OPINION

Querist: Hon'ble Lt. Governor of Delhi

My opinion has been sought in the following facts and circumstances:

- The Government of National Capital Territory (hereinafter referred to as 'GNCT') of Delhi has proposed to place the Jan Lokpal Bill in the Delhi Legislative Assembly as is evident from the letter of the Hon'ble Chief Minister written to the Hon'ble Lt. Governor on 31st January 2014. As per the letter, it has been indicated that the Government plans to have the discussion and voting on Jan Lokpal Bill in the Delhi Assembly which is to be held not exactly in the Legislative Assembly premises but in the Indira Gandhi Stadium on 16th February 2014.
- It is manifest that the GNCT of Delhi and the Hon'ble Chief Minister have decided to introduce the above Bill directly in the Assembly in the presence of vast numbers of public as the Assembly Session is sought to be held at the Indira Gandhi Stadium.
- The Hon'ble Lt. Governor has sought my opinion as to whether the introduction of the Jan Lokpal Bill in the Assembly without sending the Legislative proposal to the Central Government is in consonance with the Transaction of Business of the GNCT of Delhi Rules, 1993 and also as to whether the proposal involves any constitutional infraction. Secondly, my opinion has also been elicited as to whether the present proposal is in tune with the mandate of Article 239AA of the Constitution of India.

- It is also mentioned that a meeting is being held under the chairmanship of the Home Minister, Government of India on 6th February 2014 to discuss issues regarding holding of meeting of Delhi Assembly in the Indira Gandhi Stadium.

I will now first examine whether the proposal for passing the Bill is in consonance with the provisions of Article 239AA. For the sake of brevity, I do not propose to verbatim reproduce the provisions of Article 239AA. However, Article 239AA (3)(a),(b),(c) and Article 239(7)(a) would be relevant for the present purpose and accordingly they are extracted hereunder:

"***Article 239AA. Special provisions with respect to Delhi. -***

...

(3)(a) Subject to the provisions of this Constitution, the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union territories except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List in so far as they relate to the said Entries 1, 2 and 18.

(b) Nothing in sub-clause (a) shall derogate from the powers of Parliament under this Constitution to make laws with respect to any matter for a Union territory or any part thereof.

(c) If any provision of a law made by the Legislative Assembly with respect to any matter is repugnant to any provision of a law made by Parliament with respect to that matter, whether passed before or after the law made by the Legislative Assembly, or of an earlier law, other than a law made by the Legislative Assembly, then, in either case, the law made by Parliament, or, as the case may be, such earlier law, shall prevail and the law made by the Legislative Assembly shall, to the extent of the repugnancy, be void:

Provided that if any such law made by the Legislative Assembly has been reserved for the consideration of the President and has received his assent, such law shall prevail in the National Capital Territory:

Provided further that nothing in this sub-clause shall prevent Parliament form enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislative Assembly.

...

(7)(a) Parliament may, by law, make provisions for giving effect to, or supplement the provisions contained in the foregoing clauses and for all matters incidental or consequential thereto."

As would be evident from Article 239AA(3)(a), subject to the provisions of the Constitution, the Legislative Assembly has been empowered to make laws for the whole or in part for the National Capital Territory of Delhi with respect to any of the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union Territories except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List in so far as they relate to the said Entries 1, 2 and 18. Nothing as mentioned hereinabove would cause Article 239AA(3)(a) or derogate from the powers of Parliament under the Constitution to make laws with respect to any matter for the Union Territory or any part thereof.

In terms of Article 239AA(3)(c), it is mandated that in the event of any provision made by the Legislative Assembly in respect of any matter which is repugnant to any provision of law made by Parliament with respect to that matter whether passed before or after the law made by the Legislative Assembly or of an earlier law other than law made by the Legislative Assembly, then in either case the law made by the Parliament or as the case may be, such earlier law shall prevail and the law made by the Legislative Assembly shall to the extent of the repugnancy be void. In tune with Article 254 as per the first proviso to Article 239(3)(c), it is mentioned, "*However, if any such law made by the Legislative Assembly has been reserved for the consideration of the President and has received his assent, such law shall prevail in the National Capital Territory*". The second proviso lays down that nothing in this sub-clause shall prevent Parliament from enacting at any time

any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislative Assembly.

It is well settled in law that repugnancy would arise only in a matter which is enumerated in the Concurrent List. [*Hoechst Pharmaceuticals Ltd. v. State Of Bihar and Ors.,* (1983) 4 SCC 45, *ITC Ltd. v. Agricultural Produce Market Committee*, (2002) 9 SCC 232, *State of WB v. Kesoram Industries Ltd.*, (2004) 10 SCC 201, *K. T. Plantation (P) Ltd. v. State of Karnataka*, (2011) 9 SCC 1]

Firstly, the proposal to make a Jan Lokpal Act would obviously involve the overlap of several Entries in List III of Schedule VII to the Constitution of India, including:

(i) Entry 1 – *"Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power"*;

(ii) Entry 2 – *"Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution."*

Since it is well-known that the Lokpal are given powers of a Court in exercising its jurisdiction and it could exercise some of the powers as vested in the Code of Criminal Procedure like a Court;

(iii) Entry 11-A –*"Administration of Justice; constitution and organisation of all courts, except the Supreme Court and the High Courts.*"

This entry lays down administration of justice, constitutional organization of all Courts except Supreme Court and the High Courts; and

(iv) Entry 12 – *"Evidence and oaths; recognition of laws, public acts and records, and judicial proceedings."*

This entry deals with evidence and oaths, recognition of law, public acts and records and judicial proceedings. The Jan Lokpal would naturally have the power to administer oaths and take evidence in any complaint which is filed before it. The functions of the Jan Lokpal amounts to public acts and all its orders are matters of public records and the Jan Lokpal virtually seeks to exercise proceedings akin to judicial proceedings.

Further, some of the provisions of the Code of Civil Procedure would also resultantly be exercised by the Lokpal. At this juncture, it is pertinent to note that a copy of the Bill which is to proposed to be presented before the Legislative Assembly during the session in February, has not been seen by anyone. However, the creation or constitution of a Lokpal or Lokayukta without vesting the above powers would virtually be a meaningless exercise as the very object of appointing a Lokpal including the Jan Lokpal is to probe into allegations of corruption from the highest office holder in the National Capital namely, the Chief Minister to any other person holding any public office under the State.

It is important to notice that Parliament has also passed an enactment namely, THE LOKPAL AND LOKAYUKTAS ACT, 2013 and many of the provisions would obviously be overlapping with the proposed Lokpal Bill sought to be presented before the Legislative Assembly of Delhi. In any event since there is already an existing law made by Parliament

on the same subject matter, the Jan Lokpal Bill proposed to be passed by the Delhi Assembly has to necessarily be placed by the Lt. Governor for the purpose of consideration and grant of assent by the President to avoid any repugnancy. Otherwise, in the absence of the assent given by the President, the law can never come into force in the light of the provisions as mentioned above viz.:

***K. T. Plantation (P) Ltd. v. State of Karnataka*, (2011) 9 SCC 1:**

"*107. ...The plea of repugnancy can be urged only if both the legislations fall under the Concurrent List. Under Article 254 of the Constitution, a State law passed in respect of a subject matter comprised in List III would be invalid if its provisions are repugnant to a law passed on the same subject by Parliament and that too only if both the laws cannot exist together. The question of repugnancy under Article 254 of the Constitution arises when the provisions of both laws are fully inconsistent or are absolutely irreconcilable and it is impossible without disturbing the other, or conflicting results are produced, when both the statutes covering the same field are applied to a given set of facts. Repugnancy between the two statutes would arise if there is a direct conflict between the two provisions and the law made by the Parliament and the law made by the State Legislature occupies the same filed....*

108... The question of repugnancy under Article 254 of the Constitution arises when the provisions of both laws are fully inconsistent or are absolutely irreconcilable and it is impossible without disturbing the other, or conflicting results are produced, when both the statutes covering the same field are applied to a given set of facts. Repugnancy between the two statutes would arise if there is a direct conflict between the two provisions and the law made by the Parliament and the law made by the State Legislature occupies the same filed.

109...The test for determining the same is to find out the dominant intention of the two legislations and if the dominant intention of the two legislations is different, they cover different subject matter then merely because the two legislations refer to some allied or cognate subjects, they do not cover the same field.

110. A provision in one legislation to give effect to its dominant purpose may incidentally be on the same subject as covered by the provision of the other legislation, but such partial coverage of the same area in a different context and to achieve a different purpose does not bring about the repugnancy which is intended to be covered by Article 254(2). In other words, both the legislations must be substantially on the same subject to attract Article 254."

***Krishi Upaj Mandal Samiti v. Shiv Shakti Khansari Udyog,* (2012) 9 SCC 368:**

"42. The argument of the learned senior counsel appearing for the appellants that the provisions of the Control Order cannot prevail over the Market Act because the same was enforced after receiving Presidential assent merits rejection. The reasons for this conclusion of ours are:

42.1In the counter filed before the High Court, no such plea was raised and no document was produced to show that the Market Act was reserved for Presidential Assent on the ground that the provisions contained therein are in conflict with those contained in the Control Order.

42.2 It was not argued before the High Court that the President had been apprised of the conflict between the Control Order and the Market Act and he accorded assent after considering this fact.

42.3 It also deserves to be mentioned that during the course of hearing, this Court had after taking cognizance of the aforesaid argument, directed Shri B. S. Banthia, learned counsel for the State of Madhya Pradesh to produce the record to show as to in what context the Market Act was reserved for Presidential assent. After the judgment was reserved, Shri Banthia handed over an envelope containing File No.17/62/73-Judicial of the Ministry of Home Affairs, perusal of which reveals that the request of the State Government for Presidential assent was processed by the Ministry of Home Affairs. In the first instance, the Departments of Agriculture, Food and Internal Trade as also the Planning Commission were asked to offer their comments. The Department of Agriculture conveyed no-objection but wanted its suggestions to be incorporated in the Bill. The others did not offer any comment. Thereafter, the Joint Secretary (Home) recorded a note that the suggestions given by the Agriculture Department will be sent to the State Government for consideration. He also prepared the following summary for consideration of the President:

...

43. From the summary reproduced hereinabove, it is clear that the State Government had not reserved the Market Act for Presidential assent on the ground of any repugnancy between the provisions of that Act and the Control Order. As a matter of fact, the State Government could not have even thought of any repugnancy between these statutes because at the relevant time, sugarcane was not treated as an agricultural produce and was not included in the Schedule appended to the Market Act.

44. The nature and scope of Presidential assent under Article 254(2) of the Constitution was considered by the Constitution Bench in Gram Panchayat of Village Jamalpur v. Malwinder Singh (supra). In that case, it was argued that the President's assent to Section 3(a) of the Punjab Village Common Lands (Regulation) Act, 1953 would give it precedence over the Administration of

Evacuee Property Act, 1950, which was enacted by Parliament. The Constitution Bench held that the assent of the President under Article 254(2) of the Constitution is not an empty formality and the President has to be apprised of the reason why his assent was being sought. The Constitution Bench further held that if the assent is sought for a specific purpose, the efficacy of assent would be limited to that purpose and cannot be extended beyond it."

Thirdly, looking from the financial and expenditure point of view, the creation of a Jan Lokpal would obviously involve financial implications as it would necessarily involve establishment of new infrastructure both manpower and in the form of providing infrastructural facilities which will result in appropriation of moneys out of the Consolidated Fund of the Capital. In terms of Section 22(1) of The Government of National Capital Territory of Delhi Act, 1991 (hereinafter referred to as 'the Act'), a Bill or Amendment shall not be introduced, or moved in the Legislative Assembly except on the recommendation of the Lieutenant Governor, if such Bill or Amendment makes provision for any of the matters which includes appropriation of moneys out of the Consolidated Fund of the Capital. In terms of Section 22(3) of the Act, a Bill if enacted or brought into operation, if it would involve expenditure from the Consolidated Fund of the Capital, then it shall not be passed by the Legislative Assembly unless the Lieutenant Governor has recommended to the Assembly the consideration of the Bill.

In my view, the reliance of Section 26 would be of no avail to the GNCT because that is only in the nature of a validation provision and it only seeks to lay down that no Act of the Legislative Assembly and no provision in any such Act shall be invalid only by reason that some previous sanction or recommendation required by the Act was not given. However, the said section mandates that if such a defect was there, then the Act can be valid if assent was given by the Lieutenant Governor or if it has been reserved by the

Lieutenant Governor for the consideration of the President, by the President. This provision cannot be invoked at this juncture at all since even at the threshold there appears to be non-compliance of a constitutional mandate as well as the statutory mandate as laid down in the Government of NCT Delhi Act, 1991 as narrated above apart from infraction of the provisions of the Transaction of Business of the Government of NCT of Delhi Rules, 1993 (hereinafter referred to as 'the Rules') framed under Section 44 of the Act.

Further, in terms of Rule 55(1) of the Rules, the Lieutenant Governor is obliged to refer to the Central Government every Legislative proposal which inter-alia relates to any matter which may ultimately necessitate additional financial assistance from the Central Government through substantive expenditure from the Consolidated Fund of the Capital. This aspect has already been dealt with above. Thus, looking from this point of view also, there appears to be clear infraction of provisions of the Transaction of Business of the GNCT of Delhi Rules, 1993.

Therefore, in my opinion, prior to presenting the Bill before the Legislative Assembly of Delhi, the Legislative Proposal must be placed for the recommendation of the Lieutenant Governor in terms the Government of National Capital Territory of Delhi Act, 1991. The Lieutenant Governor may after examining the same, is of the view that it involves additional financial assistance from the Central Government through substantive expenditure from the Consolidated Fund of the Capital, may refer the said Bill to the Central Government for its consideration. Further, in the event if the Bill is passed by the Legislative Assembly, the Lieutenant Governor should in light of what is stated above,

reserve it for the consideration of the President and only after the grant of assent by the President can it become law in the NCT as per Article 239AA(3)(c).

The queries raised are answered accordingly. I have nothing further to add.

(MOHAN PARASARAN)
Solicitor General of India

New Delhi
05.02.2014