

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL 2357 OF 2017

IN THE MATTER OF:

GOVT. OF NCT OF DELHI

...APPELLANT

Versus

UNION OF INDIA & ORS.

...RESPONDENTS

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**SUPPLEMENTARY WRITTEN SUBMISSIONS ON BEHALF OF THE
APPELLANT, THE GOVERNMENT OF NCT OF DELHI**

**ARTICLE 239AA WILL BECOME UNVIALE IN THE ABSENCE OF
AVAILABILITY OF ENTRY 41 AS A LEGISLATIVE/EXECUTIVE
POWER TO THE ELECTED ASSEMBLY/GOVERNMENT AND
INABILITY TO CONTROL CIVIL SERVANTS IN THE GOVERNMENT
OF NCT OF DELHI.**

1. The fundamental principle on which the functioning of even a small organisation, leave alone that of a Government responsible for a bustling and fast-moving metropolis with more than 2 crore people, is based on is that those responsible for running the entity/organisation or state are able to appoint/employ and exercise administrative control over those who will in fact be carrying out the work. This is a fundamental principle of administration and in the absence of this principle, the entity/organisation or government will cease to be viable.

**A. THE PURPOSE AND ROLE OF CIVIL SERVICE IN A WESTMINSTER
PARLIAMENTARY DEMOCRACY**

2. Under the Westminster parliamentary democracy, the civil service is an important part of a chain of command that ensures democratic

accountability of the civil servants tasked with implementing the policies of the government, to the people. Although the civil servants are tasked with implementing the policy, this legitimacy is maintained as Ministers are answerable to the Legislature, which is directly elected by the people. Day-to-day decisions are taken by the Council of Ministers/Individual Minister and implemented by an impartial civil service. As recognized in authentic texts of the Westminster system, the simple chain of command is as follows:¹

- a. Civil servants are accountable to Ministers;
 - b. Ministers are accountable to the legislature.
 - c. Members of the legislature are accountable to their constituents.
3. In the Westminster system, the relationship between the Civil Servants and Ministers is one of mutual interdependence and they share a close professional relationship. On the file, the civil servant is fully entitled to put his forthright view on the matter, but once a decision is taken by the elected arm, he must loyally carry out that decision, even if he is not in agreement with it. Thus, the civil servant, though independent and impartial, is accountable to the elected arm of the government.

B. GOVERNANCE CHALLENGES IN THE NCT OF DELHI AND NEED FOR AN EFFECTIVE CIVIL SERVICE ACCOUNTABLE TO THE ELECTED GOVERNMENT

4. The administration of NCT of Delhi poses unique challenges as it has one of the highest population growths across the country, partly due to the pressure of migration on the City. The governance of the NCT of Delhi is already challenging given the trifurcation

¹ Martin Stanley, Civil Servants Ministers and Parliament, <https://www.civilservant.org.uk/>.

of the areas of competence with the Central Government charged with Police, Public Order and Land, the Government of NCTD charged with all other areas of competence in List II and List III and municipal bodies also charged with municipal governance. The impugned notification, by seeking to exclude “Services”, in effect makes the functioning of the Legislature/Government of Delhi even in areas of its competence an unviable proposition and converts an already challenging governance environment, into a nearly impossible one.

5. The effect of the impugned system is to make an impartial civil service an indifferent civil service, and this is being borne by out by the factual situation on the ground.
6. In fact, it is for this reason, that irrespective of the width of the area of competence that local governments in national capitals across the world have, the civil servants and staff working in those Local Governments are accountable to the Local Government.

I National Capital in Federated Countries

7. The nearly universal norm amongst National Capitals across the world in Federal Countries is that irrespective of the nature of division of powers between the Federal Government and the Local Government, the Local Government has power to appoint civil servants for its areas of competence and the civil servants who work for the Local Government are accountable to the Local Government.
8. The indivisible connection between the elected arm and the career civil servants at any level of government is a universal phenomenon. National Capitals in different countries across the world have powers distributed between the Federal Government

and the City Government in different fashion. The common theme amongst all these National Capitals is that irrespective of whether the areas of competence of these governments is broad or narrow, the Governments have power to appoint civil servants in their government and they exercise supervisory and administrative control over them.

9. In Federal Systems, the Administrative and Governance Structure of National Capitals falls in broadly three categories.²

a. Federal Territory with a City/Local Government with more or less similar powers as a State/Province. Under this model, the following Capitals/Countries fall:

- | | | |
|------|---------------|-------------------------------------|
| i. | Abuja | Capital City of Nigeria |
| ii. | Addis Ababa | Capital City of Ethiopia |
| iii. | Canberra | Capital City of Australia |
| iv. | Mexico City | Capital of Mexico |
| v. | Washington DC | Capital of United States of America |

The degree of local autonomy varies within these Federal territories. At one end of the spectrum is Abuja, which is tightly controlled by the Federal Government of Nigeria and on the other end is Canberra, which is largely autonomous of the Federal Government.

b. City-States that are simultaneously cities and a constitutive and independent unit of the Federation. In this category, the following two capital cities fall.

² Enid Slack & Rupak Chattopadhyay (Eds.), *Finance & Governance of Capital Cities in Federal Systems*, McGill-Queen's University Press, 2009, Pg. 292-326.

- i. Berlin Capital City of Germany
 - ii. Brussels Capital City of Belgium
- c. City in a State. In this model the Capital City of the Country is a city in a full-fledged State or Province. The following two capital cities fall in this category.
- i. Ottawa (Lies in Province of Ontario) Capital City of Canada
 - ii. Bern (Lies in Canton of Bern) Capital City of Switzerland
 - iii. Another sub-category within this is that of South Africa. Although, in terms of the Constitution, there is no capital city in South Africa. The executive branch of Government is based in city of Pretoria (which is located in the Metropolitan City of Tshwane), the Parliament is located in Cape Town (which is a metropolitan city in the province of Western Cape) and the Constitutional Court is located at Johannesburg, which is the capital of Gauteng Province. Thus, all arms of Government are in cities that are independent federated units.

10. The above examples show a range of models for National Capitals in Federated Systems and a wide range of distribution of powers ranging from centralised governance to highly federal and independent governance of the Capital. Crucially, however, in none of these models are those serving in the Local Government of the Capital City not answerable to that government. Even with the narrowest areas of competence, the Local Governments have

the requisite power to appoint employees for their government and to control them administratively.

11. In fact, the existence of this power is so fundamental that even in completely non-federal systems such as the United Kingdom, the Local Government of the National Capital London has the power to appoint its own officials and control them.

II The Case of London

12. The British system is not considered a Federal System as there is no division of powers between the Parliament and smaller units by and through the Constitution. The British Parliament has sovereign powers to legislate without any limitation. However, the United Kingdom has through Parliamentary enactments devolved power on regional units, such as Scotland (The Scotland Act, 2016) Wales (The Wales Act, 2017) and Greater London (Greater London Authority Act, 1999).
13. The Greater London Authority Act, 1999 (“1999 Act”) establishes the Greater London Authority which comprises of a Mayor and The Assembly (comprising of 25 Members), each of which is elected directly by the people of Greater London. The Mayor and Assembly have the power to appoint staff and officials for the Authority. The provisions in this respect are to be found from Section 67-Section 73 of the 1999 Act.
14. If there is any national capital that exemplifies the country itself, it is London. The local government of London, which only has devolved powers and is not a federated entity, has the power to appoint and control its civil service. In fact, the example of London shows that even in the most centralised set-up, where the national capital signifies the country itself, there is no national interest in

controlling the services of the Local Government of the National Capital and powers of appointment are in the exclusive control of the local government.

III Even the Municipal Bodies in the NCT of Delhi have power to appoint and control those who serve in the Municipal Corporation.

15. The NCT of Delhi has a total area of 1485 square kilometres. As far as Municipal Governance is concerned, the Municipal Corporation of Delhi, established under the Delhi Municipal Corporation Act, 1957 (“**DMC Act, 1957**”) covers 1400 square kilometres, comprising the overwhelming bulk of land mass in the NCT. The New Delhi Municipal Council, established under the New Delhi Municipal Council Act, 1994 (“**NDMC Act, 1994**”) covers an area of 42.37 square kilometres and the Delhi Cantonment Board has an area of 43 square km.
16. Under Sections 89 and 90 of the DMC Act, 1957, the Corporation and Standing Committee, have the power to make/approve appointments/posts that are crucial for the functioning of the Municipal Corporation. Similar provisions exist in Section 33-34 of the NDMC Act, 1994. Both these Acts are Parliamentary laws. Thus, in view of the Parliament, even the municipal bodies in the NCT of Delhi have control over their services. Thus, the legal position sought to be supported and argued by the Union of India in this case puts the Delhi Assembly and Government of NCT of Delhi on a worse footing than even municipal bodies in Delhi!
17. The manner and exercise of executing governmental work requires clarity and accountability. It is for this reason that the earlier Constitution Bench in 2018 has held that the executive

power in respect of all entries in List II and List III (except expressly excluded entries) is exclusively with the Delhi Government and there is no parallel executive power that the Union of India exercises. For day to day exercise of power and function, there cannot be dual authorities and it is for this reason that civil servants who serve in the Delhi Government are to be accountable to the elected arm of the Government.

C. CONCLUSION

18. In light of the above, the following conclusions emerge:

- i. That the right to create posts, make appointments, transfers and allocations to such posts is essential for a functioning Government and ensuring democratic accountability, certainly of a large and fast changing and growing metropolis, that faces many governance challenges.
- ii. That National Capitals in Federal System across the world, irrespective of the model they follow of distribution of power between the Federal Government and the Local Government, do not envisage a situation where the Local Government is incapable of appointing and controlling civil servants/staff to the Government and to control their day to day functioning.
- iii. That even in case of fully centralised non-Federal system such as United Kingdom, the Local Government for Greater London has power and control over its staff and civil servants.
- iv. That even the Municipal Bodies in the NCT of Delhi have power to appoint and control their staff and civil servants.

- v. That there cannot be two levels of functional control in respect of day to day work of the administration and governance in the Government of NCT of Delhi. Much worse, there cannot be control over civil service by one political executive and work to be carried out by another political executive.

Drawn by:

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Date: 6th January, 2023.