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LAW GOVERNING SERVICES

PROJECT TITLE: CRITICAL ANALYSIS ON ALL INDIA JUDICIAL SERVICES AND ITS IMPLICATIONS

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ABSTRACT

Since it was first proposed by the 14th Report of the Law Commission of India1, in 1958, the All India Judicial Service (AIJS) has lingered in the backdrop of the judicial reforms debate for sixty years. Aimed at creating a centralized cadre of District Judges, the creation of an AIJS will necessarily mean transferring the recruitment and appointment powers of these judges, from the High Courts and State Governments, to a centralized system, as exists for other All India Services. Same as the principles, the procedure is also same for Judicial appointment as those that are in our constitution and the statutes, whose sole objective is to protect independence of the judiciary, Rule of law and Accountability and Good governance. In any democratic systems wedded to the rule of law, an independent judiciary is sine qua non. Given the growing calls for the creation of the AIJS, we thought it would be useful to create a primer explaining the many justifications provided for the creation of the AIJS and whether these justifications still hold true. I also present the possible challenges and pitfalls in creating such a service and the political capital that will be required by any government that pushes ahead with the creation of such a service. Based on our study, we conclude towards the end of our report, that many of the justifications for the creation of the AIJS no longer exist. The debate over the creation of an AIJS is essentially a debate about constitutional federalism. Although the Indian Constitution avoids using the words ‘federal’ or ‘federalism’, the Supreme Court of India, has held ‘federalism’ to be one of the features of the ‘basic structure’ of the Indian Constitution.

Key words: All India Judicial Service, Appointments, Federalism, Autonomy, Law Commission Report, Rule of Law, Accountability, Governance
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INTRODUCTION

Although the proposal for all India judicial service (AIJS) was proposed by the law commission in the 1950’s. The constitution of India was amended in 1977 to have an all India judiciary exams under Article 312. Many High courts also favour the idea of having an All India judicial services exam based on the argument so as to tackle various issues such as pendency and delay of cases would be done away with, along with that it may also improve efficiency and efficacy of judiciary; and the problem of vacancies could also be dealt with the introduction of AJIS. Further to be noted that as many as nine High courts in India also oppose the idea of having all India judiciary exams for the direct appointment of dist. Judge, i.e., Higher judiciary based on the argument that there will be an issue in local laws, the local language, will be against the independence of judiciary, as some other body will have control in appointment and integration because in the judiciary the Higher level controls and evaluates lower level. Pay scale issue, issue of transfer, career growth as judiciary has fewer avenues of growth and limited for career advancement. Also, by having all India judiciary exams, the problem of vacancies wouldn’t be dealt with, as there are many vacancies available in subordinate judiciary due to the reason of not having competent enough candidates for the services. So, the idea of conducting all India judiciary exams for higher judiciary is illogical. This paper will look into the various challenges that will be faced by all India judiciary exams for higher judiciary, if introduced that include Promotion of judges from Dist. Court to High Court, Unremunerative pay, autonomy of Judiciary, appointment of judges on the basis of merit.

RESEARCH PROBLEM

The question of having an all India judicial service exam for the appointment of district judge continues to raise significant questions in India as there are provisions in our constitution that permit conducting all India judiciary exams for the appointment of judges. The paper aims to analyse the various challenges that will be faced by the judiciary in India if the appointment is done on the basis of merit, as due the reasons of already having various protocols or parameters that judges have to qualify through to be appointed.

Further there would be an issue related to promotions of judges that will be appointed directly through all India judiciary exams as there is no guaranteed promotion for judges, which is completely different from public servants that are appointed under Union Public Service.

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Commission (UPSC) examinations that include IAS, IPS etc.³ As in India we have separation of powers where judiciary is an autonomy body, hence the appointment of judges under the UPSC would also change the basis structure, as it would affect the autonomy of the judges.⁴

RESEARCH QUESTION

1. Whether implementation of All India Judicial Services will be effective in functioning of Subordinate Courts?
2. Whether implementation of AIJS violates basic structure of India?

HYPOTHESES

1. Conduct of All India Judicial services increases transparency in Judicial appointments in India.
2. India being is diversified country having language and cultural differences create barriers in smooth function during adjudications.

EXISTING LEGAL SITUATION

The law which gives power for the establishment of All India Judicial Service is Article 312 of Indian Constitution.

LITERATURE REVIEW

   Stephen B. Burbank in his book discusses the autonomy and the independence of the judiciary in the performance of their functions. The author tries to answer and explain the concept of judicial independence by asking questions regarding the concept of judicial independence as a concept and whether this concept of this judicial independence is actually necessary to the performance of their functions. This also tries to explain why the independence of the judiciary is real and people should be concerned regarding this. One of the major questions the book asks is whether the independence of the judiciary is actually real in the performance of their duties. And the books answer this question by discussing the hurdles to achieving true independence of the judiciary.


³ George H. Gadbois Jr., ‘ Indian Supreme Court Judges: a portrait’
The Report discusses about historical background on how appointments have been made and attempts to create All India Judicial Service. The report tries to explain the positive approach of having All India Judicial Service and need for setting up. It also tries to answer how the present difficulties can be removed my incorporation of All India Judicial Service.


This journal article is a potentially fruitful but partially explored dimension of the study of state policy innovations concerning the patterns of reform in the organization, structure, and personnel of state court systems. The study considered debate on basic structure in relation with All India Judicial Service. Survey on subordinate courts vacancies and conditions prevailing in the current system and barriers in implementation of All India Judicial Service.

SCOPE AND OBJECTIVE

1. The scope of this research covers the challenges that will be faced by the centre in introducing all India judicial service examinations for the appointment of district judges.

2. It will cover different challenges that include appointment of judges on the basis of merit, the promotion of judges and the autonomy of judges while analysing various constitutional provisions, law commission reports and various high courts suggestions regarding the appointment of judges through all India judicial service examinations.

3. Also, it would suggest ways to tackle the issue related to the vacancies and pending cases in the court by critically analysing the current procedure for selection of judges.

METHODOLOGY

For this research we adopted a doctrinal and analytical research on the matter. The study uses primary sources that include the Constitution of India, various law commission reports; along with the use of secondary sources that include books, journals, articles and web contents. The study also uses various case law to elaborate and analyse the challenges. The major part of the study is analytical in nature.
2. CONSTITUTION AND JUDICIAL APPOINTMENTS

2.1 CONSTITUTIONAL PROVISIONS

The 42nd Amendment has amended Art.312 of the Constitution which provides for the creation of an All-India Judicial Service by the Parliamentary law. The new clause (3) says that such All-India Judicial Service shall not include any post inferior to that of a District Judge as defined in Article 236. The new clause (4) makes it clear that a law providing for the creation of the All-India Judicial Service shall not be deemed to be an amendment of this Constitution for the purpose of Article 368. In addition to the amendment to Article 312, the 42nd Constitutional Amendment also amended Entry 3 of List II of Schedule VII to shift the power of “Administration of justice; constitution and organization of all courts, except the Supreme Court and the High Court” to Entry 11A of List III of Schedule VII. By shifting this entry, from the State List, to the Concurrent List, the amendment allows both Parliament and the State Legislatures to enact laws with respect to the constitution and organization of District and Subordinate courts. Prior to this amendment, only State Legislatures could enact laws pertaining to the District and Subordinate Judiciary.

The object of the creation of the All-India Judicial service is to ensure greater inter-state co-ordination and implementation of the policies of the Central Government through the officers. This also enables the Central Government to exercise and control over States in matters of execution of Union Laws. It is hoped that these services should be left under the control of the Judiciary and not under the Government. This would, indeed, essential for maintaining independence and impartiality of the Judiciary. Chapter VI of Part VI of the Constitution of India deals with subordinate courts. Clause (1) of Article 233 says that “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.” Clause (2) is not relevant for the purpose. Article 234 says that appointments 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 the 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. Article 235 vests control over the subordinate courts in the High Court. It reads “The control over district

5 Constitution of India Act 1950, Art 312
6 26 The Constitution (Forty-second Amendment) Act 1976, s 57(b)(ii).
7 Dr. J. N. PANDEY, CONSTITUTION LAW OF INDIA (Central Law Agency, 54th edn, 2017) 738
8 Constitution of India Act 1950
courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any posts inferior to the post of district judges shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorizing the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law”.

2.2 JUDICIAL INDEPENDENCY AND AUTONOMY

The judiciary is independent of the executive and legislature though there is no clear demarcation and separation of powers of judiciary, Executive, Legislature. Article 50, Part IV of the Constitution of India requires that the state take steps to ensure the separation of the Judiciary from the executive in the public services of the state, with a view so as to provide an indispensable factor for the survival of the democratic system.9 In any democratic systems wedded to the rule of law, an independent judiciary is sine qua non.10 Judicial autonomy is the idea of the independence of the judiciary which is embedded in the doctrine of separation of powers ensuring that the judiciary enjoys a special level of autonomy and independence so that it is free from influence and control of the other two branches of the government—both the executive and the legislative.11

The 14th report of the Law Commission, did not deal with this aspect in its report. The 116th report of the Law Commission dealt with this issue by recommending that appointments, postings and promotions to the AIJS be made by a proposed National Judicial Service Commission consisting of retired and sitting judges of the Supreme Courts, members of the bar and legal academics.12 The creation of such a body will result in the immense concentration of power in few hands. One of the reason for not enforcement of National Judicial Appointment Commission Act, 2014 and held to be unconstitutional and void was that it is not within the realm of Parliament to subject the process of selection of Judges to the Supreme Court because one it is violative of basic structure of the constitution which is independency of the Judiciary.13 Rule of law and judicial reviews are basic features of the

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9 Subhash Sharma and Others v. Union of India, AIR 1991 SC 631
12 Law Commission of India Report No. 116 (n 9) 32
13 Supreme Court Advocates-on-Record Association v. Union of India (2015) AIR SCW 5457
Constitution. As its integral constitutional structure, independence of the judiciary is an essential attribute of rule of law.

The government of India is now getting ready to introduce the AIJS exams by 2022 even though there was opposition from many state governments and high courts. According to it, district judges will be recruited centrally through an all India examination and allocated to each state along the lines of AIS. Therefore centralization of such form of recruitment is bound to imbalance the judicial autonomy of the judicial servants around the country.

2.3 FEDERAL STRUCTURE

Although the Indian Constitution avoids using the words ‘federal’ or ‘federalism’, the Supreme Court of India, has held ‘federalism’ to be one of the features of the ‘basic structure’ of the Indian Constitution.

Dr. Ambedkar accepted that although the logical consequence of a dual polity in a federal structure, was a dual judicial system, India was opting for a single judicial system. In pertinent part, he stated the following:

“A dual judiciary, a duality of legal codes and a duality of civil services, as I said, are the logical consequences of a dual polity which is inherent in a federation. In the U. S. A., the Federal Judiciary and the State Judiciary are separate and independent of each other. The Indian Federation though a Dual Polity has no Dual Judiciary at all. The High Courts and the Supreme Court form one single integrated Judiciary having jurisdiction and providing remedies in all cases arising under constitutional law, civil law or criminal law.”

It is however, not clear whether the amendment to Article 312 of the Constitution in 1976 would withstand a challenge on the grounds that it is a violation of the basic structure doctrine that was laid down by the Supreme Court in the landmark case of Keshavananda Bharti v. State of Kerala. In this case, the Supreme Court held that while Parliament could amend the Constitution, it could not amend those provisions which constitute the ‘basic structure’ of the Constitution. While the precise contours of the ‘basic structure’ doctrine have never been defined by the Supreme Court, but the basic structure include federalism.

By allowing individual states to lay down norms for recruitment, the Constitution allows states to choose judges who are best suited to judge the disputes arising in their unique socio-economic context. The simple act of setting an examination paper for a judicial service

14 PTI, ‘Government finalising draft bill to set up all-India judicial service’ The Hindu (New Delhi, 26 May 2020)
16 8 Constituent Assembly Debates, Lok Sabha Secretariat (4 November 1948) accessed on 10 November 2020.
17 (1973) AIR SC 1461.
examination can influence outcomes in the kind of judges that are selected for a particular state. In a country like India, with such diversity of customs, religion and language, it may be more politically prudent, to maintain a decentralized system of recruiting judges for the District and Subordinate Judiciary since these judges are the first point of contact for millions of Indians seeking justice before Indian courts. Local administrators, well versed with the affairs of the state may be better informed of the kind of judges that need to be recruited for a particular area given its unique customs or languages. The spectre of an outsider, not familiar with the customs of the state, deciding cases may affect the legitimacy of the judicial system in the eyes of local population and reduce its efficiency. A federated system of judicial administration may help to increase efficiency, by allowing for State Governments to fashion qualification and recruitment criteria keeping in mind the unique administrative and cultural identities of their local population.\textsuperscript{18}

3. **BARRIERS AND JUSTIFICATIONS IN IMPLEMENTATION OF AIJS**

### 3.1 LOCAL LANGUAGE AND CUSTOMS

The judges recruited through the process of AIJS will not know the local languages of the states in which they are posted. As per, the Code of Civil Procedure, 1908 and Code of Criminal Procedure, 1973 the proceedings of civil and criminal courts are to be conducted in a language prescribed by the State Government.\(^{19}\) Most State Governments prescribe the language of the state as the language of the civil and criminal courts. Only High Courts are required to conduct their proceedings in English, although some High Court have a special exemption and conduct their proceedings in Hindi. The 14th report of the Law Commission had dismissed the language issue as a “faint objection”\(^{20}\). The 116th report of the Law Commission also dismissed the language-based opposition. In both cases, the Law Commission simply pointed to the existing All India Services, such as the Indian Administrative Service (IAS) and the Indian Police Service (IPS) and explained how officers from one state were able to function in another state after being trained in the local language of the state.\(^{21}\)

But the nature of the judicial office however, especially at the level of the District and Subordinate Judiciary is very different since judges are often required to directly deal with litigants, prisoners, lawyers and witnesses in their local languages. The proficiency of judges in the local language, both orally and written, has to be much higher than of a gazetted officer in the IAS or IPS because the cost of a judicial error due to the judge misunderstanding the local language could result in a litigant being deprived of their liberty or property. Thus, the costs of misunderstanding or mistranslation by a judge who lacks native proficiency of the local languages are simply too high.

Similarly, there is also the question of whether an out of state candidate will be well-versed in the local customs of a state. This is particularly important for civil cases, especially matrimonial or testamentary or communal property cases where local customs can determine final outcomes. In fact, some states have opposed the creation of the AIJS on this very ground.\(^{22}\)

### 3.2 VACANCIES IN SUBORDINATE COURT

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19 Criminal Procedure Code 1973, s 272; Code of Civil Procedure 1908, s 137(2)

20 Law Commission of India, Report No. 14(1) (n 1) para 74, 191-192

21 Law Commission of India, Report no. 116(n 9) 9-10

22 Q. No. 4881, Salman Khurshid, Minister of Law and Justice, Response in Rajya Sabha on Question Relating to All India Judicial Service (21 May 2012)
One of the more recent justifications for the creation of the AIJS has been that a centralized service would help fill the approximately 5,000 vacancies across the District and Subordinate Judiciary in India. This justification has been provided by both the Union Law Minister as well as the Parliamentary Standing Committee on Law and Justice. In 2013, the Parliamentary Standing Committee on Law and Justice in a discussion on the broader question of judicial vacancies, stated the following while pitching the AIJS as a potential solution to the vacancies in the District and Subordinate Judiciary.

But rather than proposing an AIJS as a solution for judicial vacancies, it may be more prudent to investigate the reasons and causes for the large number of vacancies in the poorly performing states. In our experience, the reasons for these vacancies could be varied, ranging from lack of adequate court rooms to hurdles in the recruitment process. For example, in recent litigation before the Supreme Court on the issue of vacancies, the Allahabad High Court filed an affidavit stating that they lacked courtrooms to house additional judges. Thus, merely centralizing recruitment through the creation of an AIJS will not be a silver bullet to address the large number of vacancies in a few states.

### 3.3 REPRESENTATION OF MARGINALIZED COMMUNITIES

In 2018, India witnessed an unprecedented backlash from the Scheduled Caste community after the Supreme Court of India diluted the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 through one of its judgments. In the immediate aftermath of the judgment, prominent political leaders from the marginalized communities pitched for the creation of the AIJS, with the condition that certain number of posts within this service would be reserved for the marginalized communities. This is not the first time, that such a demand has been made. Earlier the National Commission for Scheduled Castes, in a report on reservations in the judiciary, had also supported the creation of an AIJS, with the hope that the service would provide for reservations on the lines of the other All India Services of the Government of India.

But states already reserve posts under their State Judicial Service Rules for different communities and classes. These include quotas for SC, ST, other backward communities

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26 Subhash Kashinath Mahajan v State of Maharashtra (2017) SC 1629
(OBCs), women and rural candidates. It is very likely that many of these communities who currently benefit from the state quotas, will oppose the creation of the AIJS. This is because the communities recognized as Other Backward Classes by State Governments may or may not be classified as OBCs by the Central Government and can therefore not apply for the posts reserved under a potential AIJS. If this means that certain communities are going to lose their existing quotas, they are quite likely to protest, especially since there is keen competition for jobs in the judicial services.27

RECOMMENDATIONS

1. Increase the infrastructure in subordinate courts, which is one of the reason for vacancies.
2. Process related to recruitment and budgeting shall be handover to the High Courts.
3. Specified roles of responsibility of members of the recruiting authorities should be laid down so that the process is transparent.

CONCLUSION

The paramount object of the judiciary is to administer justice to the people, and to act as an instrument against oppression and unjustness. By the introduction of AIJS it dilutes separation of power as if the control over state judiciary is transferred to Union government, through AIJS, by removing control of High Court as provided under Article 235 currently, independence of judiciary would be undermined. Local language problems as Courts up to District and Sessions Judge transact their business in State language and AIJS officers would find difficult to acclimatize themselves with local language, thus hampering dispensation of justice. The AIJS has been pitched as a solution to judicial vacancies, lack of representation for the marginalised on the bench and the failure to attract the best candidate. As demonstrated, many of these issues have been incorrectly diagnosed.

Therefore, before the introduction of AIJS the problems that are taken in to consideration for judicial appointment should be taken into account so as to avoid and confusion and contradict with basic structure of judiciary.

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