

**IS PUDUCHERRY PUBLIC SERVICE
A UNION OR STATE SERVICE: AN ANALYSIS**

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Abstract

The concept of “Federalism” may be described as a constitutional mechanism for distributing power between different levels of government thus federated units can enjoy considerable, constitutionally defined autonomy over certain policy areas while sharing power in accordance with settled rules over other areas. Generally, on this basis, the distribution of power between Union, States ,and other territories are made for exercising such defined autonomy, irrespective of the classification of the territory having a legislature. However, the same principle is not adopted concerning the Union Territory having a legislature, as they are considered to be part and parcel of the Union of India. India is a nation on “holding together” principle of Federalism and not “coming together” Federalism. It is symmetrical federalism in one aspect and asymmetrical in respect of the Instrument of accession and Treaty of cessation. The 1963 Government of Union Territories Act has established the Legislature of Puducherry with the powers to make laws concerning any of the matters enumerated in the State List or Concurrent List in the Seventh Schedule to the Constitution of India in so far as such matters are applicable in relation to Union Territory. A dispute arises whether the Council of Ministers has the competency to aid and advise the Administrator in the Union Territory of Puducherry and have the competency to enact the Puducherry Public Service Act for regulating the executive in Puducherry. The authors have attempted to analyse the feasibility of Public Service Act in Puducherry in the light of the theory of the separation of Power between Executive and Legislature of Puducherry in terms of article 240 and 309 of the Constitution of India.

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- IV. State Public Service**
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VIII. Union territory service matter: constitutional perspective**IX. Relevance of Article 239A****X. Conclusion****I. Introduction**

IT MAY BE observed that India had been administered by the Crown of the United Kingdom on a unitary basis even long before 1935. In the year 1935, the unitary system in British India was replaced by a Federal system by the Government of India Act.¹ Nonetheless, federalism under the Constitution of India is based on the foundation of the 1935 Act. It was therefore inevitable because of its lineage that the current Indian Federal system had a unitary bias². The Constitution of India speaks about India as a Union of States and not about Central Government.³ In this connection, it may be pertinent to note that French India is a historical fact whether any authority or Law accepts it⁴. This is reflected in the continuance of some French Laws in force in Puducherry French establishments *i.e.*, French Marriage Laws and Birth and Death Registration Laws *etc.*⁵ The authors have attempted to analyse the difference between the citizen and the subjects in Chapter – II. The relationship between the Administrator and the Union Territories Act and the Council of Ministers have been elaborately discussed in the chapter – III. In chapter IV, the authors have examined whether the Union Territory (hereinafter as “U.T”) has executive independency. If so whether the Union Territory Legislature would be the appropriate legislature on the subject mentioned under Part –XIV of the Constitution. Under Chapter – V, an attempt has been made

¹ The Government of India Act, 1935 provided, *inter alia*, for the establishment of a “Federation of India”, to be made up of both British India and some or all of the “Princely States” and for the establishment of a “Federal Court”. Although in 1937 federalism was sought to be introduced under the Government of India Act, 1935, it never worked in practice as, under the impact of the Second World War, India was administered more as a unitary, rather than a federal country under the emergency powers of the Centre. See M. P. Jain, “Some Aspects of India Federalism” 28 *Heidelberg Journal of International Law* 301-364 (1968) and Chanchal Kumar, “Federalism in India: A Critical Appraisal” 3(9) *Journal of Business Management and Social Sciences Research* 31-43 (2014) and Mukesh kumar, “Nature of Indian Federalism: An Analysis of Historical Basis and Problems” 7(1) *International Journal of Humanities and Social Science Invention* 42-47 (2018).

² *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.
SR Bommai v. Union of India, AIR 1977 SC 1361.

³ The Constitution of India, art. 1(1). It states thus: India, that is Bharat, shall be a Union of States.

⁴ As per the General clauses Act, India means British India as defined in the Government of India Act 1935. In the year 1935 there were Portuguese India, French India, Princely states India and Other India. French India has come to an end with the signing of French India cessation Treaty 1956 which came into force on 16.08.1962. From 1962 onwards French India became part of Indian Union.

⁵ Subhash C. Jain, “French Legal System in Pondicherry: An Introduction” 12(573) *Journal of the Indian Law Institute* 574-608 (1970).

to examine the meaning of appropriate legislature as found under article 309 of the Constitution. The impact of transitional powers of the President of India has been discussed under Chapter VI. The recent judgment of the five Judge constitutional bench of the Supreme Court of India on the differential status of the National Capital Territory and Union Territory of Puducherry in terms of the Indian Constitution has been discussed in Chapter VII. The authors have carefully examined the scope of service matters concerning the co-extensive powers extended is permanent or temporary in Chapter VIII. The authors have discussed the history and relevance of article 239A for the creation of Local Legislature in Chapter IX. The authors in concluding para have summed up that the Council of Ministers and the legislatures have powers over the State Public Services and ultimately the Administrator in the Union Territory is bound by the aid and advise of the Council of Ministers under State List item number 41 of the Constitution of India.

II. Citizen *vis-a-vis* Subject

In the year 1946, French India was treated as one of the territorial States of the French Republic under the Ministry of Overseas Territories in which Algeria, Morocco, Tunisia, Indo-China and Puducherry were granted Statehood status on the eve of decolonisation. All these Territorial States became independent Nations in the 1950s except Puducherry. Therefore, the people of French India, thus, turned from French “Subjects” into French “Citizens” in the year 1946. As a result, the Political character of the Puducherry people has also changed accordingly, as they got Representative Assembly for themselves where the difference was immense.⁶ The term “Subject” springs from the Latin words “*Sub*” and “*Jacio*” which suggests one who is under the control of another; whereas a citizen is treated as a unit of a mass of the free population who collectively possess sovereignty. Subjects look up to a master but Citizens are so far equal, that none have hereditary rights of superior to others.⁷

It may be noted that each Citizen of a free state contains within himself sovereignty naturally and therefore the maximum amount of the common sovereignty contained in the

⁶ Decree No. 46-2381 dated October 25, 1946 in Puducherry Code (Vol. I, Edn, 2nd, 2010) at 129.

⁷ Maximilian Koessler, “Subject, Citizen, National, and Permanent Allegiance” 56(58) *The Yale Law Journal* 58 - 76 (1946); Marina Gržinić, “Political Agency: The Subject and the Citizen in the Time of Neoliberal Global Capitalism” 14 *AM Journal* 1-11 (2017); Ipek Danju and Huseyin Uzunboyulu, “A content analysis of citizenship Education” 4 *Global Journal on Humanites and Social Sciences* 167-173 (2016); Linda Bosniak, “Persons and Citizens in Constitutional Thought” 8(1) *International Journal of Constitutional Law* 9-29 (2010).

Constitution which is reflected in the Preamble of the Constitution of India.⁸ In this regard, Historian David Ramsay at the dawn of American Independence stated thus:⁹

In the eye of reason and philosophy, the political condition of citizen is more exalted than that of a nobleman. Dukes and Earls are the creatures of Kings and may be made by them at pleasure: but citizens possess in their rights original sovereignty.

In another perspective, the term “Subject” is used rather than a “citizen” in a monarchy. The monarchy is the source of authority in whose name all legal power in civil and military law is exercised. The people of Monarchy in the former times were regarded as the monarch’s subjects who were under certain obligations such as owing allegiance to and thereby entitled to the protection of the Crown.

In the year 1962, French India *i.e.*, Pondicherry establishments *viz*; Pondicherry, Karaikal, Mahe, and Yanam became part of the Union of India under the nomenclature of Union Territory. The Pondicherry State Representative Assembly was assured by under *De Facto* Agreement of 1954 by an elected Legislative Assembly which is created by an Act of Parliament *i.e.*, the Government of Union Territories Act, 1963 (hereinafter as “Govt of U.T Act, 1963”).¹⁰ All French citizens of Pondicherry establishments were turned into deemed Indian Citizens by the 1962 Presidential Order called the Citizenship (Pondicherry) Order.¹¹

In the beginning, all went well as per the 1956 Treaty of Cession., both the 1962 Citizenship (Pondicherry) Order and Treaty of 1956 came into force from August 16, 1962. The Treaty was signed by Pandit Jawaharlal Nehru in 1956. He died in the year 1967. After his demise, everybody in the Union of India turned a blind eye towards Pondicherry by treating the territory as the property of the Union and the People as Subjects of the Union. Thus, free citizens of Pondicherry became subjects of the Union Government. This is evident from the deviation from the obligation of the Union Government in maintaining Pondicherry as a separate entity with financial aid under the Treaty of 1956. The initial 100% Central grant to the Pondicherry in 1954 was reduced to 90% in 1962, and thereafter to 70% and then to 30% in 2007, now virtually 18% in 2019.

⁸ The Preamble of the Indian Constitution begins with “We, the people of India....”.

⁹ Edward J. Erler, *Property and the Pursuit of Happiness: Locke, the Declaration of Independence, Madison, and the Challenge of the Administrative State* 15 (Rowman and Littlefield, London, 2019). *Chisholm v. Georgia*, 2 U.S. 419 (1793).

¹⁰ The Government of Union Territories Act, 1963 (Act, No. 20 of 1963); see *Supra* note 6 at 83.

¹¹ *Id.*, at 327.

Over time, the union territory of Pondicherry became a subservient political unit of the Union of India where the growing aspirations of the people of Pondicherry for self-rule were ignored. The Government of the Union territories Act, 1963 with time became a fetter to the peoples' political will and for self-rule. The 1963 Act, in essence, converted the people of Puducherry as "subject" of the President from "citizen" of India, repudiating popular sovereignty concerning people as the source of all authority in the state. All organs of the Political State whether it is Legislature, Executive or Judiciary, derive their power and authority from the will of the people, taken as a whole. Accordingly, the idea of popular sovereignty and political state implies that the supreme power in the State rests with the people. This democratic principle is not made applicable to the Union territory with the Legislature. This is an anachronism of democracy.

III. Lt. Governor *vis-a-vis* Council of Ministers

This anachronism manifestly in vogue in the Pondicherry during the last four years because of denial of the administrative right of the Council of Ministers over the Executive as per the interpretation of the present Administrator of U.T. of Puducherry. The executive power is generally described as the residue which does not fall within the legislative or judicial power. The expression "Business of the Government of India" in clause (3) of article 77 and the expression "Business of the Government of the State" in clause (3) of article 166 includes all executive business. The business of the Government of Puducherry is governed by section 46 of the U.T. Act 1963, and proviso to article 309 of the Constitution.

For the present analysis about the power of the Lt. Governor (Administrator) over the Executive of Union territory of Puducherry public services (Government), we have to start from the merger agreement dated October 21, 1954, followed by the Treaty of Cession, dated May 28, 1956. In international law, such a treaty does not come into immediate effect by the mere virtue of existence. It has to be ratified by the high contracting parties, and quite some time elapsed before the ratification. The *de-jure* transfer came into force on August 16, 1962, which is known as the appointed day embodied in the Pondicherry (Administration) Act, 1962, which came into effect on December 5, 1962. By the 14th Amendment of the Constitution of India, Pondicherry was merged in the Indian Union as a Union Territory, under Entry 6 of the 1st Schedule of Part -II.¹² After this, we have the enactments Pondicherry (Administration)

¹² P. M. Bakshi, *The Constitution of India* 353 (Universal Law Publishing, Delhi, 2013).

Act, 1962, and the Government of the Union Territories Act, 1963.¹³ Some reference is also useful to examine the agreed Process-Verbal dated March 16, 1963,¹⁴ which was made between France and India after the departure of the French Government.

The Administrator *i.e.*, the Lt. Governor of Puducherry and the Government of Union Territories Act, 1963, are created under articles 239 and 239A respectively of the Constitution of India. Article 239A provides for the creation of legislature or council of ministers or both for the Union Territory of Puducherry. The opening of article 239(1) begins as follows:¹⁵

Save as otherwise provided by Parliament by Law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an Administrator to be appointed by him with such designation as he may specify.

Puducherry Legislature is the creation of the Parliament of India in compliance to the *de Facto* Agreement dated October 21, 1954, *vide* article 2 and 3 as follows:

Article 2: The Municipal Regime in the communes of the Establishments (Pondichery, Karaikal, Mahe, and Yanam) and the regime relating to the Representative Assembly shall be maintained in their present form.

Article 3: The Government of India shall succeed the rights and obligations resulting from the acts of the French Administration as are binding on these Establishments.

These two provisions enable the Government of the Union of India to provide Legislature to the Puducherry establishment with the power over the matters related to State Public services, as the legislature of Puducherry is the successor of the Representative Assembly of French India. The Parliament wisely devolved Legislative Power through section 18 of the Government of Union Territories Act of 1963 which is reproduced as under:¹⁶

18(1) - Subject to the provisions of this [Government of Union Territories] Act, the Legislative Assembly of the U.T of Puducherry may make Laws for the whole or any part of the U.T with respect any of the matters enumerated in the

¹³ *Supra* note 6 at 54.

¹⁴ *Id.*, at 67.

¹⁵ *Supra* note 12 at 221.

¹⁶ *Supra* note 6 at 95.

State list or the Concurrent List in the Seventh Schedule to the Constitution in so far as any such matter is applicable to Union Territories.

The Public services are the arm of the executive power of “Political State” which includes Public Order, Police, Land and Public Service. The U.T Act of 1963, and the Rules of Business of the Government of Puducherry 1963, bestowed the executive power of the State in the Council of Ministers as was available in the then French Representative Assembly in 1946. Section 44 of the U.T Act of 1963 mandates that there shall be a Council of Ministers in U.T with the Chief Minister at the head to aid and advise the Administrator in the exercise of his functions in relation to matters for which the Legislative Assembly of the U.T. has the power to make Laws except in so far as he's required by or under this Act to act in his discretion or by or under any Law to exercise any judicial or quasi-judicial functions.

IV. State Public Service

A question arises as to whether the Legislative Assembly of the Union Territory, is vested with the powers to make Law on “State Public services”, which is found in Entry 41 of the State List of the seventh schedule of the Constitutional of India. We have to refer to the Constitution of India Part –XIV, Services under the Union and the State Chapter - I under which article 308 and 309 appear for better understanding. Those relevant provisions from the Constitution of India are as hereunder:

Article 308: Interpretation – In this Part, unless the context otherwise requires, the expression “State” does not include the State of Jammu and Kashmir.” 16A by the Jammu and Kashmir Reorganisation Act, 2019 this article becomes defunct. However, it is useful to infer the inverted meaning for the interpretation of “appropriate Legislature” found in article 309.

Article 309: Recruitment and condition of service of persons serving the Union or a State- Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with affairs of the Union or of any State

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the

case of services and posts in connection with the affairs of the State to make rules regulating the recruitment and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the Appropriate Legislature under this article and any Rules so made shall affect subject to the provisions of any such Act.

The President of India in the exercise of powers conferred by the proviso to article 309 of the Constitution made the “The Pondicherry Administration (Conditions of Service of the Employees) Rule 1966” dated November 9, 1966. The Rule provides the conditions of service of all persons appointed into the Central Civil Services and Posts, Class I, Class II and Class III and Class IV, under the administrative control of the Administrator of Pondicherry shall, subject to any other provision made by the President, be the same and the conditions of service of a person appointed to other corresponding Central Civil Services and posts and shall be governed by the same rules and orders as are for the time applying to the latter category of persons. This Rule made under proviso to article 309 is subject to until provision is made by or under an Act of the appropriate Legislature under article 309 and any rule so made shall effect subject to the provisions of any such Act. So it is clear that the Puducherry Legislature which is the creation of the Parliament is the Appropriate Legislature for the U.T of Puducherry. Any legislature is a representative body under article 326 and 329 of the Indian Constitution. Puducherry legislature complies with these provisions and hence Puducherry legislature is the appropriate legislature in terms of the Constitution. Further, under section 3(62-A) of the General Clauses Act, the Union Territory though administer by Central Government under article 239 does not get merged with the Central and loose the identity¹⁷. In respect of the National Capital Territory of Delhi by article 239 AA (2) (C) “appropriate legislature” means Parliament, But, in the case of Puducherry Parliament is not specified as the “appropriate legislature” in terms of article 309 or Section 18 of the Government of Union Territories Act, 1963.

V. Appropriate Legislature

The U.T of Puducherry is a “State” as per the Interpretation of article 308 of the Constitution of India; whereas, U.T. with Legislature is “Appropriate Legislature” under article 309. In the absence of a direct definition for the “Appropriate Legislature” in the Constitution

¹⁷ *Government of NCT Delhi v. All India Central Civil Accounts, JAO's Association*, AIR 2001 SC 3090 : (2002) 1 SCC 344; (2002) 1 SSC 344; *Chandigarh Administration v. Surinder Kumar*, (2004) 1 SSC 530: AIR 2004 SC 992.

of India we have to resort to the interpretation of article 367 of the Constitution which refers to the General Clauses Act, 1897 and the same has been extended under the 1965 Pondicherry General Clauses Act. According to section 3 (58) of the 1965 Act, “State” specified in the First Schedule in the Constitution shall include a Union Territory as well. The relevant Section is given below:

Section 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.

Therefore, in this context, Puducherry Legislature is the Appropriate Legislature empowered to enact a law in respect of regulating the recruitment, and the conditions of services of a person appointed to such services and posts to provide in that behalf by or under an Act of the Legislature under article 309 and any rules made under proviso to article 309 “shall have effect subject to the provisions of any such Act made.” The Constitution does not provide such power over services in respect of any other Union Territory other than NCT of Delhi, Puducherry ,and Jammu and Kashmir which are having Legislatures. Now Union Territories without Legislature are Andaman and Nicobar; Lakshadweep; Chandigarh; Daman and Diu; Dadra and Nagar Haveli; and Ladakh.

VI. Transitional Power of the President

Article 1 of the Constitution itself was amended by the Constitution (Seventh Amendment) Act of 1956 and as that article now stands, there is a clear discernible division between (1) Territories of the State (2) Union Territories specified in the First Schedule and (3) and such other territories as may be acquired. The Union Territories such as Pondicherry, ought not to be confused either with the Territories of the State or with such other Territory as may be acquired; the Union Territory constitute a class apart. Article 309 of the Constitution of India states thus:

Appropriate Legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or any State.

According to the proviso to article 309, it will be competent for the President to make rules and regulations in this regard until there is an act enacted by the appropriate legislature. Thus, the proviso to article 309 is a transitional proviso empowering the Union executive to make rules having the force of Law. The power of the President has to be gathered either under article 309 which cannot be made applicable to Union Territory or from other articles of the Constitution dealing with powers of the President to make rules having the force of law.¹⁸

This position is vindicated by article 239AA (2) (c) of the Constitution interpreting in relation to a State, any reference in articles 326 and 329 to “Appropriate legislature” shall be deemed to be a reference to Parliament. Such deemed reference to Parliament as to Appropriate Legislature is not available in the Constitution for other U.T’s with Legislatures. However, U.T. Legislature has the power over public service under section 18 (2) of the Government of the U.T. Act, 1963 “State Public Service” and “Public Service Commission” come under Entry 41 of the State List in the Seventh Schedule of the Constitution. The overriding power of the Parliament under article 246 (4) of the Constitution over the Legislature of the U. T. of Puducherry must be subject to articles 73 and article 253. Article 73 speaks about the extent of the executive power of the Union to exercise by the Government of India, under any treaty or agreement and article 73(2) continues the erstwhile power of the State or officer or Authority could exercise immediately before the commencement of this Constitution. Article 253 speaks about the Legislation for giving effect to international agreements by the Parliament.

The Executive Power of the Union Government under article 77 of the Constitution of India and the Executive power of the State Government under article 166 do not apply to the Executive Power of the U.T. of Puducherry. Hence, the power of the U.T Legislature with regard to the law-making power including public services emanates from the 1954 *de facto* Transfer Agreement and the 1956 Treaty of Cession and sections 44 and 46 of the 1963 Government of U.T. Act. In *Ujagar Prints II v. Union of India*¹⁹ the Supreme Court opined in respect of Entries in the Lists as:

Entries in the legislative lists, it may be recalled, are not sources of the legislative power, but are merely topics or fields of legislation and must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense.

¹⁸ D.D. Basu, *Constitution of India* 501 (Lexis Nexis, Vol IV, Edn 4th).

¹⁹ *Id.*, at 51.

The difference between the Executive power of the Union Government and Puducherry U.T Government is distinct and the same is explicit in the day-to-day executive, judicial and legislative affairs of the Government of Puducherry. For instance, the services of the Union Public Service Commission and the services of the Judicature of Madras High Court are utilised on payment by the Puducherry Government. The properties of the Indian Railways located within Puducherry are still being subject to Land Tax by the Puducherry Government, despite exemption of the properties of the Union from State taxation provided in article 285 of the Constitution of India.²⁰

Though the word “Government” has been defined to mean the Administrator under the U.T. Act 1963, the word “Appropriate Legislature” has not been defined anywhere in any of the law relating to Puducherry or under the Constitution of India. This shows that the Constitution does not bar the Puducherry Legislature to enact a law on Public Services. Instead, article 239AA specifically debars the legislature of the NCT of Delhi on matters concerning Entries 1, 2, and 18 of the state list and the Entries 64, 65, and 66 of that list in so far as they relate to the said Entries 1, 2 and 18 *i.e.*, NCT of Delhi has no power over Public order, Police, land. Public Service is entrusted to Lt. Governor of Delhi by the Ministry of Home Affairs notification of May 21, 2015, and July 23, 2015. However, Puducherry Legislature has power over, Public order, Police, Land and State Public Service as per State List Entries 1, 2, 18 and 41 of the Seventh Schedule of the Constitution of India and of Offences, Jurisdiction of Courts and Fees (Entries 64, 65, and 66 in so far as they relate to previous entries, all of which are within the exclusive legislative domain of Puducherry U.T. Legislature.

VII. National Capital Territory *vis-a-vis* Central Government

The 5 judge bench decision in the case (dated July 4, 2018) where the constitution Bench distinguished this status of NCT Delhi with Puducherry, and made some remarks on the executive powers of Puducherry Legislature as follows. The distribution of legislative power in article 239AA was indicative of the predominant role assigned to Parliament as a legislative body. This emerges from the position that Parliament was empowered to legislate on subjects falling in the State List as well as the Concurrent List and the carving out of the three subjects of public order, police and land (Entries 1, 2, and 18 of the State List) and of Offences,

²⁰ The Constitution of India, art. 285 provides that: (1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State. (2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State.

Jurisdiction of Courts and Fees (Entries 64, 65 and 66 in so far as they relate to the previous entries), all of which are within the exclusive legislative domain of Parliament. Principles of repugnancy govern any inconsistency between enacted by the Legislative Assembly and those by Parliament and the laws of Parliament were to prevail unless a Presidential assent has been received. The executive power of the government of NCT was co-extensive with the legislative power. The principle of aid and advise under Clause 4 of article 239AA extends to areas where the Lieutenant Governor exercises functions concerning matters where the legislative assembly has the power to make laws. In consequence, those matters on which the legislative assembly does not have the power to enact legislation were not governed by the principle of aid and advise. Similarly, the Lieutenant Governor was not subject to aid and advise on matters where he was required to exercise his own discretion by or under any law. And hence, it is clearly distinguished that the powers relating to police, land and public order and jurisdiction of court, which is not vested with NCT of Delhi are vested with the Union Territory of Puducherry.

Recently on February 14, 2019, the Supreme Court gave a split opinion in the *Delhi Government v. Centre* case on whether the NCT of Delhi Government had control over the administrative services and thereby decided to refer the matter to a larger bench for consideration. While Justice Bhushan held that the Delhi Government had no power over services, observing that Entry 41 of the state list in the seventh schedule of the Constitution – dealing with “State Public Services” - was outside the purview of the Delhi Legislature. However, another Judge Justice Sikri said there was a “need to evolve a just and fair mechanism”. The situation in Delhi is peculiar. But the two Judges court upheld as “legal” the Ministry of Home Affairs notifications of May 21, 2015, and July 23, 2015, authorizing the LG of Delhi to exercise powers in relation to services and directing the Anti-corruption Branch (ACB) Police respectively not to take cognizance of offences against Central Government officials. However, for a final call, the matter was referred to a three-Judge Bench. The Government which is elected by the Public, if that Government does not have the powers to work, then what kind of democracy prevails there? Moreover, how will that Government function? The Judgment seems to be against the people’s will of Delhi, against the spirit of Constitution and democracy as well, so said the Delhi Chief Minister Arvind Kejriwal.

The power of the President will extend to the making of rules having the force of law even for the Union Territory until the “Parliament legislates in this regard or the Legislature of the Union Territory does so.” It is here that article 246(4) of the Constitution of India is relevant. The Parliament under article 246 (4) has given the powers to make Laws to the Union

Government concerning the Union Territories, even for subjects included in the State List. Moreover, such a right of the Parliament is explicitly recognized under section 18 (2) of the Government of Union Territories Act (20) of 1963, which again by implication refers to article 246 (4) and the constitutional powers vested in Parliament.²¹

The dichotomy of power over Service between the President and the U.T. Legislature is transitory as per the Constitutional scheme. As this dichotomy affects the members of the Legislature they demand the Union Government to give more power over the Executive without recognizing that they themselves can enact Puducherry Public Service Act. Puducherry. The legislature is competent and appropriate to enact such an Act under article 309 of the Constitution.²² Under the Constitutional scheme, the Delhi Assembly has the power to legislate on all subjects except Public Order, Police and Land. However, the Puducherry Assembly can legislate on any issue under the Concurrent and State List. However, if the Law conflicts with the law passed by the Parliament, the Law passed by the Parliament prevails. Both the NCT Delhi and the Union Territory of Puducherry though stand on a different footing in terms of the Constitutional provisions and the interpretation made by the Apex Court, yet the Constitutional scheme as envisaged under article 239A projects Union Territory of Puducherry better in the matter of exercise of Legislative powers than of NCT of Delhi under article 239AA of the constitution.

VIII. Union Territory Service Matter: Constitutional Perspective

(A) Co-extensive Power of Parliament over Service Matters

The question is, “if the Parliament has this power, does the President has the power to make rules having the force of law, in this regard till the Parliament thinks it fit to legislate or the Union Territory Legislature does so?”²³ Under article 73 (1), the Executive power of the Union, namely, the power of the President extends to the matter for which the Parliament has the power to make laws and this will include the power to make laws for a Union Territory regarding to the services.²⁴ This read along with article 309 indicate that, till the Union

²¹ *D. Gobalously v. Union Territory of Pondicherry*, (1967) ILR 2 Mad 10; (1967) 2 MLJ 85; *Mithan Lal v. State of Delhi*, AIR 1958 SC 682; (1959) 1 SCR 445.

²² *Satya Dev Bushahri v. Padam Dev*, AIR 1955 SC 5; (1955) 1 SCR 561.

²³ *D. Gobalously v. Union Territory of Pondicherry*, (1967) ILR 2 Mad 10.

²⁴ *Ibid.*

Parliament or the legislature thinks it fit to take action in respect of services, the President is in a position of the executive head of the Part C states and he has hence responsibilities closely allied to that of Rajpramukh or Governor. In the light of the analysis of the powers of the President as appearing in the Constitution, it would seem abundantly clear that (1) the executive power of the President to make regulations having the force of law extends to the entire area of the Parliamentary legislative competency (2) that, of course, is transitional in character, since it will be necessarily superseded by Parliamentary legislation, or by the Legislation of the Appropriate State Legislature/ union Territory Legislature. That not having taken place so far, in the U.T. of Pondicherry the Presidential Notification dated November 9, 1966 of the Pondicherry Administration (Conditions of service of Employees) Rules 1966 can be considered valid till appropriate Legislature exercises its power conferred upon it by article 309 of the constitution.

The above factual position of the Power of the Union Territory legislature over U.T. public Service is co-extensive with the Union of India. There is no bar or any legal impediment to enacting the Puducherry Public services Act by the Legislature of the U.T. of Puducherry adopting the relevant CCS Rules with exceptions and modifications as Schedule to the Puducherry Public Service Act. Thus, it is clear since the legislature of U.T. Puducherry has got co-extensive power over the public services; the subject shall come under the aid and advise of the Council of Ministers. The Council of Ministers needs to rely upon Rule 47(2) of the Rules of Business of the Government of Pondicherry which is framed under Proviso to article 309. The Business Rules of Government of Puducherry 1963,²⁵ are framed under proviso to article 309 and section 46 of the Government of U.T. Act, 1963. The Present Administrator has usurped the power over public service as if the Legislature of Puducherry U.T. has no power to aid and advise the Administrator over the public service matters. It is contrary to the Constitutional scheme and further, the Authority wantonly ignoring the mandatory consultation provision provided in rule 47 (2) of 1963 Business rules of Puducherry Government.

In respect of education or service, there exists a distinction between State services and State-run institutions on the one hand and the central civil services and institutions run by Central Government on the other. Whereas within the case of the previous the reservation, whether for admission or appointment in an establishment and employment or

²⁵ *Supra* note 6 at 248.

appointment within the services or posts during a State or Union Territory must confine to the members of the scheduled castes and scheduled Tribes as notified in the Presidential orders (for that State or Union Territory) but respect of All India Services, Central Services or admission to an institution run and funded by the Central Government, the members of the scheduled castes or scheduled Tribes and other reserved category candidates irrespective of the State for which they have been notified are entitled to the benefits thereof. Services in Union Territory are essentially different from All India Services and machinery for recruitment is also different. Not only the condition of recruitment but also conditions of service differ.

If the Central Civil Services and therefore the Union Territory Services are different, keeping in sight the Constitutional Scheme, particularly having reference to article 309 proviso of the Constitution of India, the same cannot be done away with only because a Union Territory administratively is administered by the Central Government so ruled Supreme Court in vide 2010 (2) Scc (L&S) 147 dated August 4, 2009.

The availability of coextensive power of the U.T. Legislature over service matters was already settled in the High Court of Judicature, Madras in *D. Gobalously v. Union Territory of Pondicherry*²⁶ on April 6, 1966. Very broadly stated the grounds of attack under the above-said case or that Agreed Process-Verbal which was conducted between the French and the Indian delegates on March 15, 1963 and which has to be regarded as integral with Treaty of Cession has guaranteed certain rights to “citizens of Pondicherry” in respect of the judiciary. The above legal right enunciation is equally applicable in respect of Puducherry public services as well.

Nowhere in the Constitution, the “Central service” or the “Central Government” is mentioned or defined purposely. The word “Central Government” found a place in the colonial Government of India Act, 1919 and the service rule framed under the said Act viz. Fundamental Rules and Service Rules. Those rules are continuing in the Central Civil Service. Some specific subjects are culled out from the Fundamental Rules and Supplementary Rules made under the Act, 1919 such as CCS (conduct) Rules CCS (CCA) Rules, CCS (Pension) Rules, *etc.* We are still following the nomenclature of colonial law in Civil Service. These CCS Rules are extended to Puducherry administration through the Pondicherry Administration (conditions of service of Employee) Rules 1966.

²⁶ AIR 1968 Mad 298.

(B) The Word --“Central” – Not Constitutional

The analysis shows that the U.T. of Puducherry is a separate entity similar to the State bestowed with all powers enumerated in the State List and Concurrent List under the Constitution. Not only that, but Puducherry also has a Special Administrative Status under the Treaty of Cession, 1956, which cannot be usurped otherwise than provided under the Treaty despite the *stare decisis*, in the Supreme Court judgment in para 54 of the case between *Lakshminarayanan v. Lt. Governor, Puducherry* where it is to be noticed that UTs are not states. There UTs, ordinarily, belong to the Union (*i.e.*, Central Government) and therefore, they are called “Union Territories”. That is why they are governed under the administrative control of the President of India. With respect to the Apex court, it is to be noted that this may ordinarily applicable to U.T. without legislature but not applicable to U.T. with Legislature, especially to Puducherry, as of the right of property over land in entry 45 vests with Puducherry under section 18(1) of the Govt. of Union Territory Act, 1963 Public Service – under Aid and Advise.

Moreover, article 240 proviso 2 also says that the President may only make regulations during the period of dissolution or suspension of the U.T. legislature for peace, progress, and good Government. Further, in the first proviso to article 240, the President is debarred to make any regulation for the Peace, Progress and good government, when any body is created under article 239 A. Merely framing the Pondicherry Administration (Conditions of Service of Employees) Rules, 1963, by the President does not deprive the U.T. Legislature to legislate upon the domain of the state public services for good Government. In the absence of an enactment on the service matters by the U.T., the administrator can usurp the power of the legislature and council of minister covertly or overtly debarring their aid and advise role which is explicitly provided under the constitution both under article 240 and article 309 read with section 18 and 44 of the Government of U.T. Act, 1963. The same principle has been upheld by the Division Bench of the Madras High Court in the case of *K. Lakshminarayanan v. Union of India*²⁷.

The Administrator is bound by the aid and advice of the Council of Ministers in matters where the Legislative Assembly is competent to enact Laws as contemplated under section 44 of the Government of Union Territories Act 1963, though the Administrator is empowered to differ with the views of the Council based on some rationale which raises a fundamental issue

²⁷ 2018 SCC OnLine SC 2730 at 145.

regarding the action of the Government. A legitimate warranted policy decision of the Council after deliberation is expected not to be interfered with accordingly the administrator functioning in the Union Territory Puducherry shall be bound by the aid and advise of the council of Ministers as in the case of a state which is the fulcrum of the democracy.²⁸ The Business Rule of Puducherry Government stipulates that the Administrator shall consult the Chief Minister over service matters. But a verdict by the Constitution Bench on July 4 2018, wherein the Apex Court held that the L.G. was bound by the aid and advise of the Council of Ministers of the Government of National Capital Territory. Hence, it shall apply *ipso facto* to L.G. of Puducherry also because the Supreme Court of India held that wherever the Constitutional text was capable of more than one interpretation, the Court would favour a reading that increased democratic accountability; that's just in case of doubt, power would roll in the hay the government that had been directly elected by the people.

The Indian union has been described as the “holding together” of different Territories by the Constitution-framers, unlike the “coming together” of constituent units as in the case of the USA and the confederation of Canada. The Federal system of India is governed in terms of the Constitution of India. The country of India is also referred to as the sovereign, socialist, secular, democratic, republic and has a parliamentary form of government.

In Indian federalism, the head of the union executive is the President of India.²⁹ However, the *de-facto* political, as well as social power, resides with the Prime Minister of India, who in turn is the head of the Council of Ministers. The idea is stated in article 74(1) of the Constitution of India that the Prime Minister and his Council of Ministers will aid and advise the President.³⁰ The Council of Ministers is answerable to the House of People or Lok Sabah as per the federal structure prevailing in India. Therefore, this must be followed in Puducherry as the same principle is provided in section 44 in the Government of U.T. Act, 1963 and in rule 47(2) of the Rules of Business of the Pondicherry, 1963. In 2018, ruling on the limits of the L.G.’s powers in Delhi, the Supreme Court stressed the need for the L.G. as well as people’s representatives to “function in harmony within Constitutional parameters”. Had the L.G. of Puducherry followed the advice of the Supreme Court of India, then only the people of Puducherry Citizens would feel like citizens of India instead of feeling as subjects of the Union Government.

²⁸ *Ibid.*

²⁹ Art. 74(1) provides that: “There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice: Provided that the President may require the council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.”

³⁰ *Supra* note 12.

Therefore, the autocratic rule of the Administrator, i.e., L.G. of Puducherry, evidently brought to fore the lacunae of the system of Administration of Puducherry. The solution lies not in tinkering the Government of the U.T. Act, 1963 but the enactment of a new law upgrading the U.T. status to a full-fledged State.

In short, so far we have seen that the Pondicherry is a unique state with a unique identity as it is governed still by the 1956 French India Treaty of Cession. Present Legislative Assembly is the successor of Representative Assembly of the Pondicherry State under French Rule, which got power over state civil service. Initially, the 1963 Government U.T. Act with 90% financial grant held sway over the executive because of the French language barrier and small administrative machinery. With the Central Financial help and with the administrative machinery expansion people's welfare developed. Aspirations and knowledge about self-rule and acquiring the English language among Puducherry people increased in line with the All India development. Now because of the sharp fall in financial help from the centre and increase in state-owned revenue, the demand for political sovereignty over legal sovereignty arises in the form of discord between appointed Administrator and elected Council of Ministers. Search for political power over the executive in the Constitution and Govt. of U.T. Act is deepening.

Here, it may be useful to know about what political and legal sovereignty means. Political sovereignty is vested in the electorate, public opinion, and all other influences of the state which would or shape public opinion. The political sovereign is represented by the electorate or the body of voters within the state. The electorate that is the political sovereign elects the legal sovereign in the form of members of the legislature. Accordingly, the political sovereign controls the legal sovereign. It lies behind legal sovereignty. In this context, A.V. Dicey rightly stated thus:³¹

Behind the sovereign whom the lawyer recognises there is another sovereign to whom the legal sovereign must bow.

The legal sovereign is the supreme law-making body. In every independent state, some laws must be obeyed by the people and there must be a power to issue and enforce the laws. The power which has the legal authority to issue and enforce these laws and final

³¹ C. E. Merriam, *History of the Theory of Sovereignty since Rousseau* 81 (Batoche Books, Kitchener, 2001); for Dicey's concept of Sovereignty, see Simon Chesterman, "An International Rule of Law", 56 (2) *The American Journal of Comparative Law* 331-361 (2008); David G. Ritchie, "On the Conception of Sovereignty", 1 *Annals of the American Academy of Political and Social Science* 385-411 (1891). James Kirby, "A. V. Dicey and English constitutionalism", 45 (1) *History of European Ideas* 43-46 (2019).

commands is that the legal sovereign. It may vest in one person or body of persons. It alone declares in legal terms, the desire of the state law may be a command of the sovereign and, he who violates it's susceptible to be punished.³²

IX. The Relevance of Article 239A

It may be more useful and relevant to discuss briefly the importance of article 239A under which Local Legislatures are created. The insertion of article 239A has its history. It was the outcome of Ashoke Kumar Sen committee report.³³ The committee took note of the then existed representative assembly in some part C princely states of India and French India. The *de facto* agreement dated October 21, 1954 between the Government of India and Government of France, article 2 mandates the Government of India shall maintain the Municipal regime and Representative Assembly of the French regime. It is, therefore, obligatory on the Indian Parliament to provide legislative assembly and Council of Ministers to the Union Territory of Puducherry to cope up with the Constitutional principle. Before August 5, 2019 this article applies only to Puducherry. But after that date now the article 239A is extended to the bifurcated Union Territory of Jammu and Kashmir as well. So the article stands relevant today to create Local legislatures by Parliament.

X. Conclusion

The present analysis has extensively provided that there is ample power for the Legislature of Puducherry under article 309 over public services to enact the Public Service Act. Thus, the subject "Public Service" though it seems as (Union) Central Service form which is transient in content is a state service coming under the aid and advice of the Council of Ministers. The power of the Administrator over Public service under proviso to article 309 is a transitional power until Puducherry Legislature enacts a Public Service Act. The final solution to the problem of diarchy over public service between the Administrator and Council of Minister lies in the Parliamentary law to be enacted to upgrade the U.T. of

³² H.W.R. Wade, "The Basis of Legal Sovereignty", 13(2) *The Cambridge Law Journal* 172-197 (1955); Thomas Prehi Botchway, "International Law, Sovereignty and the Responsibility to Protect: An Overview", 11(4) *Journal of Politics and Law* 40-50 (2008); Yuriy Bytyak, *et. al.*, "The State Sovereignty and Sovereign Rights: The Correlation Problem", 97(23) *Man in India* 577-587 (2017).

³³ Ashoke Kumar Sen was the law minister in Jawarhalal Nehru cabinet in 1957. A committee was constituted under his chairmanship by the parliament for the purpose of rescheduling the schedule 1 of the constitution.

Puducherry into a full-fledged State under articles 2 and 253 for giving effect to the 1956 French India Treaty.