

APPOINTMENT OF 'DISTINGUISHED JURIST' AS JUDGES IN THE SUPREME COURT OF INDIA: A SQUANDERED CONSTITUTIONAL MANDATE

*Lokendra Malik**

Abstract

This paper explores the viability of selection of distinguished jurist and scholars as judges in the Supreme Court of India. Deriving inspiration from foreign jurisdictions such as the United States, the founding father(s) of the republic envisioned distinguished jurists as adjudicators on the bench of the apex court and a provision to that effect was duly incorporated in the Constitution. However, the vision remains unrealized till today. Time has come for a tryst with the idea of a jurist as judge. The present article is an exploration of the very same idea firstly in its conceptual form and thereafter proceeding to an analysis of its desirability and viability in the light of various juristic and academic developments in the country.

I Distinguished jurist: Conceptual contours

JUDICIAL APPOINTMENTS, being matters of immense importance, are constitutional matters. The procedure of appointment of judges in the Supreme Court, the high court and the district courts have been laid down the Constitution of India. As per the current constitutional practice, the judges of the Supreme Court and high courts are appointed by the President of India on the recommendation of the Supreme Court collegium (consisting of four senior-most judges and the Chief Justice of India).¹ The President of India is bound to act on the recommendation of the collegium.² However, he can return the file to the collegium once for its reconsideration but thereafter he is bound to act on the recommendation of the collegium. As the President of India is the constitutional head of the Union Government, all these powers of processing judges' appointments are exercised by the Union Council of Ministers through its Ministry of Law and Justice as per the business rules of the Government of India.³ The collegium has full power either to accept or reject the views of the President (aided and advised by the Union Council of Ministers).⁴ However, the appointments are formally made by the President and notified by the Ministry of Law and Justice, Government of India.

* Advocate, Supreme Court of India.

1 *Supreme Court Advocates on Record Association v. Union of India* (1993) 4 SCC 441; *In Re Presidential Reference*, AIR 1999 SC 1; *Supreme Court Advocates on Record Association v. Union of India* (2016) 5 SCC 1.

2 *Supreme Court Advocates on Record Association v. Union of India* (1993) 4 SCC 441.

3 *Samsber Singh v. State of Punjab*, AIR 1974 SC 2192.

4 *Ibid.*

As discussed earlier, after three landmark judgments of the Supreme Court on this issue, this practice is fully recognized in the country. The collegium includes the five senior-most judges of the Supreme Court including the Chief Justice, who collectively constitute the selection panel for appointment of judges to the Supreme Court (and the three senior-most judges including the chief justice in case of appointment of judges of the high court). However, the collegium itself is not mentioned in the Constitution. It is a judge-made body: it arose out of a judgment of the Supreme Court, and in response to increased executive interference in judicial appointments, particularly during Indira Gandhi's regime. Now the situation has changed and the collegium determines judicial appointments/transfers of high court judges in the country.

It is pertinent to mention that the Constitution of India makes a provision of appointment of 'distinguished jurists' as judges of the Supreme Court under article 124 (3) of the Constitution.⁵ But who is a 'distinguished jurist', that is the main question that should be ascertained first? The President of India has to identify the 'distinguished jurist'.⁶ In other words, the elected government has to complete this exercise through its Ministry of Law and Justice as the President is the constitutional head of the Union Government who acts on the aid and advice of the Council of Ministers headed by the Prime Minister.⁷ Generally, three kinds of persons are eligible to be appointed as judges of the Supreme Court. As per article 124(3) of the Constitution, sub-clauses (a) and (b), the judges of the high court in service and practicing advocates can be elevated to the Supreme Court, and sub-clause (c) provides that a distinguished jurist (in the opinion of the President) can also be appointed as a judge of the Supreme Court. In actual judicial practice prevalent in the country, only the high court judges and practicing lawyers of the high court and Supreme Court are appointed as judges of the Supreme Court. The general practice is that either a senior high court judge or any chief justice of the high court is appointed as judge of the Supreme Court. Rarely some direct appointments from the Bar are made to the Supreme Court.

The Indian judicial system is based on the British judicial system which leaves little space for the academic lawyers to become judges. This system mostly depends on judges and practicing lawyers. This trend has been in vogue for a long time in our country. However, the United States follows a different practice and includes legal

5 Constitution of India, 1950.

6 M.P. Singh, "Merit" in the appointment of judges" (1999) 8 SCC (Jour) 1.

7 *Supra* note 3.

academics also in the judicial system.⁸ In addition to this, many civil law countries reserve some places at the higher courts for non-career judges, usually introduced as lawyers, prosecutors, or law professors recognized by the appropriate committee as of high merit. For example, in Spain, under some conditions established by law, lawyers and law professors can become judges at the higher courts without previous experience of serving as lower court judges (they are called the *cuarto turno* in reference to the fact that it used to be the case that the three previous hiring seasons had to be completed with career judges). The process of appointment is administrative in nature (involving an examination plus assessment of merits), but they are conceptually closer to recognition judiciaries.⁹ In Japan also, the law professors can be appointed as judges of the Supreme Court by the Prime Minister.¹⁰ No legal academic has yet been appointed as a judge of the Supreme Court in India.

In India, we have never had academics as judges despite there being numerous brilliant legal academics who could have made a substantial contribution had they been allowed to sit at the benches of the apex court. The lacuna is further widened by the irony that although a distinguished jurist can be appointed to the Supreme Court but not to the high court as there is no constitutional provision to that effect. Unbeknownst to many however the 42nd amendment to the Constitution of India provided that jurists would be eligible for appointment on the high courts' benches but unfortunately the amendment was short-lived as it was struck down by the forty-fourth Amendment Act.¹¹ D. D. Basu, commenting on this deletion writes, "Logically the omission of sub-clause (c) from Article 217(2) after having once inserted it by an amendment would show that it is deliberate, and suggests that a distinguished jurist is

8 Many American judges among appellate judges who came to the bench from academia are Oliver Wendell Holmes (although he had joined the Harvard Law School faculty only months before being appointed to the Supreme Judicial Court of Massachusetts, he had been doing academic writing for many years), Harlan Fiske Stone, William O. Douglas, Felix Frankfurter, Antonin Scalia, Ruth Ginsburg, and Stephen Breyer (United States Supreme Court); Calvert Magruder, Charles Clark, Jerome Frank, Joseph Sneed, Harry Edwards, Robert Bork, Ralph Winter, Frank Easterbrook, Stephen Williams, J. Harvie Wilkinson, John Noonan, Douglas Ginsburg, S. Jay Plager, Kenneth Ripple, Guido Calabresi, Michael McConnell, William Fletcher, and Diane Wood (U.S. courts of appeals); and Roger Traynor, Hans Linde, Benjamin Kaplan, Robert Braucher, Ellen Peters, and Charles Fried (state supreme courts). (The list is not intended to be exhaustive.) All these are appellate judges but many distinguished federal district judges have been appointed from the academy as well, such as Jack Weinstein, Robert Keeton, and Louis Pollak.

9 Nuno Garoupa and Tom Ginsburg, "Hybrid Judicial Career Structures: Reputation Versus Legal Tradition" 3(2) *Journal of Legal Analysis* 441-448 (winter 2011).

10 *Ibid.*

11 The 44th Constitutional Amendment Act, 1978 was enacted to dilute the 42nd Constitutional Amendment Act, 1976 which was passed during the operation of the National Emergency by Indira Gandhi government.

a misfit for the High Court though eminently fit for the Supreme Court.”¹² The high courts along with the Supreme Court are the only courts entrusted with the jurisdiction to interpret the Constitution, and therefore, there are reasons enough to include the category of distinguished jurists for the appointment of high court judges also. The significance of legal academics on the benches of higher courts would be immense. The higher judiciary especially the Supreme Court decides on substantial questions of law thereby making law in the process. This exercise often entails theorizing and conceptualizing. Law professors, by virtue of their years of academic training and research capabilities, are most adept at nuanced legal reasoning, theorizing and conceptualizing. Having legal academics as judges has the potential to meaningfully elevate the benches.

The expression “distinguished jurist” is nowhere defined in the Constitution of India. Nonetheless, it requires pragmatic understanding. And when we understand it in that sense it includes all those eminent persons who are involved in the practice, teaching, and research of law including lawyers, judges, academics and even renowned scholars who are engaged in an in-depth research on issues of law and justice and whose works enjoy an imprimatur appeal. The Constitution-framers intended such persons as eminent law professors who failed to meet one of the first two criteria of appointment of judges to the Supreme Court as mentioned in article 124 of the Constitution.¹³ These people should be well-known for making their outstanding contribution to legal scholarship. They should not be ordinary salary-drawing people but should be authorities in their fields who have made an outstanding contribution to the legal profession in one way or the other. Their works should be duly recognized and cited by the courts of law during the adjudication process. They should produce high-quality knowledge for the profession which should have been well-recognized in the profession. Even if somebody does not practice law in the court, and he has produced high-quality literature and established an eminent position he/she can certainly be acknowledged as a distinguished jurist.¹⁴

Needless to say, practicing law is not the only condition precedent for being a distinguished jurist. Some professors of law and authors also produce legal *tours de force* on different subjects that are helpful to the judges and lawyers in their judicial practice and they recognize the professorial writings. Though generally, these kinds of writings do not have any binding effect on the judges, but they certainly carry meaningful

12 D. D. Basu, (1) *Commentary on the Constitution of India* 238 (1990).

13 George H. Gadbois, Jr., “Indian Supreme Court Judges: A Portrait” 3(2/3) *Law and Society Review*, Special Issue devoted to Lawyers in developing societies with special reference to India 318 (Nov. 1968-Feb. 1969).

14 India has had many distinguished jurists who taught law and authored high quality books on different topics. Professors like V. N. Shukla, P. K. Tripathi, G. S. Sharma, Upendra Baxi, M. P. Jain, Madhav Menon *etc* have achieved all heights in the academic world.

persuasive appeal and are significantly alluded to and quoted verbatim at times by the judges in writing their judgments on complex legal issues. A distinguished jurist, because of the breadth of knowledge and freedom from a narrow and technical approach to law, can help the practitioner judges to understand the hardcore legal issues in a better manner whenever they decide important public law issues and problems.¹⁵ The Constitution benches¹⁶ of the Supreme Court decide many important legal issues having far-reaching constitutional importance. Our Supreme Court deals with many such issues from time to time. A renowned legal academic who has a better understanding of theoretical legal issues can certainly make a visible contribution to the decision-making process at the top level. This unique participation of renowned legal academics would have a creative impact on the judicial functioning of the apex court.

II The intent of the constituent assembly

The “distinguished jurist” category was added to the list of “eligible” candidates for appointment to the Supreme Court of India in the draft Constitution. This was done in order to infuse diversity in professional backgrounds among individuals sitting on the bench of the Supreme Court. The late H.V. Kamath, a member of the Constituent Assembly, while proposing the “distinguished jurist” category, said, on May 24, 1949:¹⁷

The object of this little amendment of mine is to open a wider field of choice for the President in the matter of appointment of judges of the Supreme Court... I am sure that the House will realize that it is desirable, may [be] it is essential, to have men — or for the matter of that, women — who are possessed of outstanding legal and juristic learning. In my humble judgment, such are not necessarily confined to Judges or Advocates. Incidentally, I may mention that this amendment of mine is based on the provision relating to the qualifications for Judges of the International Court of Justice at The Hague.

Supporting the proposal of Kamath, another Constituent Assembly member M. Ananthasayanam Ayyangar observed, “...His amendment does not make it obligatory upon the President to choose only a jurist among jurists. In various cases a Supreme Court has to deal with constitutional issues. A practicing lawyer barely comes across constitutional problems. A person may enter the profession of law straightaway. He might be a member of a law college or be a dean of the faculty of law in a university. There are many eminent persons, there are many writers, and there are jurists of great

15 M P Jain, *Indian Constitutional Law* 201 (LexisNexis, 8th edn., 2018).

16 A Constitution bench consists of at least five or more judges of the Supreme Court which is set up to decide substantial questions of law with regard to the interpretation of the Constitution in a case. art. 145(3) of the Constitution of India.

17 Constituent Assembly Debates dated May 24, 1949, *available at*: <http://loksabhaph.nic.in/writereaddata/cadebatefiles/C24051949.pdf> (last visited on May 2, 2020).

eminence. Why should it not be made possible for the President to appoint a jurist of distinction, if it is necessary? As a matter of fact, I would advise that out of the seven judges, one of them must be a jurist of great reputation. I am told, Sir, by my honourable friend, Shri Alladi, whom I consulted, that some years ago President Roosevelt in the USA appointed one Philip Frankfurter. He was a professor in the Harvard University. That was a novel experiment that he made. Before that, barristers were being chosen and also persons from the judiciary. This experiment has proved enormously successful. He is considered to be one of the foremost judges, one of the most eminent judges in the USA. Therefore, Sir, I am in agreement with the proposal to add a jurist also, a distinguished jurist, in the categories for the choice of a judge of the Supreme Court.”¹⁸

It is significant to mention that Kamath’s amendment was adopted by the Constituent Assembly. The legal academics have also failed to raise this issue prominently in their academic discussions and writings. Some lawyers argue that legal academics lack practical experience. This is a fact but many issues are adjudicated by the Supreme Court that can also include the eminent legal academics who possess excellent knowledge of and a sound grounding in law and philosophy. In addition to this, the Supreme Court can also appoint eminent legal academics as amicus in important cases relating to the constitutional law *etc.*

III Academics as judges

The idea of an academic as a judge should be welcomed. The Supreme Court of India is the constitutional court which is a final appellate court, dealing both with appellate and original matters with substantial questions of law involving constitutional interpretation and interpretation of various statutes framed by the Parliament and the state legislatures. During this process of judicial interpretation, the court not only declares the law but also some time makes the law which is called the judge-made law. There are many examples of such judge-made law in our country. The public interest litigation jurisprudence is nothing but a clear example of judge-made law. The same is the doctrine of basic structure and many other provisions. As per article 141 of the Constitution, the law declared by the Supreme Court is binding on all courts and tribunals within the territory of India. The Supreme Court is the most powerful court and most trusted public institution in the world in terms of exercising its judicial review power and by exercising this power under article 32, 132, 133, 136, and 142 of the Constitution; it has made wonders sometimes positive but sometimes negative also. The court is fully empowered to declare any law unconstitutional if that violates the constitutional provisions as per the mandate of article 13 of the Constitution. It is the ultimate interpreter and guardian of the Constitution.¹⁹ The people of the country

18 *Id.* at 28.

19 *Nar Singh v. State of U.P.*, AIR 1954 SC 457.

hold the court in high esteem and whenever the government violates their fundamental rights they rush to the court for getting justice. Many of its judgments have protected and promoted the rule of law and democracy in the country. In many cases, the court has acted as a shield to the Constitution to protect it from executive and legislative excesses. The court has promoted constitutionalism, and rule of law remarkably in many of its landmark judgments.²⁰ The court enjoys higher popular legitimacy and it is seen as the most credible institution, having the will and the wherewithal to tackle the ills plaguing the community. At the same time, questions have also been raised about its encroachment into the realm of executive and legislative wings and some other failures.

The Supreme Court of India does not only interpret the law but also makes the law, as and when it finds gaps. There are many examples of the law-making activity of the Supreme Court such as its landmark judgments in the *Kesavananda Bharati* case²¹ (doctrine of basic structure), *Vishakha* case²² (prevention of sexual harassment of women at the working place), *S. R. Bommai*²³(article 356) *etc.* In these cases and many more cases, the court has made the law which changed the direction of the governance in the country and compelled the government to run the administration as per the constitutional mandate. The decisions of the court guide the legal destiny of the nation. The people who adorn the highest bench should be fully equipped in the adjudication process and deliver high-quality judgments that must not only be cited by the lower benches but should be cited in foreign jurisdictions also. The academic experts can certainly contribute to this cause up to a large extent. The court decides a variety of cases that cannot be adjudicated only by the practitioners effectively. The eminent legal academics hold a good command over constitutional jurisprudence and other issues that need serious academic inputs. A variety of new issues can be handled effectively by the legal academics on the bench. As the Supreme Court is the final constitutional court of the country which decides complex issues about constitutional law, human rights, criminal law, and sociology, there is an urgent need for its intellectual restructuring. In India there is no dearth of brilliant and outstanding legal academics but the academic field remains largely untapped. A multi-faceted judicial community can serve a better purpose.

20 *S. R. Bommai v. Union of India* (1994) 3 SCC 1; *Supreme Court Advocates on Record Association v. Union of India* (1993) 4 SCC 441; *L. Chandra Kumar v. Union of India*, AIR 1997 SC 1125; *Supreme Court Advocates on Record Association v. Union of India* (2016) 5 SCC 1.

21 *Kesavananda Bharathi v. State of Kerala* (1973) 4 SCC 225.

22 *Vishakha v. State of Rajasthan* (1997) 6 SCC 241.

23 *S. R. Bommai v. Union of India* (1994) 3 SCC 1.

IV Locating distinguished jurists

We can search the answer to this question with the help of some foreign precedents. The United States Supreme Court is a good example of the appointment of distinguished jurists as judges. In that court, many law professors have been appointed as judges from time to time. While framing the Constitution, even our constituent assembly referred to the American example where President Roosevelt had appointed Felix Frankfurter, a Professor at Harvard Law School for 25 years, as an associate judge of the American Supreme Court in 1939.

In the United Kingdom also, judges like Lady Hale had served in the academia for a long time and thereafter she graced the highest bench of that country. Justice Beatson was a leading academic at Oxford and Cambridge universities. Justice Cranston, apart from being a former Solicitor-General, was for many years a professor at the London School of Economics. Lord Justice Maurice Kay (Vice-President of the Court of Appeal (Civil Division) was Professor of Law at Keele University before practicing at the Bar. Lord Hoffmann, Goff, Rodger, and Collins, as is well known, all had academic careers, as well as careers in practice, and another Law Lord, Lord Millett, wrote many learned articles of high scholarship before during and after his judicial career.²⁴ Recently Professor Andrew Burrows, a renowned professor of the Law of England at the University of Oxford has been appointed as a judge to the United Kingdom Supreme Court. Can we also find such brilliant minds in our country?

Academic knowledge is very useful in litigation also. It is beyond doubt that the academics are more educationally qualified than ordinary lawyers. Academics possess higher knowledge and if they utilize that knowledge for building positive legal theories that will certainly be appreciated by the other stakeholders of the legal profession. The academics are generally good orators and can argue well in the courts. They can present good legal principles before the judges in complex cases involving juristic issues about law, society, and governance. In recent years, our Supreme Court has decided many important cases that deserved serious academic participation. Cases like triple talaq, section 377 IPC, adultery, privacy, and so on were fit for academic participation. Not only this, generally the constitutional litigation needs academic inputs of high-quality. The Supreme Court is meant to guide the constitutional destiny of the country. Legal academics should also be part of this judicial discourse. The court should also involve the renowned legal academics as amicus in important cases that need academic inputs.

It is noteworthy that some lawyers in the Supreme Court have made excellent contributions by utilizing their past academic backgrounds.

24 Lord Neuberger of Abbotsbury MR, *Judges and Professors-Ships Passing in the Night*, Bd. 77, H. 2 *The Rabel Journal of Comparative and International Private Law* 248-249 (Apr. 2013).

The author opines that the law professors produce high-quality knowledge for the legal profession which helps the judges in the adjudication process. They can contribute better as judges also. They should not be confined only to the lecture halls or academic disciplines. They should also be engaged in practical teaching, focusing on high-quality research and publications. As mentioned earlier, the constitutional courts can also involve them as *amicus curiae* in important cases that need serious academic inputs. Not only in judicial bodies such as the Supreme Court, high courts but also in some other quasi-judicial bodies they can contribute too much if proper opportunities are given to them. Many legal bodies allow legal academics to contribute as their member/ chairperson. Our universities should act like human-welfare institutions, and not only degree distributing houses. The knowledge which is imparted there should be used for the intellectual growth of the country. In this mission, legal academics deserve serious consideration. Many eminent jurists have also supported this idea of appointing renowned legal academics as judges of superior constitutional courts. D. D. Basu believed that “infusion of academic jurists of the right order into the highest tribunal may lead to its enrichment”.²⁵

V Concluding observations

In light of the above discussion, it is submitted that the time has come when both the Union Government and the Supreme Court collegium should seriously consider the proposal to appoint the judges in the Supreme Court of India from the category of ‘distinguished jurists’ particularly eminent law professors who are well recognized in the legal system. Besides the apex court, the provisions may also be made in the Constitution and other statutes to appoint the legal academics in the high courts, tribunals and various commissions as members and chairpersons.

The Bar may also engage the eminent academics in the litigation process on a part-time basis and can get the benefit of their knowledge which they possess in abundance. They can send opinion matters to legal academics and take their assistance. The professors should first establish their credentials by making Himalayan academic contributions to the cause of justice and only thereafter they can claim something. For achieving this target, the quality of legal education needs to be improved. The legal academics should undertake high-quality research about the practical side of the legal profession which could help the judges also. They should involve themselves in the arbitration process, opinion jurisprudence and constitutional adjudication. They should organize seminars, conferences, lectures on contemporary legal issues and suggest the measures to deal with such issues. The academics are social scientists and they can certainly help to mitigate the litigation. They can find out the reasons of increasing litigation and social conflicts. They can increase their participation in the legal aid movement and poverty eradication jurisprudence.

25 D D Basu, I *Commentary on the Constitution of India* 47 (1990).

The quality of justice that is dispensed in the society is greatly determined by who sits at the bench. The debate in our country is disproportionately focused on who appoints the judges whereas it should also equally be on from where the judges are appointed. Distinguished jurist is one of the constitutional categories from where such appointments can be made but it is also greatly overlooked. The Indian republic needs its own Frankfurters and Laskins²⁶ and it can only be achieved if the government points its gaze at the universities.

26 Justice Felix Frankfurter was directly appointed to the U.S. Supreme Court from the Harvard Law School. Justice Bora Laskin was appointed to the Supreme Court of Canada from the Toronto University Law School.