

# THE DELHI ORDINANCE IS AN UNABASHED POWER-GRAB

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'The ordinance raises multiple legal and political questions regarding federalism, democracy, bureaucratic accountability, executive law-making, and judicial review' | Photo Credit: SHIV KUMAR PUSHPAKAR

On May 19 this year, the [Union government promulgated an ordinance](#) to amend the [Government of National Capital Territory of Delhi \(NCTD\) Act, 1991](#) that effectively nullified [the Supreme Court judgment of May 11](#) on the powers over bureaucratic appointments in Delhi. After an eight-year long protracted legal battle, a five-judge Constitution Bench led by the Chief Justice of India D.Y. Chandrachud had unanimously held that the elected government of Delhi had legislative and administrative powers over “services”.

The ordinance removes Entry 41 (services) of the State List from the Delhi government's control and creates a National Capital Civil Service Authority, consisting of the Chief Minister, Chief Secretary and Principal Secretary-Home, to decide on service matters in Delhi. Decisions of the Authority will be made through majority voting, which means that two Union-appointed bureaucrats could overrule the Chief Minister. Further, the ordinance provides that if a disagreement arises between the Authority and the Lieutenant Governor (LG), the decision of the LG shall prevail. The ordinance raises multiple legal and political questions regarding federalism, democracy, bureaucratic accountability, executive law-making, and judicial review. Several Opposition parties, barring the Congress, have supported the Aam Aadmi Party (AAP) government in its opposition to the ordinance. Congress leader Ajay Maken said that “cooperative federalism principles don't fit” Delhi since it is the “National Capital”. In this context, it is important to examine how the ideas of federalism fit in unique contexts such as Delhi.

The position of Delhi in India's federal constitutional scheme is not straightforward. The Supreme Court, in its May 11 verdict, had noted that the addition of Article 239AA in the Constitution accorded the National Capital Territory of Delhi (NCTD) a “sui generis” status. The Court held that there is no “homogeneous class” of Union Territories and States; rather, India's Constitution has several examples of special governance arrangements which treat federal units differently from each other. It noted that the special provisions for States under Article 371 are in the nature of “asymmetric federalism” made for “accommodating the differences and the specific requirements of regions”.

Scholars of federalism have long argued that for countries with deep social cleavages along ethnic, linguistic, and cultural lines, an asymmetric model of federalism, which accommodates the interests of various social groups through territorial units, is desirable. India's federal system has been described as asymmetric due to the special status it accorded Jammu and Kashmir under Article 370 (before its dilution) and special protections under Article 371, and 5th and 6th Schedule Areas.

What is striking about the Court's judgment is that it used the asymmetric federalism framework to clarify the position of the NCTD in India's federal scheme. It remarked that though NCTD is not a full-fledged State, since its Legislative Assembly is constitutionally entrusted to legislate upon subjects in the State and Concurrent Lists, the insertion of Article 239AA created a "asymmetric federal model" for the NCTD. So, while the NCTD remains a Union Territory, the "unique constitutional status conferred upon it makes it a federal entity".

While the invocation of asymmetric federalism for Delhi is interesting, the Court was a mute spectator when this idea was annihilated in Jammu and Kashmir. Nevertheless, an articulation of the underlying principles of federalism in this case is welcome. The Court noted that the principles of federalism and democracy are interlinked since the States' exercise of legislative power gives effect to people's aspirations and that federalism creates "dual manifestation of the public will" in which the priorities of the two sets of governments "are not just bound to be different, but are intended to be different". Such a clear expression of the federal principle punctures hollow exhortations of "cooperative federalism" that have been weaponised to centralise Indian politics.

The presidential ordinance is problematic at different levels. First, the government's swift and brazen act of undoing a Constitution Bench judgment does not augur well for judicial independence. While the legislature can alter the legal basis of a judgment, it cannot directly overrule it. Further, executive law-making through an ordinance, as the Supreme Court held in *D.C. Wadhwa* (1987), is only to "meet an extraordinary situation" and cannot be "perverted to serve political ends". Most crucially, adding an additional subject of exemption (services) to the existing exemptions (land, public order, and police) of Delhi's legislative power listed in Article 239AA, without amending the Constitution, is arguably an act of constitutional subterfuge. Finally, creating a civil services authority where bureaucrats can overrule an elected Chief Minister destroys long-established norms on bureaucratic accountability.

For all of these reasons, the ordinance is a direct assault on federalism and democracy. Such an unabashed power-grab by the Union government needs to be opposed by all who care for the future of India as a federal democracy. However, Opposition parties do not often take a position on federalism on first principles or articulate it as a normative idea. Hence, AAP cheered the dilution of Article 370, and now the Congress refuses to oppose this ordinance. This poses limits for federalism to act as a counter-hegemonic idea. As the foundations of India's constitutionalism are threatened, we need a new politics of federalism that reflects and articulates the underlying values of federalism consistently.

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