

AN ORDINANCE, ITS CONSTITUTIONALITY, AND SCRUTINY

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'The Union of India's decision to prefer review (Article 137) and promulgate an ordinance (Article 123) simultaneously is ill conceived' | Photo Credit: Getty Images/iStockphoto

On May 19, 2023, the President of India exercised legislative power under Article 123 of the Constitution, during the period Parliament was in recess, to promulgate [The Government of National Capital Territory of Delhi \(Amendment\) Ordinance, 2023](#) (Ordinance). The [ordinance negates](#) a [Constitution Bench judgment of the Supreme Court of India](#), which was delivered on May 11, that brought "services" under the Government of National Capital Territory of Delhi (NCTD).

There are two issues here that require analysis: first, the scope of the Court's verdict. Second, the constitutionality of the ordinance.

While interpreting Article 239AA(3)(a), the Court ruled, inter alia, that these were the points: The Legislative Assembly of the NCTD has competence over entries in List II and List III, except for expressly excluded entries of List II (entries 1, 2, 18 are excluded); the executive power of NCTD is co-extensive with its legislative power, that is, it shall extend to all matters with respect to which it has power to legislate; the Union of India has executive power only over three entries in List II over which the NCTD does not have legislative competence (entries 1, 2, 18).

Thus, essentially, the Court interpreted that out of the 66 entries in List II (the State list), while the executive power of the Government of NCTD covers 63 entries, that of the Union of India is restricted to the remaining three: public order (entry 1), police (entry 2) and land (entry 18).

Consequently, executive power over "services" (entry 41) can be exercised exclusively by the Government of the NCTD. This interpretation of the Court is consistent with the wordings in Article 239AA(3)(a). But, this interpretation was negated by the Union of India, acting through its Council of Ministers under Article 74, by triggering extraordinary legislative power of the President under Article 123 in the promulgation of an ordinance on May 19.

What the ordinance did was to read/insert entry 41 of List II (State list) into Article 239AA(3)(a), thereby expanding the scope of excepted matter from three (1, 2, 18) to four (1, 2, 18, 41).

This could not have been done without amending Article 239AA(3)(a) of the Constitution. The power conferred on Parliament under Article 239AA(3)(b) is to make fresh laws — not to amend Article 239AA(3)(a) of the Constitution.

Similarly, power conferred on Parliament under Article 239AA(7)(a) is to make laws for giving effect to or supplementing the provisions contained in various clauses of Article 239AA and for all matters incidental or consequential thereto. Such a power cannot be pressed into action to amend Article 239AA(3)(a) of the Constitution. Significantly, Article 239AA(7)(b) stipulates that Parliament's law making under Article 239AA(7)(a) shall not be deemed to be an amendment of the Constitution for the purposes of Article 368. No such clause has been stipulated in Article 239AA(3)(a). Therefore, altering the scope of Article 239AA(3)(a) requires constitutional amendment under Article 368; there is not an iota of doubt.

Consequently, the ordinance promulgated under Article 123 of the Constitution to expand the scope of excepted matters in Article 239AA(3)(a) is void ab initio and is liable to be struck down for bypassing constitutional amendment. It amounts to a colourable exercise of power. Article 123 is no substitute for Article 368 (amendment of the Constitution) in Part XX.

Besides, when a Constitution Bench (five judges) of the Supreme Court declares/interprets the law (Article 239AA(3)(a)), the same is binding on all courts and authorities in India in terms of Articles 141 and 144, respectively. Could Articles 141 and 144 have been negated by Article 123 without a constitutional amendment?

Articles 123, 141, 144 are in Part V (The Union) of the Constitution. None has a non-obstante clause. The aid and advice of the Union Council of Ministers to the President under Article 74 could not have overridden Article 144. The basis of the Court judgment is Article 239AA(3)(a). To alter this basis, a constitutional amendment is necessary.

The Union of India's decision to prefer review (Article 137) and promulgate an ordinance (Article 123) simultaneously is ill-conceived; if the ordinance is challenged, the Union of India is unlikely to succeed through either route to wrest power of "services" in Delhi.

In the landmark seven-judge Bench verdict of the Supreme Court in the matter of Krishna Kumar Singh vs State of Bihar (2017) 2 SCC 136, the Court held that the satisfaction of the President under Article 123 is not immune from judicial scrutiny; powers under Article 123 is not a parallel source of law making or an independent legislative authority.

It was further held that the Court is empowered to look into the relevance of material placed before the President, but not its sufficiency or adequacy.

The ordinance is likely to be struck down since it expands excepted matters in Article 239AA(3)(a). Parliament alone can do this under Article 368.

Bishwajit Bhattacharyya is a senior advocate in the Supreme Court of India and a former Additional Solicitor General of India

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