

AS INTRODUCED IN THE RAJYA SABHA
ON THE 15TH DECEMBER, 2017

Bill No. XLII of 2017

THE CONSTITUTION (AMENDMENT) BILL, 2017

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further to amend the Constitution of India.

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

1. (1) This Act may be called the Constitution (Amendment) Act, 2017.

Short title and
commencement.

5 (2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. In article 366 of the Constitution, after clause (5), the following clause shall be inserted, namely:—

Amendment
of article
366.

'(5A) "consultation" means the action or process of formally consulting or discussing with another in a merely consultative, advisory and non-binding manner.'

STATEMENT OF OBJECTS AND REASONS

Certain terms in the Constitution are not defined leading to leeway in interpretation causing substantial questions of law. Such ambiguity in the law has contributed to the question regarding the appointment of judges to the higher judiciary in India. It is for this reason that the term "consultation" requires to be defined in the Constitution by way of amendment of article 366 that defines certain terms used in the Constitution. Such definition will not only remove ambiguity in the definition of the term, but restore the constitutional scheme in the appointment of judges to higher judiciary by restoring the role of the Executive Branch in the appointment process of judges and reaffirming the primacy of Parliament in the domain of legislation in the nation that has been weakened by judicial overreach in the domain of judicial appointments.

The term "consultation" appears in a number of articles in the Constitution, mainly in articles 124 and its analogous article 217 and articles 127 and 222. Herein the matters under question allow for the consultation of other parties by the President of India or the Governor of the State, as the case may be, in the discharge of his duties. The President and Governor are bound by the opinions of others as delivered explicitly by the Constitution under article 103(2) and its analogous article 192(2).

Articles 103(2) and its analogous article 192(2) incorporate the wording "the President (Governor) shall obtain the opinion of the Election Commission and shall act according to such opinion". Hence indicating the intent of the framers of the Constitution to bind the President and the Governor's actions to the advice they have received on the matter detailed in the relevant articles. While exercising the powers under the articles 103(2) and 192(2), the President and the Governor respectively are not required to act on the aid and advice of the respective Council of Ministers.

Article 124 and its analogous article 217 and articles 127, 143, 146(1) and 222 of the Constitution utilise the word "consultation", hence indicating that the framers of the Constitution did not have the intention to bind the President and the Governor's actions to the advice they have received on the matter detailed in the relevant articles. They sought only to ensure that the President or Governor appropriately consulted the relevant authorities or institutions in discharging their duties, therefore undertaking the action to the best of their knowledge, even allowing them to disregard the recommendations received during the consultation process. This is essential as it ensures that the highest executive functionary of the nation and states, respectively, has flexibility in the discharge of duties of his office, while ensuring that he received sound non-binding guidance on matters of constitutional and national importance and ensuring that all stakeholders were represented in the consultation process. The term "consultation" mentioned in the Constitution should be given the same meaning homogeneously throughout the Constitution and different meaning cannot be assigned for different provisions of the Constitution.

The judicial pronouncements with regard to article 124 made the recommendations binding upon the President which is not in keeping with the constitutional scheme. Similar judicial pronouncements can alter the meaning of other articles of the Constitution, risking the constitutional fabric and framework of the nation. Similar arguments can be utilised with respect to article 143, making the court's recommendations to the President binding on questions of law, not allowing the President to exercise his authority with the flexibility accorded to him and disturbing the constitutional scheme. Similarly under article 146(1), the recommendations of the Union Public Service Commission may be made binding upon the President for the appointment of officers and servants to the Supreme Court and analogously for the State, hence going against the constitutional scheme.

As detailed above, there is a requirement for defining the term "consultation" to ensure that the constitutional scheme is not disturbed due to ambiguity of the definition of the term. This will also ensure that the principle of separation of powers, while not enumerated in the Constitution, but upon which it is based, will be maintained. This will also ensure that the appointment process for higher judiciary in the nation is maintained and kept in sync with the constitutional scheme and constitutional text as envisioned by the framers of the Constitution. The need for the same has been elaborated upon below.

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 of 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 of India 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 under his constitutional powers, 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 High Courts was formulated known as the "collegium system", and is presently being followed for such appointments. Pertinently, the said collegium system does not find mention either in the original Constitution or in any successive amendments thereto. This was in direct contravention of the Court's earlier decision in the matter. In the case of S.P. Gupta (December 30, 1981) also known as the "First Judges Case", it declared that the "primacy" of the recommendations of the Chief Justice of India to the President can be refused for cogent reasons. This had brought a paradigm shift in favour of the executive having primacy over the judiciary in judicial appointments for the next twelve years before the Supreme Court overturned this in the Second and Third Judges' case.

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 assure itself any power of appointing its own successors. An unelected institution, however exalted, appointing its own peers 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 institutions. 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.

It is important to protect the credibility of the judiciary, an institution held in high regard 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.

For achieving the goals as 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 restore the Constitutional scheme as established by the text of the constitution and not by judicial usurpation of constitutional amendment, while also defining the key term of "consultation" within the Constitution, removing ambiguity while subsequently eliminating substantial question of law regarding the term.

Hence this Bill.

SUKHENDU SEKHAR RAY

ANNEXURE

EXTRACTS FROM THE CONSTITUTION OF INDIA

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366. (1)* * * * *

(5) "clause" means a clause of the article in which the expression occurs;

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RAJYA SABHA

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further to amend the Constitution of India.

(Shri Sukhendu Sekhar Ray, M.P.)