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## Deviation from constitution in matters of judicial appointments in India: An overview

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### Abstract

Constitution of India provides a framework for higher judiciary by laying down its powers, appointment, tenure and removal of officers of courts including judges etc. Chapter IV of Part V provides for Union Judiciary i.e. the Supreme Court of India and chapter V of Part VI provides for State Judiciary i.e. the High Court.

This research paper is an attempt to analyse how the Indian practices in appointment of judges to the highest court have from time and again deviated from the Constitution of India.

**Keywords:** Constitution, supreme-court, appointment, judges, distinguished jurist

### Introduction

Independent judiciary is an important tenet of any democratic state. In India, Judiciary has from time to time played a vital role in keeping the other organs of the state, namely Administration and Legislature within the bounds of their constitutional jurisdiction. Appointment of independent and impartial judges is essential to ensure strict observance of constitutional norms. Appointment of Judges to the Supreme Court of India are done by the President of India in consultation with Chief Justice of India. The minimum qualification for the appointment has been laid down clearly in the Constitution itself.

### Appointment of Judges: Deviation form Constitution

While laying down the qualification for appointment as judge to countries top court, Article 124 (3) lays down three categories of persons namely;

A citizen of India having

- At least 5 years of experience as High Court Judge (Article 124 (3) (a))
- At least ten years of experience as an advocate of a High Court (Article 124 (3) (b))
- Who is, in the opinion of the President, a distinguished jurist (Article 124 (3) (c))

Use of term 'distinguished jurist' clearly indicates that the appointment to SC judge cannot be restricted to judicial or Bar members but even one who having no such membership, but is distinguished person in the field of law can be appointed as judge. Unfortunately, in spite of having a legacy of great jurists like Subhash Kashyap, Upendra Baxi, MP Singh etc. no such appointment has taken place till date.

There was no provision to appoint jurist as a judge of SC. Addition of "(c) or is a distinguished jurist" was suggested by Constituent Assembly member, Hari Vishnu Kamath. Explaining the object of this amendment, he stated that,

"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, nay 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."(Constituent Assembly Debates (PROCEEDINGS) 1949) <sup>[4]</sup>.

Strongly supporting the views of Mr. Kamath, Mr. M. Ananthasayanam Ayyangar, referring to the example of J Frankfurter of USA, insisted that,

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“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 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 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.” (Constituent Assembly Debates (PROCEEDINGS) 1949) [4].

In USA, President Roosevelt appointed Felix Frankfurter, a Professor at Harvard Law School for 25 years, as an Associate Judge of the American Supreme Court in 1939. Justice Frankfurter went on to become one of the most celebrated judges of the American Supreme Court and a noted advocate of “judicial restraint” - something, which our constitutional polity desperately needs. (Ranjan, 2016) [3]. This practice of appointing law professors as US SC judge has now well rooted in American Judicial system.

This amendment proposed by Mr Kamath was approved by Constituent assembly after replacing word “Distinguished” with “Eminent.”

The SC of India is under constitutional duty to evolve new set of principles by theoretical interpretation of the Constitution. Such theoretical conceptualisation is something the law professors are doing frequently in their academic field. Hence, using their expertise of theoretical analysis in building the constitutional jurisprudence will certainly help in broadening the interpretation of existing or developing new theories and principles. Aforementioned debate of constituent assembly underlines this philosophy behind idea of ‘appointing jurist in SC.’ Unfortunately, this constitutional mandate is yet to see the daylight.

Along with India and USA, many other countries have a provision for appointment of Jurist as a Judge. After serving as professor for about 30 years in different educational institutes of repute, Andrew Burrows was appointed as SC judge in UK from 2<sup>nd</sup> June 2020. Statutes of countries like Spain, Italy, Turkey and many more provide for appointment of University Professors as Judge.

Commenting sarcastically upon this practice, Professor Upendra Baxi said,

“In 67 years of Independence, the Presidents of India have been looking with a telescope and have not found any jurist worth appointing as a Supreme Court Judge! So obviously jurists don't exist in India. Hence, I think this is a dead issue.” (Kini, 2021) [2].

“The Constitution does not contain any provision which says that a person below the age of 55 cannot be appointed to the Supreme Court. However, only 9 out of 247 Supreme Court judges, i.e., less than 4% of the court's judges, have been appointed to the court at an age lower than 55. Justice PN Bhagwati was the youngest judge appointed to the court in its history at age 51.” (Chandrachud, 2021) [1]. In last decade, the current CJI Mr. NV Ramana was the youngest one to be appointed in the Supreme Court. He was appointed at the age of 56 years and 5 months.

Similarly, the Constitution does not say that only High Court Chief Justices or very senior judges can be appointed as Supreme Court judges. However, the trend has been that advocates have very rarely been appointed to the Supreme

Court directly from the Bar. One advocate was appointed directly to the Supreme Court in every decade barring the 1950s and 2000s: Chief Justice SM Sikri (1960s), Justice S. Chandra Roy (1970s), Justice Kuldip Singh (1980s), Justice Santosh Hegde (1990s). However, in the previous decade, a record number of lawyers were directly appointed as Supreme Court judges. Four judges were appointed, all from the Supreme Court Bar: Justice RF Nariman, Justice Uday Lalit (who will occupy the post of Chief Justice for a short while upon the retirement of Chief Justice Ramana in 2022), Justice L Nageswara Rao, and Justice Indu Malhotra. (Chandrachud, 2021) [1]. Less than 7% of the judges appointed to the court in the previous decade, and less than 4% of the total number of judges appointed to the Supreme Court, have been advocates. (Chandrachud, 2021) [1]. With recent appointment of Senior Advocate PS Narsimha, the total number of advocates directly appointed as judge from the bar has now reached the meagre number of nine. This shows the reluctance in appointing practicing advocates as Judge in countries supreme judicial body. Even in these lesser number of advocates, almost all of them are advocates practising in Delhi. Hence, the practise of appointing advocates as judge in Supreme Court is unequitable as there practically no chance for an advocate from north east or southern HC's to secure appointment as judge to the top Court.

### Suggestions

Based upon the analytical outcome of this research, author proposes following suggestions;

- The term used under Article 124 namely, ‘Distinguished Jurist’ needs to be defined in clear words. It may include law professors, journalists, social activists etc. having knowledge and expertise in law.
- Article 217 of the Constitution of India doesn't provide for appointment of ‘distinguished jurist’ to the High Court. An amendment may be brought to the said Article to enable such appointment at least on the constitutional benches. In every High Court and in the Supreme Court, minimum one jurist may be appointed.
- Law professors make up a significant portion of India's academic community, and they are frequently involved in high-quality research and training for law students and executives. They are highly qualified and keep themselves up to speed by conducting study on current topics of interest. Their confinement to classrooms is unjustified and unreasonable. Hence, there must be a representation to the law professors from the category of ‘Distinguished Jurists.’
- More number of Lawyers with demonstrated skills and experience in field of legal service and practice should be appointed, preferably having representation from all India and not just from Delhi.

### Conclusion

In spite of a constitutional mandate, in its seventy two years of existence, not even a single ‘distinguished jurist’ has been appointed to the Supreme Court of India. India has a longstanding legacy of academic and other jurists having expertise in law. The central government of India too had underlined the need for compliance to the Constitutional mandate and giving away with the practice of preference to seniority over merit. Instead of observing the Constitutional mandate, the Supreme Court has been following and

advocating collegium system for the appointment of judges which doesn't find any recognition in the Constitution. The collegium system has completely ignored the Constitutional mandate for appointment of 'distinguished jurist' to the Supreme Court. This deviation must be averted and legal academicians and other jurists having skills and expertise in legal matters should be appointed to the Supreme Court of India.

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