

Bill No. 128 of 2022

THE CONSTITUTION (AMENDMENT) BILL, 2022

By

SHRI P.P. CHAUDHARY, M.P.

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further to amend the Constitution of India.

BE it enacted by Parliament in the Seventy-third Year of the Republic of India as follows:—

1. This Act may be called the Constitution (Amendment) Act, 2022.

Short title.

2. After article 123 of the Constitution, the following article shall be inserted below the heading “CHAPTER IV.—THE UNION JUDICIARY”, namely:—

Insertion of new article 123A.

“123A. None of the articles *viz.* 124, 127, 128, 217, 222, 224A and 231, as amended, and new articles 124A, 124B and 124C, as inserted, by the Constitution

Validation.

(Ninety-ninth Amendment) Act, 2014 shall be deemed to be void, or ever to have become void, on the ground that the said articles are inconsistent with, or taken away, the independence of judiciary, and, notwithstanding any judgment, decree or order of any court, each of the said article shall, subject to power of Parliament to omit or amend them, continue in force and shall be deemed always to be in force from the 13th day of April, 2020.”

STATEMENT OF OBJECTS AND REASONS

The Judges of the Supreme Court are appointed under clause (2) of article 124 of the Constitution and the Judges of the High Courts are appointed under clause (1) of article 217 of the Constitution, by the President of India. The Ad-hoc Judges and retired Judges for the Supreme Court are appointed under clause (1) of article 127 and article 128 of the Constitution, respectively. The appointment of Additional Judges and Acting Judges for the High Court is made under article 224 and the appointment of retired Judges for sittings of the High Courts is made under article 224A of the Constitution. The transfer of Judges from one High Court to another High Court is made by the President after consultation with the Chief Justice of India under clause (1) of article 222 of the Constitution.

The Supreme Court in the matter of the Supreme Court Advocates-on-Record Association *Vs.* Union of India in the year 1993, and in its Advisory Opinion given in the year 1998 in the Third Judges' case on a reference being made to the Supreme Court by the then President of India, had interpreted clause (2) of article 124 and clause (1) of article 217 of the Constitution with respect to the meaning of "consultation" as "concurrence". Consequently, a memorandum of procedure for appointment of Judges to the Supreme Court and the High Courts was formulated known as the "collegium system", and is presently being followed for such appointments. Pertinently, the said collegium system doesn't find mention either in the original Constitution or in any successive amendments thereto.

After a thorough review of relevant constitutional provisions, pronouncements of the Supreme Court of India and consultations with eminent jurists, a pressing need has been felt that a broad based National Judicial Appointments Commission should be established for making recommendations for appointment of the Judges of the Supreme Court and the High Courts. The said Commission is expected to serve a meaningful role to the judiciary, the executive and eminent persons to present their view points and make the participants accountable, while also introducing transparency in the selection process. This is further strengthened by the fact that a democratic set up necessitates that all appointments to public offices are made transparently and in a manner which is free from any bias. The process of appointment should be open to review and not merely based on the personal preferences. The transparency in appointments is also necessary to maintain the credibility and reputation of the institution for whose offices such appointments are being made.

The proposed amendment for introduction of National Judicial Appointment Commission is being made after taking into account the fact that established and mature democracies across the world such as the United Kingdom, France, Canada, Denmark, Ireland and South Africa have a robust democratic system of appointing judges to their highest courts where opinion of all quarters of democracy *i.e.* legislature, executive, judiciary and public at large is considered and valued while appointing the judges in their apex courts.

In a democratic set up, the legitimacy of every constitutional institution including the Supreme Judicial Authority must be traced to the will and consent of the people, directly or indirectly. The bearers to public offices in all other institutions in the country are appointed either by an executive authority that is accountable to the people or by a mechanism involving the executive and legislature by law. No institution in a democracy is entitled under the

Constitutional provisions to abrogate itself any power of appointing its own successors. An unelected institution, however exacted, appointing its own press and successors is smeared with the questions regarding democratic accountability. Since the pronouncements made by the judges have a strong and deep impact on the public at large, it is necessary that the judicial appointments are not made unilaterally by the incumbents of the said institution only. Transparency and objectivity in appointment of judges of the Supreme Court and the High Courts is also *sine qua non*, to ensure the credibility of the judiciary and the will of the people.

The legitimacy of the people's express or implied consent in the democracy as established by the Constitution of India is required to be upheld under all circumstances and for all public appointments including those of the judges of the Supreme Court and the High Courts. The Parliament of India is one of the pillars upon which the foundations of democracy stand and which has been bestowed with the right of formulating legislations and any attempt to override such constitutional mandate would only go to lessen the supremacy of Constitution which would in effect amount to altering the basic structure of the Constitution.

No functioning Democracy in the world, save for India, has a judiciary that appoints itself. In well-developed democracies, judicial appointments are not in the sole prerogative of the judiciary but the said appointments are made on the basis of an amalgam of considered and valued opinions of the legislature, executive, judiciary and lay citizens appointed by law. The body entrusted with the task of appointing the judges plays a critical role by keeping effective checks and balances and steers to keep any bias out of the system. The history of the appointments of judges in the other democracies as listed in the table can be an effective proof that the involvement of the executive and legislature in the appointment of the judges to the highest judicial offices has not reduced the independence or effectiveness of the judiciary as secured and safeguarded by the Constitution of India.

It is important to protect the credibility of the judiciary, an institution held in high esteem by the citizens of India and the other organs of the State. This credibility must not be tarnished and a credible and respected Supreme Court alone can safeguard the Constitution and the nation and effectively reconcile justice, Constitution, law, harmony and the public good. Any supposed unconstitutional usurpation of power by any constituent of democracy will only go to adversely affect the entire democratic set up. Any apprehension or suspicion that any input by the executive and/or legislature would deconstruct the independence of judiciary and the attempts to completely exclude the executive and/or legislature from the process of appointing judges would be wholly illogical and inconsistent with the foundations of the theory of democracy and a doctrinal heresy.

Lastly, it is vital that transparency of all proceedings material to the people of India and necessary within the Constitutional framework be ensured. The current proceedings of the collegium system are absolutely opaque and inaccessible both to the public and the Governmental records. This is in contrary to the recordings of all other matters that affect the people of India, unlike the proceedings of Parliament and the Government that are available on record and on request under the Right to Information Act, 2005 to the people. Introduction of transparency in appointment of judges would only strengthen the independence of democracy and would be a positive step to further reinforce the trust and faith of people in the judicial set up. Any biasness suspected to have crept into the collegium system would effectively be wiped out by introducing a democratic election of the judges by a body

having its roots in the Constitution. For achieving the goals set out above, for ensuring the continued credibility and independence of judiciary and for reinforcing the faith of general public in the judicial set up, the proposed Bill seeks to insert a new article 123A, in the Constitution with a view to validate the Constitution (Ninety-ninth Amendment) Act, 2014.

Hence this Bill.

NEW DELHI;
4 July, 2022

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further to amend the Constitution of India

(Shri P.P. Chaudhary, M.P.)