

# Legislative Brief

## The Government of NCT of Delhi (Amendment) Ordinance, 2023

The Government of NCT of Delhi (Amendment) Ordinance, 2023 was promulgated on May 19, 2023. It amends the GNCTD Act, 1991.

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### Highlights of the Bill

- ◆ The Ordinance amends the Government of National Capital Territory of Delhi (GNCTD) Act, 1991. It removes services from the legislative competence of the Delhi legislative assembly.
- ◆ It establishes the National Capital Civil Services Authority, which consists of the Chief Minister, Chief Secretary of Delhi, Principal Home Secretary of Delhi. The Authority will make recommendations to the Lieutenant Governor (LG) regarding transfers and postings of officials and disciplinary matters.
- ◆ The Ordinance empowers the LG to exercise his sole discretion on several matters including those related to National Capital Civil Services Authority, and the summoning, prorogation and dissolution of the Delhi Legislative Assembly.

### Key Issues and Analysis

- ◆ The Ordinance excludes “Services” from the purview of the Delhi Assembly. The question is whether such a change can be made without a Constitutional Amendment under Article 368.
- ◆ Taking “Services” outside the purview of the Legislative Assembly may break the triple chain of accountability that links the civil services, ministers, the legislature and citizens. This may violate the principle of parliamentary democracy, which is a part of the basic structure doctrine.
- ◆ The LG has been granted sole discretion in several matters including when the Legislative Assembly will convene. This implies that the Chief Minister may be unable to convene a session needed for essential government business.

## PART A: HIGHLIGHTS OF THE ORDINANCE

### Context

Union Territories (UTs) are directly governed by the President or an administrator appointed by the President.<sup>1</sup> However, Delhi and Puducherry are UTs with a legislature, and a council of ministers.<sup>2,3</sup> The Delhi Legislative Assembly has the power to legislate over subjects in the State List and Concurrent List, except for police, public order and land.<sup>4</sup> The Delhi government has executive powers over the same subjects. Further, Parliament has the power to legislate over all matters in the State and Concurrent Lists related to Delhi. The Lieutenant Governor (LG) is designated as Delhi’s administrator, operating with the aid and advice of the council of ministers of Delhi.<sup>5</sup> The Government of National Capital Territory of Delhi (GNCTD) Act, 1991 lays down the framework for the functioning of the Delhi Assembly and the Delhi government.<sup>6</sup> It outlines the powers of the Assembly, the discretionary powers of the LG, and the Chief Minister’s duty to provide information to the LG.

The question of power-sharing between the Delhi government and central government has been raised before the Supreme Court on several occasions.<sup>7,8,9,10</sup> On May 11, 2023, the Supreme Court gave its verdict on the control of services between the central government and the Delhi government. The question before the Court was whether the Delhi government (headed by the elected Chief Minister) or the Lieutenant Governor

(appointed by the central government) would have control over services and civil servants in Delhi. The central government claimed that the Delhi Assembly lacked the power to legislate over services due to Delhi's status as a Union Territory. However, the Delhi government contested this position. Under the Constitution, services fall under the State List.<sup>11</sup> The Court ruled that the Delhi government will have control over services in Delhi. Such control will not extend to subjects of police, public order, and land, over which the central government has exclusive powers. The 2023 judgement also reaffirmed a 2018 judgement where the Supreme Court had ruled that the LG did not have independent decision-making powers and was bound to follow the aid and advice of the Council of Ministers.<sup>8</sup> Please see Table 1 (page 4) for more details.

After the Supreme Court's judgment on control over services in Delhi, the GNCTD (Amendment) Ordinance, 2023 was promulgated on May 19, 2023. It amends the GNCTD Act, 1991 to remove services from the legislative competence of the Assembly. The Ordinance has been challenged in the Supreme Court, which has started hearing the petition.<sup>12</sup>

## Key Features

- **Powers to legislate over services:** The Ordinance specifies that the Delhi Legislative Assembly will not have the power to legislate on the subject of 'services', which comes under the State List. Services include matters related to appointments and transfers of employees of the Delhi government, and vigilance.
- The central government will notify the conditions of service of persons appointed to services including their tenure, qualification, salaries, powers and functions, and suspension.
- **National Capital Civil Services Authority:** The Ordinance establishes the National Capital Civil Services Authority to make recommendations to the Lieutenant Governor of Delhi (LG) on certain matters related to services. These include: (i) transfers and postings, (ii) matters related to vigilance, (iii) disciplinary proceedings, and (iv) prosecution sanctions of Group A of All India Services (except Indian Police Service), and DANICS.
- The Authority will consist of the: (i) Chief Minister of Delhi as Chairperson, (ii) Principal Home Secretary of the Delhi government as Member Secretary, and (iii) Chief Secretary of the Delhi government as member. The central government will appoint both the Principal Home Secretary and Chief Secretary. All decisions of the Authority will be based on a majority vote of the members present and voting. The quorum for a meeting is two people.
- **Powers of the Lieutenant Governor:** Under the Act, matters where the LG may act on his discretion are: (i) matters outside the legislative competence of the Delhi Legislative Assembly but which have been delegated to the LG, or (ii) matters where he is required by a law to act in his discretion or exercise any judicial or quasi-judicial functions. The Ordinance specifies that in these matters, the LG will act in his sole discretion. It expands the discretionary role of the LG by giving him powers to approve the recommendations of the Authority, or return them for reconsideration. The LG's decision will be final in the case of a difference of opinion between him and the Authority.
- **Disposal of matters by Ministers:** A Minister of the Delhi government may issue standing orders concerning the disposal of matters brought to his attention. The order should be issued in consultation with the concerned Department Secretary. Certain matters must be submitted to the LG, through the Chief Minister, for their opinion prior to the issue of any order. These include proposals affecting: (i) the peace and tranquillity of Delhi, (ii) relations between the Delhi government and the central government, Supreme Court, or other state governments, (iii) summoning, prorogation, and dissolution of the Legislative Assembly, and (iv) matters on which LG is to give an order in his sole discretion.
- Additionally, the concerned Department Secretary must bring certain matters to the notice of the LG, the Chief Minister, and the Chief Secretary. These include matters which may bring the Delhi Government into controversy with the central or any state government, the Supreme Court, or High Court of Delhi.

## PART B: KEY ISSUES AND ANALYSIS

### The Ordinance may be violating the constitution

The Ordinance amends the control over services in Delhi in two ways. First, the Ordinance removes services from the legislative competence of the Delhi legislative assembly. Since the executive powers of the Delhi government are co-extensive with the Assembly's legislative powers, the Delhi government will also not have control over services.<sup>13</sup> Second, it creates a three-member Authority which will have the power to control transfers of officers in Delhi. Two members (Chief Secretary and Principal Home Secretary) of the Authority are appointees of the central government, and can in effect outvote the Chief Minister of Delhi. These features of the Ordinance raise the following constitutional issues:

*Ordinance:* Sections 3, 4B, 45C, 45E, 45J (4)

## Ordinance amends powers of Delhi Assembly, which are specified in the Constitution

Ordinance:  
Section 3

Article 239AA of the Constitution provides the Delhi Legislative Assembly with powers to make laws on subjects in the State List and the Concurrent List, barring: (i) police, (ii) public order, and (iii) land.<sup>4</sup> Parliament may also legislate on subjects under the State List with respect to Delhi, and these laws will prevail in case of repugnancy with state laws.<sup>14</sup> The Ordinance specifies that the Delhi Legislative Assembly will not have the power to legislate on the subject of ‘services’, which comes under the State List. By doing so, the Ordinance effectively expands the subjects that the Delhi Assembly cannot legislate on, and hence might be changing the constitutional framework. This raises the question whether Parliament can amend the Constitution through an ordinary law. Further, the amendment has been brought in through an Ordinance. Under Article 368 of the Constitution, a constitutional amendment can only be initiated through the introduction of a Bill in Parliament.<sup>15</sup>

However, the Constitution also empowers Parliament to make laws that give effect to or supplement the provisions related to the powers of the Delhi Legislative Assembly.<sup>16</sup> Such a law shall not be deemed as an amendment to the Constitution even if it amends or has the effect of amending any provision of the Constitution.<sup>17</sup> The question is whether curtailing the powers of the Delhi Assembly would amount to “supplementing” the provisions. If it is a permissible amendment, by implication, an ordinary law of Parliament can exclude the entire State List from the purview of the Delhi legislative assembly. This would make the Delhi legislative assembly and the Delhi government redundant.

## Giving central government control over services in Delhi may violate the basic structure

Ordinance:  
Sections  
45C, 45E

There may be an issue even if this change were made through a Constitutional Amendment Bill, as this could be a violation of the basic structure. “Services” are intrinsically different than other items in the State List such as health or market fairs. If the government does not have control over services, it cannot execute any programmes across any field.

The Supreme Court explained this principle in the recent 2023 judgement.<sup>13</sup> It said that democratic government rests on a triple chain of accountability: (i) civil servants are accountable to ministers, (ii) ministers are accountable to legislatures, and (iii) legislatures are accountable to the electorate.<sup>13</sup> It observed that a democratically elected government must be able to have control over and hold accountable public officers posted in the service of their government.<sup>13</sup> By severing the first link of the triple chain of accountability, the Ordinance may be contradicting the principles of parliamentary democracy.

The 2023 judgement re-iterates the principle spelt out by the 2018 judgement that ministers bear the responsibility before the legislature for every action undertaken by public officials in their respective department.<sup>8</sup> However, under the Ordinance, a minister of Delhi will not be able to hold his public officials accountable for bureaucratic delays.

## The LG may not be bound to act on the aid and advice of the Council of Ministers

Act: Sections  
6 and 41

Ordinance:  
Sections 4B,  
45J (4)

As per Article 239AA, the LG has to act on the aid and advice of the Council of Ministers, except when exercising his functions in his discretion.<sup>5,8</sup> The Transaction of Business Rules of the GNCTD, 1993 provides that certain matters must be submitted to the LG, through the Chief Minister and Chief Secretary, for his opinion prior to the issue of any order.<sup>18</sup> These matters include: (i) the peace and tranquillity of Delhi, (ii) relations of the Delhi government with any state government, the Supreme Court, and the High Court of Delhi, and (iii) summoning, proroguing, and dissolving of the Legislative Assembly. The Ordinance expands the mentioned matters to include the relations of the Delhi government with the central government. Additionally, it expands the powers of the LG’s opinion to have sole discretionary power on these matters. If there is a difference of opinion between the LG and the Chief Minister, the LG’s opinion will take precedence.

These provisions may violate the principle of the LG acting on the aid and advice of the Council of Ministers on matters within the executive competence of the latter. They also contradict the 2018 judgement of the Supreme Court which stated that the decision-making power lies with the elected government.<sup>8</sup>

For example, under the 1991 Act, the LG has the power to summon, prorogue, and dissolve the legislative assembly.<sup>6</sup> However, he is bound to act on the aid and advice of the Council of Ministers since the function is not within his discretionary powers. The Ordinance allows the LG to override the decision of the Council of Ministers and exercise sole discretionary powers on these matters. This implies that the Chief Minister will not be able to convene a session of the Assembly for any essential government business.

## Certain terms in the Ordinance are unclear

### Sole discretionary power of the LG

Act: Section  
41

Ordinance:  
Section 4A

Under the Act, matters where the LG may act on his *discretion* are: (i) matters outside the legislative competence of the Delhi Legislative Assembly but which have been delegated to the LG, or (ii) matters where he is required by a law to act in his discretion or exercise any judicial or quasi-judicial functions. The Ordinance specifies that in these matters, the LG will act in his *sole discretion*. It is unclear how ‘sole discretion’ of the LG is different from ‘discretion’.

## The criteria for certain matters brought to the notice of the LG may be overbroad

Ordinance:  
Section 45K  
(4)

Under the Ordinance, the concerned department secretary must bring certain matters to the notice of the LG, the Chief Minister, and the Chief Secretary. These include matters which may bring the Delhi Government into controversy with the central or any state government, the Supreme Court, or High Court of Delhi. It is not clear what matters would be considered controversial.

Moreover, this provision enables department secretaries to directly bring certain matters to the LG, Chief Minister and Chief Secretary, without consulting the concerned minister. This would break the usual chain of command as issues related to the ministry would have no inputs from the concerned minister. This also may go against the principle of collective responsibility of the cabinet.

**Table 1: Timeline on Key Legislations and Judgements on Delhi**

Year	Development
1956	States Reorganization Act is passed. Delhi classified as a Union Territory
1991-92	<ul style="list-style-type: none"> <li>The 69<sup>th</sup> Constitutional Amendment (Article 239AA) is passed to make Delhi a UT with legislature.</li> <li>The Government of National Capital Territory of Delhi (GNCTD) Act, 1991 is passed.</li> <li>The 70<sup>th</sup> Constitutional Amendment is passed which provides for certain laws of Parliament (amending Article 239AA) to not be deemed as an amendment to the Constitution</li> </ul>
2015	MHA issues a notification taking away the control over services from the Delhi legislature, and empowering the LG to discharge functions of the Central Government in relation to the same.
2016	Delhi High Court holds that services lay outside the purview of the Delhi legislative assembly and executive.
2018	The Supreme Court rules that the LG must act on the "aid and advise" of the council of ministers of Delhi.
2019	A two-judge bench delivers a split verdict while ruling over the issue of services.
2021	Union government amends the GNCTD Act, 1991, expanding the list of matters where the LG's opinion was mandatory and the nature of Bills that LG could refer to the President.
2023	<ul style="list-style-type: none"> <li>Supreme Court gives control over services in Delhi to the Delhi government.</li> <li>Union government promulgates an Ordinance to amend the GNCTD Act, 1991, excluding "services" from the purview of Delhi legislature.</li> </ul>

Notes: MHA refers to the Ministry of Home Affairs.

Sources: States Reorganization Act, 1956, The Constitution (Sixty-ninth Amendment) Act, 1991, The Government of National Capital Territory of Delhi Act, 1991, The Constitution (Seventieth Amendment) Act, 1992, S.O. 1368(E), Notification, MHA, May 26, 2015, W.P.(C) No.5888/2015 Government of National Capital Territory of Delhi vs. Union of India, 2016, The Government of National Capital Territory of Delhi Act (Amendment) Act, 2021, The Government of National Capital Territory of Delhi Act (Amendment) Ordinance, 2023, Government of NCT of Delhi vs Union of India (2018), Government of NCT of Delhi vs Union of India (2023); PRS.

- [Article 239](#), The Constitution of India.
- Clause 2(a), [Article 239AA](#), The Constitution of India.
- [Article 239 A](#), The Constitution of India.
- Clause 3(a), [Article 239AA](#), The Constitution of India.
- Clause 4, [Article 239AA](#), The Constitution of India
- [The Government of National Capital Territory of Delhi Act](#), 1991.
- Writ Petition (civil), No. 7887 of 2015, [Rajendra Prasad vs Govt of NCTD](#), Delhi High Court, August 4, 2016.
- Civil Appeal No 2357 of 2017, [Government of NCT of Delhi vs Union of India](#), Supreme Court, July 04, 2018.
- Civil Appeal No 2357 of 2017, [Government of NCT of Delhi vs Union of India](#), Supreme Court, February 14, 2019.
- Civil Appeal No 2357 of 2017, [Government of NCT of Delhi vs Union of India](#), Supreme Court, May 06, 2022.
- Entry 41, List II, [Seventh Schedule](#), The Constitution of India.
- ["Supreme Court agrees to hear Delhi Government's challenge to Ordinance on July 10"](#), The Hindu, July 06, 2023, as accessed on July 19, 2023.
- Civil Appeal No 2357 of 2017, [Government of NCT of Delhi vs Union of India](#), Supreme Court, May 11, 2023.
- Clause 3(c), [Article 239AA](#), The Constitution of India.
- [Article 368](#), The Constitution of India.
- Clause 7(a), [Article 239AA](#), The Constitution of India.
- Clause 7(b), [Article 239AA](#), The Constitution of India.
- Rule 23, [The Transaction of Business of the Government of National Capital Territory of Delhi Rules, 1993](#).

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