

WHO SHALL ADMINISTER THE NATIONAL
CAPITAL TERRITORY OF DELHI?
THE INDIAN SUPREME COURT AFFIRMS
A PRINCIPLE OF COLLABORATION BETWEEN
THE FEDERAL AND THE “LOCAL” GOVERNMENT
FOR THE CITY MANAGEMENT

ABSTRACT: *The Indian Supreme Court has put an end to the long-running political battle over who should have more power to administer Delhi, between the central government, in the person of the Lieutenant Governor Anil Baijal, and the Delhi’s local one, represented by Arvind Kejriwal as the Chief of the Council of Ministers. Since the local Aam Aadmi Party has won the elections, it has struggled to govern, especially because of the 2016 Delhi High Court’s judgment according to which the “Lieutenant Governor is boss of administration in Delhi”. In its final decision, the five-judge constitutional bench affirms a principle of collaboration between the two levels of government. As written in the conclusion of the Court, the Lieutenant Governor and the Chief of the Council of Ministers are a “team” or a “pair on a bicycle” that share collective responsibility for the city management.*

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boss of administration in Delhi.¹”

The present case, *Government of NCT of Delhi v. Reportable Union of India & Another* (4 July 2018),² has been decided by the Supreme Court, acting as the highest Appellate Court in civil and criminal issues (“appellate jurisdiction”). At the same time, in the header of the concurring opinion issued by judge D. Y. Chandrachud, it is written that the case also falls within the “original jurisdiction” for disputes between the Government of India and the States, in this case a special Union territory (p. 238: “In the Supreme Court of India civil/criminal appellate/original jurisdiction”). In fact, when the Civil Appeals were heard, a Bench consisting of Justice A. K. Sikri and Justice R. K. Agrawal, in an order dated 15 February 2017, was of the opinion that the appeals should be heard by a Constitutional Bench, since it dealt with a substantial legal question about the interpretation of Article 239AA of the Constitution. This double jurisdiction is possible because the Supreme Court of India, in addition to acting as the guardian of the Constitution in the guise of a Federal Court, it also exercises appellate and advisory powers - arts. 124 et seq., Const.³

In its final decision, the five-judge constitutional bench affirms a principle of collaboration between the two levels of government. As written in the conclusion of the Court, the Lieutenant Governor and the Chief of the Council of Ministers are a “team” or a “pair on a bicycle” who share collective responsibility for the city management (p. 200). Looking at the facts, many questions arise, in particular: why is there a Lieutenant Governor who represents the central government in a city, given that India is a Federal State? Which is the legal nature of the National Capital Territory of Delhi?

The organization of the Indian Territory is peculiar: there are twenty-nine States (as in a normal Federation) and seven Union territories. The former each have a Parliament, a Council of Ministers and a Prime Minister. They each also have a Governor, who acts as a Secretary of the Indian President, and exercises his powers “only upon and in accordance” with the advice of Ministers, except in a few well-known situations (arts. 74 and 163, Const.). The latter are a type of administrative division, ruled directly by the central government (Art. 239, Const.). In fact, an Administrator governs them. He is not bound to act according to the advice of the Council of Ministers (Sec. 44, Union Terri-

1 D. MAHAPATRA, *Relief for AAP: Supreme Court Says Delhi Lieutenant Governor Can't Act Independently*, in *The Times of India*, 4 July 2018.

2 Supreme Court of India, *Government of NCT of Delhi v. Reportable Union of India & Another*, No. 2357/2017, 4 July 2018.

3 See K. RANA, *Jurisdiction of Supreme Court of India*, in *Important India*, July 2018. See also M. ROSENFELD – S. SAJÓ, *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, *passim*, for a general overview on Constitutional jurisdiction traditions in common Law countries.

tories Act, 1963). At the moment, there are three kind of Union territories: the regular ones, the Union territory of Puducherry and the sui generis National Capital Territory of Delhi (respectively arts. 239, 239A and 239 AA, Const.). Only the last two territories have their own local Parliaments, which are directly elected. The National Capital Territory of Delhi has been a special Union territory since 1991, when article 239AA was introduced in the Constitution. In the city, the local government is the expression of the Legislative Assembly. However, a form of “administrator” has been maintained, in the role of the Lieutenant Governor. Because of this national hybrid institutional structure, the Supreme Court recalls, in the decision at hand, that the Indian form of government is one of “quasi-federalism” or a “weak federalism” (the expression “quasi-federalism” can be found originally in the sentence *Shamsher Singh v. State of Punjab*, in 1974). Indeed, the “Union territory” entity was not present in the Charter at the beginning, but was incorporated only afterwards, in 1956, by the Seventh Amendment Act.

First, to solve the issue as to who has the power to administer Delhi, it is worth examining whether the city is still a Union territory or if its “special status” confers on it a semi-statehood that would justify an exception to top-down control by the federal government. In the words of the Supreme Court: “whether the inhabitants or voters of National Capital Territory of Delhi remain [de facto] where they were prior to the [recognition of the] special status [that] instils prana into the cells” (pp. 3-4).

The appellant (the chief of the Council of Ministers) claims that, after 1991, the status of the voters of the National Capital Territory of Delhi changed the principle of representativeness from a notional to a real one. Consequently, the High Court’s decision has suffocated the true soul of the provision. “Thus, article 239AA, in the case of Delhi, whittled down the executive power of the centre to only three reserved subjects falling outside the [...] executive power of the [chief of the Council of Ministers]” (p. 31).

The respondent (the Lieutenant Governor) affirms that, notwithstanding the special status, the National Capital Territory of Delhi has not acquired any statehood. It is still a Union territory, where a literal and true interpretation of the relevant constitutional articles is sufficient, considering also the suggestions made by the Balakrishnan Committee during the preparatory works for the introduction of art. 239 AA in the Constitution (1991). On these premises, the power of the National Capital Territory

of Delhi's Legislative Assembly is, according to article 239AA-3, "special and partial". In fact, nowhere in the Constitution has it been stipulated that the executive power of a Union territory vests in the Council of Ministers and/or in the Legislative Assembly. Article 239AA-4, in addition, employs the phrase "Lieutenant Governor and his Ministers", which implies that the Lieutenant Governor, and not the Chief of the Council of Ministers, is responsible for the administration of the Union territory. The result is that, even if there is a directly elected Legislative Assembly, there is not necessarily a parallelism between legislative and executive-administrative federalism (p. 40).

Based on the differences in the arguments on these points the Supreme Court analyzed whether if the role and powers of the Lieutenant Governor were more similar to those of a Governor of a State (following the *Shamsher Singh* case) or to those of a Union territory's Administrator (following the *Deuji Vallabhbbhai* and others case). It concluded that, because the Lieutenant Governor is bound by the "aid and advice" of the Chief of the Council of Ministers, his role is more similar to that of a Governor of a State. However, the National Capital Territory of Delhi, (page 157): "is a class by itself but is certainly not a State" (in the sense of Part VI, Const.).

Secondly, it is necessary to focus on the interpretation of the words "aid and advice", referring to the duty of Delhi's Chief of the Council of Ministers to report to the Lieutenant Governor for matters in the competences of the local Legislative Assembly. Is there the possibility for the Lieutenant Governor, on behalf of the Indian President, to interfere in "any matters" on which there are differences of opinions between the Lieutenant Governor himself and the Chief of the Council of Ministers (Art. 239AA-4)? The answers to these further questions depend on which kind of executive power the Lieutenant Governor can exercise with respect to the Chief of the Council of Ministers' activity. The Supreme Court sheds light on the issue in the following way, (pages 168 169): "sixty-ninth Amendment wanted to establish a democratic setup and representative form of government. [This effort] turns futile if the Government of Delhi is not able to usher in policies and laws." According to a purposive interpretation, article 239AA-4 stipulates a Westminster style cabinet for the National Capital Territory of Delhi, thus, (page 178): "It can be very well said that the executive power of the Union [the Lieutenant Governor] in respect of the National Capital Territory of Delhi is confined to the three matters in the State List", that are considered as exceptions (police, public order

and land). Such an interpretation would thwart any attempt on the part of the Lieutenant Governor to seize all control, and allow the concept of pragmatic federalism and federal balance to prevail by giving the National Capital Territory of Delhi some degree of independence. However, it can not be denied that the words “any matters” indicate, in case of differences of opinions between the Lieutenant Governor and the Chief of the Council of Ministers, that the former has the power to refer to the Indian President on all matters and not only on those three exceptions that derive from articles 239AA-3 and 4. Notwithstanding the incontrovertible literal sense, this “does not mean that the Lieutenant Governor should raise an issue in every matter” (p. 188). The power of the Lieutenant Governor, to replace with his own decisions those of the Chief of Ministers, is a special one and it must be an exception to the general rule. The Chief of the Council of Ministers, on his part, has the duty to inform the Lieutenant Governor about all the agendas proposal and decisions so as to keep the latter apprised and to enable him to scrutinize the activity of the former. According to the judgement, the Business of the Government National Capital Territory of Delhi Act (1993) already contains detailed instruments to adopt mutual cooperation (rules 9, 10, 11, 14, 23, 25, 42, 49 and 50).

The Supreme Court itself recognizes that carrying out the above-proposed solution would give rise to new conflicts: “[...] that apart, when we take a broader view, we are also alive to the consequence of such an interpretation” (p. 190). However, the choice in favour of equilibrium in interests and principles through the institutional dialogue is not necessarily, a bad path. It allows clarifying the point, on the one hand, with a flashback to the Indian constitutional history, and on the other hand, by presenting the complex structure of a capital city.

On the basis of a holistic, pragmatic and purposive interpretation of the Fundamental Law, three judges explained their decision starting from the clarification of the following fundamental concepts: “representative governance”, “constitutional morality”, “constitutional objectivity”, “legitimate constitutional trust”, “collective responsibility”, “federal functionalism”, and “collaborative” and “pragmatic federalism”. However, also the other two judges, of the five that have constituted the bench for this case, have adopted a similar method in their concurring opinions. Then, as a long preamble to the decision, the Supreme Court offers a paternalistic argumentation on

the universal value of the Constitution. It employs words such as “vital force”, “sanctity of objectivity”, “sacrosanctity of democracy”, “solemn idea of decentralization”, “spirit of the Constitution”, “constitutional ethos”, etc. The style of the long digression is not purely mystique but is also characterized by references to the fathers of Western political and juridical doctrines (Main, Jefferson, Locke, Montesquieu, Dicey) and to the activities of other Supreme Courts (such as the US, Canadian and Israeli ones). Why is this long part of the judgment so important? The Indian Constitution has represented the point of balance within the complex ant-colonialist movement, between the instances of nationalists (any “form” of government as long as independence is maintained) and the necessity of that part of public opinion to properly represent all religious groups (a new progressive legal order that reflects society). Because of the conflictive social system, the Constitution has been the solution to all these different positions, “imposing every constitutional act as an affirmation of juridical truth that reduces the spaces of politics.”⁴ This probably explains why the Indian Constitution, with its 450 articles and numerous special provisions, is the longest in the world. However, in the present case, the traditional “constitutional ethos”, instead of creating a strictly legal interpretation, is used in order to give space to negotiation and political action.

They are, precisely, the negotiation and the political action that find a favourable ground in a (global and capital) city where the incompleteness of the constitutional structure, in terms of “weak federalism”, enters into a particular tension. A capital city, in fact, lives the relationship between local (the city as an autonomous political entity) and central interests (the city as an administrative unit, dependent on the central government) intensely. At the same time, its special status makes the coexistence between the federal and the unitary impulses even more problematic. The special status depends on the fact that the National Capital Territory of Delhi hosts the capital city and it is in itself a special global prototype: a megalopolis, the second in the world after Tokyo in terms of population and density.⁵ The starting point is the kind of urbanization that

4 Personal translation from G. GRAPPI, *Stato e costituzionalismo (post)coloniali in India. Differenze e attraversamenti*, in *Scienza e politica*, XXV:48, 2013, pp. 53-73).

5 WORLD ECONOMIC FORUM, *These Will Be the World's 10 Biggest Cities in 2030*, 28 June 2017; see also UN DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, POPULATION DIVISION, *The World's Cities in 2016*.

is, in this case, truly widespread. The urban area of Delhi hosts 46 million of people.⁶ It does not represent the administrative border but the functional unit as the sum of the territory included in the National capital region and other several districts from other Border States. To have a complete picture of the urban reality, it is important to think in terms of concentric circles. Under the National capital region, there is the National Capital Territory of Delhi with its 16 million people.⁷ Below this level, there are eleven districts, among which there is also New Delhi which is both the capital city of India and of the National Capital Territory of Delhi. At this level, the population approaches the local European standards and New Delhi is around 250,000 people.⁸ Indeed, the “district” is not the most appropriate term to describe it considering that it normally indicates the “rural” local units above the village and the block levels (seventy-third Amendment, Panchajati Raj Act, 1992). In the urban context the right labels for the local units are those of “municipal corporations” for areas with more than one million people; “municipal councils”, for those more than 100,000, and nagar panchayati for areas in transition from rural to urban. The National Capital Territory of Delhi originally had a municipal corporation that covered eight districts, providing services for 11 million people.⁹ It has been recently divided into three new local authorities for North, South and East and they can be considered as metropolitan institutions. Moreover, there are the New Delhi Municipal council, specific for the sole “district” of New Delhi, and another special authority known as Delhi Cantonment Board. Because of this complex situation, the National Capital Territory of Delhi’s semi-statehood and the *ratio* of the Union-territory system are strangely overlapping with each other, to say: is Delhi an independent State? Or is it merely a decentralized authority (as an internal articulation of the federal State)? Or, even, is it a local self-government?

In conclusion, with these historical and demographic elements in mind, some of the words of the judges become clearer. In particular, the reference to a “principle of

6 NATIONAL CAPITAL REGION PLANNING BOARD, MINISTRY OF URBAN DEVELOPMENT, GOVERNMENT OF INDIA, *Annual Report 2014-2015*.

7 National Capital Territory of Delhi’s population available at www.citypopulation.de/India-Delhi.html?cityid=2925

8 New Delhi’s population available at www.citypopulation.de/php/india-delhi.php

9 Municipal Corporation of Delhi’s population in 2011, available at www.census2011.co.in/census/state/delhi.html and www.censusindia.gov.in/2011-prov-results/paper2/data_files/India2/Table_2_PR_Cities_1Lakh_and_Above.pdf.

constitutional governance” in the meaning of the “fiduciary nature of public power and the system of checks and balance” or, in a negative form, of a “principle of non-obstinacy” of the centre towards the local government, in favour of a welfare administration (p. 58 and what has been called here: a “principle of collaboration”) makes much more sense. Therefore makes much more sense, the judgment can be considered not only a signal of a more mature democracy but, also, of an improvement in the National federal structure. The latter consequence is evident even just by considering the reference the Court makes to the enumerated powers of the local Legislative Assembly in article 239AA-3 and 4, with the aim to clarify the demarcation of competences between the centre and the periphery or, otherwise, between the federal government and the “quasi-State” of Delhi.