federal structure adopted by the drafters of the Constitution for the nation as a whole.

Article 239-AA of the Constitution introduces changes in the administrative structure of the NCT of Delhi, which places this 'Union Territory' in a class of itself. This provision provides for the establishment of a Legislative Assembly⁴⁴ and the constitution of a Council of Ministers⁴⁵ for the NCT of Delhi. Most importantly, under Clause (3) of this provision, certain entries have been excluded from the domain of the Assembly;⁴⁶ and the Parliament has been granted the power to legislate on matters related to the Union Territory;⁴⁷ however, such power must not be utilised for excluding the legislative powers of the NCT of Delhi with respect to other Entries.⁴⁸ Clause (7) of Article 239-AA provides for the power of the Parliament to enact laws for supplementing clauses (1) to (6) of the said provision.⁴⁹ However, any such law must not be construed as an amendment to the Constitution.⁵⁰

⁴⁴ Constitution of India, art 239-AA(2).

⁴⁵ Constitution of India, art 239-AA (4).

⁴⁶ Constitution of India, art, 239-AA(3)(a).

⁴⁷ Constitution of India, art, 239-AA(3)(b).

⁴⁸ *Government of NCT of Delhi* (n 7), [62].

⁴⁹ Constitution of India, art 239-AA(7)(a).

⁵⁰ Constitution of India, art 239-AA(7)(b).

The legislative and constitutional history which precedes the Amendment Act of 1991 plays a pivotal role in understanding the original intent of the legislators behind inserting Article 239-AA and Article 239-AB in 1991.⁵¹

In 1956, the States Reorganisation Act, which was enacted after the Constitution (Seventh Amendment) Act, 1956, divided the territory into States and Union Territories and 'Delhi' was brought under the category of a Union Territory. Delhi was thus required to be governed by an Administrator, abolishing the then existing Legislative Assembly and Council of Ministers.⁵² In 1963, the Government of Union Territories Act ('Act of 1963') was enacted by the Parliament. Under this Act of 1963, Sections 3⁵³ and 18⁵⁴ covered the establishment of a Legislative Assembly and the extent of powers that would be enjoyed by such an Assembly. In 1966, the Delhi Administration Act ('Act of 1966') was enacted, and consequently, a representative government was instituted in Delhi by establishing a Metropolitan Council, which consisted of elected and nominated members.⁵⁵ Following this, the Balakrishnan Committee's Report occupied the field, and as a result thereof, the Amendment Act of 1991 was passed by the Parliament.

The historical background supplements the argument made in favour of a 'representative' form of Government instituted within the territory of the NCT of Delhi. The provisions of the Act of 1963 have been incorporated specifically under Clauses (3) and (4) of Article 239-AA of the Constitution. The Act of 1966 provided for a unique system under which the Union Government continued to retain the powers to legislate upon the matters included under List II.⁵⁶ However, the intent of the then-legislators to maintain a balance between the will of the people and that of the Union Government is apparent from such a statutory provision. The Balakrishnan Committee reported this conflict in the following manner:-

“378.The main difficulty lies in reconciling the two conflicting requirements, namely, the requirement of satisfying the democratic aspirations over the citizens of the capital to govern themselves in consonance with the spirit of their national Constitution and the

⁵¹ *NDMC v State of Punjab* (1997) 7 SCC 339.

⁵² The States Reorganization Act 1956, s 12 (Part C States).

⁵³ The Government of Union Territories Act 1963, s 3.

⁵⁴ *ibid*, s 18.

⁵⁵ The Delhi Administration Act 1966, s 3.

⁵⁶ *ibid*, s 22 & 27.

*requirement that the national Government should have sufficient control over the capital city and its administration for discharging its national and international responsibilities and commitments.....*⁵⁷

(emphasis supplied)

The necessity of maintaining this 'delicate' balance between the interests of the people living within the territory and that of the Union Government had instigated the conferment of such special status upon the NCT of Delhi. The Balakrishnan Committee contemplated granting complete 'statehood' to the NCT of Delhi but rejected the claim on the grounds that '*the national capital belongs to the nation as a whole.*'⁵⁸ The NCT of Delhi continues to be included under 'Union Territories' in the First Schedule⁵⁹ appended to the Constitution. Additionally, Article 239-AA and Article 239-AB have been inserted under Part VIII⁶⁰ of the Constitution, which specifically deals with the Union Territories. Therefore, the conclusion contained in the Report of the Balakrishnan Committee against granting complete statehood to Delhi has been given effect to in the Constitution.

The historical discourse had been undertaken with a view to understanding the legislative intent behind the insertion of Article 239-AA and Article 239-AB. NCT of Delhi is included within the Parts and Schedules specifically dealing with Union Territories. However, the next layer of analysis reveals that NCT of Delhi, in essence, is a class in itself. The legislators intended to accommodate the will of the electorate because the interests of the Union Government were protected under the administration of the 'national capital' from 1963 itself. In pursuit of such accommodation, the constitutional provisions have conferred powers upon the Legislature of the NCT of Delhi which would ordinarily be granted to the Assembly of any other State, subject to certain exceptions. The Amendment Act of 1991 has added a new dimension to the governance of Union Territories. This has led to the creation of a 'third category' under the Union Territories, wherein the only constituent member of such category is the NCT of Delhi.⁶¹

⁵⁷ *State (NCT of Delhi)* (n 1), [378].

⁵⁸ *State (NCT of Delhi)* (n 1), [380]; Balakrishnan Committee Report (n 3), [6.5.6], [6.5.8], [6.5.9].

⁵⁹ Constitution of India, sched I.

⁶⁰ Constitution of India, pt VIII.

⁶¹ *State (NCT of Delhi)* (n 1), [453].

The third category of Union Territories shares features with the general category of States: the presence of a separate Legislature;⁶² the power of the Legislature to legislate on the matters enumerated under List II; a Council of Ministers with the Chief Minister at the its head to 'aid and advise' the LG;⁶³ the Council of Ministers being collectively responsible for the actions taken by the Legislative Assembly;⁶⁴ the President's role in the appointment of the Chief Minister and other Ministers of the Council;⁶⁵ and the requirement of receipt of report from the LG to impose the President's rule.⁶⁶ In addition to these similarities, NCT of Delhi has been granted a special status among the other Union Territories, much like how the marginal notes to Article 371⁶⁷ of the Constitution reflect the special treatment offered to some States over the others due to specific needs of the State in question. The Supreme Court in the 2023 Judgment made similar observations:-

*“75. While NCTD is not a full-fledged state, its Legislative Assembly is constitutionally entrusted with the power to legislate upon the subjects in the State List and the Concurrent List. It is not a State under the First Schedule to the Constitution, yet it is conferred with the power to legislate upon subjects in Lists II and III to give effect to the aspirations of the people of NCTD. It has a democratically elected government which is accountable to the people of NCTD. Under the constitutional scheme envisaged in Article 239AA(3), NCTD was given legislative power, which though limited, in many aspects is similar to States ”*⁶⁸

(emphasis supplied)

Therefore, it is reasonably inferred that NCT of Delhi is undoubtedly a 'Union Territory' having a '*sui generis*' status, but at the same time, the territory shares certain characteristics ordinarily attributed to States.

Article 246(4)⁶⁹ constitutes the general 'thumb-rule' which has to be followed for those territories not included within a State, which, in other words, is a Union Territory. However, Article 239-AA can be significantly construed as an

⁶² *Constitution of India*, art 239-AA(2) & 239-AA(3).

⁶³ *Constitution of India*, art 239-AA(4)

⁶⁴ *Constitution of India*, art 239-AA(6).

⁶⁵ *Constitution of India*, art 239-AA(5).

⁶⁶ *Constitution of India*, art 239-AB.

⁶⁷ *Constitution of India*, art 371.

⁶⁸ *Government of NCT of Delhi* (n 7), [75].

⁶⁹ *Constitution of India*, art 236, cl 4.

exception to this general rule. Article 246(4) has been drafted on the premise that the Union Territories would have no competent legislature to legislate on the matters enumerated under the State List, as seen from the *T.M. Kanniyam* and *Mithan Lal* judgments of the Supreme Court.⁷⁰ This premise does not apply to NCT of Delhi by virtue of Article 239-AA of the Constitution. Article 239-AA *firstly*, makes no reference to Article 246(4) of the Constitution; and *secondly*, as per Clause (3) sub-Clause (b) of the provision, the Parliament has the power to legislate upon any matter in relation to the Union Territory, irrespective of the List in which the matter has been enumerated. Article 239-AA, therefore, represents a comprehensive code in itself, which rules out the possibility of Article 246(4) extending to NCT of Delhi on account of the Parliament's role being expressly defined under the former provision. The rationale behind the contention is apparent from the provision itself, which demarcates the power vested in the Legislature and that granted to the Parliament. The power of the Legislature extends to enacting laws upon all matters enumerated under the State List and Concurrent except for entries like 'police', 'land', and 'public order.' The exclusion of such matters from the ambit of the Legislature stems from the fact that the governance involves 'national imperatives' and, as a result thereof, such areas are carved out from the power granted to the Assembly.⁷¹ Therefore, it can be reasonably concluded that Article 239-AA is a comprehensive code in itself in relation to the NCT of Delhi.

IV. A 'COLOURABLE' VIOLATION OF THE BASIC STRUCTURE OF THE CONSTITUTION

The Act of 2023 contains several provisions that have the effect of vesting power in the Union Government or an officer appointed thereby, in matters pertaining to 'services.' This goes against the constitutional provisions, which expressly prescribe that the Legislature of NCT of Delhi shall have the power to legislate on matters pertaining to 'services.'⁷² Therefore, the Act of 2023, passed by both Houses of the Parliament on a *prima facie* evaluation, has the effect of amending the provisions of the Constitution.⁷³ Prior to analysing the 'colourable'

⁷⁰ *T.M. Kanniyam v ITO* 1967 SCC OnLine SC 43; *Mithan Lal v State of Delhi* AIR 1958 SC 682.

⁷¹ *State (NCT of Delhi)* (n 1), [389].

⁷² Constitution of India, art 239-AA(2).

⁷³ Yash Mittal, 'Addressing the Constitutional vices of the Delhi Services Act, 2023: A critical analysis' (*Bar and Bench*, 12 August 2023) <<https://www.barandbench.com/columns/addressing-the-constitutional-vices-of-the-delhi-services-bill-2023-a-critical-analyses>> accessed on 01 September 2024.

violation of the basic structure of the Constitution, the authors briefly summarise the main provisions of the Act of 2023:

A. Section 3 of the Act of 2023

Section 3A of the Act of 2023 substitutes the original phrase '*act in his discretion*' with the phrase '*act in his sole discretion*' in Section 41⁷⁴ of the Act of 1991, which lays down the extent of power to be exercised by the LG. Additionally, the Act of 2023 inserts a third scenario in which the LG may act in his 'sole' discretion. Prior to the amendment in 2023, the LG had the power to act in his discretion only in two classes of matters, namely, where the matter in question dealt with the subjects outside the domain of the Legislature of NCT of Delhi and where the law as such prescribes him to act in his discretion in exercising judicial or quasi-judicial functions.⁷⁵ The LG is required to act on the 'aid and advice' of the Chief Minister and Council of Ministers, while dealing with matters that fall within the power of the Legislative Assembly. However, through the insertion of the third class of matters, the Act of 2023 expands the extent of power exercised by the LG and makes the doctrine of 'aid and advice' inapplicable for the matters which come within the purview of the Assembly as per the Constitution. The provision stands in stark contrast with the decision of the Supreme Court in *State (NCT of Delhi) v. Union of India* wherein it was held that as per Article 239-AA(4), the LG is bound by the aid and advice of the Council of Ministers unless he exercises his power under the proviso that is when there is a difference of opinion between the LG and the Council of Ministers.⁷⁶ Therefore, such a provision, which confers unfettered power upon an executive official appointed by the President, suffers from the vice of manifest arbitrariness, thereby being violative of Article 14 of the Constitution.⁷⁷

⁷⁴ Lok Sabha, 'Statutory Resolution Re: Disapproval of Government of National Capital Territory of Delhi (Amendment) Ordinance, 2023 (No. 1 of 2023) and Government of National Capital Territory of Delhi (Amendment) Bill 2023', (Lok Sabha Debates, 2023) <<https://sansad.in/getFile/debatestextmk/17/XII/3.8.2023.pdf?source=loksabhadocs>> accessed 12 October 2024.

⁷⁵ Transaction of Business of the Government of National Capital Territory of Delhi 1993, r 46; *Government of NCT of Delhi* (n 7), [102].

⁷⁶ *State (NCT of Delhi)* (n 1), [247].

⁷⁷ *EP Royappa v State of Tamil Nadu* (1974) 4 SCC 3; *S G Jaisinghani v Union of India* (1967) 2 SCR 703.

B. Sections 45C and 45D of the Act of 2023

Sections 45C⁷⁸ and 45D⁷⁹ vest in the Union Government, the power to make rules under Part IV-A⁸⁰ (inserted by the Act of 2023) that deal with 'provisions relating to the maintenance of the democratic and administrative balance in the governance of NCT of Delhi.' These provisions vest power upon the Union Government to make rules pertaining to various service-related matters, including *inter alia*, the tenure of office, salaries, allowances, qualifications of candidates, transfer of the employees, and procedure for the imposition of the penalty. Further, the provisions grant power to the NCCSA to recommend a panel of suitable persons for constitution or appointment or nomination by the LG, for any authority, board, commission or any statutory body to be constituted or appointed under any law made by the Legislature of NCT of Delhi.

C. Section 45E of the Act of 2023

NCCSA is constituted as per Section 45E of the Act of 2023. The NCCSA consists of the Chief Minister of NCT of Delhi, the Chief Secretary of the Government of NCT of Delhi, and the Principal Home Secretary of the Government of NCT of Delhi.⁸¹ The decisions in the meeting of the NCCSA would be taken on the basis of the majority of members present and voting.⁸² The quorum required for a meeting of the NCCSA is two members.⁸³ Although the Chief Minister of NCT of Delhi has been appointed as the Chairperson of NCCSA, the quorum does not require the presence of the Chairperson itself. This authority shall have the power to recommend the transfers and postings of all Group 'A' officers; to recommend for all matters falling under the subject of vigilance and non-vigilance for the purposes of initiation of disciplinary proceedings; to make recommendations to the LG for framing policies on various service-related matters; and to frame policies on various other service-related matters.⁸⁴

The power conferred upon the Union Government to make rules in relation to matters included within List II of the Seventh Schedule is clearly violative of the

⁷⁸ The Government of National Capital Territory of Delhi (Amendment) Act 2023, s 45C.

⁷⁹ GNCTD (Amendment) Act, s 45D.

⁸⁰ GNCTD (Amendment) Act, pt IV-A.

⁸¹ GNCTD (Amendment) Act, s 45E(2).

⁸² GNCTD (Amendment) Act, s 45E(3).

⁸³ GNCTD (Amendment) Act, s 45F(3).

⁸⁴ GNCTD (Amendment) Act, s 45H.

principles of cooperative federalism as envisaged by the then legislators before the insertion of Article 239-AA in the Constitution. The exhaustive list of matters excluded from the domain of the Legislature of the NCT of Delhi bears testimony to the intention of the legislators, which was to exclude only certain matters essential to the interests of the Union Government and prevent any such exclusion in the future. The title of the new Part inserted by the Act of 2023 reflects an ironic situation because the Parliament attempts to provide a solution for a balance that was caused by the Union Executive itself. The democratic balance would be maintained if and when the will of the electorate has been given effect.

In our view, in the NCCSA, when two out of the three members are appointed by the Union Government two obvious conclusions can be made by a layman: *firstly*, the opinion of the Chief Minister is equivalent to no opinion in light of the requirement of majority of members present and voting for passing a decision; and *secondly*, the number of meetings in the absence of the Chief Minister, a representative of the electorate, would increase in light of the quorum required being merely 2 members.⁸⁵ Therefore, the Chief Minister has been included within the NCCSA to solely console the electorate about the lack of adequate representation of the members elected by the electorate in the governance of the NCT of Delhi. In reality, the Chief Minister has no say in the execution of decisions rendered pursuant to the interest of the political party elected at the Union level.

The Act of 2023 denudes the Legislature of NCT of Delhi of the power that was conferred upon the Assembly by the provisions of the Constitution itself. Article 239-AA(7)(b) of the Constitution provides that any law made pursuant to the clauses under the provision would not be brought within the category of amendments for the purpose of Article 368.⁸⁶ The Act of 2023 has been enacted by the Parliament in light of Article 239-AA(7)(a) of the Constitution. The legislation does not alter the provisions of the Constitution; instead, the enactment has the 'effect of amending' Article 239-AA and therefore, such changes can be referred to

⁸⁵ PRS Legislative Research, 'The Government of National Capital Territory of Delhi (Amendment) Bill, 2023', (PRS) <<https://prsindia.org/billtrack/the-government-of-national-capital-territory-of-delhi-amendment-bill-2023>> accessed 09 July 2024; P.D.T. Achary, 'The legality of the Delhi ordinance' (*The Hindu*, 03 July 2023) <<https://www.thehindu.com/news/national/the-legality-of-the-delhi-ordinance/article67038623.ece>> accessed on 15 July 2024; Yash Mittal, 'Addressing the Constitutional vices of the Delhi Services Act, 2023: A critical analysis' (*Bar and Bench*, 12 August 2023) <<https://www.barandbench.com/columns/addressing-the-constitutional-vires-of-the-delhi-services-bill-2023-a-critical-analysis>> accessed 01 September 2024.

⁸⁶ Constitution of India, art 239-AA(7)(b).

as 'changes-in-effect'.⁸⁷ Therefore, in light of such 'changes-in-effect,' the Act of 2023 can be construed as an 'atypical amendment.'⁸⁸ Such an atypical amendment must be examined through the lens of the basic structure of the Constitution. Similar provisions are included under Articles 4⁸⁹ and 169;⁹⁰ however, the intention of the drafters is to categorise such clauses within a separate category of amendments that can be made through the ordinary law-making procedure.

Justice Mathew opines that such clauses must be assigned the meaning of an amendment itself, as the draftsmen used different words to indicate the same idea for the purpose of elegance or what is called '*the graces of style*.'⁹¹ Justice Beg, in the same case, categorically held that there is no distinction between such amendments and those envisaged under Article 368 of the Constitution because the sole difference between the two is the procedure for invoking the amendment.⁹² The position adopted by Justice Mathew and Justice Beg was held by six other judges out of the 13-judge Bench in the *Kesavananda* case.⁹³ The logical inference that can be derived from the 'birth-giver' of the basic structure of the Constitution is that such amendments are subject to the basic structure of the Constitution because these amendments, in substance, are the same and merely differ from each other, procedurally.⁹⁴

In our view, the Act of 2023 is susceptible to being declared unconstitutional on the grounds that the provisions are violative of the features of the basic structure of the Constitution, such as the federal character of the Constitution, and the separation of powers. The question which requires attention before delving into the unconstitutionality of the Act of 2023 is whether the doctrine of basic structure extends to ordinary legislation as well. Ordinary legislation entails legislation enacted by the Parliament or State Legislature pursuant to their 'legislative power' under Article 245 of the Constitution.

⁸⁷ *UOI v Rajendra N. Shah & Anr* (2021) SCC OnLine 474.

⁸⁸ Ashwin Vardrajan, 'The 2023 Delhi Ordinance, Services, and the Basic Structure – I' (*Constitutional Law and Philosophy*, 09 June 2023) <<https://indconlawphil.wordpress.com/2023/06/09/guest-post-the-2023-delhi-ordinance-services-and-the-basic-structure-i/>> accessed 01 August 2024.

⁸⁹ Constitution of India, art 4.

⁹⁰ Constitution of India, art 169.

⁹¹ *Kesavananda Bharati* (n 31), [1565]-[1570].

⁹² *Kesavananda Bharati* (n 31), [1830].

⁹³ *Kesavananda Bharati* (n 31), [498]-[502], [790]-[793], [842] & [1439].

⁹⁴ *Gautam Bhatia* (n 88).

In *Indira Nehru Gandhi v. Raj Narain*, Justice Beg opined that the basic structure of the Constitution tests the validity of both constitutional amendments and ordinary laws. This is because the power to enact ordinary legislation is inherently limited by, and cannot exceed, the scope of constituent authority. Relying on Kelsen's theory, he argues that the Constitution embodies the supreme or basic norms of the legal order, from which all other norms derive their validity. Consequently, the legality of any law, whether presented as ordinary legislation or as a constitutional measure, must be assessed against the norms and principles enshrined in the Constitution itself.⁹⁵

From this, it can be reasonably inferred that ordinary legislation has to fall within the competence of the legislature enacting the legislation, and should not take away any fundamental rights guaranteed under Part III of the Constitution. The authors contend that whenever a legislation is declared unconstitutional, under Article 13(2)⁹⁶ of the Constitution or on the grounds that the legislature did not have the power to legislate upon the matter pursuant to Articles 245⁹⁷ and 246⁹⁸ of the Constitution, the cumulative effect of these contraventions is the violation of features of the basic structure of the Constitution itself.⁹⁹

The Supreme Court has, on previous occasions, struck down ordinary laws on the basis of violation of features including inter alia, secularism, rule of law, and the power of the courts to exercise judicial review.¹⁰⁰ These features are nothing but features of the basic structure of the Constitution. Therefore, as argued by Senior Advocate Arvind P. Datar as well, ordinary laws should be subjected to the basic structure of the Constitution.¹⁰¹ This is particularly the case when the ordinary legislation in question has the effect of not only violating certain features of the basic structure but also amending the provisions of the Constitution.

⁹⁵ *Indira Nehru Gandhi & Anr v Shri Raj Narain & Anr* (1975) SCC OnLine SC 521, [622].

⁹⁶ Constitution of India, art 13(2).

⁹⁷ Constitution of India, art 245.

⁹⁸ Constitution of India, art 246.

⁹⁹ *Supreme Court Advocates-on-Record Association v Union of India* (2016) 5 SCC 1.

¹⁰⁰ *M. Ismail Faruqui v Union of India* AIR (1995) SC 605; *G C Kanungo v State of Orissa* AIR (1995) SC 1655; *State of West Bengal v Committee for Protection of Democratic Rules* (2010) 3 SCC 571; *L Chandrakumar v Union of India* (1997) 3 SCC 261.

¹⁰¹ Arvind Datar, 'Legal Notes by Arvind Datar: Ordinary Laws and The Basic Structure' (Bar and Bench, June 28 2025), <<https://www.barandbench.com/columns/legal-notes-by-arvind-datar-ordinary-laws-and-the-basic-structure>> accessed 25 August 2025.

In the *Madras Bar Association v. Union of India* case, Justice J.S. Khehar, on behalf of the majority, concluded that the legislative power conferred by the Constitution, particularly under Part XI, had one overall exception:-

“109.undoubtedly is, that the basic structure of the Constitutional cannot be infringed, no matter what.....This leads to the determination that the 'basic structure' is inviolable. In our view, the same would apply to all other legislations (other than amendments to the Constitution) as well, even though the legislation had been enacted by following the prescribed procedure, and was within the domain of the enacting legislature, any infringement to the basic structure would be unacceptable.....”¹⁰²

(emphasis supplied)

Justice J.S. Khehar observed in the landmark *NJAC* Judgment that the provisions of a legislative enactment can be examined on the basis of the 'basic structure' of the Constitution:-

“381.if a challenge is raised to an ordinary legislation based on one of the 'basic features' of the Constitution, it would be valid to do so. If such a challenge is accepted on the ground of violation of the 'basic structure', it would mean that the bunch of articles of the Constitution (including the Preamble thereof, wherever relevant), which constitute the particular 'basic feature', had been violated.....”¹⁰³

(emphasis supplied)

In *State of Karnataka v. Union of India*, the then Chief Justice Beg opined that certain imperatives which necessarily flow from the Constitution's basic structure, like express mandates, can be utilised for testing the validity of ordinary laws.¹⁰⁴ Further, the phrase '*subject to the provisions of the Constitution*' in Article 245 may lead to a logical inference that ordinary legislation is subject to the

¹⁰² *Madras Bar Association v Union of India* (2014) 10 SCC 1.

¹⁰³ *Supreme Court Advocates-on-Record Association* (n 72).

¹⁰⁴ *State of Karnataka v Union of India* (1977) 4 SCC 308, [125] (Opinion of Beg J).

provisions of the Constitution, and some of these provisions may be included within the Constitution's basic structure.¹⁰⁵

In the peculiar case of NCT of Delhi, the legislative competence of the State Legislature and Union Legislature is determined by Article 239-AA(3) of the Constitution since, as demonstrated previously, Article 239-AA is a complete code in itself. The Act of 2023, enacted by the Union Legislature, is well beyond the legislative competence of the Union. Further, the legislation has the effect of amending the Constitution by bringing the matter related to 'services' within the legislative competence of the Union Legislature. Consequently, the Act of 2023 should be treated differently when compared to the other ordinary laws, which may not have the effect of amending the provisions of the Constitution. The power of the Parliament to legislate on matters related to the Union Territory is restricted to enacting legislation related to any matter enumerated in the State List¹⁰⁶, but does not extend to promulgating laws which have the effect of amending the provisions of the Constitution. The Act of 2023 amends the provisions of the Constitution without following the procedure prescribed under Article 368 of the Constitution. The legislation can be considered as a direct attack on the federal balance adopted by virtue of Article 239-AA between the Government of NCT of Delhi and the Union Government. Both of these principles, that is, the federal structure of the Constitution¹⁰⁷ and the separation of powers,¹⁰⁸ have been recognised as features of the basic structure of the Constitution. The Act of 2023 can be construed as a 'colourable legislation' in light of the Parliament exceeding the powers conferred upon the Union Legislature by the Constitution. In other words, the Parliament seeks to enact legislation which, in essence, lies outside the purview of the Parliament since the enactment amends the provisions of the Constitution and deprives the State Legislature of powers conferred upon it by the provisions of the Constitution itself. Therefore, the Parliament cannot indirectly amend the provisions of the Constitution in the absence of a direct power to do so.¹⁰⁹

¹⁰⁵ Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (OUP 2009) 65-69.

¹⁰⁶ Constitution of India, art 239-AA(3)(b).

¹⁰⁷ *SR Bommai v Union of India* (1994) 3 SCC 1.

¹⁰⁸ *Kesavananda Bharati* (n 31).

¹⁰⁹ *RS Joshi S T O Gujarat v Ajit Mills Ltd. Ahmedabad & Anr.* AIR (1977) SC 2279; *KC Gajapati Narayana Deo & Ors v The State of Orissa* AIR (1953) Orissa 185.

The concepts of rule by the people and federalism are firmly imbued in the ethos of the Constitution of India.¹¹⁰ Federalism is a part of the basic structure of the Constitution, in light of every state being a constituent unit with an exclusive legislature and executive elected and constituted by the people residing within the territory of the state.¹¹¹ The Act of 2023 harms this federal balance envisaged by the Constitution in relation to the NCT of Delhi and suffers from the vice of manifest arbitrariness. Therefore, the legislation is susceptible to being struck down on the basis of violating the features of the basic structure of the Constitution.

V. PARLIAMENT'S OVERRULING: THE ACT OF 2023

The Ministry of Home Affairs, through the Notification of 2015, stipulated the exclusion of legislative power of the Legislative Assembly of NCT of Delhi in relation to 'Services.'¹¹² The rationale behind such exclusion, as explained by the notification itself, was that the State Public Services and State Public Service Commission do not exist in the NCT of Delhi.¹¹³ Further that the Union Territories Cadre, consisting of Indian Administrative Service and Indian Police Service personnel common to all Union Territories, was under the control of the Union Government.¹¹⁴ Consequently, the Government of NCT of Delhi was denuded of its executive power in relation to 'Services.'¹¹⁵

The Supreme Court in *State (NCT of Delhi) v. Union of India* ('2018 Judgement') held that the real purpose behind the enactment of the Amendment of 1991 was to establish a democratic set-up and representative form of Government wherein the majority has a right to embody their opinions in law and policies pertaining to NCT of Delhi.¹¹⁶ Further, the Court held that for fulfilling the real purpose, it is imperative to give a purposive interpretation to Article 239-AA of the Constitution so that the principles of democracy and federalism (which are also a part of the basic structure) are reinforced in the NCT of Delhi in their truest sense.¹¹⁷

¹¹⁰ *State (NCT of Delhi)* (n 1) [108].

¹¹¹ *ibid.*

¹¹² Ministry of Home Affairs, Notification (2015) F. No. 14036/04/2014-Delhi-I (Part File).

¹¹³ *ibid.*

¹¹⁴ Notification of 2015 (n 25).

¹¹⁵ Notification of 2015 (n 25).

¹¹⁶ *State (NCT of Delhi)* (n 1), [208].

¹¹⁷ *ibid.*

The Supreme Court in the 2018 Judgment held that the Parliament has the power to legislate on any matters enumerated in the State List and Concurrent List and at the same time, the Legislative Assembly of NCT of Delhi has the legislative power in relation to all matters in the State List and Concurrent except matters that have been '*explicitly excluded from Article 239-AA(3)(a)*'.¹¹⁸ Additionally, in relation to the exercise of executive power by the Union, the Supreme Court held that:-

*“224. Article 239-AA(4) confers executive powers on the Government of NCT of Delhi whereas the executive power of the Union stems from Article 73 and is coextensive with Parliament's legislative power. Further, the ideas of pragmatic federalism and collaborative federalism will fall to the ground if we are to say that the Union has overriding executive powers even in respect of matters for which the Delhi Legislative Assembly has legislative powers. Thus, it can be very well said that the executive power of the Union in respect of NCT of Delhi is confined to the three matters in the State List for which the legislative power of the Delhi Legislative Assembly has been excluded under Article 239-AA(3)(a). Such an interpretation would thwart any attempt on the part of the Union Government to seize all control and allow the concepts of pragmatic federalism and federal balance to prevail by giving NCT of Delhi some degree of required independence in its functioning subject to the limitations imposed by the Constitution....”*¹¹⁹

(emphasis supplied)

As apparent from the aforementioned pronouncement, the legislative power of the Legislative Assembly of the NCT of Delhi and the executive power of the Government of NCT of Delhi, coextensive with the legislative power, extend to all matters enumerated in the State List and Concurrent List except for the ones expressly excluded from their ambit. The necessary implication of such a ruling is that any modification to the matters explicitly excluded from the domain of legislative power of the Assembly shall be construed as an amendment to the

¹¹⁸ *ibid*, [219].

¹¹⁹ *State (NCT of Delhi)* (n 1), [224].

Constitution, and as a result thereof, the same would have to be passed after following the procedure provided in the Constitution.

Article 239-AA(3)(a) of the Constitution lays down the extent of power to be exercised by the Legislature and excludes matters of national importance from the purview of the Assembly.¹²⁰ On the other hand, Article 239-AA(3)(b), by virtue of a '*non-obstante*' clause, grants Parliament the power to legislate upon any matter 'applicable' to the Union Territory.¹²¹ Such power of the Parliament cannot extend to the level of amending the Constitution itself. However, the Parliament, through the Act of 2023,¹²² alters the provisions of the Constitution through ordinary legislation passed only by both Houses of the Parliament. Section IV of the paper has entailed the provisions of the Act of 2023, which have the effect of altering the constitutional provisions.

The parliamentary discourse that took place in the Houses of the Parliament before the enactment of the Act of 2023 supplements the aforementioned contention that the Legislative Assembly of the NCT of Delhi is empowered to legislate, upon matters under the State List, to give effect to the aspirations of the people of the NCT of Delhi.¹²³ The mandate of the people living within the territory of the NCT of Delhi would be disregarded as a result of the Act of 2023. Shri H V Kamath had stated that '*a State is not inferior to the Central Government.*'¹²⁴ This statement indicates the fundamental basis of a federal structure like the one adopted by the drafters of the Constitution. The Act of 2023 not only undermines the federal structure of the Constitution but also overrules the Supreme Court's pronouncement as elucidated in the 2023 Judgment¹²⁵ through ordinary legislation passed by the Parliament.

The Supreme Court has declared the federal character of the Constitution as a feature of the basic structure of the Constitution.¹²⁶ A facet of the federal character

¹²⁰ Constitution of India, art 239-AA(3)(e).

¹²¹ Constitution of India, art 239-AA, cl. 3, sub-cl b.

¹²² GNCTD (Amendment) Act.

¹²³ Lok Sabha, 'Statutory Resolution Re: Disapproval of Government of National Capital Territory of Delhi (Amendment) Ordinance, 2023 (No. 1 of 2023) and Government of National Capital Territory of Delhi (Amendment) Bill 2023', (Lok Sabha Debates, 2023) <<https://sansad.in/getFile/debatestextmk/17/XII/3.8.2023.pdf?source=loksabhadocs>> accessed 12 October 2024.

¹²⁴ Lok Sabha Secretariat, 'Speech by HV Kamath', (Constitutional Assembly Debates, 1948) <<https://www.constitutionofindia.net/debates/15-nov-1948/>> accessed 01 August, 2024.

¹²⁵ *Government of NCT of Delhi* (n 7).

¹²⁶ *SR Bommai* (n 107), [96]-[99]; *Kesavananda Bharati* (n 31), [292].

of the Constitution has been elucidated under Article 239-AA. The provision lays down the extent of powers to be exercised by the Legislature of NCT of Delhi and that to be exercised by the Parliament. The federal structure envisaged originally by the members of the Constituent Assembly has been preserved by protecting the power of the Legislature from being encroached upon by the Parliament. The Notification of 2015 serves as a precedent for the Parliament to promulgate similar notifications in the future. The respective domains of the Legislature of NCT of Delhi and Parliament have been clearly demarcated under Article 239-AA, and any action of the Parliament that reduces the ambit of power to be exercised by the former would be deemed unconstitutional. The phrase '*insofar as such matter is applicable to the Union Territories*' included within Article 239-AA(3)(b) does not imply the exclusion of more entries from the domain of the Legislature of NCT of Delhi apart from the ones excluded by the provision itself.¹²⁷ The Supreme Court in the 2023 Judgment had propounded this principle; however, nine days after the pronouncement by the Hon'ble Court, the President promulgated an ordinance which had the effect of overriding the judgment.¹²⁸ This may be referred to as a case of 'parliamentary overruling'. Dr. Shashi Tharoor, while opposing the Bill of 2023 (which was eventually enacted as the Act of 2023), referred to such promulgation in the following manner:-

*“.....It represents a great chapter in the history of the Indian Republic seeking to ratify an ordinance that in many ways is an assault on our democratic heritage and the spirit of federalism.....”*¹²⁹

(emphasis supplied)

The Act of 2023 goes against the letter and spirit of the Constitution by restricting the scope of power to be exercised by the Legislature of the NCT of Delhi. The legislative device of abrogation, to remove the basis of a judgment, has

¹²⁷ Government of NCT of Delhi (n 7), [164.g].

¹²⁸ PRS Legislative Research, 'The Government of National Capital Territory of Delhi (Amendment) Bill, 2023', (PRS Blog) <<https://prsindia.org/billtrack/the-government-of-national-capital-territory-of-delhi-amendment-bill-2023>> accessed 09 July 2024.

¹²⁹ Lok Sabha, 'Statutory Resolution Re: Disapproval of Government of National Capital Territory of Delhi (Amendment) Ordinance, 2023 (No. 1 of 2023) and Government of National Capital Territory of Delhi (Amendment) Bill 2023', (Lok Sabha Debates, 2023) <<https://sansad.in/getFile/debatestextmk/17/XII/3.8.2023.pdf?source=loksabhadocs>> accessed 12 October 2024.

been discussed extensively by the Supreme Court in *NHPC Ltd. v. State of Himachal Pradesh*.¹³⁰ The Hon'ble Court laid down certain inexhaustive principles to be followed in the exercise of the legislative device of abrogation:-

“39.following principles which are not exhaustive:-

- (i) *There is no legal impediment to enacting a law to validate a legislation which has been held by a court to be invalid, provided such a law removes the basis of the judgment of the court, by curing the defects of the legislation as it stood before the amendment.*
- (ii) *The validating legislation may be retrospective. It must have the effect that the judgment pointing out the defect would not have been passed if the altered position as sought to be brought in by the validating statute existed before the court at the time of rendering its judgment.*
- (iii) *Retrospective amendment should be reasonable and not arbitrary, and must not be violative of any Constitutional limitations.*
- (iv) *Setting at naught a decision of a court without removing the defect pointed out in the said decision is opposed to the rule of law and the scheme of separation of powers under the Constitution of India.*
- (v) *Abrogation is not a device to circumvent an unfavourable judicial decision. If enacted solely with the intention to defy a judicial pronouncement, an Amendment and Validation Act of 1997 may be declared as ultra-vires.....”*

(emphasis supplied)

The authors undertake an analysis to demonstrate the non-compliance by the Parliament while enacting the Act of 2023, which had the effect of overruling the 2023 Judgment rendered by the Supreme Court. *Firstly*, the Act of 2023 removes the basis of the 2023 Judgment by altering the provisions of the Constitution without the presence of an amendment through the manner prescribed under Article 368 of the

¹³⁰ *NHPC Ltd. v State of Himachal Pradesh* (2023) SCC OnLine SC 1137.

Constitution.¹³¹ Additionally, the Act of 1991 in itself did not suffer from any defects as such; rather, it was the Notification of 2015 that attempted to diminish the ambit granted to the Legislature of NCT of Delhi. However, such a defect in the Notification of 2015 was resolved by the Supreme Court through the 2023 Judgment. *Secondly*, the 2023 Judgment would not have been passed only in an alternate setting where the Notification of 2015 was not promulgated. The Act of 2023 in no way addresses this defect inherent in the Notification of 2015; instead supplements the defect which was struck down previously by the Hon'ble Court. *Thirdly*, the Act of 2023 applies retrospectively; however, the arbitrariness lies in its attack on the federal structure of the Constitution. The legislation goes against the intention of the members of the Constituent Assembly. The drafters envisaged the dual polity proposed under the Draft Constitution not to be a league of States nor for the States to be administrative units or agencies of the Union Government.¹³² *Fourthly*, the legislation, as explained in the aforesaid reasons, fails to cure the defect of the Notification of 2015, and such failure is an antithesis to the rule of law and the separation of powers scheme under the Constitution. *Fifthly and lastly*, on consideration of the aforementioned reasons collectively, it may be reasonably inferred that the legislation has been enacted with the sole intention of defying the 2023 Judgment rendered by the Hon'ble Court and therefore, such a piece of legislation must be declared *ultra vires* the Constitution. Ordinarily speaking, in situations of exercise of legislative devise of abrogation, the intention of the legislative authority is to merely remove the causes of ineffectiveness or invalidity, which forms the basis of the judgment. However, such exercise is undertaken without the intention of rendering the judgment invalid by encroaching upon the Judiciary's domain.¹³³ Therefore, the correction by the legislature (Parliament in the instant situation) must be made for the purpose of removing the basis on which the judgment was based, without necessarily violating the scheme of separation of powers by interfering in the judicial turf.¹³⁴

Additionally, from the aforementioned analysis, it can be reasonably inferred that the legislature has attempted to defy a judicial pronouncement. This

¹³¹ Constitution of India, art 368.

¹³² Lok Sabha Secretariat, 'Speech by Dr. B R Ambedkar', (Constitutional Assembly Debates, 1948) <<https://www.constitutionofindia.net/debates/04-nov-1948/>> accessed 27 July 2024.

¹³³ *Tirath Ram Rajendra Nath v State of UP* (1973) 3 SCC 585.

¹³⁴ *Cheviti Venkanna Yadav v State of Telangana* (2017) 1 SCC 283.

exercise on the part of the legislature can be seen as a violation of yet another feature of the basic structure of the Constitution, that is, the separation of powers. The legislature attempts to undermine and legislatively overrule a judgment passed by the highest constitutional court of the nation.

The aforementioned analysis had been undertaken by the authors after delving into the provisions of the Act of 2023. The analysis of the authors in relation to specific provisions of the Act of 2023 has been contained under Section IV.

VI. TRIPLE CHAIN OF ACCOUNTABILITY AND GOOD GOVERNANCE: THE CO-RELATIONSHIP

Herman Finer, in his book titled '*The Theory and Practice of Modern Governance*', states that "*the function of civil service in the modern state is not merely an improvement of government; for without it, indeed, government itself would be necessarily impossible*".¹³⁵ Regardless of the type of government, i.e., republican, monarchical, or autocratic, people have always been involved in administration.¹³⁶ Thus, civil services are a vital component of the government. The development of the State and the ability of the Government often depend upon the civil servants. The political executive frames the policies and the laws, whereas it is the permanent executive that implements the policies and actions. Hence, it is not the people, the Parliament, the Cabinet, or even the individual ministers that carry out the policies; it is the civil servants, who have no association with politics.¹³⁷ These civil servants are responsible to the permanent executive, i.e., ministers, and the ministers who constitute the government are responsible to the legislature, and the legislature is responsible to the people. Thus, a constitutional democracy sustains upon the legislature being accountable to the electorate, the administration being accountable to the legislature, and the electorate ultimately retaining dominion through regular elections. This is called the triple chain of accountability. It emphasises a sustained system of political responsibility, where a breakdown at any one level undermines the overall constitutional power and is necessary for the legitimacy of administration than just legal authority. As a result, the triple chain serves as a fundamental democratic defence that guarantees responsible government in accordance with the Constitution. This interwoven connection

¹³⁵ Herman Finer, *The Theory and Practice of Modern Governance* (New York: The Dial Press 1932).

¹³⁶ *Union of India v Tulsiram Patel* (1985) 3 SCC 398.

¹³⁷ Dr DD Basu, *Commentary on the Constitution of India* (9th edn, vol 13, Lexis Nexis, 2018).

ensures that power is never used in a vacuum and is always subject to accountability at every democratic level.

A. The Westminster Model

India has adopted the Westminster style of cabinet form of government. No-confidence motion and the principle of collective responsibility are two important features of this system. It means that the Parliament and the government, which consist of the elected representatives of the people, are accountable to the people. If the Legislature loses confidence in the government, a no-confidence motion can be passed against the government. The elected representatives who constitute the Cabinet are accountable to the legislature for their acts and are collectively responsible for the proper administration of the country. The accountability of the government is often assessed in the legislature through deliberations on Bills, questions raised during Question Hour, resolutions, debates and ultimately the no-confidence motions. This establishes the loop of the Legislature being accountable to the people who elected them and the government being responsible to the legislature. The political executive is responsible to the government, and the government is collectively responsible to the legislature for its actions. Thus, this creates the multi-linked chain of responsibility where the government is responsible to the electorate.

As stated above, the ministers are responsible to the government, the government is collectively responsible to the legislature and the legislature to the people. However, the policies of the government are implemented through civil servants. Thus, ultimately, when it comes to execution, the will of the people is implemented through the administrative officers. As the civil servants who constitute the permanent executive branch in contemporary welfare state democracies wield significant influence, effective accountability requires two transactions: “one set of officials, such as the bureaucracy, who give an account of their activity, to another set, such as legislators, who take due account and feed their own considered account back into the political system and, through that mechanism, to the people”.¹³⁸

Consequently, we can see that the political executive is responsible for the actions of the permanent executive. In *Secretary, Jaipur Development Authority v.*

¹³⁸ Adam Przeworski and Others, *Democracy, Accountability, and Representation* (Cambridge University Press 2012).

Daulat Mal Jain,¹³⁹ the Court held that the individual minister is responsible and accountable for the actions of the permanent executive working under him or her. The Court opined that the government works through its civil servants, who formulate its administrative, social, and economic policies in an effort to promote social stability and instigate political, social, and economic advancement.¹⁴⁰ The minister is not only responsible for his own activities, but also for the actions of the bureaucrats who work for him or have worked for him. The minister is answerable to the voters for all of the activities he takes on behalf of the Governor in connection with the department he leads. He is accountable for all the acts of the bureaucrats who work for him, not just morally, but also practically, for how the department operates under his ministerial authority.¹⁴¹

Therefore, the Westminster style of cabinet form of government calls for a triple chain of command in order to ensure democratic accountability. Civil servants are accountable to the ministers, and ministers are accountable to the legislature, and the legislature is accountable to the electorate.

B. The Triple Chain of Accountability, the Federal System, and the Act of 2023

The Constitution of India is federal in its essence. Federalism is recognised as a part of the basic structure of the Constitution. Justice D.Y. Chandrachud, in the *Govt. of NCT of Delhi v Union of India*,¹⁴³ opined that the government is collectively responsible for the actions of the civil servants, where the minister itself is unaware of such actions by the bureaucrats. He further harangued that with all of its complications, modern government is made up of a number of parts and constituent parts. It consists of unelected public servants who work on daily governance concerns and ministers who are elected to the legislature. A decision made by one of the ministers or by one of their departments binds all other ministers and the government.

In the Constituent Assembly Debates, civil services are referred to as the '*soul of administration*', and it was stated that '*the importance of the civil services*

¹³⁹ *Secretary Jaipur Development Authority v Daulat Mal Jain* (1997) 1 SCC 35.

¹⁴⁰ *Secretary Jaipur Development Authority* (n 139).

¹⁴¹ *Secretary Jaipur Development Authority* (n 139).

¹⁴² *Kesavananda Bharati* (n 31).

¹⁴³ *State (NCT of Delhi)* (n 1).

cannot be gainsaid'.¹⁴⁴ Thus, the Bill of 2023, which vests administrative control of the civil servants with the Central Government, is unconstitutional in nature and is violative of the constitutional principles. The Act of 2023 gives the right to the departmental secretary to directly report to the LG, which is a clear violation of the triple chain of accountability by bypassing the ministers.¹⁴⁵ Thus, it is unconstitutional in nature as it is violative of Article 164(2) of the Constitution.¹⁴⁶ The legislation also provides that the LG can act on the recommendations of the National Capital Civil Service Authority with regard to the transfer and actions on civil servants. The NCCSA primarily consists of the Chief Minister, Chief Secretary and the Principal Home Secretary. Thus, predominance is given to the interest Central Government through Governmental officials, who can bypass the decision of the Chief Minister through a majority opinion.¹⁴⁷ However, the LG is again given the discretionary power not to follow the recommendation given by the NCCSA, where again the will of the central government would prevail.¹⁴⁸

Another important constitutional issue with regard to the Act of 2023 is whether the control over 'services' can be given to the Delhi legislature, which is covered under Entry 41¹⁴⁹ of List II. Here, for the purpose of Part XIV¹⁵⁰ of the Constitution, the interpretation of State under Section 3(58)¹⁵¹ of the General Clauses Act, 1897, shall be taken into consideration. Thus, NCT of Delhi will have the power to control and govern 'services'. In *Union of India v Prem Kumar Jain*,¹⁵² the Supreme Court of India held that provisions of Part XIV of the Constitution apply to Union Territories as well.

¹⁴⁴ Lok Sabha Secretariat, 'Speech by VI Muniswamy Pillai & BN Munavalli', (Constitutional Assembly Debates, 1948) <<https://www.constitutionofindia.net/debates/22-aug-1949/>> accessed 05 August 2024.

¹⁴⁵ The Government of National Capital Territory of Delhi (Amendment) Ordinance 2023, s 45K.

¹⁴⁶ Constitution of India, art 164(2).

¹⁴⁷ GNCTD (Amendment) Act, s. 45E.

¹⁴⁸ GNCTD (Amendment) Act, s. 45E.

¹⁴⁹ Constitution of India, sched. VII, lt. II, ent. 41

¹⁵⁰ Constitution of India, Constitution of India, pt. XIV.

¹⁵¹ The General Clauses Act 1897, s 3(58) (State:- (a) as respects any period before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean a Part A State, a Part B State or a Part C State; and (b) as respects any period after such commencement, shall mean a State specified in the First Schedule to the Constitution and shall include a Union territory;).

¹⁵² *Union of India v Prem Kumar Jain & Ors.* AIR 1976 SC 1856.

Section 45C of the Act of 2023 permits the Union Government to frame rules in relation to various matters, *inter alia*, conditions of service, tenure, salaries, allowances, and qualifications.¹⁵³ Section 45E of the Act of 2023 provides for the establishment of the NCCSA, wherein the majority of members are associated with the Union Government.¹⁵⁴ Section 45G of the legislation states that the Central Government, in consultation with the NCCSA, shall have the power to determine the nature and categories of officers; their salaries, allowances and conditions of service.¹⁵⁵ These provisions, in reality, effectively vest the control over the officials in the Union Government. The officers and other employees posted or appointed are subject to the rules made by the Union Government and not the Government of NCT of Delhi. The problem with such an arrangement is that the officers appointed by the Government of NCT of Delhi may not be performing a function which would concern the Union Government and the discharge of its responsibilities; however, these officers would still be subject to rules made by the Union Government. Such provisions mark the breakdown of the triple-chain of accountability, and as a result thereof, the Government of NCT of Delhi is unable to exercise control over the implementation and enforcement of its policies vested in such officers.

Within the bounds of the Constitution, the elected branch of the State must hold the true authority for governance in a democracy.¹⁵⁶ Control over governmental affairs is essential for a democratically elected government. In this case, all public officers are involved in the administration of the government, regardless of whether the respective government was involved in their hiring. If the government loses control over the administrative wing, the notion of triple chain responsibility would be rendered obsolete. If the bureaucrats are exempt from the oversight of the State Legislature, then they are unaccountable to the government and indirectly will not be responsible to the people. Thus, the will of the people, which is the most important feature of the democratic system, becomes obsolete. Hence, the Act of 2023 is a colourable legislation which is violative of the triple chain of accountability and democratic principles.

¹⁵³ GNCTD (Amendment) Act, s 45C.

¹⁵⁴ GNCTD (Amendment) Act, s 45E.

¹⁵⁵ GNCTD (Amendment) Act, s 45G.

¹⁵⁶ *State (NCT of Delhi)* (n 1).

VI. CONCLUSION

The Parliament's colourable violation of the Supreme Court's pronouncement and the basic structure of the Constitution has been critically examined. The harmonious and constructive relationship between the Union Government and the Government of NCT of Delhi was established in a delicate manner in 1991. However, nearly 24 years after the insertion of Article 239-AA and Article 239-AB in the Constitution, the Parliament attempts to straddle the federal nature of the Constitution by passing an 'atypical amendment' which continues to be subjected to the basic structure of the Constitution.

The provisions of the Constitution place an obligation upon the Union to operate with the States in harmony. This reflects the idea of collaborative federalism.¹⁵⁷ The judiciary is required to interpret the provisions of the Constitution in a manner that the powers reserved for the State are not whittled down.¹⁵⁸ Article 239-AA of the Constitution should be interpreted purposively with the intention of reinforcing the principles of democracy and federalism. Therefore, the principles of collaborative federalism are applicable in the case of NCT of Delhi as well.

The legislature of NCT of Delhi stands on an equal footing with the legislature of other States except in the case of certain entries of the State List. Consequently, the Union is obliged not to frame policies that would vest complete control in the hands of the Union legislature. The representative elected by the people residing within the territory of the NCT of Delhi should have the freedom to frame policies to safeguard the welfare of the very people who have put them in the position. However, the Act of 2023 makes these representatives subject to the rules and general control of either the Union or officers appointed thereby.

The Act of 2023 suffers from manifest arbitrariness and illustrates the enactment of a colourable legislation enacted solely for the purpose of defying a judicial pronouncement. The Parliament attempts to deprive the elected branch of the State of adopting policies which cater to the interests of the people of the NCT of Delhi. The Union has failed to uphold its duty of operating in harmony with the legislature of the NCT of Delhi. The federal balance was delicately maintained by Article 239-AA with the sole intention of ensuring the independence of the

¹⁵⁷ *State (NCT of Delhi)* (n1) [116]-[119].

¹⁵⁸ *SR Bommai* (n 107).

legislature of the NCT of Delhi, while remaining subject to the limitations included expressly in the provisions of the Constitution itself. However, this federal balance has been disturbed by the Act of 2023, which not only defies a judicial pronouncement by the highest constitutional court but also has the effect of amending the provisions of the Constitution.

Therefore, the Act of 2023 is liable to be struck down in light of the protection of the federal structure instituted by the provisions of the Constitution. If not being struck down, the Act of 2023 may serve as a precedent for the Parliament to slowly take away more powers vested in the legislature of the NCT of Delhi and establish complete control over the national capital.