## Article 239AA and ordinance

- 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).
- 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).
- 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)
- The 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.
- 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.
- Article 141 says that the law declared by the Supreme Court shall be binding on all courts within the territory of India and Article 144 directs that all authorities civil and judicial, in the territory of India, shall act in aid of the Supreme Court.
- 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.

**THE HINDU**

## Judges recusal

**Why do judges recuse?**

- Whenever there is a potential conflict of interest, a judge can withdraw from a case to prevent the perception that the judge was biased while deciding a case. This conflict of interest can arise in many ways from holding shares in a litigant company to having a prior or personal association with a party.
- Another common reason is when an appeal is filed in the Supreme Court against a High Court judgment delivered by the concerned judge before his elevation. The practice stems from the cardinal principle of due process of law Nemo judex in sua causa, that is, no person shall be a judge in his own case.
- "Another principle guiding judicial recusals is 'justice must not only be done but must also be seen to be done' propounded in 1924 in Rex v. Sussex Justices by the then Lord Chief Justice of England.
- By taking the oath of office, judges promise to perform their duties, 'without fear or favour, affection or ill will', in accordance with the Third Schedule of the Constitution.

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**What is the procedure for recusal?**

- There are two kinds of recusals an automatic recusal where a judge himself withdraws from the case, or when a party raises a plea for recusal highlighting the possibility of bias or personal interest of the judge in the case.
- The decision to recuse rests solely on the conscience and discretion of the judge and no party can compel a judge to withdraw from a case.
- While judges have recused themselves even if they do not see a conflict but only because such apprehension was cast, there are also several instances where judges have refused to withdraw from a case.

**DO JUDGES HAVE TO RECORD A REASON FOR RECUSAL?**

- SINCE THERE ARE NO STATUTORY RULES GOVERNING THE PROCESS, IT IS OFTEN LEFT TO THE JUDGES THEMSELVES TO RECORD REASONS FOR RECUSALS.
- SOME JUDGES SPECIFY ORAL REASONS IN OPEN COURT WHILE OTHERS ISSUE A WRITTEN ORDER RECORDING THE REASONS. IN OTHER CASES, THE REASONS ARE SPECULATIVE.

**WHAT RULES HAS SUPREME COURT FORMULATED IN THE PAST?**

- In Ranjit Thakur versus Union of India (1987), the SC held
- "The proper approach for the Judge is not to look at his own mind and ask himself, however honestly, "Am I biased?" but to look at the mind of the party before him," the Court ruled.

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- SUPREME COURT ADVOCATES-ON-RECORD ASSOCIATION VERSUS THE UNION OF INDIA (2015), THE COURT OBSERVED THAT WHERE A JUDGE HAS A PECUNIARY INTEREST, NO FURTHER INQUIRY IS NEEDED AS TO WHETHER THERE WAS A 'REAL DANGER' OR 'REASONABLE SUSPICION' OF BIAS.
- HOWEVER, OTHER CASES REQUIRE SUCH AN INQUIRY, WITH THE RELEVANT TEST BEING THE 'REAL DANGER' TEST WHETHER THERE IS A 'REAL DANGER' OF BIAS, TO ENSURE THAT THE COURT IS THINKING IN TERMS OF POSSIBILITY RATHER THAN THE PROBABILITY OF BIAS.

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