

**Joint views of Sri MN Venkatachaliah and Sri JS Verma,
former Chief Justices of India.
Endorsed by Sri VR Krishna Iyer, former Judge, Supreme Court of India**

Note re: NJC

The 'Foundation for Democratic Reforms' headed by Dr. Jayaprakash Narayan has prepared a document containing suggestions for the needed judicial reforms for effective preservation of the 'Rule of Law' in our democratic polity. It has been sent to us seeking our views in this behalf.

We have perused the document and given our most anxious consideration to its contents relating to a matter of utmost significance to our polity. The main issues therein are:

- (i) creation of an All India Judicial Service;
- (ii) Appointment of judges to the Supreme Court;
- (iii) Appointment of judges to the High Courts; and
- (iv) Removal of errant judges of the superior courts.

We have also considered the various options suggested as the remedial measures for the improvement of the existing system.

As desired, we express our views on the issues, here after:

Background

The Background Paper is comprehensive and indicates the perspective in which the issues require to be considered. We express and place on record our appreciation of the Background Paper.

I—All India Judicial Service

We agree with the urgent need to constitute the All India Judicial Service envisaged by Article 312 of the Constitution of India, at par with the other All India services like the I.A.S. to attract the best available talent at the threshold for the subordinate judiciary, which is at the cutting edge of the justice delivery system to improve its quality. Moreover, the subordinate judiciary is important feeder-line for appointments to the High Court. The general reluctance of competent lawyers to join the Bench even at the higher levels adds an additional urgency to the problem. AIJS will, in due course of time, also help to improve the quality of the High Courts.

The modalities for creating the AIJS to achieve its avowed purpose, and the necessary constitutional changes and the legal frame-work can be worked out after acceptance of the proposal in principle.

II—Appointment of the Judges in the Supreme Court

The current perception is of a felt need for constitution of a National Judicial Commission for making the appointments of judges in the higher judiciary. Recent experience impels us to agree with this perception. Thus, the only issue is of its composition for which several options are suggested in the

Background Paper. We give our views on the composition of the NJC, after some general remarks equally applicable to the appointments, both in the Supreme Court and the High Courts.

In our view, the composition of the NJC should be such that neither the judiciary, nor the executive gets the impression of having the veto power, to develop the spirit of accommodation for the other point of view. The constitutional purpose of the process is joint and participatory to find the most suitable candidate for appointment. It will better serve the purpose if the opinion of each organ which is better equipped in the particular field is given the due weight e.g. judiciary's opinion regarding the legal acumen, executive's opinion relating to antecedents/character of the candidate and other relevant criteria.

It is also important that a doubtful person be not considered for appointment, and those considered have impeccable credentials. For this reason, if no consensus can be reached or the members of the NJC are evenly divided in their opinion, it is safer to drop the proposal from further consideration.

In our considered view, the composition of the NJC for making the appointments should be, as under:

For the Supreme Court

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| 1. The Vice President of India |Chairman |
| 2. The Prime Minister of India or his Nominee Union Minister |Member |
| 3. The Chief Justice of India |Member |
| 4. The Two senior most Puisne Judges of the Supreme Court |Member |

There have been suggestions to enlarge the NJC and have two or more members nominated by the President. However, it may be desirable to constitute the NJC with all ex-officio members comprising the Vice-President as the Chair, and representatives of the Government and Judiciary to ensure accountability by virtue of their office. In the absence of any defined yardsticks for selection of members of NJC (in addition to ex-officio members), such a nomination of additional members may pose problems and raise questions of bias.

Instead, it may be desirable to have a wider consultation with participation of other eminent citizens and jurists, and a wide search to identify the eligible pool of candidates from judges as well as jurists; and then to have the list publicly displayed to elicit comments, if any, regarding the antecedents of the candidates or suggestion of any other suitable names. Wide publicity to the process of identification of suitable candidates and views of experts as well as lay persons can be solicited in this manner without addition of another body whose composition may be problematic. This whole process of wider consultation should be faithfully documented. In particular, the NJC should recommend appointment of judges based on the principle of unanimity and consensus. In other words, if even one or two members express valid reservations about the suitability of any candidate, such a candidate should not be considered for appointment. Only persons with unimpeachable integrity, blemishless record, and unquestioned competence should be recommended for appointment.

The Chief Justice of India should consult the five senior most judges of the Supreme Court, and any other judge/judges of the Supreme Court who had earlier worked in the High Court from which the new judge is to be drawn.

In the case of direct appointment from the Bar, or of a jurist, a wider consultation with those not likely contenders may become necessary.

The NJC must ensure a wide consultation by ascertaining the views of all those likely to contribute in this behalf. However, the composition of the NJC must be confined only to constitutional functionaries.

It is imperative that all consultations made by the NJC are documented to form part of the record, and the same is shared with all members before the final decision.

III—For the Appointment to the High Courts

The composition of the NJC could be as under:

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| 1. The Chief Justice of India |Chairman |
| 2. The Chief Justice of the High Court |Member |
| 3. The Chief Minister of the State concerned |Member |

The Chief Justice of India must consult the judge/judges of the Supreme Court coming from the concerned High Court. The Chief Justice of the High Court must consult the five senior most judges of his High Court. All consultations must be documented and should form part of the record shared with all members before making the decision.

The general remarks/principles as in the case of the Supreme Court appointments are to apply *mutatis mutandis* for the High Courts.

IV—Removal of Errant Judges

Past experience has revealed the futility of the existing procedure for removal of any such judge, even after authentic evidence of his/her proved misbehaviour. Judicial accountability being a facet of judicial independence, lack of an effective mechanism to enforce judicial accountability of the errant in the higher judiciary has eroded its credibility considerably. This poses a grave danger to the polity.

We are in general agreement with the composition of the National Oversight Committee (NOC), the Scrutiny Panels and the Investigation Committee/Panels etc. as per the reported provisions of the *Judicial Standards and Accountability Bill, 2010*. (See details at p. 24 of 57 in Part A of the above document)

However, there is one aspect that needs specific provision. As soon as the concerned authority gives an adverse finding of misbehaviour by an errant judge, the Chief Justice of the Court must deny to him/her any judicial and administrative functions; and if the errant is the Chief Justice of the Court who fails/refuses to proceed on leave, the President of India should invoke the power under Article 223 of the Constitution and appoint an Acting Chief Justice to replace him/her.

Minor punishments (other than removal) like censure etc. should not be in the public domain as it would erode and undermine individual and institutional credibility. That should remain private between the Chief Justice and the concerned judge to correct but not to denigrate the errant. The need for serious action must invariably be followed only by removal.

The process of removal of Judges of Higher Courts through impeachment under Article 124(4) has proved to be both cumbersome and unsatisfactory. Therefore, if there is political consensus, it may be desirable to amend the process of removal of judges. In such a case, based on the findings of the Oversight Committee envisaged under The Judicial Standards and Accountability Bill, the NJC will be empowered to recommend removal of a Judge on the ground of proved misbehaviour or incapacity.

Conclusion

Finally, it is instructive to recall Dr. Rajendra Prasad's words of wisdom in the Constituent Assembly about the working of the Indian Constitution. He then said: "... *the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who work it...*". Amartya Sen echoed the same sentiment in 'The Idea of Justice', saying: "... *The success of democracy is not merely a matter of having the most perfect institutional structure that we can think of. It depends inescapably on our actual behaviour patterns and the working of political and social interactions. There is no chance of resting the matter in 'safe' hands of purely institutional virtuosity*".

To begin with, this method has to be tried. If in its working also defects surface, steps to cure those defects will have to be taken, as we endeavour now according to the felt need.

N.B. It is imperative that the chairperson and members of the above Committees perform this public duty without receiving any salary/remuneration, other than the facilities/infrastructure needed strictly for the performance of this duty. This must be expressly stated in the scheme drawn for the purpose.

These are our views in this matter.

M.N. Venkatachaliah & J.S. Verma
Former Chief Justices of India

Letter from Sri VR Krishna Iyer, former Judge, Supreme Court of India

January 18, 2011

My dear Jayaprakash Narayan,

I have heard it read (thanks to my poor eyesight) with respect the views of Justices Verma and Venkitachaliah. Basically I see no fundamental difference. As explained by me orally on the telephone you may go ahead.

The most prominent point on which we must agree is the integrity of the candidate to be appointed to the highest court. If there is doubt, he must be dropped like Caesar's wife the candidate must be above suspicion. The candidate considered must be known to the public so that they may offer their criticism and the ground. Therefore, the public criticism must be considered by the committee. Why? As quoted by Ralph Nader 'whatever touches us all should be decided by all'.

It is important to have a Performance Commission which even David Pannick Q.C has supported (his book on 'Judges'). A California Chief Justice was removed by such a Commission. There need not be two separate Commissions but one Commission, I agree. Otherwise, I agree with the two CJs, Verma and Venkitachalaiah.

Former Chief Justice of India Shri. K.G. Balakrishnan clears my mind of all doubts about the need for a Commission. Corrupt people have no place in high offices. Otherwise we will have very wealthy CJs who cannot be removed because they will remain in their office with their wealth. I am shocked the Prime Minister of today remains mute in the presence of a mountain of corrupt materials.

Socialist economic justice can never succeed if the Executive, Legislators and judiciary belong to the plutocracy. In that case the power will be the martyrs of the system and the richer will be the masters as the oft-quoted anonymous poem explains:

The law locks up both man and woman
Who steals the goose from off the common,
But lets the greater felon loose
Who steals the common from the goose.

With regards,

Yours sincerely,

V.R. KRISHNA IYER