

Reading Material and Notes on Indian Judiciary

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Q. Critically examine the Supreme Court's judgment on 'National Judicial Appointments Commission Act, 2014' with reference to the appointment of judges of higher judiciary in India.

Q. Starting from inventing the 'basic structure' doctrine, the judiciary has played a highly proactive role in ensuring that India develops into a thriving democracy. In light of the statement, evaluate the role played by judicial activism in achieving the ideals of democracy.

Basic characteristics of the Indian Judiciary:

In the Republic of India, an independent and an integrated framework of judiciary has been established.

An **integrated framework of judiciary** denotes the following:

- Such a system implies that separate courts are not required to hear cases based on the origin of the law. In the United States of America, the federal courts are not authorized to handle cases relating to state laws. In India, on the contrary, no such distinction exists, and the entire system is unified from the lowest to the highest level.
- Furthermore, the rulings of the Supreme Court are binding on all lower courts, and the decisions of the high courts are binding on all courts within their respective jurisdictions.
- It ensures that there is a uniform interpretation of the law throughout India, and it provides a mechanism for appeals to higher courts. This can help to ensure that justice is served, even in cases where the lower courts have made mistakes.

An **independent judiciary** entails the following:

- There shall be no intervention by the legislative and executive branches in the operations of the judiciary, and the judiciary shall be free from fear or favor.
- It also implies that the functioning of the judiciary shall not be impeded by other organs of the Constitution.

In what manner does the Constitution guarantee the independence of the judiciary

- The removal process requires a special majority in both houses of parliament, making it a challenging exercise.
- Their salaries, allowances, and other benefits cannot be reduced to their disadvantage except during a declared financial emergency.
- The conduct of judges cannot be discussed or debated in the Parliament or State Legislature, ensuring the independence of the judiciary.
- Appointments of judges are made in consultation with existing judges, promoting a collaborative and informed decision-making process.
- The judiciary possesses the power to hold individuals in contempt of court, reinforcing its authority and upholding the rule of law.
- All expenditures related to the Supreme Court and High Courts are considered

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charged expenditures, ensuring their financial independence and stability.

- The judiciary has the freedom to make rules and appoint its own staff, allowing it to operate effectively and efficiently
- The contempt powers given to the judiciary to preserve their independence; its actions and decisions cannot be criticized and opposed by anybody.
- Judges of the Supreme Court are prohibited from practicing law after retirement, maintaining the integrity and impartiality of the judiciary.
- Judges who have served as High Court judges are prohibited from practicing law within the jurisdiction where they served, preventing any potential conflicts of interest.

Threats To The Independence Of Judiciary In India

- The allocation of retired judges to prestigious constitutional posts such as governor or their nomination to the legislature.
- Delays in appointments recommended by the Collegium.
- The excessive discretionary powers granted to the Chief Justice of India, that may compromise the role of other judges in the Supreme Court.
- The opaque functioning of the Collegium, where doubts have been raised regarding the impartiality of the appointment process.
- The judiciary's excessive inclination to transgress the boundaries of the Constitution has subjected them to public criticism, compromising their independence.

Supreme Court

Article 130: The Supreme Court shall sit in Delhi or in such other place or places, as the Chief Justice of India may, with the approval of the President, from time to time, appoint.

The Supreme Court shall convene in Delhi or any such location(s) as the Chief Justice of India, with the approval of the President, may designate from time to time.

The composition of the Supreme Court is intended to consist of thirty-four judges, including the Chief Justice of India and thirty-three other justices. However, the precise number is subject to change over time. The Parliament, through legislation, will determine the exact number of judges serving on the Court.

Article 124 (Original Provision)

(1) There shall be a Supreme Court of India consisting of a Chief Justice of India (CJI) and, until Parliament by law prescribes a larger number of not more than seven other judges.

(2) 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.

Provided that in the case of appointment of a judge other than the chief justice, the Chief Justice of India shall always be consulted. Provided further that:

(a) A Judge may, by writing under his hand addressed to the President, resign his office.

(b) A judge may be removed from his office in the manner provided in clause (4).

(3) A person shall not be qualified for appointment as a judge of the Supreme Court unless he is a citizen of India and,

(a) has been for at least five years of a judge of a high court or of two or more such courts in succession, or

(b) has been for at least ten years an advocate of a high court or of two or more such courts in succession, or

(c) is, in the opinion of the president, a distinguished jurist.

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(4) 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 the House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehavior or incapacity.

(5) Parliament by law regulate the procedure for the presentation of an address (the same address for the removal of a judge and for the investigation and proof of the misbehavior or incapacity of a Judge under clause (4)).

Judges Inquiry Act, 1968:

The process for the removal of Supreme Court Judges or High Court Judges can be initiated in either house of Parliament. In the event of initiation in the Rajya Sabha, the notice for the initiation of removal must be signed by not less than fifty members of the Rajya Sabha. In the case of the Lok Sabha, the notice must be signed by not less than one hundred members of the Lok Sabha. Subsequently, the Presiding Officer accepts the petition.

Following the acceptance of the petition, the Presiding Officer may admit or reject it. In the event of admission, the Presiding Officer appoints a committee to investigate the matter.

The committee shall comprise three members: a sitting judge of the Supreme Court, a sitting judge of the High Court, and a distinguished jurist. If the committee finds that the accused judge has engaged in misbehavior or suffers from an incapacity, it will send a report to both houses of Parliament. The two houses then sit separately and adopt a motion. After the motion is passed by each house of parliament by a special majority, the matter is presented before the President for the removal of the judge. Subsequently, the President issues an order for the removal of the judge.

Tenure Of The Judges In The Higher Judiciary

The Constitution provides that the retirement age for judges of the Supreme Court (SC) should be sixty-five years, while for High Court (HC) judges, it should be sixty-two years. Notably, there is no fixed tenure for these judges.

There is an ongoing debate regarding whether the retirement age for SC judges should be increased.

- Some argue that early retirement does not provide them with sufficient time to fully utilize the expertise they have gained.
- Early retirement age compromises the independence of the judiciary due to the lure of post-retirement benefits.
- Moreover, there is a significant disparity between the working experience of an SC judge and that of advocates with regard to the rules and procedures of the apex court.

All India Judicial Services

The **42nd Constitutional Amendment Act (CAA)** has paved the way for setting up AIJS in India. If the Rajya Sabha approves through a resolution, parliament can pass a law for setting up AIJS in the country. Recruitment would be conducted centrally by the UPSC and the judicial officers shall be allocated to the respective states. Originating from Law Commission reports in 1958 and 1978, AIJS seeks to address structural issues like varying pay, faster vacancy filling, and standardized nationwide training. The idea was revisited in 2006 by the

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Parliamentary Standing Committee, supporting a pan-Indian judicial service.

Advantages

- 1) It will ensure a uniform standard of Judicial services in the country.
- 2) It would help in attracting the best talent to the lower judiciary
- 3) UPSC enjoys an impeccable integrity and image which would help in reducing the politicization of the lower judiciary.
- 4) Centralized recruitment would help in efficient manpower planning. AIJS would fill the vacancies of judges in the lower courts, which are presently around 5,400 vacant positions in lower judiciary
- 5) AIJS would increase the representation and diversity of judges from different regions, genders, castes, and communities, reflecting the social composition of the country.

Challenges

- 1) The states are reluctant to adopt the AIJS approach as they believe it would reduce their powers significantly.
- 2) The states have raised concerns over the lack of knowledge of local language, customs, laws and traditions.
- 3) Some of the states have raised concerns over age and eligibility criteria that presently vary from one state to the other.

Way Ahead

- Consult with states and legal experts to address concerns and gain support for AIJS.
- Implement AIJS in select states on a pilot basis to assess impact.
- Design AIJS with flexibility for local laws and customs.
- Provide a smooth transition period for existing judicial officers.
- Establish periodic reviews to assess AIJS impact.

Appointment Of The Judges in the Higher Judiciary

Originally, the Constitution of India provided that the appointment of Supreme Court (SC) judges shall be made by the President under his hand and seal of the SC/High Court (HC). This provision was laid down in Article 124(2) of the Constitution. The appointment had to be made in consultation with the Chief Justice of India (CJI), the Chief Justice of the HC, and other judges of the SC. This consultation process was meant to ensure that the most qualified and suitable candidates were appointed to the SC bench.

Appointment of Chief Justice of India

From the beginning the practice established for the appointment of the CJI was based on the seniority principle. It worked well till 1973 when the apparent politicization of the judiciary led

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to the breaking of the convention.

The practice was again broken after the ADM Jabalpur case with the appointment of Justice MH Begh as CJI. Post this appointment the convention has been restored. Seniority based appointments have created the problem of short and insignificant tenure for the CJI leading to the **rotating door syndrome**.

First Judges Case (SP Gupta vs UOI, 1980)

- The Supreme Court of India ruled that the President should engage in meaningful consultation with the Chief Justice of India (CJI) and the judiciary as a whole. However, in the event of a profound disagreement between the two, the executive's perspective shall prevail over that of the judiciary.
- The court further clarified that effective consultation cannot be reduced to a mere procedural formality. It can only be considered effective when the government accords due weight to the views expressed by the CJI and provides cogent reasons for not accepting the recommendations made by him. In other words, the term "consultation" as mentioned in the Constitution does not imply concurrence.
- Following this judgment, several allegations of politicization of the judiciary in the country have been raised. The 101st Law Commission report also raised various concerns regarding the appointment procedure.

Second Judges Case (SC AoR vs Union of India, 1993)

- In this case, the Supreme Court reversed its previous ruling and interpreted the meaning of the word "consultation" as "concurrence." The court stated that the Chief Justice of India (CJI) shall have primacy in the appointment of judges.
- With regard to the appointment of Supreme Court judges, the CJI should consult the two senior-most judges of the Supreme Court. In the case of the transfer of High Court judges, the CJI should consult the four senior-most judges of the Supreme Court. When appointing High Court judges, the CJI must consult the Chief Justice of the High Court in addition to the two senior-most judges of the Supreme Court.
- The court also held that the senior-most judge of the Supreme Court should be appointed as the CJI upon the retirement of the sitting CJI. In other words, the appointment of the CJI should be based on the principle of seniority.

Third Judges Case (In Re: Under Article 143(1) vs Unknown, 1998)

- The President of India sent a matter to the Supreme Court (SC) for clarification on the judgment delivered in the "Second Judge" case. The court concluded that the Chief Justice of India's (CJI) opinion is not personal and requires consultation with four senior colleagues while making appointment recommendations to the President.
- In the case of transferring High Court (HC) judges, the CJI must consult the four senior SC judges and the Chief Justices of the two HCs involved.
- For HC judge appointments, the CJI must consult the two senior-most SC judges and the Chief Justice of the relevant HC, as well as SC judges familiar with the HC's functioning. The HC Chief Justice must consult the two senior HC judges.
- The court ruled that the entire process must be documented in writing, and any deviation from the prescribed procedure will not be binding on the President of India.

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- If any two judges in the five-member collegium object, it constitutes a veto, and the collegium must abandon the proposal. If the next CJI is not among the four senior-most SC judges, a 5+1 collegium may be formed.

Issues With The Collegium System

- The judiciary is perceived to lack transparency in the processes of the collegium, leading to allegations of partiality and favoritism in the appointment of judges.
- Executive's role diminished, disrupting balance with judiciary.
- Judges appoint themselves and the checks and balances in the system have gone missing.
- The collegium structure inherently tends to favor specific societal segments and falls short of being representative of the entire society.
- The appointment of High Court judges has experienced excessive delays, jeopardizing the effective operation of the justice delivery system. The lack of a secretariat to assist the collegium in its functions may be a contributing factor. Out of the total authorized complement of 1098 judges across the High Courts, only 645 positions have been filled.
- Justice JS Verma who was the principal author in the second judge's case has stated that the collegium system has been a failure. In his opinion despite the primacy of the executive some of the finest judges were appointed in the first four decades in contrast to the last three decades where the appointments by the collegium have turned out to be faulty.
- Even justice Ruma Pal, the only female judge in the collegium so far has criticised it for being non-transparent.
- Certain critics argue that the collegium system is equivalent to rewriting the constitution.

Fourth Judges Case

- The 99th Constitutional Amendment Act established the National Judicial Appointments Commission (NJAC), an entity tasked with making recommendations for appointments to the higher judiciary.
- The NJAC was envisioned to comprise the Chief Justice of India (CJI), the two most senior judges of the Supreme Court, the Minister of Law and Justice, and two eminent individuals.
- The eminent individuals were to be selected by a committee consisting of the CJI, the Prime Minister (PM), and the Leader of the Opposition (LoP) in the Lok Sabha.
- The guiding principle behind the formation of the NJAC was to accord the executive an equally significant role in the appointment process for the higher judiciary.

The Supreme Court repealed the provisions of the 99th CAA for the following stated reasons:

- The principle of judicial independence would have been compromised because the judiciary would not have enjoyed primacy in such a body.
- The act provided that any two members of the NJAC could block an appointment by making a contrary vote, thereby stalling the appointment of names recommended by the judiciary.
- The SC also noted that the presence of a union law minister would be improper as usually, law ministers are practicing advocates and since the government is the

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largest litigant in the court, it would violate the principle of separation of powers and create a conflict of interest in the functioning of the judiciary.

- The court also found that the criteria for the selection of eminent persons were vague, subjective, and prone to misuse.
- The only judge to give a dissenting opinion was Justice Chelmeshwar who stated that judicial primacy in appointments neither guarantees judicial independence nor is it a part of the basic structure of the Constitution.

Way Ahead

- The Parliament may contemplate introducing another piece of legislation that would grant primacy to the judiciary in the National Judicial Appointments Commission (NJAC). Until such a law is enacted, the judiciary must prioritize fostering diversity in the functioning of the collegium.
- The Parliament should also consider enacting a law to ensure judicial accountability and transparency. Such a law could be based on the provisions of the Judicial Standards and Accountability Bill, 2012.
- According to the former president of the Supreme Court Bar Association, the collegium has established a system of "Imperium in Imperio," granting it unfettered authority. Consequently, there is a need to establish certain checks and balances on the collegium's functioning.
- Considering the burdensome workload of judges, the collegium should have an independent secretariat to assist in its functioning.
- It is imperative to draw lessons from the British practice of judicial appointments, which has been in place since 2005. Eligible candidates can submit their applications for appointments, disclosing their relationships with sitting and retired judges of the Supreme Court. Subsequently, appointments are made by the Judicial Appointments Commission.
- In accordance with the evolved Memorandum of Procedure (MoP), the executive and the judiciary should engage in thorough consultations. This MoP was revised after the Fourth Judges case to enhance the executive's involvement in the appointment and transfer of judges. Regrettably, the MoP has not been effectively implemented, either due to time constraints faced by the collegium or deliberate delays by the executive in making appointments to the judiciary.
- Lastly, any adverse report by the Intelligence Bureau on a particular judge should be treated with caution, and an inquiry should be constituted to examine such a report

Appointment Of Adhoc And Retired Judges To The Supreme Court

- Art 127: If there is a lack of quorum of permanent judges to hold or continue any session of the SC, the CJI in consultation with other seniormost judges and the CJ of HC and the previous consent of the president may appoint a qualified judge of an HC as a judge of the SC of India.
- Art 128: Appointment of the retired judge: The CJI with the previous consent of the President may request a retired judge of SC or HC to act as a judge of the SC.

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Judicial Pendency in India

- At the present moment, India's courts have a backlog of over 5 crore cases.
- Since a case's inception in the lower court, it is estimated that it would take approximately fourteen years for the Supreme Court to reach a final decision.
- According to a former Supreme Court justice, it would take over two hundred and thirty years to resolve the entire backlog of cases in India's courts.

Impact Of Judicial Pendency:

1. Judicial pendency causes denial of justice, which disproportionately affects the most vulnerable communities in society.
2. The deterrent effect of the law is weakened due to the excessive delays in the judicial system.
3. The credibility of the rule of law suffers, leading individuals to seek justice through extrajudicial measures.
4. The faith of the general public in the judicial system is eroded.
5. It also leads to wastage of resources and time of litigants.

Reasons for the Judicial Pendency in India:

- An insufficiency of judges, with a ratio of 19.6 judges per million people compared to 75 judges per million in Canada and 107 judges per million in the United States.
- Considerable vacancies in the High Courts (40%) and lower courts (60%).
- Dilatory tactics employed by advocates.
- Inadequate infrastructure and inefficient case management in the lower courts.
- Outdated procedural laws, such as the Evidence Act, among others.
- An escalating litigation rate in the country.
- An inability to effectively utilize alternative dispute resolution mechanisms.
- The government is a major litigant, responsible for 50% of pending cases.
- Lack of judicial impact assessment leads to litigation and delays in case disposal, contributing to pendency.

Addressing Judicial Pendency:

1. **Introduction of AIJS** to improve the intake of judges in the lower judiciary, the
2. Reforms should be introduced in **procedural laws** such as the Code of Criminal Procedure (CrPC) and the Indian Penal Code (IPC) to ensure that they are aligned with the requirements of the 21st century.
3. A **time-bound approach** should be adopted to dispose of cases in the lower judiciary. This can be achieved by setting specific timelines for each stage of the judicial process and by providing adequate resources to the courts.
4. **Alternative dispute resolution (ADR) mechanisms**, such as mediation and arbitration, should be encouraged to settle disputes between parties in a timely and cost-effective manner.
5. **Massive investment is required in the infrastructure of the lower courts**, including the introduction of technology for better case management. This can include the implementation of electronic case management systems, video conferencing facilities, and other technological tools.
6. **A rigorous impact assessment** should be carried out to estimate the upcoming

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litigation in the country so that the recruitment of judges can be carried out accordingly. This will ensure that there is an adequate number of judges to handle the expected caseload.

National Court of Appeals

The establishment of benches of the apex court has been proposed as a solution to the challenges posed by physical proximity to the court. Discussions regarding setting up benches of the Supreme Court have sparked debates, particularly for the purpose of expediting access to justice.

A proposition has been presented suggesting a comprehensive restructuring of the Supreme Court. At the apex, a Supreme Constitutional Court should be established, composed of a limited number of judges solely responsible for adjudicating cases involving constitutional interpretation. Below it, a National Court of Appeal should be formed, comprising four benches situated in four metropolitan cities, including one in Delhi.

The National Court of Appeal would be followed by High Courts and other subordinate courts in a hierarchical structure.

Advantages of the National Court of Appeal:

- Enhancing access to justice for individuals residing in remote regions of the country, making it more accessible and inclusive.
- Ensuring affordability of justice for underprivileged and marginalized communities, promoting equal access to legal recourse.
- Relieving the highest courts from the burden of appellate cases, enabling them to focus primarily on establishing legal principles and precedents for lower courts.

Concerns with National Court of Appeal:

- Establishing the National Court of Appeal would be a financially demanding endeavor, straining the country's resources.
- The Supreme Court (SC) is concerned that the proposed National Court of Appeal could result in inconsistent judgments from appellate courts, potentially compromising the quality of justice.
- The SC's current capacity is insufficient to handle the increased workload that would arise from the establishment of the National Court of Appeal.