

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 3

2021

© 2021 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at submission@ijlmh.com.

Distinguished Jurists: An Unused Mandate of the Constitutional Court

MUSTAFA CHITALWALA¹

ABSTRACT

The judiciary in India plays a peripheral role in upholding the rule of law. It is, therefore, of the utmost importance that highly knowledgeable and skilled judges are appointed to preserve the sanctity of the judiciary. The Constitution of India provides for the appointment of judges to the Supreme Court in accordance with Article 124(3).

The focus of this paper is on the Supreme Court of India's unused mandate to appoint "Distinguished Jurists" as judges. The research paper investigates the mechanisms by which such appointments can improve the efficiency of the judicial system or provide the Constitutional Court with a flawless point of view. The paper goes into greater detail about countries such as the United Kingdom and the United States of America, from which this article was borrowed. Despite having such a mandate, the cornerstone of the legal profession, law professors, have no involvement in the Indian judicial system.

I. INTRODUCTION

India has prided itself on being the world's largest democracy, and the importance of the judiciary in this democratic establishment is exceptional. In India, the judiciary plays a crucial role in safeguarding the supremacy of the constitution by interpreting and applying the laws. The judiciary acts as a watchtower and is above all offices of the state, this helps the judiciary to sustain its freedom, which is included in the powers of separation.

The Constituent Assembly has consciously provided for the division of powers for judicial appointments, and retirements. This independence is vital for the judiciary to be upheld.

The Appointments of judges to the higher courts have now become a question of debate. Judges appointed, are expected to be of the highest quality, training, and at the same time, are expected to present themselves with composure and demeanour. The Supreme Court of India's collegium is a peripheral body for the appointment of judges. The qualifications required for the appointment of the judges are laid down under Article 124(3) of the Indian Constitution.

¹ Author is a student at Symbiosis Law School, Pune, India.

The Constitution under Article 124(3) provides the qualifications for the appointment of the Supreme Court judges in three forms:²

1. A Judge at the High Court for a period of five years or more;
2. An Advocate in the High Court for a period of ten years or more; and,
3. A person in the opinion of the President, a 'Distinguished Jurist.'

The initial two clauses for the arrangement of Article 124(3) are unmistakably understandable; in any case, the word 'Distinguished Jurist' has not been characterized anywhere in the Constitution of India.

II. WHO IS A DISTINGUISHED JURIST?

Under Article 124(3) of the Indian Constitution, the High Court judges and practising lawyers of higher courts are appointed as judges to the Supreme Court. Hence, it has to be inferred in a practical sense that the word 'Distinguished Jurist' implies to a community of people who are not practising lawyers or even judges since the two have already been listed. The term Jurist is very vague in India; we have developed a traditional sense that every lawyer, judge and other law officers are described as 'Jurists'. It is the misapplication of this term that had added ambiguity to it.

The terms "Jurist" is defined as "a person very knowledgeable in the field of law." Black Law Dictionary defines Jurists as "One who is versed or skilled in law; One who is skilled in civil law, or the law of nations. The term is now usually applied to those who have distinguished themselves by their writings on legal subjects."³ Alternatively, "Distinguished Jurist" refers to academic lawyers or law professors: people who have challenged and expanded the existing frontiers of legal knowledge through cutting edge research and teaching.⁴

In the past, few appointments have been made from the Bar directly (An advocate from the High court). Few Justices who have been given this prestigious honour are S. M. Sikri, U. Lalit, Kuldeep Singh, Rohinton Nariman, S. Chandra Roy, Santosh Hedge and Indu Malhotra. Surprisingly, it has been 71 years since the birth of the Constitution of India, and so far, no judge has been appointed from the legal academic community. There are many ways that a law professor or academic scholar can contribute to the justice system. The position of law professors shall not be solely confined to the field of education. However, their minds and

² The Constitution of India, 1950, Art. 124(3).

³ Black, H., 1968. *Black's Law Dictionary*. 4th ed. St. Paul, Minn.: West Publishing Co., p.998.

⁴ Ranjan, P., 2016. *Wanted, An Indian Frankfurter*. [online] The Hindu. Available at: <https://www.thehindu.com/opinion/op-ed/wanted-an-indian-frankfurter/article4895511.ece>

experience can be used to accomplish greater things in the judicial system. In the opinion of the researcher, many distinguished law professors can function better than a few of the traditional judges, if only they are given the ability to stand part of the country's judicial process.

III. THE CONSTITUENT ASSEMBLY DEBATES

During the Constituent Assembly Debates, it was stressed by late H. V. Kamath, where he proposed the term 'Distinguished Jurist' to be added for the qualifications for the appointment of the Supreme Court Judges. H. V. Kamath emphasised to include this category, in order to have a diverse professional background seated on the bench of the Supreme Court.

On May 24, 1949, H. V. Kamath initiated his declaration in support of adding "Distinguished Jurists" to the category for the appointment of Supreme Court judges by emphasizing that this would give the President a wider field of choice when it came to this appointment and emphasised that outstanding legal and juristic knowledge is not limited to Judges or Advocates and how this amendment was based on the qualifications for judges at the International Court of Justice in Hague.⁵

The celebrated speech by late H. V. Kamath caught Shri. M. Ananthasayanams ears and support, where he observed that "*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, and there are many writers, 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?*"⁶ He went on to advise that out of the seven judges, one of them must be a jurist of great reputation." Later on, Shri M. Ananthasayanams recalled how President Roosevelt in the U.S.A had appointed eminent jurists Philip Frankfurter, a professor at Harvard University. This experiment had demonstrated hugely fruitful. Philip Frankfurter is remembered today as one of the most prominent adjudicators in the U.S.A.

The Constituent Assembly, after vigilant consideration, adopted this deliberation of the members as "Distinguished Jurist". However, to date, no distinguished jurists have been appointed to the Supreme Court. It appears that the President and the Collegium have consciously overlooked this constitutional provision.

⁵ *Constituent Assembly Debates*, 24th May, 1949 speech by H. V Kamath, <http://loksabhaph.nic.in/writereaddata/cadebatefiles/C24051949.pdf>.

⁶ *Constituent Assembly Debates*, 24th May, 1949 speech by Shri. M. Ananthasayanams, <http://loksabhaph.nic.in/writereaddata/cadebatefiles/C24051949.pdf>.

IV. ARE THERE DISTINGUISHED JURISTS IN THE HIGH COURTS?

The structure for the appointment of Judges to the High Court is set down in Article 217 of the Indian Constitution. Inquisitively the Constitution did not give any probability to 'Distinguished Jurists' to be appointed as judges in the High Court. Is it true that the Constituent Assembly felt compelled to appoint jurists to the highest judicial position?

The Constituent Assembly Debates have explained this arrangement as Professor Shibban Lal Saksena had moved an amendment to include the appointment of a 'Distinguished Jurists' as a criterion for the appointment of judges to the High Court with the reference from the Governor of that State. Since this provision has been extended to the Supreme Court, he wished it to be a piece of the High Court's appointments. Surprisingly, at the time of the formation of the constitution, this amendment was excluded.

In 1975, the 42nd Constitutional Amendment was passed; the amendment added the term "Distinguished Jurist" as a method of appointment of the judges to the High Court. The thought behind this constitutional move was taken in the framework of the Constituent Assembly Debates. This would be adding to the experience which will be gained by the Jurists in the High Courts would be helpful for the jurists-judges in the Supreme Court.

Notwithstanding, the life expectancy of such provision was shortened by the Forty-Fourth Constitutional Amendment in 1978. The justification given for the removal of "Distinguished Jurists" was fairly devoid of justification, stating that it was during the despised Emergency period that the Forty-Fourth Amendment was heavily considered to correct the steps taken by the Forty- Second Amendment.⁷ In *Kumar Padma Prasad v. Union of India*,⁸ the Supreme Court quashed the appointment of Shri K.N. Srivastava, the Secretary (Law & Justice), Mizoram Government, as a High Court Judge on the grounds that he was not eligible. The fact that a distinguished jurist can be appointed to the Supreme Court but not to the High Court is ironic.

V. THE BORROWED PROVISION; A COMPARATIVE ANALYSIS

The Constituent Assembly incorporated the term 'Distinguished Jurist' as a measure for the appointment of Judges in the Supreme Court of India. All things considered, this term was debated in heaps and was borrowed from the United States of America. The Constituent

⁷ The Constitution (Forty-fourth Amendment) Act, 1978 omitted Article 217 (2) (c) of the Constitution of India which was inserted by the Constitution (Forty-second Amendment) Act, 1976. This clause made provision for appointing distinguished jurists as judges of the High Courts.

⁸ AIR 1953 SC 75.

Assembly spoke of the immense achievements of Philip Frankfurter, former professor of law at Harvard University. In the United States of America, it is very common for judges to have had a previous teaching experience prior to their election as judges. A similar is the case with Justice Stephen Bryer.

In the United States of America, the United Kingdom and Canada the law professors can claim to be part of the Judiciary and are even appointed as the apex court judges. Recently two professors were appointed as judges in Ontario in Canada opinion of their legal academic achievements. The U.S.A in the late 80's went one step further by appointing Justice Samuel Miller who is a Medical degree holder as a judge of the apex court, even though he had no degree of law. Justice Samuel Miller had excelled in his field, thus in America, the term Distinguished Jurists is not only confined to Legal Scholars. In the United Kingdom lately, Professor Andrew Burrows who was quite recently sworn in as a Judge of the Supreme Court was also a professor of law at the prestigious Oxford University, before being elevated to the Judiciary.

Professor Upendra Baxi, a prominent legal scholar, has posed this problem in his articles stated that *“For fifty long years, the constitutional provision, which enables the elevation of a jurist to the Supreme Court of India has been consistently ignored. This has deprived India of its best prospect of conversion of a law Professor into a Justice. The prospect of having our own equivalent of a Felix Frankfurter has been wilfully squandered.”*⁹ However, If the Judiciary and the President in India make a concerted effort, they will certainly pick viable candidates from the legal profession who can represent the Bench and can make a better approach to the cause of justice.

VI. WHAT ARE THE REASONS FOR NOT APPOINTING JURISTS?

Until now no ‘Distinguished Jurists’ had been named as a judge by the Supreme Court, so the researcher assumes that President and Judiciary have not seen one single such Jurist in India sufficiently capable of assuming this role. The bigger problem, however, is that once a Jurist passes through one door, he will inevitably be excluded from another. Such Appointments are not made due to three major reasons.

Firstly, The Collegium has not brought diversity. It is to this entity that was created to uphold the independence of the judiciary. This non-constitutional Collegium has, however, defied the Constitution by ignoring the appointment of lawyer's legal academicians herby failing to bring

⁹ Krishnadas, G., 2019. *Why Can't Jurists Be Judges*. [online] Deccan Herald. Available at: <https://www.deccanherald.com/opinion/in-perspective/why-can-t-jurists-be-judges-738167.html>.

diversity.

Secondly, in accordance with the Advocates Act 1961, the Bar Council of India laid down very stringent rules by refusing to allow full-time law professors to practice in the courts. Taking an example of a similar profession of medicine where no restrictions are placed on professors who teach at medical schools to attend to patients. Thus, this rule restricts the provision of expertise and abilities for professors in a court. The gap between 'law in books' and 'law in action' is thus increased.

Lastly, a legal academician as a person is a revolutionary man with independent ideologies but if they are allowed to view it as a means of justice compared with a judge, a judge cannot make these decisions on account of their autonomous ideologies, since they are constrained by their responsibility to maintain a functional democracy.¹⁰

However, the researcher would like to emphasize that the judges who are finally able to lead the bench through their expertise and knowledge are dependent on the writing and reasoning of legal scholars. As an example, in the *A. K. Gopalan v. the State of Madras*,¹¹ where the literature as a secondary source of law and concluded on the logic of eminent scholars (professors).

VII. WHY 'DISTINGUISHED JURISTS' SHOULD BE APPOINTED AS JUDGES?

The focal reason to put forth this provision of 'Distinguished Jurists' under Article 124(3) was to diversify the bench with talented Judges. It was argued that, because of the breadth of their experience and the independence from their restrictive and technical approach to the law, a Distinguished Jurist may be in a stronger position to deal with public law issues. Eminent Jurist D.D Basu considered that "*the infusion of an academic jurist of the right order into the highest tribunal may lead to its enrichment.*"¹²

Law professors in India make up an enormous network of scholars who teach law and examine at different colleges and schools, making them great legal counsellors and judges throughout the long term. A large number of them are especially qualified, alarmingly more qualified than their equivalent, judges and attorneys, however, their involvement in the legal profession is least recognized.

The apex courts in India needs to recognise the importance and benefits of taking Distinguished

¹⁰ Yadav, R. and Jamuar, R., 2014. *Are Jurist's Entitled to Be "Judges" Or It Is for Name Sake*. Madras Law Journal - Civil (Journal Article), 6(1).

¹¹ 1950 AIR 27.

¹² D. D. Basu, Commentary on the Constitution of India (G-1) 47(1993).

Jurists to the bench. It's the Supreme Courts constitutional duty to decide substantial questions of law and interpret legal principles. To this end, a successful judge has a certain propensity to theorise and conceptualise the law. A diligent law professor has gained ground on this preparation through long periods of examination and instructing. These well-developed complex theorising and conceptualising skills of a 'Distinguished Jurist' have the ability to lift the standard of legal reasoning in a multitude of ways.

Currently, in India, we have more than 1,200 law schools. Few of them are remarkable in their success on a national scale. The key goal of these law schools is to improve legal education and to create a centre of supremacy for legal education and research in the country. It is high time for the Bar Council of India, to relax should not prohibit these professors from appearing on behalf of the Court Proceedings. Unfortunately, the constitution was adopted 71 years ago, since then both the executive and the judiciary have overlooked this constitutional Mandate.

VIII. A PRIMARY INVESTIGATION

Thirty men serve in the Supreme Court of India even then there was not even a single jurist which has been appointed as the judge of the Supreme Court. It sounds ironic but it's still the truth. Though it's been stated numerous times that no Distinguished Jurists has been appointed as a Judge of the Supreme Court, there a keen Judge with scarcely any information professed to have been elevated to the post of a judge of the Supreme Court.

One such judge is Justice T. L Venkatarama Iyer a former Supreme Court Judge. At the time of his appointment, he had served at the Madras High Court for only two years (opposed to the constitutional mandate of 5 years), and it is known that he was not elevated from the bar. Therefore, it seems that Justice T.L. Venkatarama Iyer is the first person to be elevated to the Apex Court as a 'distinguished jurist'.¹³ In the case of *Anshu Kumar v. Ministry of Law and Justice, Department of Justice*,¹⁴ where the appellant moved to the court since he was dissatisfied with the RTI. During this hearing, the respondent (Department of Justice) had stated "*this provision of Constitution has been used very rarely - only four times so far*".

However, the researcher to find some clarity on the subject filed an RTI questioning if any 'Distinguished Jurists' has been appointed under this Article and further questioned to provide the names if any were Jurist was appointed, and if not, what was the reason for the courts not to appoint a 'Distinguished Jurist' to the bench. The reply to the question was very direct and

¹³ Shanbhag, S., 2020. Article 124(3)(c) of the Constitution of India— A Dead Letter – Vidhi. [online] Vidhi.org. Available at: <https://vidhi.org/article-1243c-of-the-constitution-of-india-a-dead-letter/>.

¹⁴ Case No. CIC/SS/A/2011/000175.

guarded. The reply to the RTI did mention that no Distinguished Jurist has been appointed under this Article which removes the probability of four Jurists being elevated to Supreme Court Judge and when examined the reason for why no 'Distinguished Jurists' have been appointed the RTI stated that it is beyond the jurisdiction and scope of duties of the undersigned Officer, to interpret the Law, to explain, opine, comment or advise on this matter. Nevertheless, it is determined that is Article 124 Clause 3(c) is just a hallow Article and has never and is likely not to be used in the future. This unused constitutional provision is likely to lose its power in the future.

IX. CONCLUSION & SUGGESTIONS

It is undisputed that the appointment of the Supreme Court Judges via Article 124 (3)(c) of the Indian Constitution has been silenced. The continuing ignorance of this mandate under the constitution reflects an innate constitutional trauma. In the legal system, where such a mandate remains unused by groups of people with the highest authority, this gives rise to a convention or a custom that contradicts the use of that mandate. The mandate after time loses its legal legitimacy and becomes outdated. It is not recommended above that our Supreme Court's entire structure be similar, but rather that the composition is balanced by including some academic jurists, as the Constitution requires. The absence of acknowledgement of 'Distinguished Jurists' as an appointed authority of the Court was discovered to be underhanded and incorrect by the Government of the Union in 2015, while proposing its proposals for strengthening the Collegium System. The researcher therefore wishes, to make you aware that eminent judges and lawyers have enhanced the highest level of integrity, prestige and reputation. The general public is looking forward to a judicial solution to several problems and controversial issues with this public faith. The politics of partisans cannot solve the highly polarized problems like the Ayodhya conflict, caste reserves and inter-state conflicts. The position of the judiciary is especially critical when many state institutions are eroded in their integrity and public confidence is reduced. Evidently, the Constituent Assembly considered it necessary to also add to the Supreme Court academicians, professors and other people involved in the legal field. However, it is regrettable that this law is one of our Constitution's unused mandates. Further history in other countries reveals that scholars and professors have been some of the greatest judges ever met by the legal fraternity.

Suggestions

- Law educators ought to be assigned as "amicus curiae" and ought to be qualified to contend in P.I.L Case procedures and ought to be supported in A.D.R interview and

placation in family debates, and so forth., for this, the BCI Provision must be adjusted likewise.

- It is time the Bar Council of India Rule 49 ought to be loose, restricting educator from showing up for the benefit of the Court Proceedings.

The provision for appointing Distinguished Jurists to High Court judges, which was struck down by the Constitution (Forty-fourth Amendment) Act of 1978, should be reviewed and reintroduced. In accordance with Article 124 (3) (c) of the Indian Constitution, the number of Supreme Court judges should be improved.¹⁵

¹⁵ Sujit Kumar Biswas, Improvement of the Quality of Legal Education by Inter-Linking and Inter-Relating Law Teaching and Law Practice, 1 INDIAN J.L. & Just. 48 (2010).