



# IJLESS

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Volume: 3, Issue 1, 2016 (Jan-Mar)

## **INTERNATIONAL JOURNAL OF LAW, EDUCATION, SOCIAL AND SPORTS STUDIES (IJLESS)**

**[WWW.IJLESS.KYPUBLICATIONS.COM/](http://WWW.IJLESS.KYPUBLICATIONS.COM/)**

ISSN:2455-0418 (Print), 2394-9724 (online)

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[www.kypublications.com](http://www.kypublications.com)

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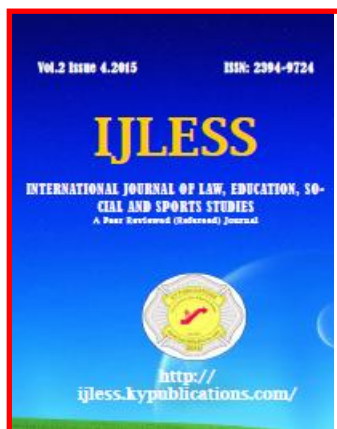
(Law)

## “APPOINTMENT OF DISTRICT JUDGE AND LAW ACADEMICIAN TO BE APPOINTED AS A JUDGE – IN INDIAN CONSTITUTION’S PERSPECTIVE: AN ANALYSIS”

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REVIEW ARTICLE



### ABSTRACT

Though we have crossed 66 years after commencement of the Indian Constitution and the establishment of the Supreme Court of India, no academician were appointed as a judge of a High Courts or Supreme Court – Article 124 (3) (c) of the Constitution provides that The person who is, in the opinion of the President, a distinguished jurist be appointed as a Judge of a Supreme Court – the term “distinguished jurist” refers only the law teachers – in India, Magistrate working in lowest rung of judiciary are not eligible to write the Direct recruitment to the post of District Judge - In this Article, the author is going to analyse the provisions of the Indian Constitution with respect to Appointment of District Judge and Law Academician to be Appointed as a Judge.

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### Introduction

The Constitution of India was adopted on 26 November, 1949 and came into force on 26 January, 1950. It took 2 years 11 months and 18 days for the Constitution makers to make the Constitution of India. The Constitution of India is not an original document. While framing the constitution, the framers of Indian Constitution was freely borrowed the good features of other constitution which is suitable to the Indian scenario, from the classic Constitution of the World. The framers not failed to insert the provisions for the establishment of the judiciary both lower and higher.

**The Judiciary:** According to the Constitution of India, the Judiciary is classified into two categories. One is *Union Judiciary* and another one is *State Judiciary*. Under the *Union Judiciary*, the Supreme Court of India alone comes. But under the *State Judiciary*, the High Courts and Subordinate Courts comes. Subordinate Courts means Appointment of District Judges and other than District Judges.

**Establishment of Supreme Court of India:** The Supreme Court in India is established under Article 124 (1) of the Indian Constitution. Article 124(1) says that there shall be a Supreme Court of India consisting of Chief Justice of India and, until Parliament by law prescribes a larger number, of not more than seven other judges.

**Qualification for Appointment as a Judge of Supreme Court<sup>1</sup>:** Under Article 124(3) of the Constitution, there are three types of persons are qualified to be appointed as a Judge of the Supreme Court of India<sup>2</sup>.

The three types of persons are as follows:

<sup>1</sup>Article 124 (3) of the Constitution of India.

<sup>2</sup>Provisions exist for the appointment of a Judge of a High Court as an Ad-hoc Judge of the Supreme Court and for retired Judges of the Supreme Court or High Courts to sit and act as Judge of the Supreme Court. See Article 127 & 128.

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- (i) The persons who has been for atleast five years of a Judge of a High Court or of two or more such Courts in succession; or
- (ii) The persons who has been for atleast ten years an advocate of a High Court or of two or more such Courts in succession; or
- (iii) The person who is, in the opinion of the President, a distinguished jurist.

Apart from fulfilling the above mentioned qualification, the first and foremost condition to be fulfilled is that he should be the Citizens of India. Because the opening part of Article 124 (3) says that *“A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India”*.

#### **Appointment of Judges to Supreme Court of India and the Provisions of Indian Constitution**

Supreme Court of India was inaugurated on January 28, 1950 and commenced its sittings in a part of the Parliament House. The Court moved into the present building in 1958<sup>3</sup>. So far, this Court was decorated by 41 Chief Justices<sup>4</sup> and 151 other Judges<sup>5</sup>. And now is being decorated by 1 Chief Justice and 27 other Judges<sup>6</sup>. Out of the above numbered Judges, no Judges is or was appointed from Article 124 (3) (c).

#### **Article 124 (3) (c) of Indian Constitution**

Article 124 (3) (c) of the Indian Constitution declares that *“A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India”* and *“the person who is, in the opinion of the President, a distinguished jurist”*.

#### **Distinguished Jurist; Meaning of**

The term “distinguished jurist” has not been defined in the Indian Constitution. According to Dictionary meaning “Jurist” means “a person who is an expert in law” and Distinguished means “to notice or understand the difference between two things, or to make one person or thing seem different from another. “distinguished jurist” means that a person who is expert in law and are capable to understand the difference between two things or an eminent personality in the field of law who is quit distinguished from other jurist in the field of law.

A jurist, also known as legal scholar or legal theorist, is someone who researches and studies jurisprudence/theory of law<sup>7</sup>. Such person can work as an academic, legal writers or law lecturer<sup>8</sup>. “If we carefully look upon Article 124, it will give an impression that the requirements for Judge or an advocate to become as a Supreme Court judge are expressly provided therein. Therefore we may say the term “distinguished jurist” was intended to cover only those persons who are neither Judges nor Advocates.

#### **Constituent Assembly Debate**

The move, during the Constituent Assembly Debate, for adding the term *“distinguished jurist”* to be appointed as a Supreme Court Judge was moved by *Mr. H.V. Kamnath*. He said that the “object of this little amendment of is to open a wider field of choice for the President in the matter of appointment of judges of the Supreme Court”.

This move was supported by *Shri.M.AnanthasayanamAyyangar* and 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, 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? He advised that *out of the seven judges, one of them must be a jurist of great reputation*.

Further he observed that, some years ago President Roosevelt in the U.S.A. appointed one Philip Frankfurter. He was a Professor in the Harward University. This experiment has proved enormously successful. He is considered to be one of the foremost judges, one of the most eminent judges in the U.S.A. as such he was in agreement with the proposal to add a *distinguished jurist* also, in the categories for the choice of a judge of the Supreme Court. With respect to this

<sup>3</sup> <http://supremecourtofindia.nic.in/history.htm>.

<sup>4</sup> <http://supremecourtofindia.nic.in/judges/rcji.htm>.

<sup>5</sup> <http://supremecourtofindia.nic.in/judges/fjud.htm>.

<sup>6</sup> <http://supremecourtofindia.nic.in/judges/judges.htm>.

<sup>7</sup> <https://en.wikipedia.org/wiki/Jurist>. Last visited on 26/11/2015.

<sup>8</sup> *ibid*.

move/amendment *Dr.B.R. Ambedkar* observed whether the word “distinguished” is the proper word in the context or the word “eminent” is more suitable. He is not in a position to make up his mind on this subject. Ultimately he left it to the discretion of the drafting committee to say whether it would accept the word “distinguished” or substitute “eminent” or some other suitable word. Lastly the amendment was accepted to include “distinguished jurist” to be appointed as a Supreme Court Judge.

But, it is unfortunate to note here that though 65 years crossed after the commencement of the Indian Constitution and the establishment of Hon’ble Supreme Court of India, The successive Government at the Centre and the Supreme Court, custodian of the Constitution of India have not used the essential provision of the Indian Constitution and ignored a number of persons though eligible to be appointed as a Judge of the Supreme Court of India.

#### **Appointment of High Court Judges; Article 217 of the Constitution**

According to Article 217 (2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and

(a) *has for at least ten years held a judicial office* in the territory of India; or

(b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession.

Under this Article also only two kinds of persons i.e., the persons who holds judicial office for atleast ten years or an advocate of a High Court or of two or more such Courts in succession for atleast ten years alone are eligible to become as a Judge of a High Court. There is no mentioning about the jurist to be appointed as a judge of the High courts. But in **Constituent Assembly Debates on 7 June, 1949 Part I Prof. Shibban Lal Saksena** (United Provinces: General): moved an amendment... "that after sub-clause (b) of clause (2) of article 193, the following new sub-clause be added:-

(e) *is a distinguished jurist.*"

He said that Sir, I have tried to put this clause in line with the clause we have already passed for the Supreme Court. I have used the same language which has been used there. The only thing is that I have omitted reference to the Governor of the State. I feel that in case of appointment of a Judge of a High Court, consultation with the Chief Justice of the High Court is enough. Consultation with the Governor of the State will, I think, not be proper. I also feel that the Judges of the Supreme Court Should be consulted. I do not see why the language should be different here from the language used in Article 103 for the Supreme Court.

I have also made provision for the appointment of a *distinguished jurist*. When we have made this provision in the case of the Supreme Court, I do not see why we should not provide that a distinguished jurist should be appointed as a Judge of the High Court also. I think, Sir that in view of the fact that the principle has already been accepted, this amendment will prove acceptable to the House.

*Mr. Naziruddin Ahmad* (West Bengal: Muslim): offered his comments with regard to the amendment moved by *Prof. Shibban Lal Saksena*, he said that I think there are some very good points in it. .... his amendment is that a *distinguished jurist* also can be appointed as a Judge of the High Court. In fact, we have adopted this in connection with article 103 which I have just mentioned. In sub-clause (c) of clause (3) of article 103 we have provided that a distinguished jurist can be appointed as a Judge of the Supreme Court. So that principles underlying the present amendment of Professor Saksena have already been accepted by the House.

Dr. B.R.Ambedkar was silent on this move. Ultimately the amendment 'That after sub-clause (b) of clause (2) of article 193, the following new sub-clause be added:-

'(c) *is a distinguished jurist.*' was negated.

Though the amendment was negated to include a distinguished jurist, if we refer Explanation (aa) to Article 217 (2), for appointment as a judge of a High Court, it explains that "*in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate;*

According to my analysis, under this category an academican may be appointed as a judge since he is working under a State or the Union and for becoming as an academican, he is required special knowledge of law. Further, enrolling

as an advocate is one of the essential requirements to become as a law academician. Hence no doubt, under the Explanation (aa) to Article 217 (2), an academician may be appointed as a judge.

#### **Appointment of District Judges and Other than District Judges in Judicial Service<sup>9</sup>:**

Article 233 (1) **Appointments of persons to be**, and the posting and promotion of, **district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.**

According to this Article, no qualification prescribed for the post of district judge. The Governor of the State in consultation with the concerned High Court can appoint "**person**" who is already in service of the Union or of the State, to be the district judges.

Article 233(1) is nothing more than a declaration of the general power of the Government in the matter of appointment of District Judges. It does not lay down qualifications of the candidates to be appointed nor does it denote the source from which the recruitment is to be made<sup>10</sup>.

Because under Article 233 (2) three kinds of qualifications has been prescribed for persons to be appointed as a District Judge. (i) he shall not be **in service** of the Union or of the State (ii) he has been for not less than seven years an advocate or pleader and (iii) he is recommended by the High Court for the appointment.

Whether the expression the service of the Union or of the State meant any service of the Union or of the State? Or whether it meant the judicial service of the Union or of the State? The Court held that the expression "**the service**" in Art. 233(2) could only mean the judicial service<sup>11</sup>. Further, in this case the Madras High Court, elaborately discussed who are advocate or pleader and quoting Supreme Court and various High Courts judgments comes to the conclusion that "the candidates holding the post in the Subordinate Judicial Service are not eligible to appear in examination and not eligible for appointment to the post of District Judge (Entry Level)". Now according to our analysis, if we took up both clauses Article 233 (1) and (2), **if, for promotion of District Judge, the Magistrates, District Munsifs and Sub Judges who are in judicial service are eligible, why not they are all not eligible for appointment of district judge by direct recruitment, if they otherwise qualified?**

What is to be noted here is that, the candidates holding the post of judicial service actually practiced for more than three years as an advocate and then competed and appointed on merit basis. The experience as an advocate and a judicial officers are one and the same. That means, both are performing judicial function. Without one (judge), the other (advocate or pleader) cannot function. So, the subordinate judicial officers shall be made eligible for direct recruitment to the post of district judge. Because the meritorious subordinate judicial officers shall not be denied the opportunity of competing the post of district judge. **It is not a sin to become as subordinate judicial officer.** Since because he became as a subordinate judicial officers how can they be denied the opportunity for direct recruitment as a district judge?

In **Special Officer, Salem Co-op. Sugar Mills Vs All Teachers Front & Ors<sup>12</sup>**, the Hon'ble Madras High Court while answering to the question whether the teachers working in private educational institutions are entitled to get pay on par with their counter parts serving in the Government schools, observed "*that the management of the unaided educational institutions cannot complain about the infringement of fundamental rights to administer the institution, when they deny the members of its staff, the opportunity to achieve the very object of Article 13(1) of the constitution which is to make the institution an effective one. .... the object behind this principle is that the purpose is not to interfere with the administration of the autonomous institutions, but it is merely to improve the excellence and efficiency of education, because a really good education can be achieved only if the tone and temper of the teachers are so framed as to make them to teach the students with devotion and dedication and put them above all*".

Keeping the above observation, the author of this article suggest that to get quality and meritorious judges to the judiciary, the judicial officers working in lowest rung of judiciary has to be included to compete with the district judge examination.

<sup>9</sup> Article 209(A)(2) and 209(b) of the Constituent Assembly Debate. Vol IX (16<sup>th</sup> September, 1949)

<sup>10</sup> Chandra Mohan vs. State of Uttar Pradesh AIR 1966 SC 1987.

<sup>11</sup> K.Appadurai Vs. The Secretary to Government, Public (Special.A) Department, Government of Tamil Nadu, W.P.No.16383 of 2010, High Court of Madras, Date of judgment 26.08.2010. Available at <http://indiankanoon.org/doc/713378/> last visited on 04/12/2015.

<sup>12</sup> CDJ 2008 MHC 3636.

To support this view, it is my duty to refer, Explanation II to clause 3 of Article 124. Where for appointment as a judge of the Supreme Court, it is categorically mentioned that in computing for the purpose of this clause {124(3)} the period during which a person has been an advocate, **any period during which a person has held judicial office not inferior to that of a DISTRICT JUDGE** after he became an advocate shall be included. Similar provision are not found in Explanation (a) and (aa) to clause 2 of Article 217. It simply says for appointment as a judge of a High Court **“in computing the period during which a person has held judicial office** in the territory of India, **there shall be included any period, after he has held any judicial office**, during which the person has been an Advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;

Actually the judicial officer, the prosecutor and the defense advocate are reading and dealing the same laws in the same premises/Court. Hence the differentiation between them is untenable. Above all, in the appointment of High Court Judge the judicial officers and the practicing advocates are treated equally. That is, Article 217 (2) (a) says that judicial officers having ten years' experience are eligible for appointment of High Court Judges. And Article 217(2)(c) says an advocate having ten years of experience is eligible for appointment of High Court Judge.

**Whether the expression any judicial office mentioned in Explanation to Article 217(2)(a) excludes the lowest rung of judiciary?**

If answer to the question is negative, then, why the person/magistrate working in the lowest rung of judiciary should not be considered to be appointed as a district judge by direct recruitment, when they are qualified to be appointed as a High Court Judge?

Now a day's performance based promotion can be triggered. Seniority based promotion should be done away completely. Then only we can produce a good number of quality judges in the judiciary.

An academican to be appointed as a district judge, under Article 233 (2), three qualifications has been prescribed. That is (i) he shall not be **in service** of the Union or of the State (ii) he has been for not less than seven years an advocate or pleader and (iii) he is recommended by the High Court for the appointment.

With respect to 1<sup>st</sup> category, whether the expression the service of the Union or of the State meant any service of the Union or of the State or whether it meant the judicial service of the Union or of the State, the court held that the expression “the service” in Art.233(2) could only mean the judicial service<sup>13</sup>. (ii) he has been for not less than seven years an advocate or pleader. My analysis is that According to Explanation (aa) to Article 217 (2), **“in computing the period during which a person has been an advocate of a High Court, any period during which the person has held ..... any post, under the Union or a State, requiring special knowledge of law after he became an advocate shall be included.**

But if we refer Rule 49 of Bar Council of India Rule it says that An advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practise, and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears and shall thereupon cease to practise as an advocate so long as he continues in such employment.

Simply because of the reasons of holding a post on regular basis or service, a law graduate should not be made ineligible to be appointed as a judicial officer. The spirit of the provision is that one should not hold two post at a time or simultaneously. A law graduate who is in the service of the Union or a State or in a Public Concern whose service is not related to special knowledge of law should not be made eligible to hold the post of judicial officers. But, at the same time a person whose service is very much connected with the field of law should be made eligible become a judicial officers, if he is otherwise eminent or potential in the field of law. Just like a renounced academicians or a jurist.

Hence, it is submitted that the judgments both by the various High Courts and the Apex Court of India has to be reviewed in the light of the explanation given above and it is opined that an academican may be considered as similar to an advocate. Since for becoming as an academican, he is required special knowledge of law and enrolling as an advocate is one of the essential requirements to become as a law academican. Hence, no doubt, under the Explanation (aa) to Article

<sup>13</sup> K.Appadurai Vs. The Secretary to Government, Public (Special.A) Department, Government of Tamil Nadu, W.P.No.16383 of 2010, High Court of Madras, Date of judgment 26.08.2010. Available at <http://indiankanoon.org/doc/713378/> last visited on 04/12/2015.



217 (2), an academician may be considered for applying the post of district judge provided if he has been an experience for not less than seven years as an academician and an advocate.

#### **Appointment of Other than District Judges**

Appointment of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State<sup>14</sup>.

Here also, no qualification has been prescribed. But the discretion is given to the Governor of the State. If the Governor thinks that an academician can be considered for other than district judges, he may make rules in exercising the power conferred on him under Article 309 of the Constitution of India, after consultation with the State Public Service Commission and with the concerned High Court. As of now, The Tamilnadu Judicial Service (Cadre & Recruitment) Rule, 2007 as amended from time to time does not pave the way for the young academicians to apply for the post of Civil Judge (Junior Division) examination. The advertisement for the post of Civil Judge (Junior Division) examination will have a sentence that **“to eligible for applying the post he must be a practicing advocate”**. Hence, the author of this Article filed an application under the Right to Information Act, 2005 to get the information about whether law teaching can be equated with law practice? And assistant professors working in Law colleges are eligible to apply for the post of Civil Judge (Junior Division) examination? For the former question, the answer was “there is no order in the Tamilnadu State Judicial Service (Cadre and recruitment) Rules equating law teaching with law practice. And for the later question, the answer was practicing advocates, Pleaders, Assistant Public Prosecutors, and Fresh Law Graduates are eligible to apply for the post of Civil Judge according to the Tamilnadu State Judicial Service (Cadre and recruitment) Rule, 2007. There is no mention about Assistant Professor in Law in the said rules<sup>15</sup>. Hence for both the questions the answer was not in negative. Hence my humble request to the Governor of Tamilnadu is to make suitable amendments in the Said rule so as to enable the young academician, in the future, to apply for the post of Civil Judge (Junior Division) examination.

#### **Why Academician to be appointed as a Judge?**

The law professors constitute a big constituency of academics in India who are engaged in law teaching and research in different universities and colleges, producing thousands of lawyers and judges over the years. They are highly qualified, in fact more qualified than their other counter parts, judges and lawyers, but their stake in legal profession is less recognized. In fact, they are highly ignored by their other counterparts, as well as the Government<sup>16</sup>. The Supreme Court is constitutionally bound to develop new legal principles and jurisprudence by interpreting the Constitution and other statutes<sup>17</sup>. Unfortunately, 65 long years after the Constitution was adopted, both the judiciary and the executive have consistently ignored this clear constitutional mandate. In the history of the Indian Republic, never ever has a “distinguished jurist,” i.e. a law professor, been appointed as a judge of the Supreme Court, although India has produced some outstanding law professors worthy of the “distinguished jurist”. Is it because of the vested interest of the Bench and Bar? Because, in last 65 years, all appointments to the Apex Court have been made from the High Court judges, and only a number of practicing lawyers were directly appointed as Supreme Court judges<sup>18</sup>.

Even among the current judges of the American Supreme Court, Justice A.M. Kennedy, before being nominated to the Supreme Court by President Reagan in 1988, was a Professor of Constitutional law for 23 years. Similarly, Justice R.B. Ginsburg, another current Associate Judge of the U.S. Supreme Court, taught for 17 years including at the Columbia Law School before becoming a judge<sup>19</sup>.

The law teachers are always reading the current judgments and discussing current issues in class rooms in order to strengthen the legal education and to produce more number of efficient/talented lawyers in order to compete with global

<sup>14</sup> Article 234.

<sup>15</sup> Tamilnadu Public Service Commission Memorandum No:7223/R1D2/RND-A3/2014, Dated 10/10/2014.

<sup>16</sup> DR. LOKENDRAMAIK, CONVERSION OF LAW PROFESSORS INTO JUSTICE: IS IT A DREAM OR POSSIBILITY? MAY 12, 2015, LIVE LAW.IN.

<sup>17</sup> PrabhashRanjan, Wanted an Indian Frankfurter, The Hindu, July 9, 2013. available at <http://www.thehindu.com/todays-paper/tp-opinion/wanted-an-indian-frankfurter/article4896382.ece>. Last visited on 30/11/2015.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

competition. It is the right time to relax the Bar Council of India Rule which prohibits law teachers' from appearing the Court proceeding and the law teachers must be allowed to appear before the Court of law and to argue in order to make themselves to be more efficient. Now a days, in India we are having more than 20 National Laws Schools. Out of which some of them are outstanding in their performance in the global level. The main object of these law schools is to reform legal education and to establish a centre of excellence for legal education and research in India. The challenge for the Law School is to stay ahead especially in the context of globalization. Law School was established with a view to cater to the requirements of the legal profession, law teaching and research, and judiciary and almost all law schools are having **legal aid cell, a Centre for legal awareness to women and others from the downtrodden sections of the society, and a Centre for mediation and negotiation for settlement of disputes**. The teachers are actively involving their services in legal aid programme for promoting the welfare juvenile delinquents. And conducting and coaching the students for moot legal problems which needs special skill and real research in the field of law. And exploring the possibility of finding and inferring right answers logically based on principles. Further, it is expected that the students who study in this School will eventually become legal practitioners, law teachers or engage in legal research or enter the judiciary in due course<sup>20</sup>. A few of them are established themselves their credentials already. As such, the real experience witnessed the practical and the theoretical knowledge of such academicians has ended in good result.

#### Suggestions:

1. Now time has come to appoint distinguished jurist as a Judge of the Supreme Court. Hence, Article 124 (3) (c) shall be given effect to.
2. Similar Provision has to be incorporated in Article 217 to include "Distinguished Jurist" to appoint as a judge. After Article 217 (2) (b) new clause 217 (2) (c) has to be added in the constitution.
3. Amendment needs in Article 233 to add subordinate judicial officers and academicians to compete for the post of district judge.
4. Request is made to Tamil Nadu State Government to add Assistant Professor in Law in the eligibility criteria of the Tamil Nadu State Judicial Service (Cadre & Recruitment) Rule, 2007 so as to make them eligible to write the Civil Judge (Junior Division) Examination.
5. Experienced law teachers should be appointed as an "amicus curiae" and to be permitted to plead in Public Interest Litigation Petitions and his help should be taken for Alternative Dispute Resolution matters, Mediation and Conciliation in family matters etc., for which the BCI Rule has to be amended accordingly.
6. The subject of procedural laws should be taught both from "institution and from industry (court)" point of view as in the case of medical college and as such the law teachers should be taken.
7. Moot Court competition must be turned into real court competition. Final students should be allowed to appear for small cases like bail matters under the guide ship of the law teachers and senior advocates.
8. Provision has to be incorporated to make the academician eligible to write the District Judge and Civil Judge (Junior Division) Examination if in case, the State Governments rule does not permit the academician to the above mentioned examination.

#### Conclusion

Since law is being an instrument social change, the author, hope necessary changes would be effected, by the concerned authorities, so as to make the lower judiciary officials to compete in the District Judge examination and the Academician to be appointed as a Judge in all level of judiciary.

<sup>20</sup> <https://www.nls.ac.in/>