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Judicial Appointments in India and Sri Lanka: A Comparative Constitutional Matrix

Rangaswamy Nayak*

Abstract

Successful democracy presupposes Independent Judiciary (IJ). Written form of constitutions, consisting bill of rights, postulate autonomy of the judiciary. IJ implies that the judicial power ought to be free from internal motives and external influences. The process of Appointment of Judges (AOJ) is the stepping stone of such IJ. Sri Lanka and India being democratic, republic and socialist nations have made enormous efforts to establish IJ required for strengthening the constitutional values. Despite concrete constitutional mechanism for appointment of judges in India and Sri Lanka, the experience of both the countries recorded lack of stability in these systems. The purpose of this paper is to understand rationality of the practice followed in AOJ along with incidental issues couple with it. The basic principles and standards meant for AOJ are tested and examined in the backdrop of these two systems. The methodology adopted for the study is non-doctrinal in nature. The paper concludes that the practices of both the countries entangled with certain shortcomings addressing of which may resulted elevation of constitutionalism to the greater in both the countries.

Keywords: *Judiciary, India, Sri Lanka, Appointment, Comparison*

*Assistant Professor of Law, Karnataka State Law University, Hubballi, Karnataka, India

Introduction

Both Sri Lanka and India, in addition to having geographical and historical affinity,[1] are sovereign, democratic, republic, socialistic states founded on the values of human dignity, equality, human rights and freedoms, pluralism and open government system. [2] Responsible and accountable governance is the hallmark of both political systems. The political systems of both countries, although, are influenced by Anglo-Saxon system these two countries are best testimonies for 'Constitutional Autochthon.'[3] The role of Judiciary in both countries is distinctive. It is a supreme ultimate constitutional power to interpret the Constitution.[4] Constitution shall be interpreted in a constructive way and it shall be interpreted in a destructive manner.[5] The intrinsic character of judiciary and non-delegation of the core judicial functions resulted in outstanding place for judiciary under the constitutional scheme.[6] The judiciary is the true example of a body with specialized skills and technical knowledge.[7] Predominate use of the free and fair judicial system for better protection and advancement of the Human Rights under

1 For historical, geographical, political, Military relationship between the two countries see, Russell R. Ross and Andrea Matless. *Sri Lanka: Country Study* (DA pam: Area handbook series, 1998)

2 See preamble of the both the countries.

3 S.A. De Smith, *Constitutional And Administrative Law* (Penguin Books Ltd, Harmondsworth 1971) 65.

4 Constitution of Kosovo Constitution Art.112; Constitution of Kyrgyzstan 2010, Art.97(6); Constitution of Latvia 1922, Art.85; Constitution of Lebanon 1926, Art.19; Constitution of Lesotho 1993, Art.128; Constitution of Liberia 1986, Art.2; Constitution of Libya 2016, Art.150; Constitution of Liechtenstein 1921, Art.104; Constitution of Lithuania 1992, Art.102; Constitution of Luxembourg 1868, Art.95; Constitution of Malawi 1994, Art.12; Constitution of Federated States of Micronesia, 1978, Art.11 Sec.8; Constitution of Republic of Moldova, 1994, Art.135 (1)

5 Constitution of Maldives 2008, Art.69. It provides: "No provision of the Constitution shall be interpreted or translated in a manner that would grant to the State or any group or person the right to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set out in this Constitution."

6 Arthur T. Vanderbilt, *Doctrine of the Separation of Powers and Its Present-Day Significance* (University of Nebraska Press 1963) p.xi

7 Ibid

various international[8] and regional[9] and national level instruments[10] accelerated concern for the impartial and IJ. Wherefore, to enable the judiciary to achieve its objectives and perform its functions, it is essential that judges are selected on the basis of proven competence, integrity and independence.[11]

The Indian judicial system is pyramidical and unified in nature.[12] The judicial power of the Republic of India is vested in Supreme Court,[13] High Courts[14] and Subordinate Courts[15] consisting of both civil and criminal Courts. The Supreme Court of India (SOI) is sovereign in its allotted sphere. Indian judiciary has dressed up with suitable legislative as well as executive powers for the purpose of maintenance of IJ.[16] The Parliament is also authorised under the scheme of the Constitution to make laws investing jurisdiction to the Courts. Thus, the constitution has left to the discretion of the Parliament the determination of the degree to which the jurisdiction of the courts is to be utilised for the administration of justice. The Constitution of the Democratic Socialist Republic of Sri Lanka (CDSRS) has provided prudent provisions relating to

8 Universal Declaration of Human Rights, 1948, Art.8 & Art.10; International Covenant on Civil and Political Rights, 1966, Art. 14(1); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990, Art.18; Convention on the Elimination of All Forms of Discrimination against Women, 1979, Art.15; Convention on the Rights of the Child, 1989, Art.37 (d)

9 See for example Statute of the Inter-American Court of Human Rights, 1977, Art.24; American Declaration of the Rights and Duties of Man, 1948, Art.26; American Convention on Human Rights "Pact of San José, Costa Rica, 1969, Art.8; European Convention on Human Rights, 1950, Art.6; African Charter on Human and Peoples' Rights, 1981, Art.7

10 Constitution of Bulgaria 1991, Art.121; Constitution of Burkina Faso 1991, 136; Constitution of Burundi 2018, Art.211; Constitution of Cape Verde 1980, Art.33; Constitution of Croatia 1991, Art.117; Constitution of Timor-Leste 2002, Art.34; Constitution of Eritrea 1997, Art.17; Constitution of Gambia 2019, Art.43 & Art.45; Constitution of Germany 1949, Art.103; Constitution of Ghana 1992, Art.19

11BSPIJ, para 11

12 Mamta Kachwala, *The Judiciary in India* (Leiden University 1998) vii.

13 COI, Part IV, Chapter IV, Art. 124 to 137

14 COI, Part VI, Chapter V, Art.214 to 231

15 COI, Part V, Chapter VI, Art.232 to Art.237

16 For example, Art. 141 and Art. 145 mirror the legislative powers of the SOI. Art.146 symbolizes executive power of SOI

Judiciary.[17] It provides specific provisions relating structure of the courts,[18] public hearings,[19] appointment of the judges,[20] security of the tenure,[21] removal of judges[22] and protection of salaries of judges.[23] The power to appoint the Chief Justice, the President of the Court of Appeal and every other judge of the Supreme Court and the Court of Appeal vested with president in concurrence with Constitutional Council.[24]

The dependency of the judiciary on rest of the organs of the State in terms of appointment, posting, promotion and leave would certainly impair IJ. Such nexus with rest of the organs of the State may influence judges in discharging their duties. It may result in weeding out of impartiality, free and fair principles sine quo non for administration of justice system. Both the systems have severe concerns about AOJ and IJ. Despite such constitutional backup, both India and Sri Lanka have witnessed certain unconventional development as to the appointment and removal of the judges. In this background, the present has been undertaken to analyse approaches and practices adopted by these two countries for the AOJ.

IMPORTANCE OF JUDICIAL APPOINTMENT

The Judiciary is a branch that is autonomous and independent of all other powers.[25] The scheme of the Constitutions is structured and organized in line with this exceptional characteristic of the judiciary. Because of this standout position of the judiciary, appointment of

17 Chapter XV, Art.105 to 111 C, Chapter XV A, Art. 111D to Art.117, Chapter XVI, Art. 118 to 147
18 Art.105
19 Art. 106
20 Art. 107 (1)
21 Art. 107 (5)
22 Art. 107 (2)
23 Art. 108
24 Art. 107 (1)
25 Constitution of Italy, 1947, Art. 104

judges right from those of the Supreme to those of the subordinate courts is dealt with by separate provisions of the Constitution.[26] *Nakul Dewan* point outs that the reason why selection of judges to the higher judiciary sparks debates and assumes significance is because in practice the real political- judicial interaction takes place in the superior judiciary.[27] Further *Mark Ryan* opines "the system of appointing judges is of immense constitutional importance because the individuals appointed must be considered to be constitutionally acceptable and legitimate."[28] In view of immense importance of the nexus between IJ and judicial appointment, this part of paper analysis constitutional values such as check and balance theory, rule of law, protection of human rights in the backdrop of AOJ.

Check and Balance Theory

Separation of Power theory is the intrinsic principle of Constitution across the globe.[29] The constitution is the document structuring the allocation of the power of each of the organs of the State which is usually peculiar to one of the other departments.[30] It is bounden duty to of the judiciary to ensure that executive and legislative powers are exercised within the framework of the Constitution. The influence of these executives and legislature over the process of AOJ may dilute this sacred duty of the judiciary and devalue the constitutional morality. The tussle between the executive and the judiciary, *Nakul Dewan* writes, in the matter of selection of judges flows out of the 'separation of power' and the 'check and balance' principles that are embedded in the Constitution.[31]

26 V.S. Deshpande, 'High Court Judges: Appointment and Transfer' (1985) 27 Journal of the Indian Law Institute 179, 181-182

27 Nakul Dewan, 'Revisiting the Appointment of Judges: Will the Executive Initiate a Change?' (2005) 47 Journal of the Indian Law Institute 199, 202

28 Mark Ryan, *Unlocking Constitutional and Administrative Law* (Third Edition, Routledge 2014) 332

29 See for example Constitution of Algeria 2020, Art.15; Constitution of Angola 2010, Art.2(1); Constitution of Armenia 1995, Art.4

30 Arthur T. Vanderbilt (n 6) vii

31 Nakul Dewan (n 27) 199

Rule of Law

Rule of law is the foundation of modern polity.[32] Rule of law protects people against arbitrary actions by the government and those who are empowered to act for the State.[33] It is expression of popular will.[34] Rule of law can only ensure system based on pluralism and guarantee of fundamental freedoms and human rights.[35] Legal stability and respect for legal system rooted with rule of law.[36] Justice is the symbol of rule of law.[37] The State of democratic rule of law means the safeguarding of justice and legality as fundamental values of collective life.[38] The sacred and central duty of the highest court of the country is to exercise supreme supervision over the enforcement of the Constitution, decide breach of the constitutional scheme and to ensure strict observance of the Constitution by the State Organs to ensure wings of the justice. It is possible for justices and judges to uphold Constitution and maintain rule of law when they are appointed through transparent and accountable manner and justice without fear and favour can be expected only from these judges.

Human Rights

The immense importance attached to the Human Rights protection and judicial system can be understood by looking into very first article of Chapter VI of the Oman Constitution deals with judiciary. It mandates "The rule of Law shall be the basis of governance in the

32 See for example, Constitution of Montenegro, 2007, Art.1; Constitution of Namibia 1990, Art.1; Constitution of Nicaragua 1987, Art.6; Constitution of Norway 1814, Art.2; Constitution of Palestine 2003, Art.6; Constitution of Peru 1993, Art.3; Constitution of Portugal 1976; Art.2; Constitution of Romania 1991, Art.2; Constitution of Slovenia, 1991, Art.1; Constitution of Sudan 2019, Art.6;
33 Eric Mintz, Christopher Dunn, Livianna S. Tossutti, *Democracy, Diversity and Good Government : An Introduction to Politics in Canada By* (Pearson Prentice Hall 2011) 471.
34 See Preamble of Constitution of Spain, 1978
35 See, Constitution of Mozambique 2004, Art.3
36 See, Constitution of Mozambique 2004, Art.212
37 Constitution of Niger 2010, Art.117
38 Constitution of Sao Tome and Principe 1975, Art.7

State. The dignity of the judiciary, and the integrity and impartiality of the judges are a guarantee for the rights and freedoms."[39] Rule of law is a fundamental prerequisite for the Constitution which is based on inalienable human rights.[40] Inalienable human and minority rights having purpose of preserving human dignity and exercising full freedom and equality of each individual in a just, open and democratic society based on the principle of the rule of law.[41]

The relation of judiciary to rule of law, separation of powers, check and balance theory, and human rights are fundamental and inseparable. The close nexus between all the above-mentioned principles can be understood through the following text of the Serbian Constitution: "The rule of law shall be exercised through free and direct elections, constitutional guarantees of human and minority rights, separation of power, independent judiciary and observance of Constitution and Law by the authorities."[42] Protection of rights of minorities and prevention of abuse of the power by the majority require independent organ of the State. Though separation of power theory is the mirrored in check balance theory under modern constitutions, inherent nature of the judiciary requires that judiciary shall guard these two constitutional theories. Accordingly, the respect for these primordial constitutional values is dependent upon IJ backed by competent and efficient judges elected for judiciary. Countries across the globe have adopted their own models to ensure transparent appointment process. Out of 48 independent Commonwealth nations, in 38 countries (79.16%) there is a judicial appointments commission, constituted under either the Constitution or specific legislation, which plays pivotal

39 Constitution of Oman 1996, Art.59
40 Constitution of Serbia, 2006, Art.3
41 Constitution of Serbia, 2006, Art.19
42 Ibid

role in the selection and appointment of judges.[43]

AOJ IN INDIA AND SRI LANKA

It is clear from the history of the drafting of the Constitution of India (COI) that framing of the Constitution was plugged with numerous anomalies. [44] The importance of the AOJ, as emphasized by *Govind Ballabh Pant*, member of the constituent assembly: "The future of this country is to be determined not by the collective wisdom of the representatives of the people, but by the fiats of those elevated to the judiciary."[45] Consequently, this part of the paper emphasises Modality Principle, Competence and Integrity Principle, Security of the Tenure Principle and Diversity Principle as adopted and practiced under Indian and Sri Lankan system. It is necessary to analyse these principles to understand in depth the scheme of the Constitution in the background of in which way these principles are conceived and the spirit with which these principles are implemented.

Modality Principle

The Modality Principle by the author here is the method through which judges are appointed. There is no bounden duty for the State to follow specific modality for the AOJ and each State is at liberty to adopt and practice her own system. It differs from the society to society. [46] Notwithstanding, the modality shall be in line

43 Bahamas, Belize, Botswana, Cameroon, Cyprus, Fiji, Ghana, Guyana, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nigeria, Organisation of Eastern Caribbean States, Pakistan, Papua New Guinea, Rwanda, Samoa, Seychelles, Sierra Leone, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Uganda, the UK, Vanuatu and Zambia. Cited in; J. van Zyl Smit, 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles A Compendium and Analysis of Best Practice' (The British Institute of International and Comparative Law 2015) Report of Research Undertaken by Bingham Centre for the Rule of Law, 30

44 B.Shiva Rao, *The Framing of India's Constitution: Select Documents*, vol 2 (Indian Institute of Public Administration 1967) 328

45 Ibid, 243

46 BSPIJ, para 14

with principles of IJ. The integrity of ideal system mandates that the process of AOJ should be clearly defined and formalised and information about them should be available to the public.[47]

The AOJ is encapsulated under Art. 124 (2) of the COI. This provision insulates Courts from political influences. Contrary to legislative model, the AOJ under this provision is domain of executive and judiciary. Though there is no scope for separation of theory under Constitution,[48] the appointment and removal clauses of Art.124 clearly indicate incorporation of check and balance theory under the Constitution. It contemplates that:

> "Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years"[49]

The Indian Model is popularly called as *'Collegium'* which is an extra-constitutional concept developed and evolved by the judiciary through the series of the cases popularly called as First Judges Case,[50] Second Judges Case,[51] Third Judges Case[52] and Fourth Judges Case.[53] This process of appointment is further supplemented by Memorandum of Procedures adopted for appointment of Supreme Court as well as High Court judges.

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47 BSPIJ para 16

48 Some extent Art. 50 of the Constitution is the example for separation of power. it says that "The State shall take steps to separate the judiciary from the executive in the public services of the State."

49 COI, Art. 124 (2)

50 *S.P. Gupta v. Union of India, AIR 1982 SC 149*

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

52 *In Re Presidential Reference Case,* AIR 1999 SC 1

53 *Supreme Court Advocates-on-record Association & Anr. vs. Union of India* (2016) 5 SCC 1, (2016) 2 SCC (LS) 253

Under the scheme of the CDSRS, appointment of judges of Supreme Court, including other judges of the SOI, are to be appointed by the President in terms of Art.107 of the CDSRS. It provides:

"The Chief Justice, the President of the Court of Appeal and every other judge of the Supreme Court and the Court of Appeal shall be appointed by the President subject to the approval of the Constitutional Council, by warrant under his hand."[54]

It is clear from the above provision that while the power to appoint is vested in the president, it is subjected to the approval of the Constitutional Council set up under the Constitution[55] The Constitutional Council is bound to consult Chief Justice.[56] The Indian model which was clearly intended by the framers of the Constitution as co-operative model has been turned into judicial model by upholding primacy of the opinion of collegium against Central Government opinion through the judges' cases. The Sri Lankan model appears to be a model giving much scope for political voice as the appointments are subjected to the approval Constitutional Council.

Competency and Integrity Principle

Competency is a major metric to assess efficacy of holders of the State power.[57] When appointments are made to the judiciary, only objective factors, such as merit and competence, shall be taken into account.[58] Accordingly, competence principle has been given primordial importance in the process of AOJ.[59] Incompetence of the judges would be the ground for their removal from the office.[60]

54 CDSRS, Art.107 (1)
55 CDSRS, Chapter VIIA, Art.41A to Art.41J
56 CDSRS, Art.41C (4)
57 See for example Constitution of Thailand Sec.259 (2) (4)
58 Constitution of Sweden 1974, Art.6
59 See for example, The Constitution of Togo 1992, Art.100; the Constitution of Turkey 1982, Art.140; the Constitution of Ukraine 1996, Art. 148;
60 See for example, Constitution of Uganda 1995, Art. 144 (2) (b)

According to Beijing Statement on Principles of the Independence of the Judiciary(BSPIJ), 1995 both appointment[61] and promotion[62] of judges require their competency. The SOI rightly pointed out devastating impact of incompetence of the judges in following words: "There are various factors which make a Judge pliable. Some of the factors are - individual ambition, loyalty-based on political, religious or sectarian considerations, incompetence and lack of integrity."[63]

There is no specific mention about competence principle under the Constitution. Qualification clause contemplated for judges of SOI as well as High Courts is the base test for competency principle of the AOJ. The qualifications such as 'at least five years as a judge of High Court'[64] 'at least ten years as an advocate of High Court'[65] and 'distinguished jurist,'[66] and 'ten years as judicial officer,'[67] 'ten years as practice advocate before High Court,'[68] These are the supportive provisions expecting and strengthening competence of the judges in order to discharge their duties to highest pedestal. There is no specific provision under Sri Lankan Constitution analogous to Indian Constitution as to the qualification.

Security of the Tenure Principle

The tenure of the judges has colorful history. A Judge in England held tenure at the pleasure of the Crown and the Sovereign could

61 BSPIJ, para.14. See also, Code of Conduct for United States Judges, 2019, Canon 3

62 BSPIJ, para 17. See also, para 2.17 of Universal Declaration on the Independence of Justice (Montreal Declaration) 1983, para 2.17; Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration"), 1985, para 14

63 *Supreme Court Advocates-on-record Association & Anr. vs. Union of India* (2016) 5 SCC 1, (2016) 2 SCC (LS) 253, para 30

64 COI, Art. 124(3) (a)

65 COI Art. 124(3) (b)

66 COI, Art. 124(3) (c)

67 COI, Art. 217 (2) (a)

68 COI, Art. 217 (2) (b)

dismiss a Judge at his discretion.[69] The Act of Settlement, 1688 substantially changed the position. This Act substituted "tenure at pleasure" with "tenure during good behaviour".[70] The BSPIJ has envisaged elaborative provisions relating to security of tenure of the judges. It mandates that Judges must have security of tenure.[71] This document sheds light on: (a) Confirmation of the tenure of the judges by the legislature; (B) Fixing specific age; (c) Protection against arbitrary removal of the judges; (d) Shield against alteration of the tenure of the judges to his disadvantage.

In India, the age of the judges of SOI[72] and High Courts[73] is specifically contemplated under the COI. The position of security of the tenure of the judges of Supreme Court of Sri Lanka and Court of Appeal is substantially similar to India. It is respectively fixed at 65 and 63 years.[74] The common law principle of good behaviour has specifically been retained under Sri Lankan Constitution and same is not reflected under the Indian Constitution.[75]

India has witnessed none of the cases shaking security of the tenure of the judge, except aborted efforts of impeachment cases such as V. Ramaswami J, Soumitra Sen J, P.D. Dinakaran J, Dipak Misra CJI, C.V. Nagarjuna Reddy J and J.B. Pardiwala J. However, Sri Lanka witnessed a constitutional crisis and tussle between the state organs and procedural anomalies in removal of certain judges.[76]

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69 Cited in; *Supreme Court Advocates-on-record Association & Anr. vs. Union of India* (2016) 5 SCC 1, (2016) 2 SCC (LS) 253
70 Ibid
71 BSPIJ, para 18
72 COI, Art. 124 (2) (b). The retirement age of judges of SOI is 65 years
73 COI, Art. 217 (2) (b). The retirement age of judge of High Courts is 62 years.
74 Art. 107 (5)
75 Art. 107 (2)
76 For details see, Anthony Francis Tissa Fernando, 'Procedure for Removal of Superior Court Judges in Sri Lanka and the Issue of Quis Custodiet Ipsos Custodes' (2013) 39 Commw L Bull 717

Diversity Principle

Diversity is the order of the world. This system bound to be part of the system. *J.S.Mill* writes "It still remains to speak of one of the principal causes which make diversity of opinion advantageous, and will continue to do so until mankind shall have entered a stage of intellectual advancement which at present seems at an incalculable distance."[77] Accordingly, no specific ideology shall be the ideology of the State.[78] Protection of diversity is part of the State. Understanding, recognizing and respect of diversity is one the core constitutional values. Ethnic diversity is related to supportive culture to the sense of identification in terms of geographical extension and its legitimate quality on which every durable form of political system essentially rests.[79] Both India and Sri Lanka are known for their diversity. The mixed heritage of today's Sri Lanka results in a varied and vibrant culture.[80] The judicial appointment process shall champion this diversity to live through the confidence of the diverse population of the nation. The mechanism for considering candidature for the judge of the apex Courts was supposed to look into relevant factors including geographical, gender, language and multicultural characters.

Notwithstanding its diversity, skimpiness of diversity principle as to AOJ is very much clear in the text of the Constitution. The Constitution (Ninety-Ninth Amendment) Act, 2014 introduced to National Judicial Appointment Commission to the Indian constitution consisted of provision for the existence of two eminent persons.[81] This is the mirror image of diversity principle for AOJ in India. Unfortunately, this 99th constitutional amendment Act

77 John Stuart Mill, *On Liberty (*Longman, Green, Longman, Roberts & Green 1864) 82
78 See for example, The Constitution of Russian Federation 1993, Art. 13 (2)
79 Andre W.M Gerrits & Dirk Jan Wolffram, *Political Democracy and Ethnic Diversity in Modern European History* (Stanford University Press 2005)4
80 Royston Ellis, *Sri Lanka: The Bradt Travel Guide* (Chalfont St Peter, Bucks 2014)12
81 COI, 124 A 1 (d)

struck down as unconstitutional. As a result, currently maintaining diversity rule is the complete domain of collegium and president of India.

The roots of diversity principle for the purpose of AOJ in Sri Lanka is correlated with the composition of Constitutional Council. Under the constitutional scheme, appointment of the Chief Justice, the President of the Court of Appeal and every other judge of the Supreme Court and the Court of Appeal is subjected to the approval of constitutional council.[82] Out of ten members of the Constitutional Council, five members to be appointed by the President in consonance with the Prime Minister, the Speaker and the Leader of the Opposition or the Members of Parliament. [83] While selecting these five members for constitutional council, these political entities need to ensure that the Council reflects the pluralistic character of Sri Lankan society, including professional and social diversity.[84]

Removal Principle

Concrete provisions relating to removal of the judges symbolize the cultivated culture of the AOJ. Judges shall not be subjected to arbitrary removal from the executive and legislature. Security of the tenure principle and removal principle are related mutually. Removal of a judge from their office shall be based on valid grounds. The BSPIJ has recognized 'proved incapacity,' 'conviction of a crime,' or 'conduct that makes the judge unfit to be a judge', as the grounds for the removal of the judges.[85] Similarly, there shall be a casual way to imitate action against judges unless there are serious grounds against judges.[86] Much importantly, proportionality principle would be matter in case of allegation against judges.

82 CDSRS Art. 107 (1)
83 CDSRS Art. 41 A (e)
84 CDSRS Art 41 A (4)
85 BSPIJ, para. 22
86 BSPIJ, para.25

Removal of the judges shall be last resort and alternative means are to be exhausted to punish judges instead of removal.

Commission of serious professional or ethical misconduct which may result in discredit for the image of the judiciary has been contended with prudent provisions under both the Sri Lankan and Indian Constitutions. The CDSRS mandates:

> "Every such Judge…shall not be removed except by an order of the President made after an address of Parliament supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity"[87]
>
> In a similar way, the COI stipulates that:
>
> "A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity."[88]

Power of the legislature to remove judges implanted with British and American systems.[89]The comparative look at these provisions manifests reverence given for parliament being great democratic institution of the nation. These provisions also demonstrate check and balance theory promulgated under constitutional scheme of the countries. The AOJ will be the domain of the executive, on

87 CDSRS, Art. 107 (2)
88 COI, Art. 124 (4)
89 Alexander Hamilton and others, *The Federalist Papers* (New American Library 1961) 302

the other removal of judges is the province of legislature. Sri Lankan system is considerably more stringent than Indian. The majority required for the removal of the judges is majority of the total number of members of Parliament including both members present and remained absent for the voting. However, the majority required for the same under the Indian constitution is fixed at two-third members present in the house.[90] The grounds responsible for removal are also similar. However, both the Constitutions lack proper definitions for 'Misbehaviour' and 'Incapacity'. The procedure to be followed for the removal of the judge is given due legal status under Sri Lankan[91] and Indian legal systems. [92] The total number of the parliamentarian required for a notice of a resolution for the presentation of an address to the President for the removal of the judges is not specified either under Constitution or Standing Orders in Sri Lanka. But the same has been spelled out under the Indian legal system.[93] The procedural deficiency has also been emphasised by the Supreme Court of the Democratic Socialist Republic of Sri Lanka in the matter of a reference under and in terms of article 125 of the CDSRS. [94]

Conclusion and Discussion

Justice springs from the popular will. It shall be administered on behalf of the State. Judges are the custodians of it. Judicial power dressed up with judges for the purpose of administration of justice shall be independent and accountable. The principle of JI flourishes through AOJ. Both the Constitution of India and Sri Lanka have strong faith in IJ. Guarantee of fundamental rights and freedoms, respect for rule of law, defense for democracy, promotion of welfare of the society and enhancement of quality of the life

90 COI, Art. 124 (4)

91 Standing orders of the Parliament of the Democratic Socialist Republic of Sri Lanka, R.84.

92 See COI, Art.124 (5) and Judges Enquiry Act, 1968

93 Judges Enquiry Act, 1968, Sec.3

94 S.C. Reference No. 31201 2 C.A.(Writ) Application No.35812012

closely connected with proper enforcement of the Constitution. Promotion of fair, efficient and good governance for the purpose of these constitutional values requires unequivocal and IJ rooted with concrete constitutional scheme.

Lack of scope for diversity principle and manipulation of modality principle is a serious concern for India. Multiformity of the nation and inadequate representation of certain diverse groups in the highest judiciary resulted in trembling of confidence of the people of the country in judiciary. Considerably least representation of women, minority members and marginalised sections pitched deep concerns about impropriety of diversity principle in India. It was argued by central government in fourth judges' case[95] that "the presence of 'eminent persons' was necessary, to ensure the representative participation of the general public, in the selection and appointment of Judges to the higher judiciary. Their presence would also ensure, that the selection process was broad-based, and reflected sufficient diversity and accountability, and in sync with the evolving process of selection and appointment of Judges, the world over." Despite such convincing arguments, the Central Government struck down the NJACA as unconstitutional. This diversity principle is flowering principle of the Sri Lankan Constitution. The structure of the Constitutional Council responsible for the appointment of the judges promises prevalence of members representing diversity.

The AOJ on the basis of seniority of the judges of the SOI is the conventional practice. It may be stated without fear of contradiction that the strong executive may manipulate the conventional practice and dilute the spirit of the Constitution. This Convention was broken down in appointment of A.N.Ray by superseding three senior judges due to the judgement of *Keshavananda Bharathi* case and Justice Beg was appointed as CJI, superseding the seniority

95 *Supreme Court Advocates-on-record Association & Anr. vs. Union of India* (2016) 5 SCC 1, (2016) 2 SCC (LS) 253

of Justice Khanna as retaliation for Khanna J's dissent in *ADM Jabalpur* case. This is the clear indication of the constitutional immorality of the executive authority of the country. The upper hand of political voice in appointment of judges is clear from the composition of the Constitutional Council of Sri Lanka. Proportionate increase of appointment of the Attorney Generals, being part of executive, as the judges of the highest Court is also serious concern of the modality principle of Sri Lanka.

The law relating to removal of the judges is another area of concern for both the countries. The Judge Enquiry Act, 1968 is outdated law in view of the idealistic nature of law. The longstanding pending of the Judicial Standard and Accountability Bill, 2012 is the best testimony to show the lack of will of the parliamentarian for betterment of the system. In Sri Lanka it was held by Supreme Court of Sri Lanka way back in 2012 that there shall be separate law to rejuvenate legal regime on removal of the judges. But so far nothing has been done in Sri Lanka. The procedure followed for removal of the judges according to the standing order may clash with the procedural law applicable to removal of the judges in Sri Lanka. In order to avoid such developments, there is a need for separate laws contemplating procedure for removal of the judges. India witnessed such kind of clash in case of Justice V. Ramaswamy.