

Classroom Study Material

POLITY & CONSTITUTION

PART-4



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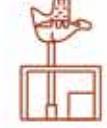
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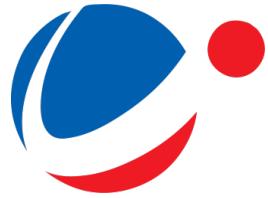
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POLITY PART 4

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STATE LEGISLATURE

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1. State Legislature

Student Notes:

1.1. Constitutional Status

- India is a federal state, with a parliamentary form of government comprised of legislatures at the Union and State levels.
- Articles 168 to 212 in Part VI of the Constitution deal with the organization, composition, duration, officers, procedures, privileges, powers and so on of the state legislature.

1.2. Organization

- Based on the number of houses, a state legislature can either be Unicameral or Bicameral. Bicameral legislature means that the legislature has two Houses – an upper and a lower apart from the governor. The legislative council (Vidhan Parishad) is the Upper House while the legislative assembly (Vidhan Sabha) is the Lower House.
- Montagu – Chelmsford Reforms introduced Bicameralism in India at the centre. Later, Govt. of India Act 1935 extended it to 6 out of 11 provinces namely Bengal, Bombay, Madras, Bihar, Assam and the United Provinces.
- The Constitution has given the States the option of establishing either a unicameral or bicameral legislature. At present only six States have a bicameral legislature – Andhra Pradesh, Bihar, Karnataka, Maharashtra, Telangana and Uttar Pradesh.

1.2.1. Creation and abolition of Second Chambers in States

- This involves a simple procedure, which does not involve amendment of the constitution. Under the Article 169 of the Indian Constitution, the legislative assembly of the concerned state can pass a resolution with special majority (that is, a majority of the total membership of the Assembly not being less than two-thirds of the members actually present and voting). Accordingly, Parliament may by law provide for the creation or abolition of the Legislative Council of the State.
- In January 2020, Andhra Pradesh Legislative Assembly passed the resolution for abolition of the Legislative Council. This resolution is yet to be cleared by the Parliament of India to finally abolish the council.

1.3. Composition of Two Houses

	Legislative Assembly	Legislative Council
Permissible No. of Members	From 60 to 500 (depending on population) <u>Exceptions:</u> Goa, Arunachal Pradesh and Sikkim- 30 (min) Mizoram (40), Nagaland (46)	40- 1/3 rd of the total strength of Legislative Assembly
Election of members	Election by people on the basis of universal adult franchise	1/3 rd are elected by the members of local bodies in the state, like municipalities, district boards, etc. 1/3 rd are elected by the members of the Legislative Assembly of the state from among the members who are not the members of the Assembly. 1/12 th are elected by graduates of three years standing and residing within the state. 1/12 th are elected by teachers of three years standing in the state, not lower in standard than secondary school.
Governor's Nominations	1 member of Anglo Indian Community	1/6 th of the total strength

Duration	Normal term- 5 years However, governor can dissolve the assembly at any time. Can be extended one year at a time during emergency by a law of Parliament.	LC is a continuing chamber (like Rajya Sabha), not subject to dissolution. 1/3 rd of members retire every second year. Hence, the tenure of a member is six years	Student Notes:
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1.4. Membership of State Legislature

1.4.1. Qualifications

The Constitution lays down the following qualifications for a person to be chosen as a member of the State Legislature:

- He must be a citizen of India.
- He must make and subscribe to an oath or affirmation before the person authorized by the Election Commission for this purpose. In his oath or affirmation, he swears
 - To bear true faith and allegiance to the Constitution of India
 - To uphold the sovereignty and integrity of India
- He should not be less than 25 years of age in case of the Legislative Assembly and not less than 30 years of age in case of the Legislative Council.
- He must possess other qualification prescribed by the Parliament.

The Parliament has laid down following additional qualifications in the Representation of People Act (1951):

- To be elected to the Legislative Council, a person must be an elector for an assembly constituency in the concerned state and to be qualified for a Governor's nomination, he must be a resident in the concerned state.
- To be elected to the Legislative Assembly, a person must be an elector for an assembly constituency in the concerned state.
- A person must be an SC or ST if wants to contest a seat reserved for SCs or STs respectively.

1.4.2. Disqualifications

Under the Constitution, a person shall be disqualified for being chosen as and for being a member of the legislative assembly or legislative council of a state:

- a) if he holds any office of profit under the Union or state government.
- b) if he is of unsound mind and stands so declared by a court
- c) if he is an undischarged insolvent,
- d) if he is not a citizen of India or has voluntarily acquired the citizenship of a foreign state
- e) if he is so disqualified under any law made by Parliament.

Accordingly, the Parliament has prescribed a number of additional disqualifications in the Representation of People Act (1951). These are similar to those for Parliament. (**Please refer to Union Legislature notes**)

Disqualification on the grounds of Defection

The Constitution also lays down that a person shall be disqualified for being a member of either House of state legislature if he is so disqualified on the ground of defection under the provisions of the Tenth Schedule.

The question of disqualification under the Tenth Schedule is decided by the Chairman, in the case of legislative council and, Speaker, in the case of legislative assembly (and not by the governor). In 1992, the Supreme Court ruled that the decision of Chairman/Speaker in this regard is subject to judicial review

1.4.3. Vacation of Seats

Student Notes:

In the following cases, a member of the state legislature vacates his seat:

- **Double Membership:** A person cannot be a member of both Houses of state legislature at one and the same time. If a person is elected to both the Houses, his seat in one of the Houses falls vacant as per the provisions of a law made by the state legislature.
- **Disqualification:** If a member of the state legislature becomes subject to any of the disqualifications, his seat becomes vacant.
- **Resignation:** A member may resign his seat by writing to the Chairman of legislative council or Speaker of legislative assembly, as the case may be. The seat falls vacant when the resignation is accepted.
- **Absence:** A House of the state legislature can declare the seat of a member vacant if he absents himself from all its meeting for a period of sixty days without its permission.
- **Other Cases:** A member has to vacate his seat in the either House of state legislature,
 - if his election is declared void by the court,
 - if he is expelled by the House,
 - if he is elected to the office of president or office of vice-president, and
 - If he is appointed to the office of governor of a state.

1.5. Presiding Officers of State Legislature

1.5.1. Speaker of the Assembly

The Assembly elects the Speaker from amongst its members. Usually, the Speaker remains in office during the life of the Assembly. However, he vacates his office earlier in the following cases:

- If he ceases to be a member of the Assembly.
- If he resigns by writing to the Deputy Speaker.
- If he is removed by a resolution passed by a majority of all the then members of the assembly. Such a resolution can only be moved after giving 14 days advance notice.

The powers of the Speaker of Legislative Assembly are similar to those of the Lok Sabha.

1.5.2. Deputy Speaker of Assembly

The Deputy Speaker is also directly elected by the Assembly from amongst its members. He is elected after the election of Speaker has taken place. Usually, he remains in office during the life of the Assembly. However, he vacates his office earlier in the following cases:

- If he ceases to be a member of the Assembly.
- If he resigns by writing to the Speaker.
- If he is removed by a resolution passed by a majority of all the then members of the assembly. Such a resolution can only be moved after giving 14 days advance notice.

The Deputy Speaker performs the duties of the Speaker's office when it is vacant. He also acts as the Speaker when the latter is absent from the sitting of the assembly. In both cases, he has all the powers of the Speaker.

The Speaker also nominates from amongst the members a panel of Chairpersons. Any one of them can preside over the Assembly in the absence of the Speaker and the Deputy Speaker. He has same powers as that of the Speaker while presiding.

1.5.3. Chairman of Council

The Legislative Council elects the Chairman from amongst its members. He vacates his office in the following cases:

- If he ceases to be a member of the Council.
- If he resigns by writing to the Deputy Chairman.

- If he is removed by a resolution passed by a majority of all the then members of the Council. Such a resolution can only be moved after giving 14 days advance notice.

Student Notes:

The powers of the Chairman are similar to those of the Speaker **except that the Speaker decides whether a Bill is a Money Bill or not**. As in case of Speaker, the salaries and allowances are fixed by state legislature and are charged on the Consolidated Fund of the State and not subject to annual vote.

1.5.4. Deputy Chairman of Council

The Legislative Council elects the Chairman from amongst its members. He vacates his office in the following cases:

- If he ceases to be a member of the Council.
- If he resigns by writing to the Chairman.
- If he is removed by a resolution passed by a majority of all the then members of the Council. Such a resolution can only be moved after giving 14 days advance notice.

The Deputy Chairman performs the duties of the Chairman's office when it is vacant. He also acts as the Chairman when the latter is absent from the sitting of the assembly. In both cases, he has all the powers of the Chairman.

The Chairman also nominates from amongst the members a panel of Vice-Chairpersons. Any one of them can preside over the Council in the absence of the Chairman and the Deputy Chairman. He has same powers as that of the Chairman while presiding.

1.6. Conduct of Business

1.6.1. Duration

1. Duration of Legislative Assembly

The duration of Legislative Assembly is five years but:

- a. The Governor may dissolve it sooner than five years.
- b. The term of five years may be extended in case of a proclamation of Emergency by the President. In such a case, the Union Parliament has the power to extend the life of Legislative Assembly up to a period not exceeding six months after the proclamation ceases to have effect. However, such an extension shall not exceed one year at a time.

2. Duration of Legislative Council

The Legislative Council is not subject to dissolution. But $\frac{1}{3}$ rd of its members retire on the expiry of every second year. Thus it is a permanent body like the Rajya Sabha

1.6.2. Sessions of State Legislature

The sessions of State Legislature are similar to those of the Union Legislature. For details regarding Summoning, Adjournment, Adjournment *Sine Die*, Prorogation, Dissolution refer to Union Legislature notes.

1.7. Legislative Procedure in State Legislature

The legislative procedure in a State Legislature having two chambers is broadly similar to that in Parliament except for certain differences. These differences are described below.

Comparison of Legislative Procedure in Parliament and a Bicameral State Legislature

1. With regards to Money Bills

The position is same in case of Money Bills. The Legislative Council has no power except to make recommendations to the Assembly for amendments or to withhold the Bill for a period of 14 days. However, the will of the assembly prevails and the Assembly is not bound to accept any recommendations of the Council. Thus there cannot be any deadlock between the two Houses with regards to a Money Bill.

2. With regards to Bills other than Money Bills

With regards to other Bills also, the Council can only delay a bill for a maximum period of 3 months. If the Council disagrees to such a Bill, it must go through a second journey from the Assembly to the Council. However, in the second journey, the Council has no power to withhold the Bill for more than a month. Thus the Legislative Council of a state is not a revising chamber like Rajya Sabha but only an advisory or dilatory chamber.

3. Provisions for resolving a deadlock between the two Houses

Unlike the Parliament, there is no provision of a joint sitting to resolve a deadlock between the two Houses of the State Legislature. In such a scenario, the views of the Assembly shall prevail and the Council can only delay the passage of the Bill by a maximum of 4 months.

Comparison of Legislative Procedure in Parliament and State Legislature in case of ordinary bills:

	Parliament	State Legislature
1	It can be introduced in either House of Parliament.	It can be introduced in either House of State Legislature.
2	It can be introduced either by a minister or a private member.	It can be introduced either by a minister or a private member.
3	It passes through first reading, second reading and third reading in the originating House.	It passes through first reading, second reading and third reading in the originating House.
4	It is deemed to have been passed by the Parliament only when both the Houses have agreed to it, either with or without amendments.	It is deemed to have been passed by the Parliament only when both the Houses have agreed to it, either with or without amendments.
5	A deadlock between the two Houses takes place when the second House, after receiving a bill passed by the first House, rejects the bill or proposes amendments that are not acceptable to the first House or does not pass the bill within 6 months.	A deadlock between the two Houses takes place when the Legislative Council, after receiving the bill passed by the Legislative Assembly, rejects the bill or proposes amendments that are not acceptable to the Legislative Assembly or does not pass the bill within 3 months.
6	The Constitution provides for a mechanism to resolve the deadlock between the two Houses.	The Constitution does not provide for the mechanism of joint sitting of two Houses of the State Legislature to resolve a deadlock between the over the passage of the bill.
7	The Lok Sabha cannot override the Rajya Sabha by passing the Bill for the second time and vice versa.	The Legislative Assembly can override the Legislative Council by passing the Bill for second time (Legislative Council does not have such privilege). When a bill is passed by the assembly for the second time and transmitted to the Legislative Council and it rejects the bill again (or proposes amendments that are not acceptable to the assembly or does not pass the bill within one month) then the bill is deemed to have been passed by both Houses.
8	The mechanism of joint sitting in case of a deadlock is available irrespective of the House where the House in which the Bill originates.	The mechanism of passing the bill for the second time to resolve a deadlock applies to a bill originating in the Legislative Assembly only. When a bill, which has originated in the Council and sent to the assembly, and is rejected by the latter, the bill ends and becomes dead.

Student Notes:

Comparison of Legislative Procedure in Parliament and State Legislature in case of Money bills

Student Notes:

	Parliament	State Legislature
1	It can be introduced only in the Lok Sabha and not in the Rajya Sabha.	It can be introduced only in the Legislative Assembly.
2	It can be introduced only by a minister and not by a private member.	It can be introduced only by a minister and not by a private member.
3	It can be introduced only on the prior recommendation of the President.	It can be introduced only on the recommendation of the Governor.
4	It cannot be rejected or amended by the Rajya Sabha. It should be returned to the Lok Sabha within 14 days, either with or without amendments.	It cannot be amended or rejected by the Legislative Council. It has to be returned to the Legislative Assembly within 14 days with or without amendments.
5	The Lok Sabha can either accept or reject all or any of Rajya Sabha's recommendations.	The Legislative Assembly can either accept or reject all or any of the Legislative Council's recommendations.
6	If the Lok Sabha accepts any recommendation, then the bill is deemed to have been passed in the modified form.	If the Legislative Assembly accepts any recommendation, then the bill is deemed to have been passed in the modified form.
7	If the Lok Sabha does not accept any recommendation, then the bill is deemed to have been passed in the original form.	If the Legislative Assembly does not accept any recommendation, the bill is then deemed to have been passed by both Houses in the original form.
8	If the Rajya Sabha does not return the bill within 14 days then the bill is deemed to have been passed in the original form.	If the Legislative Council does not return the bill within 14 days then the bill is deemed to have been passed in the original form.
9	There is no provision of a joint sitting in case of a deadlock between the two Houses in case of a Money Bill.	There is no provision of a joint sitting in case of a deadlock between the two Houses.
10	The money bill passed by Parliament is presented to the President. He may either give his assent or withhold his assent but cannot return it for reconsideration.	When a money bill is presented to the Governor, he may give his assent, withhold his assent or reserve the bill for Presidential assent but cannot return the bill to the state legislature for reconsideration. The President can give his assent or withhold assent but cannot return the bill for reconsideration.

1.8. Governor's Power of Veto

When a bill is presented before the Governor (after its passage by both Houses of the Legislature), the Governor may take any of the following steps:

1. He may give his assent to the bill. In this case, it will become a law at once.
2. He may withhold his assent to the bill. In this case, the bill fails to become a law.
3. In case of a bill other than a money bill, he may return the bill with a message.
4. He may reserve the bill for the consideration of the President. The reservation is compulsory in case the law in question would diminish the powers of the High Court under

the Constitution. In case of a money bill so reserved, the President may give his assent or withhold his assent.

But in case of a bill other than a money bill, he also has the option to direct the Governor to return the bill to the legislature for reconsideration. In this case, the Legislature must reconsider the bill within six months and if passed again, the bill has to be presented to the President again. But it shall not be obligatory upon the President to give his assent. (Art. 201)

It is clear that a bill, which is reserved for the consideration of the President, shall have no legal effect until the President declares his assent to it. Further, the Constitution imposes no time limit on him to assent (or withhold his assent) to the bill. Consequently, the President can keep a bill of State Legislature pending at his hands for an indefinite period of time.

In addition, when a bill is reserved for President's consideration, he can refer it to the Supreme Court under Art. 143 for its advisory opinion where any doubts as to its constitutionality arise. This is done in order to decide whether to assent to a bill or to withhold assent.

1.8.1. Comparison of Veto Powers of Governor and President

President	Governor
May assent to the Bill passed by both Houses of the Parliament.	May assent to the Bill passed by the State Legislature.
May declare that he withholds his assent, in which case the Union Bill fails to become a law.	May declare that he withholds his assent, in which case the Bill fails to become a law.
In case of a Bill other than a Money Bill, he may return it for reconsideration by the Parliament. If the Bill is passed again by the Parliament, with or without amendments, the President has to declare his assent to it.	In case of a Bill other than a Money Bill, he may return it for reconsideration by the State Legislature. If the Bill is passed again by the Legislature, with or without amendments, the Governor has to declare his assent to it.
-Nil-	Instead of either assenting or withholding his assent, the Governor may reserve the Bill for President's consideration
In case of a State Bill reserved for President's consideration, he can take the following steps:	Once the Governor reserves a Bill for the President's consideration, the subsequent enactment of the Bill is in the hands of the President and the Governor plays no part in its career.
1. In case of a Money Bill: He may either declare that he assents to it or withholds his assent to it. 2. Any other Bill: He may (a) declare that he assents to it or withholds his assent to it, or (b) return the Bill to the State Legislature for reconsideration. The state legislature must reconsider the Bill within 6 months. If it is passed again (with or without amendments), it must be presented to the President again directly. But the President is not bound to give his assent, even though the State Legislature has passed the Bill twice.	

Student Notes:

1.8.2. Legislative Assembly vs. Legislative Council of a State

It is clear that the position of the Legislative Council vis-à-vis the Legislative Assembly is much weaker than the position of the Rajya Sabha vis-à-vis the Lok Sabha. The Rajya Sabha has equal powers with the Lok Sabha in all spheres except financial matters and with regards to the control over the Government. On the other hand the Legislative Council is subordinate to the Legislative Assembly in the following respects:

- A money bill can be introduced only in assembly and not in council. The council cannot amend or reject the money bill. It should return the bill in 14 days, either with or without recommendations.
- With regards to ordinary Bill also, the Council is subordinate to the Assembly. It can at most cause a delay of 4 months (in two journeys) in the passage of the Bill originating in the Assembly. In case of a disagreement, the will of the Assembly has its way.
- On the other hand, in case of a Bill originating in the Legislative Council, the Assembly has the power of rejecting and putting an end to the Bill forthwith.
- The very existence of Legislative Council depends upon the will of the Legislative Assembly. The latter has the power to pass a resolution for the abolition of the second Chamber by an act of Parliament.
- The Council of Ministers is responsible only to the Legislative Assembly.
- The members of council do not participate in the election of the President of India and representatives of the state in Rajya Sabha.
- The council has no effective say in the constitutional amendment bill. (Interestingly the constitution does not say anything regarding the role of legislative council).

The Constitution prescribes lesser importance to Legislative Council of a State compared to the Rajya Sabha because:

- The Rajya Sabha represents the federal character of the Constitution, so it should have a better status than merely being a dilatory body. Hence, the Constitution provides for a joint sitting in case of a disagreement between the Lok Sabha and Rajya Sabha.
- However the Lok Sabha will ultimately have an upper hand due to its numerical majority. In case of State Legislature, the Constitution of India adopts the English system.
- According to the English system, the Upper House must eventually give way to the Lower House, which represents the will of the people. Under this system, the Upper House has no power to obstruct the Lower House other than to effect some delay. This has been adopted in our Constitution since the question of federal importance of Upper House does not arise in case of State Legislatures.
- The Legislative Council is heterogeneously constituted. It represents different interests of differently elected members and also includes some nominated members. On the other hand, the Rajya Sabha is homogeneously constituted. It represents only the States and most of the members are elected (only 12 out of 250 are nominated).

1.8.3. Utility of Second Chamber in States

- It checks **hasty, defective, careless and ill-considered legislation** made by the Assembly by using its dilatory power.
- Due to indirect elections and nomination of persons having special knowledge, the Legislative Council commands better resources to vet and scrutinize legislations. It also gives representation to the people who cannot directly face elections (via nominations).
- 2nd ARC suggested that Legislative Council must work as representatives of the Panchayati Raj Institutions and the Constitution may be suitable amended to give the required powers to the council to work for strengthening the local governance.

1.9. Criticism of Second Chamber in States

- **Plays Superfluous and obstructive Role:** If a majority of the members in the upper house belong to the same party, which holds majority in the lower house, the upper house will become a mere ditto chamber. If on the other hand, two different parties are holding sway in the two Houses, the upper house will delay the bills for four months unnecessarily.
- **Not an effective check:** Powers of the Legislative Councils are limited to the extent that they can hardly impose any effective check on the Assemblies.

- **Stronghold of vested interests:** It serves as stronghold of vested interests, who are not expected to support progressive legislation. Instead they may block such legislation initiated by popularly elected Legislative Assembly.
- **Backdoor entry of defeated members:** It is utilized to accommodate discredited party-men who may not be able to return to Assemblies through popular votes. The nominated quota placed in the hands of Governor may be used for enabling these defeated leaders to seek nomination to the Council and even their elevation to the Chief Minister ship.
- **Costly institution:** It is a big drain on the State's exchequer. In the Punjab Vidhan Sabha, the Vidhan Parishad was described as a superfluous luxury. In West Bengal also one of the main reasons for its abolition was stated as unnecessary burden on the State exchequer.
- **Utility doubtful:** Critics point out that the very fact that some of the States, such as Punjab, Bihar and West Bengal decided to wind up bicameral legislatures goes to prove that second chambers have doubtful utility. The provision for their abolition in the Constitution itself further confirms that even the Constituent Assembly was doubtful about the utility of these chambers.
- **Heterogeneity:** A blend of direct election, indirect election and nomination makes the Council a hotchpotch of representation. A chamber so heterogeneously constituted, neither serves the purpose of a revisory chamber nor acts as an effective brake against hasty legislation.

1.10. Privileges of State Legislature

The privileges of the Union Parliament and State Legislatures are identical according to the constitutional provisions (Arts. 105 and 194). It may be noted that the Constitution has extended the privileges of State Legislature to those persons who are entitled to speak and take part in the proceedings of the state legislature or any of its committees. These include advocate-general of state and state ministers. The following propositions may be noted from the decisions of the Supreme Court:

- Each House of the State Legislature has the power to punish for breach of its privileges or for contempt.
- Each House is the sole judge of the question whether its privileges have been infringed. The courts have no jurisdiction to interfere with the decision of the House on this point.
- However, the Court can interfere if the Legislature or its duly authorized officer is seeking to assert a privilege not known to the law of the Parliament, or if the notice issued or the action taken was without jurisdiction.
- No House of the Legislature had the power to create for itself any new privilege not known to the law. The Courts possess the power to determine whether the House in fact possesses a particular privilege.
- It is also competent for the High Court to entertain a petition for habeas corpus under Art. 226 (or the Supreme Court under Art. 32) challenging the legality of sentence imposed by a Legislature for contempt. This can be done on the ground that it has violated a fundamental right of the petitioner. The Court can release the prisoner on bail, pending disposal of that petition.
- Once a privilege is held to exist, it is for the House to judge the occasion and manner of exercise. The Court cannot interfere with an *erroneous* decision by the House or its Speaker in respect of breach of its privilege.

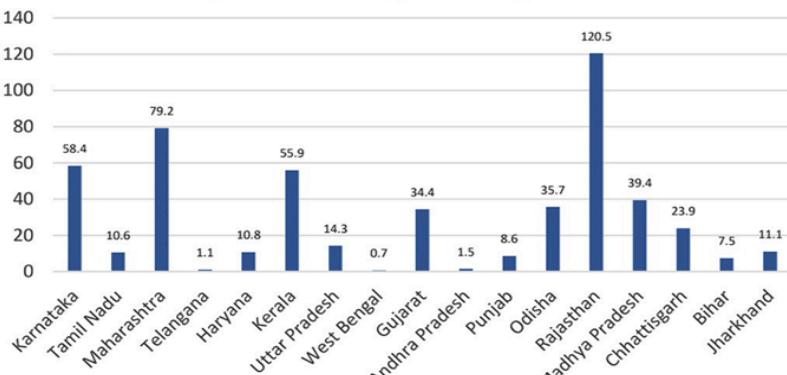
2. Emerging Issues

2.1. Functioning of state legislatures in India

An analysis of NITI Aayog's Innovation Index Report 2019 and other reports by PRS earmarks following issues in the functioning of state legislatures in India:

- Dominance of undemocratic processes:** In most states, Chief Ministers solely run the state without making many ministers portfolios clear to the public. Assembly debates seldom take place and Bills are passed without adequate discussion. This gives illusion of efficiency but it overlooks democratic process.
- Inability to hold executive accountable:** Asking questions (starred or unstarred) to the government is an effective way to keep a check on the executive. But the report suggest that there exists a disparity in the number of question asked in the major states. Total starred questions vary between **11,200 in Rajasthan** to **65 in West Bengal** in the last two years. However, **only 21 per cent of starred questions** admitted in the 14th Rajasthan Assembly were answered on the floor of the House.
- Lack of discussion and deliberations:** Transparency and public accessibility to the procedure followed in the house has not automatically resulted in improved legislative performance. A case in point is Karnataka – a state which is ranked highest in the innovation report. Between 2017 to 2020, on an average each MLA asked 58 questions and a video repository of all assembly proceedings, including Question Hour, is available online. But a report by PRS suggest that 92 per cent of Bills in the state's assembly were passed within a week of their introduction.
- Lack of participation by the members:** In Chhattisgarh assembly, only 78 MLAs have asked questions in its 4th assembly between 2014 and 2018 and a meagre 5 per cent of time was spent on legislation. Despite this, the House managed to pass 104 Bills and 94 per cent of these were passed within a week of introduction.

Average number of questions per member



TE: Data in the graph refers to the two-year period between June 2017 and June 2020

- Issues raised by the members:** A deeper analysis shows that MLAs concern themselves to the micro-civic problems like waste management, sewage treatment, construction of roads and supply of basic utilities. However, 73rd Amendment Act empowered local bodies to take care of these issues. But the fear of voter dissatisfaction forces MLAs to focus on these issues instead of legislative deliberations and holding the government accountable through policy-relevant questions.

2.2 Role of governor in dissolution of the state legislature

Issue

- In the recent past, legislatures of various states have been dissolved by their respective governors on some feeble grounds like 'extensive horse trading' or the possibility that a government formed by parties with "opposing political ideologies" would not be stable.

Constitutional Provisions related to dissolution

- Article 172** - Every Legislative Assembly of every State, unless sooner dissolved, shall continue for five years.
- Article 174 (2) (b)** - states that the Governor may, from time to time, dissolve the Legislative Assembly.

- **Article 356** : In case of failure of constitutional machinery in State the President, on receipt of report from the Governor of the State or otherwise,
 - may assume to himself the functions of the Government of the State
 - declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament

Student Notes:

Issues related to the dissolution powers of the governors:

- **Lack of Objective Criteria for untimely dissolution:** While Article 174 gives powers to the governor to dissolve the assembly, but the Constitution is silent on as to when and under what circumstances can the House can be dissolved.
- **Politically motivated:** Potential for political instability in the future being cited as a reason in J&K to prevent emerging alliances is undemocratic in nature. Describing an alliance as opportunistic is fine as far as it is political opinion but it cannot be the basis for constitutional action.
- **Lack of political neutrality:** The post has been reduced to becoming a retirement package for politicians for being political faithful to the government of the day. Consequently, the office has been used by various governments at the centre as a political tool to destabilise elected state governments. Bihar State Assembly was dissolved by the governor in 2005 on apprehensions of "horse trading". Later the Supreme Court called the decision to be illegal and mala fide.

Way forward

According to Sarkaria Commission:

- The state assembly should not be dissolved unless the proclamation is approved by the parliament.
- Sparing use of article 356 of the constitution should be made.
- All possibilities of formation of an alternative government must be explored before imposing presidential rule in the state.

MM Punchhi Commission also recommended that:

- The governor should follow "constitutional conventions" in a case of a hung Assembly.
- It suggested a provision of 'Localized Emergency' by which the central government can tackle issue at town/district level without dissolving the state legislative assembly.

Also the Supreme Court in the **Bommai Judgement of 1994** accorded primacy to a floor test as a check of majority. The court also said that the power under Article 356 is extraordinary and must be used wisely and not for political gain. The verdict concluded that the power of the President to dismiss a State government is not absolute. The verdict said the President should exercise the power only after his proclamation (imposing his/her rule) is approved by both Houses of Parliament. Till then, the Court said, the President can only suspend the Legislative Assembly by suspending the provisions of Constitution relating to the Legislative Assembly. Later in the Rameshwari Prasad Case (2006), the court observed that Governor cannot shut out post-poll alliances altogether as one of the ways in which a popular government may be formed.

3. UPSC Mains Previous Year UPSC Questions

1. How any by which authority can a State Legislative Council be abolished?
2. Should the Speaker of a Legislative Assembly appear before the courts on summons? Justify your viewpoint
3. What is a bicameral legislature? Mention the states that have a bicameral legislature in our country.
4. On what grounds the Legislative Councils are justified? How is it created or abolished in a State?

4. Previous Year Vision IAS GS Mains Questions

Student Notes:

1. **"Legislative Councils in India are not only second, but also secondary chambers of state legislatures. In terms of their composition and powers, they have become obsolete and must be scrapped." Examine.**

Approach:

- The question demands explanation as to how and why the legislative councils are – second and secondary chamber. This requires explanation of their powers vis-à-vis legislative assemblies. At least three aspects must be covered – with respect to ordinary bills, money bills/budget and that their very existence depends on the will of the assembly
- Their composition and manner of appointment should also be described briefly
- Then the answer must reflect on their utility in the modern context
- Finally it should suggest reforms (such as recommendation of second ARC) that can make it more effective institution

Answer:

Part 1

The powers accorded to the legislative councils by the constitution makes it clear that they are supposed to be subordinate bodies vis-à-vis assemblies. Because:

- A money bill can only be introduced in assembly. The council can't amend or reject the bill on being sent to it. It can only recommend changes and return the bill within 14 days. Even these, the assembly is not bound to accept.
- With respect to budget also, it can only discuss but can't vote on demands for grants
- The final powers of passing an ordinary bill also lie with assembly. The council can at the maximum delay the passage by four months – three in the first instance and one month in the second instance. In other words, council is not even a revising body like Rajya Sabha. It is only a dilatory chamber or advisory body.
- When an ordinary bill that originates in the council and is sent to assembly is rejected, it becomes a dead bill.
- The very existence of council depends on the will of assembly. Council can be established or abolished by the parliament on the recommendations of the assembly.

Part 2

- Apart from their insignificant powers, the composition and manner of selection is also not in tune with times. For instance 1/12th each are selected among the graduates and 1/6th are nominated by the governor. This enables unpopular, defeated, ambitious politicians or their favorites to become part of state legislature or even executive through it.

Part 3

Despite the above criticisms, the councils have following utility:

- It checks hasty, defective, careless and ill-considered legislations made by assembly by making provision for revision and thought.
- It facilitates representation of different sections of society such as eminent professionals and experts who can't win in direct elections

Therefore instead of abolishing them altogether, reforming them to make effective institution can be considered a better approach. The recommendations of Second ARC that each state should have LCs which should be populated by members elected by local bodies (Panchayats and Municipalities) gains significance in this regard.

2. “Unlike the Union Parliament, there is no provision for resolving any deadlock between the two houses of the state legislature because no deadlock can possibly arise”. Elaborate. Provide a comparative assessment of procedure regarding Ordinary Bills and Money Bills in Parliament and state legislatures. 215-618

Student Notes:

Approach:

- Introduce by highlighting bicameralism at centre and states.
- Elaborate the supremacy of Legislative assemblies over legislative councils
- The last part should flow from the preceding discussion and specify the legislative mechanism with respect to bicameral legislature at Union and state level.

Answer:

The Constitution established a bicameral legislature at the Union. However, in the case of states the provision of the second chamber is a matter of expediency dependent on a resolution of the Legislative Assembly pursuant to article 169 of the constitution. Thus, in the case of states the second Chamber or Legislative Council can be established as well as abolished on the recommendation of the Legislative Assembly.

Evidently, on a comparative scale the position of Legislative Councils is much weaker than the Rajya Sabha. While Disagreement between the two Houses of Parliament is to be resolved by joint sitting, there is no such provision for resolving differences between the two Houses of State Legislature, as ultimately the will of the Assembly prevails.

This can be demonstrated by citing the legislative procedure in a bicameral State Legislature, which is broadly similar to that in the Parliament, barring a few differences:

- As regards the Money Bill, the position is the same as the Union Parliament. The Legislative Council has no power save to recommend amendments to the Assembly or withhold the bill for a period of 14 days from the date of the receipt of the bill. Eventually the will of the Assembly prevails and it is not bound to accept any recommendation. Thus there cannot be a deadlock at all on the matter of money bill.
- In the matter of Ordinary bills i.e. bills other than Money Bills, the Only power of the Council is to interpose some delay in the passage of the Bill for a period of 3 months according to the article 197(1b).
- In case of disagreement a bill can only go back to the Assembly but ultimately the view of the Assembly shall prevail. It has to be noted that upon the second consideration of a bill by the Assembly the Council cannot withhold the Bill for more than a month pursuant to Article 197(2b). It can be argued, thus, that the Second Chamber in states, unlike the Rajya Sabha, is not revising but merely an advisory or dilatory Chamber.

The power differential between the Second Chamber in the Union Parliament and its counterpart in State legislature can be attributed to the fact that the Rajya Sabha as upper house represents the federal character of the Constitution, hence it has a better status than merely a dilatory body that the legislative councils are.

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Student Notes:



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1. Introduction

1.1. Evolution of Indian Judicial System

The history of the present judicial system may be traced back to the **18th century**, when the British started to establish their control in India. The promulgation of **Regulating Act of 1773** established the **Supreme Court at Calcutta** as a Court of Record, with full power & authority. It was established to hear and determine all complaints for any crimes and also to entertain, hear and determine any suits or actions in Bengal, Bihar and Orissa. Further, two Supreme Courts were established at **Madras** and **Bombay** in 1800 and 1823 respectively.

In 1861, the **Indian High Courts Act** was enacted, and steps were taken to establish High Courts at Calcutta, Madras and Bombay. The Supreme Courts established earlier were abolished. These High Courts remained the highest courts in both civil and criminal jurisdictions.

Finally, in 1935, the **Federal Court of India** was established under the **Government of India Act 1935**. After Independence, the **Supreme Court of India** was inaugurated on **January 28, 1950** succeeding the Federal Court of India.

1.2. Conceptual basis of Indian Judicial System

The Indian Constitution is founded upon the **doctrine of separation of powers**. As per this doctrine there are three organs viz., Legislature, Judiciary and Executive and all these three organs should discharge their functions independently, none should encroach one upon another. The Judiciary has the task to act as a watchdog and to check whether the executive and the legislature are functioning within their limits under the constitution and not interfering in each other's functioning. Thus, there are **checks and balances** in Indian model of separation of powers.

The present Indian Law is largely derived from **English common law** which was first introduced by the British when they ruled India. Various Acts and Ordinances which were introduced by the British are still in effect today.

1.2.1. Procedure established by Law vs. Due process of Law

The doctrine of '**Procedure established by Law**' originated in England. It literally means "**according to usages and practices as laid down by the statute**". Under this doctrine, the court examines a law from the view of the legislative competence and whether the prescribed procedure has been followed by the legislature while passing the law.

If an action of the executive is challenged before a court of law seeking protection from it then the court will subject the action of executive to following test:

- Whether there exists a law that authorizes the executive to take such an action; and
- Whether the legislature was competent to pass such a law; and
- Whether the legislature followed the established procedure while enacting the law.

If the above tests are satisfied the court will uphold the executive action. The court will **not go behind the fair and just nature and reasonableness of the law** and cannot declare the law as unconstitutional however arbitrary or oppressive the law may be unless the law was passed without procedural formalities. Thus, the doctrine relies more on the good sense of legislature and the strength of the public opinion in the country. Therefore, this doctrine confers **limited powers on the judiciary**, which can extend protection for individual only against arbitrary actions of the executive and **not against arbitrary actions of the legislature**.

On the other hand, doctrine of '**Due process of law**', which originated in USA confers wider power in hands of judiciary. According to this, if an executive action is challenged before a court of law, then apart from putting the action of the executive to above three tests, the court will **also examine the law from the broader angle of inherent goodness of the law by applying the**

principles of natural justice. Due process of law means that the law passed by the legislature shall also have to be **fair, just and reasonable** and not fanciful, oppressive and arbitrary. The US Supreme court, while following due process of law, can declare laws violative of rights of citizen not only on **substantive grounds** of being unlawful but also on **procedural grounds** of being unreasonable. Thus, it extends protection to an individual against the arbitrary action of **both the executive and the legislature.**

The India Constitution, under Article 21 provides **only for procedure established by law.** However, the Supreme Court in *Maneka Gandhi vs. GOI*, 1978 case interpreted the constitution to include the doctrine of **due process of law** under it by incorporating the principles of natural justice under Article 21.

1.2.2. Principle of Natural justice

There are three rules that govern the principle of natural justice

- a) No man should be punished without being heard.
- b) No man shall be judge of his own case.
- c) An authority shall at bona-fide (in good faith) without any bias.

The object of principles of natural justice is to **exclude the chances of arbitrariness and assures a certain degree of fairness** in the process of decision making. It demands that actions must be supported by reasons. They aim to humanize the decision-making process. They are based upon human rationality and are universal in nature.

The Supreme Court has ruled that the Principles of Natural Justice are binding on all authorities, including individuals and judiciary itself. Though, they are not incorporated explicitly in our Constitution, but still they are an inherent feature of it. In *Maneka Gandhi vs. GOI*, 1978 case the Supreme Court held that principles of natural justice are inherently found under Article 21(right to life) of the Constitution and the legislature is bound by the 'due process of law'. In the *Central Inland Water Transport Corporation Ltd. vs. Brojo Nath Ganguly*, 1986 case the Supreme Court held that the rules of natural justice are implicit to the right of equality under Article 14. They are one of the principles over which the constitution has been founded. They are so pervasive in the Constitution that they can be regarded as a part of basic structure of the Constitution.

2. Organisation of Judicial system

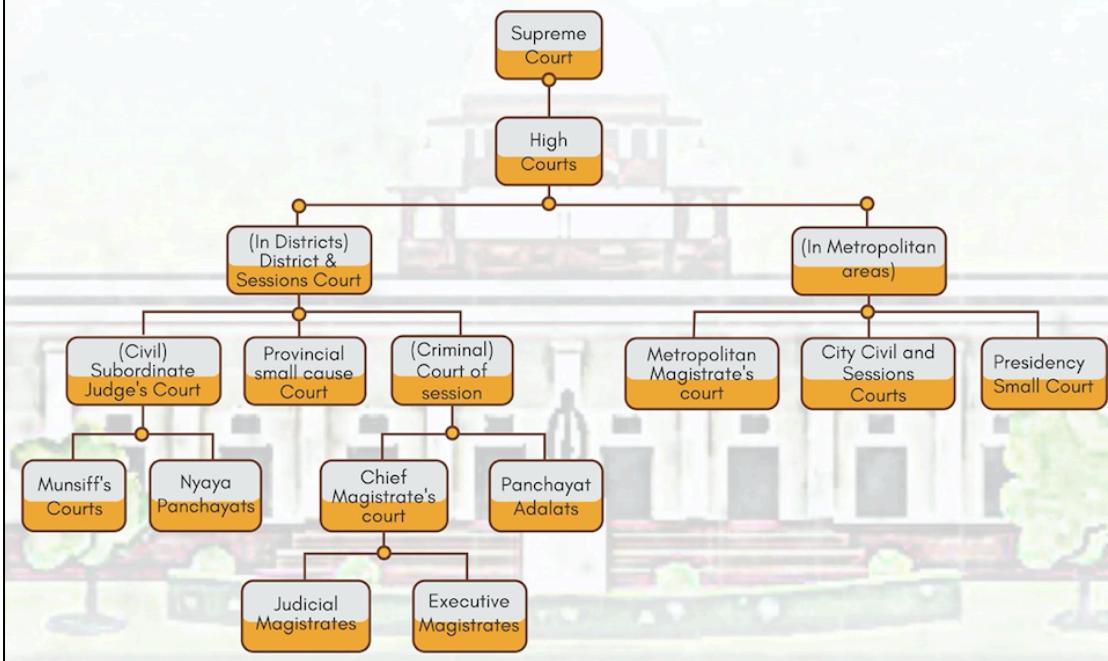
2.1. General Structure of Judicial System

Indian Constitution has established an **integrated judicial system** with Supreme Court at the top, followed by high courts and subordinate courts. This unified judicial system enforces both central laws as well as state laws. This integrated judicial system of India has been adopted from the **Government of India Act, 1935.**

Articles 124 to 147 of the Indian Constitution deal with organization, independence, jurisdiction, powers, procedures etc. of the Supreme Court. Parliament has the power to make laws regulating constitution, organization, jurisdiction, and powers of the Supreme Court.

Student Notes:

GENERAL STRUCTURE OF INDIAN JUDICIAL SYSTEM



The architecture of subordinate judiciary varies across states and are broadly classified as shown in the above figure. At the lowest stage, two branches of justice-civil and criminal are bifurcated. The Panchayat courts are functioning in civil and criminal areas under various regional names like Nyaya Panchayat, Panchayat Adalat, Gram Kutchery etc.

2.2. Seat of Supreme Court

The Constitution of India declares **Delhi as the seat of the Supreme Court**. But, it also authorises the **Chief justice of India** to appoint other place or places as seat of the Supreme Court, but only with the **approval of the President**. This provision is only optional and not compulsory. This means that no court can give any direction either to the President or to the Chief Justice to appoint any other place as a seat of the Supreme Court.

2.2.1. Demand of Regional Bench of Supreme Court

Over the period of time, various expert committees have observed the need of regional benches of Supreme Court. The **Standing Committees of Parliament** recommended in 2004, 2005, and 2006 that Benches of the court be set up elsewhere. In 2008, the Committee suggested that at least one Bench be set up on a trial basis in Chennai.

The **Law commission** had recommended the division of the Supreme Court into 1) **Constitutional court** and 2) **National court of appeal**. It recommended that a Constitution Bench be set up in Delhi to deal with constitutional and allied issues, and four regional Benches in Delhi (north), Chennai/Hyderabad (south), Kolkata (east) and Mumbai (west) to deal with all appellate work arising out of the orders/judgments of the High Courts.

Recently, the Vice President of India has suggested setting up of **four Regional Benches** of the Supreme Court.

Need for Regional Benches

- **Constitutional obligation:** Article 39-A directs the State to ensure that the operation of the legal system promotes justice on a basis of equal opportunity to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other

disabilities. Thus, it is essential to ensure that the additional transaction cost of litigation for people of north-eastern states or southern states should be minimal.

Student Notes:

- **High pendency of cases:** More than 65,000 cases are pending in the Supreme Court, and disposal of appeals takes many years.
- **Litigation as a measure of well-being:** An empirical study on litigation in India, finds that there is direct correlation between civil case filing and economic prosperity (more prosperous states have higher civil litigation rates). However, in recent years civil case backlog has discouraged civil case filings which may impact India's future economic growth. Thus, setting up regional bench is a step-in right direction.
- **Higher accessibility-** The accessibility to SC due to its seat in Delhi is less, especially to the poor and those living in far-off places like north-east.

Issues associated with setting up of regional benches

- **Dilute the authority of Supreme Court:** Setting up of regional benches may dilute superiority of the Supreme Court's decisions.
 - However, critics argue that many High Courts in this country have different Benches for meting out justice without 'justice' being 'diluted'. For example, the Bombay High Court has four Benches, in Mumbai, Aurangabad, Nagpur and Panaji (Goa).
 - Also, with the decentralisation being both functional and structural in nature, with only the bench in Delhi dealing with constitutional matters, such concerns may be put to rest.
- **Affect integrated judiciary system:** The Indian Constitution has established an integrated judicial system with the Supreme Court at the top and the state high courts below it. The setting up of regional court may dilute this unitary character. In 2010, the Full Court, comprising 27 judges and headed by Chief Justice of India had rejected law commission recommendation for regional Benches citing this reason.
 - However, it has been argued that High Court having different branches has not diluted the integrated judiciary system.

With the rising arrears of cases and practical difficulties being faced by poor litigants, it is about time that the idea of setting up regional benches be explored seriously. Setting up regional benches of the Supreme Court dealing with appeals and a constitutional bench in Delhi is the best way forward.

2.2.2. National Court of Appeal (NCA)

The **National Court Appeal** with regional benches in Chennai, Mumbai and Kolkata will be meant to act as final court of justice in dealing with appeals from the decisions of the High Courts and tribunals within their region in civil, criminal, labour and revenue matters.

The **Supreme Court**, as early as in 1986, had recommended establishment of National Court of Appeal. In **V. Vasantha Kumar case, 2016** the Supreme Court referred the matter to a Constitutional Bench for decision on the National Court of Appeal.

Currently, the Supreme Court is **overburdened** with work, much of which comprises appeals from lower courts. Due to this, it is not able to fulfill its primary duty of deciding upon constitutional matters and acting as the final interpreter of the Constitution.

In such a scenario, a much-relieved Supreme Court of India situated in Delhi **would only hear matters of constitutional law and public law**. This is significant as, the number of decisions by Constitutional benches has drastically come down; from about 15% of total decided cases in 1950s to a worryingly paltry 0.12% in last decade.

However, this would fundamentally change the character of Supreme Court, its constitution and also its aura as the Apex court. It would require amending **Article 130** which might not stand the test of basic structure.

Way Forward

National Court of Appeal is a drastic measure, a last resort with lot of practical problems. Till then other measures need to be taken to address the issue - like reducing appellate burden (rationalization of Special Leave Petitions, subordinate judiciary reforms, improving judicial strength, quality, infra etc). For proximity issue benches of SC like that of HC can be set up in 4 important cities.

Article 145(3) mandates that minimum 5-judge bench should sit to decide a matter involving 'substantial question of constitutional law'. Clearly, this mandate is not being followed. For e.g. the Naz Foundation case involving the question of decriminalization of homosexuality, Shreya Singhal case dealing with the illegality of section 66A of IT Act were all decided by 2-judge benches.

Student Notes:

2.3. Comparison with American Supreme Court

There is a fundamental difference in Indian and American judicial system, as India has a unified judicial system while American judicial system is segregated on federal principle. Still, there are striking similarities due to the democratic setup of polity. These can be seen as-

	Indian Supreme Court	American Supreme Court
Original Jurisdiction	It is confined to federal cases .	It covers not only federal cases but also cases relating to naval forces, maritime activities, ambassadors, etc.
Appellate Jurisdiction	It covers constitutional, civil and criminal cases.	It is confined to constitutional cases only .
Advisory Jurisdiction	It has advisory jurisdiction.	It has no advisory jurisdiction.
Judicial Review	It defends rights of the citizen according to the ' procedure established by law '. Thus, its scope of judicial review is limited .	It defends rights of the citizen according to the ' due process of law '. Thus, its scope of judicial review is wide .
Change in Jurisdiction	Its jurisdiction and powers can be enlarged by Parliament.	Its jurisdiction and powers are limited to that conferred by the Constitution.
Control over subordinate courts	It has power of judicial superintendence and control over state high courts due to integrated judicial system.	It has no such power due to double (or separated) judicial system.

Apart from these, the Supreme Court of India has extraordinary power of **special leave** to entertain appeals without any limitation upon its discretion, from a decision not only of court but also of any tribunal within territory of India. American Supreme Court doesn't possess such power.

3. Judges of Supreme Court

3.1. Appointment of Judges

3.1.1. Eligibility

A person shall not be qualified for appointment as a Judge of the Supreme Court unless:

1. He is a citizen of India; and
2. He should satisfy one of the following-
 - a) He has been **judge of a High Court** (or of two or more such Courts in succession) for at least **five years**, or
 - b) He has been an **Advocate of a High Court** (or of two or more such Courts in succession) for at least **ten years**, or
 - c) The person is a **distinguished jurist** in the opinion of President.

It may be noted that the Constitution **has not prescribed a minimum age** for appointment as a judge of the Supreme Court, nor any fixed period of office. Further, a Judge of a High Court or a retired Judge of the Supreme Court or High Court may be appointed as an ad-hoc Judge of the Supreme Court.

3.1.2. Procedure of Appointment

Background

The Constitution of India under **Article 124** states that

- **Chief Justice of India (CJI)**- is appointed by the President after **consulting** such judges of the Supreme Court and High Courts as the President deems necessary.
- **Judges other than CJI**- are appointed by the President after **consulting** with the Chief Justice of India and other SC and HC judges as he considers necessary.

Initially, the Executive had a primacy and role of Judiciary was **more advisory**, as the word **consultation** was not binding on the President. Subsequently, the Supreme Court has given **different interpretation** of the word '**consultation**' in the **three Judges cases**. As a result of this, the word '**consultation**' has more or less acquired the meaning of '**concurrence**'.

3.1.2.1. Collegium System

The Supreme Court created the Collegium system where a **committee of the Chief Justice of India, four senior judges of the Supreme Court** take decisions related to appointments and transfer of judges in the Supreme Court.

The appointment of Chief Justice of India is done in accordance with the *Second Judges case* (1993), in which the SC ruled that the senior-most judge should alone be appointed to the office of CJI.

Three Judge Cases

- **First Judges Case**, 1981 or **S P Gupta Case**: The Supreme Court ruled that the recommendation made by the CJI to the President can be refused for "**cogent reasons**", thereby giving greater say to executive.
- **Second Judges Case**, 1993: It is also known as **Supreme Court Advocates-on Record Association vs Union of India**. CJI only need to consult two senior-most judges over judicial appointments and transfers. However, on objection raised by executive on appointment, Collegium may or may not change their recommendation, which is binding on executive.
- **Third Judges Case**, 1998: On the Presidential Reference, the SC gave its judgement. CJIs should consult with four senior-most Supreme Court judges to form his opinion on judicial appointments and transfers.

Issues with Collegium System of Appointment

- **View of Constituent Assembly**: It had rejected the proposal to vest the Chief Justice with veto power over appointments.
- **Violation of constitutional Provision**: According to 214th Law commission of India Collegium is a clear violation of Article 74 of the Constitution of India which demand President to act on the aid and advice of the Council of Ministers.
- **Undemocratic**: Collegium system is non-transparent and closed in nature as there exists no system of checks and balances which is essential to a democracy.
- **Disturbing Balance of Power** by the Second Judges case as provided by the constitution between executive and judiciary.
- **Uncle Judges Syndrome**: Law Commission in its 230th report said that nepotism, corruption and personal patronage is prevalent in the functioning of the collegium system
- **Merit vs Seniority**: There have been numerous cases where people with better qualifications and better track records have been sidelined to make way for someone incompetent due to seniority rule.

COMPARISON BETWEEN DIFFERENT COUNTRIES

HOW THE SELECTION PROCESS WORKS IN VARIOUS JURISDICTIONS

The mechanism for judicial appointments differ from country to country. A look

				
WHO APPOINTS				
				
PERSONS INVOLVED IN MAKING THE DECISION				
Since 1993, a collegium, consisting of the CJL and other senior SC judges, has made recommendation for persons to be appointed as SC and HC judges, to the President	It consists of the SC President, his deputy, and one member each appointed by the JACs of England, Scotland and Northern Ireland. The JACs comprise lay persons, members of Judiciary and the Bar	Justices are nominated by the President and confirmed by the U.S Senate. Senate Judiciary Committee holds hearings and votes on whether nominations should go to the full Senate	It is unique as the country has an election process to appoint judges. Half the members of the Federal Constitutional Court are elected by the executive and half by the legislature.	The South African Judicial Services Commission recommends the list of candidates to be appointed as Supreme Court judges. All other judges are appointed on its advice

3.1.2.2. National Judicial Appointment Commission (NJAC)

- The government had established **National Judicial Appointment Commission** by way of 99th Constitutional Amendment.
- It was proposed constitutional body to replace the Collegium system of appointing judges.
 - It was envisaged as an independent commission to appoint and transfer judges of High Court and appoint judges of Supreme Court of India.
 - It was composed of three senior judges, two eminent outsiders and the Law Minister.
- However, before it was notified, it was challenged in Supreme Court as an attempt by government to interfere with the independence of the judiciary.

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NATIONAL JUDICIAL APPOINTMENTS COMMISSION

National Judicial Services

Setting up of National Judicial Service Commission recommended by Law Commission in its 121st report

98th Constitutional Amendment

98th Constitutional Amendment Bill, 2003 proposed the idea of Commission comprising of two senior most judges, the law minister and the CJI. Bill lapsed

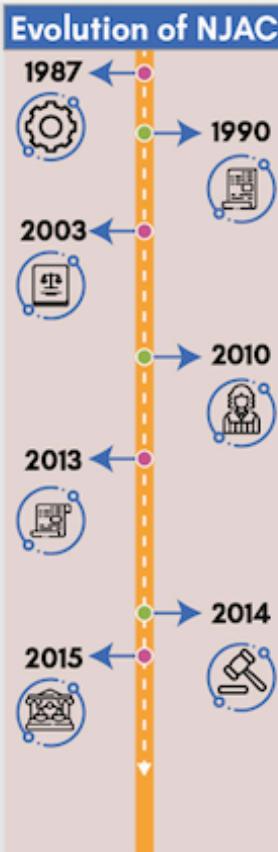
JAC Bill

16th session of Lok Sabha passes the JAC Bill while Rajya Sabha did not clear it

NJAC Act

NJAC Act was notified on April 13. Collegium System replaced by NJAC.

Supreme Court strikes down NJAC Act on October 16.



67th Constitutional Amendment

67th Constitutional Amendment Bill, 1990 proposed the creation of National Judicial Commission. Bill lapsed due to dissolution of Lok Sabha in 1991

Jurists

Eminent jurists Shri MN Venkatachaliah, (late) Shri Justice JS Verma and (late) Shri Justice VR Krishna Iyer with the initiative of FDR proposed judicial reforms which included JAC

NJAC Bill

NJAC Bill introduced in Lok Sabha. NJAC Bill and 121st Constitutional Amendment bill passed by both the houses

Key features of NJAC

- A six-member panel for appointment of judges to the Supreme Court & high courts
- CJI will head the panel which will have 2 SC judges, 2 eminent persons and law minister
- Constitutional amendment status to stop easy change in current legislation by future govt
- Eminent persons will be selected by CJI, PM & Oppn leader/leader of largest Oppn party in Lok Sabha
- One of eminent persons will be nominated from persons belonging to SC/STs, OBCs, minorities or women
- Term of eminent persons will not exceed 3 yrs, will not be re-nominated
- If two members of panel do not agree, appointment will not happen. President can return recommendation for reconsideration once

Supreme Court's verdict

- The Court struck down the amendment and concluded that NJAC did “not provide an adequate representation, to the judicial component”.
- The new provision in Constitution are insufficient to preserve the primacy of the judiciary in the matter of selection and appointment of Judges”
- It was held that the amendment impinged upon the principles of “independence of the judiciary”, as well as, the “separation of powers”.

Primacy of the judiciary is required as

- Government is major litigant: Since the government is a major litigant, giving it an edge in appointments would amount to fixing the courts.
- Independence of Judiciary: It has been regarded as basic structure of constitution and NJAC was termed as violating the independence of judiciary
- To enable Separation of Powers between executive and judiciary as directed by Constitution of India.

After quashing the proposed National Judicial Appointments Commission, Supreme Court's Constitution Bench had **asked the Centre to consult the CJI for drafting the new memorandum for appointments of judges to the higher judiciary**. Acting on the above a Group of Ministers (GoM) headed by External Affairs Minister had finalized the new Memorandum of Procedure (MoP) for appointment of Judges

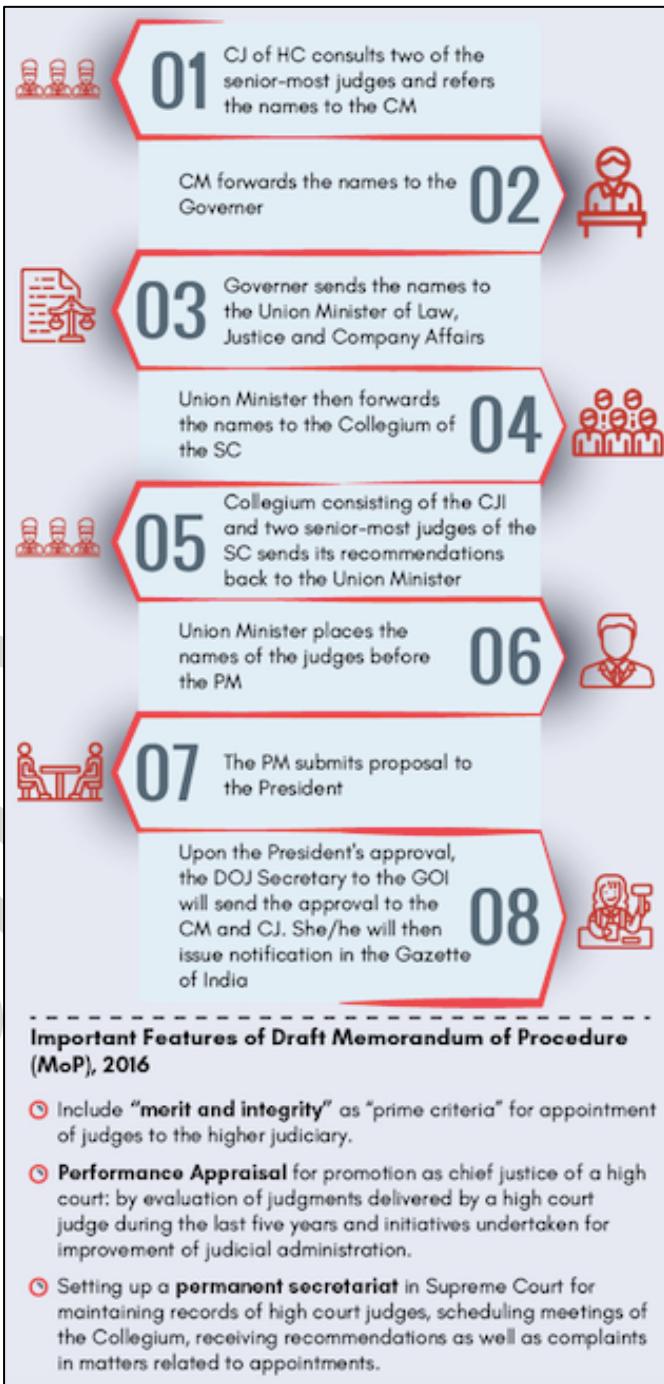
3.1.2.3. Memorandum of Procedure (MOP):

The government drafted a **Memorandum of Procedure** in 2016 to set a fresh set of guidelines for making appointments to the higher judiciary. However, there is **lack of agreement** between government and judiciary as of now.

The procedure of appointment judges by promotion under the MOP has been depicted in the infographic.

Significance of MOP

- It seeks to introduce performance appraisal as a standard for appointing chief justices of high courts and Supreme Court judges.
- It proposes that for appointment of judges in the Supreme Court, the "prime criteria" should be "seniority as chief justice/ judge of the high court".
- The MoP states that up to three judges in the Supreme Court need to be appointed from among the eminent members of the Bar and distinguished jurists with proven track record in their respective fields.
- The Union Law Minister should seek the recommendation of the incumbent CJI for appointment of his successor at least one month prior to his retirement.
- A notice for vacancies of judges should be put up on the website of the high courts at the beginning of the year for appointments.
- **National security and public interest** have been included as the new ground of objection to appoint a candidate as a judge. If the government has objections on the ground of national security and public interest, it will convey the same to the collegium. The collegium will then take a final call.



3.1.2.4. SC Collegium Proceedings in Public Domain:

Student Notes:

Background

Supreme Court collegium decided that it would **upload its decisions on the appointment and transfer of judges** of the Supreme court and High Courts on the Supreme Court's website. These details would be available as **collegium resolutions**. This means every time the collegium forwards the names of candidates to the government for appointment as judges, it would automatically place the names and the reasons for the recommendation before the public.

Rationale behind the decision

- **Moral Obligation-** The Judiciary fulfilled its moral obligation especially after it struck down NJAC.
- **Right to Information:** The proactive disclosure by the judiciary is a welcome step in spirit of Right to Information act, 2005.
- **Openness in procedure:** It not only means openness in the functioning of the executive arms of the state but also in judicial apparatus including judicial appointments and transfers.
 - This is expected to counter allegations that the collegium has, under political pressure, cleared the names of individuals who turned out to be inefficient and sometimes corrupt.
- **Right to know:** The step strengthens democratic processes and fundamental right of freedom of speech as the right to know is an inherent part of it. The secretive collegium system was violating that till now.

Criticism

- **Limited Transparency:** The decisions should be made public on the websites ideally, at the stage when the High Court makes the recommendation not after when the process is complete when nothing can be done.
- **Lack of clear criteria:** Eligibility criteria to judge the performance and suitability must be formulated objectively and must be made public. The reasons for appointment or non-appointment can be only understood well only in the context of that criteria.
- **Personal and Professional Reputation:** Rejection of candidatures on the ground of "unsuitability" may dent their professional and personal reputations as they are either serving judicial officers or eminent lawyers.

What should be done in future?

- **Power Balance:** Law Commission, in its 2008 and 2009 reports, suggested that Parliament should pass a law restoring the primacy of the CJI, while ensuring that the executive played a role in making judicial appointments.
- **System to ensure judicial primacy but not judicial exclusivity:** The new system should ensure independence, accommodate the federal concept of diversity, demonstrate professional competence and integrity. The trend across liberal, constitutional democracies is towards such a commission which preserves judiciary's primacy while also divorcing its membership from the executive.
- **Criteria for Appointment:** Eligibility criteria to judge the performance and suitability must be formulated objectively and must be made public. The reasons for appointment or non-appointment can be only understood well in the context of such a criterion. Recently Supreme Court Collegium has decided to put all its recommendations in Public Domain indicating the reasons.
- **Early Finalisation of Memorandum of Procedure (MoP):** SC in Justice Karnan case underlined the need to revisit the process of selection and appointment of judges to the constitutional court.

3.1.3. Other Judges of Supreme Court

Student Notes:

3.1.3.1. Acting Chief Justice of India (Article 126)

In case the office of the Chief Justice is vacant or the CJI is temporarily absent or is unable to perform his duties, the President can appoint a judge of the Supreme Court as an acting Chief Justice of India.

3.1.3.2. Ad hoc Judges (Article 127)

In case of a lack of quorum of the permanent judges to hold or continue any session of the Supreme court, the Chief Justice of India can appoint a judge of a High Court as an ad hoc judge of the Supreme Court for a temporary period, provided the judge so appointed should be qualified for appointment as a judge of the Supreme court and this can be done only after consulting with the Chief justice of the concerned High Court with the prior consent of the President. It is the duty of the judge so appointed to attend the sitting of the Supreme Court, in priority to other duties of his office and while so attending he enjoys all the jurisdiction, powers and privileges of a judge of the Supreme Court.

3.1.3.3. Retired Judges (Article 128)

The Chief Justice of India can request a retired judge of the Supreme Court or High Court to act as a judge of the Supreme Court for a temporary period. The President's previous consent is necessary. Such a person will enjoy all the jurisdiction, powers and privileges of a Supreme Court Judge. But he will not otherwise be deemed to be a judge of the Supreme Court.

3.1.4. Number of Judges for Supreme Court

Originally, under Article 124 of the Indian Constitution the strength of Supreme Court was fixed at **eight** (one chief justice and seven other judges).

- **Article 124 (1)** provides the power to the Parliament to increase the number of judges if it deems necessary.
- The Parliament through **the Supreme Court (Number of Judges) Act, 1956** increased strength of Supreme Court to ten. The Act was last amended in 2009 to increase the judges' strength from **25** to **31**.
- Recently, Parliament has passed the legislation to increase the sanctioned strength of the Supreme Court from **31** to **34** including the Chief Justice of India.

3.2. Oath of Judge

A person appointed as a judge of the Supreme Court, before entering upon his Office, has to make and subscribe an oath or affirmation **before the President, or some person appointed by him for this purpose**.

In his oath, a judge of the Supreme Court swears:

- to bear true faith and allegiance to the Constitution of India;
- to uphold the sovereignty and integrity of India;
- to duly and faithfully and to the best of his ability, knowledge and judgement perform the duties of the Office without fear or favour, affection or ill-will; and
- to uphold the Constitution and the laws.

3.3. Salary and Allowances

Article 125 of the Indian Constitution leaves it to the **Indian Parliament** to determine the salary, other allowances, leave of absence, pension, etc. of the Supreme Court judges. However, the Parliament **cannot alter any of these privileges and rights to the judge's disadvantage** after his appointment. Salaries, allowances and pensions of the judges of Supreme Court are charged on the Consolidated Fund of India and are non-votable by the Parliament.

3.4. Tenure

Once appointed, a Judge of the Supreme Court may cease to be so on happening of any one of the following contingencies (other than death)

- On attaining the age of **65 years**.
- On resigning by addressing his resignation to the President.
- On being removed by the President by the procedure prescribed in Article 124(4) (impeachment) of the Constitution of India on ground of proved misbehaviour or incapacity.

3.5. Removal of Judges

Background

The Constitution of India under **Article 124(4)** states that a Judge of Supreme Court can be removed only by the **President** on ground of '**proved misbehaviour**' or '**incapacity**' only after a motion to this effect is passed by both the Houses of Parliament by special majority.

The Constitution also requires that misbehaviour or incapacity shall be proved by an impartial Tribunal whose composition is decided under Judges Enquiry Act 1968.

Issues in removal

- **Lack of Enforcement:** The Act has only been invoked three times since 1950.
 - Interestingly, no judge of the SC or HC has been impeached so far. The few cases taken up by the Parliament were Justice V. Ramaswami (1991-93), Justice Soumitra Sen, Justice P.D. Dinakaran.
 - Recently, Chief Justice of India has written to Prime Minister to initiate a motion for removal of a judge of Allahabad High Court.
- **Lack of Clarity-** The law does not define what misbehaviour is and hence ultimately fails to recognize the wide range of misbehaviour.
- **Lack of Transparency:** The proceedings are wrapped in secrecy and the judge continues to hold the post.
 - Both the Constitution and the Judges (Inquiry) Act of 1968 are silent on whether a judge facing impeachment motion should recuse from judicial and administrative work till he is cleared of the charges against him.
 - The Judge under investigation is not prohibited from discharging his duties in court of law.
- **Cumbersome Process:** Impeachment process is tedious and lengthy, judges have virtually no accountability.
- **It also involves political considerations:** Only Parliament can take cognizance of a case of a tainted judge. No space is given to a common man. For example, the Congress abstained

IMPEACHMENT PROCEEDINGS



A removal motion signed by 100 members (in case of Lok Sabha) or 50 members (in case of Rajya Sabha) is to be given to the Speaker/Chairman.



If the motion is admitted, then a three-member committee (consisting of a supreme court judge, a chief justice of high court and a distinguished jurist) to investigate into the charges is constituted.



If the committee finds the judge to be guilty of the charges (misbehaviour or incapacity), the House in which the motion was introduced, can take consideration of the motion.



Special majority: Majority of total membership of the House & Majority of not less than two thirds members present and voting.



Once, the House in which removal motion was introduced passes it with **special majority**, it goes to the second House which also has to pass it with a **special majority**.



After the motion is passed, an address is presented to the President for removal of the judge. The President then passes an order removing the judge.

- from voting on the resolution when the motion for removal of Justice V. Ramaswami was moved in 1993 resulting in failure of the process.
- **Judiciary removing itself:** Contempt of court ruling may amount to removing him as a judge, thus, amounting to judicially-ordered impeachment.

Can chairman reject impeachment motion?

- **Section 3 of Judges (Inquiry) Act, 1968**, says the presiding officer may admit or refuse to admit the motion after holding consultations with such persons as he thinks fit, and considering the material before him.
- Earlier also impeachment motions having been shot down. For e.g.: motion moved against Supreme Court judge J.C. Shah was rejected by the then Lok Sabha Speaker, G.S. Dhillon, in 1970.
- The job of the Chairman is not just procedural to see the required no of signatures but to also see whether there is a *prima facie* case, whether the notice for motion is based on substantial grounds, before admitting or rejecting.
- Even mere admission of an impeachment motion can cause incalculable damage to reputation in this perception-driven world. Thus, motion needs to be admitted very carefully.

What should be done in future?

- Bringing a **new Judicial standards and accountability bill** along the lines of Judicial Standards and Accountability Bill 2010 (which lapsed) to establish a set of legally enforceable standards to uphold the dignity of superior judiciary and establish a new architecture to process the public complaints leveled against the judges.
 - The **Judges (Inquiry) Bill, 2006** also proposed establishment of a National Judicial Council (NJC) to conduct inquiries into allegations of incapacity or misbehaviour by High Court and Supreme Court judges.
- **Appointment-** the collegium should take adequate safeguards so that only judges of high caliber and impeccable integrity are appointed to the higher courts. This requires infusion of greater transparency in the selection of judges.
- **Greater Internal regulation:** There were several instances where the Judge behaved inappropriately, disciplinary actions should have been taken promptly at very first instance of such misconduct. For this, a **National Judicial Oversight Committee** should be created by parliament which shall develop its own procedures to scrutinizing the complaints and investigation. The composition of such committee should not affect judicial independence.

4. Procedure of Supreme Court

The Supreme Court can make rules regulating the general practice and procedure to be followed by court, which are **only subject to laws made by Parliament and the Constitution**.

- The **constitutional cases** or references made by the President under **Article 143** (advisory jurisdiction of Supreme Court) are decided by a bench consisting of atleast five judges (constitutional bench). All other cases are usually decided by a bench consisting of not less than three judges.
- The judgements are delivered by the **open court**.
- All judgements are by **majority vote** but if differing, then judges can give dissenting judgements or opinions.
- The law declared by the Supreme Court is **binding on all courts** within the territory of India.
- All authorities, civil & judicial, in the territory of India, are required to act in aid of the Supreme Court
- The Chief Justice of India has an exclusive power in the matter of appointment of officers and servants of the Court and administrative expenses of Supreme Court, including all salaries, allowances and pensions payable to or in respect of officers and servants of the Court is charged upon the consolidated fund of India.

5. Independence of Supreme Court

Independence of Supreme court judge is secured in a number of ways. Some of them are as follows:

- The Judges of Supreme Court are appointed by the President **in consultation with the collegiums** headed by the Chief Justice of Supreme Court.
- By laying down that Judges of Supreme Court **shall not be removed except by an order of President** after an address by the Parliament (supported by majority of the membership of the house and not less than two thirds of the members present and voting) is presented to him. (Art.124(4))
- The salaries, allowances, privileges, leave and pension of judges of Supreme Court are determined from time to time by Parliament. They **cannot be varied to the disadvantage** of the judges.
- The salaries, allowances and pensions of the staff are **charged on the Consolidated Fund of India** and thus are non-votable by the Parliament. (Art. 146)
- The conduct of judges in the discharge of their duties cannot be discussed in Parliament or in a state legislature except when an impeachment motion is under consideration.
- The Retired Judges are **prohibited from pleading or acting in any court or before any authority** within the territory of India. This removes the chances of any biased decision for any future favour.
- The Supreme Court **can punish anyone for its contempt**. Its actions, thus, cannot be criticized or opposed by anybody. It ensures authority, Dignity and Honour of Supreme Court.
- The Chief Justice of India **can appoint officers and staff of Supreme Court** without any interference from the executive.
- The parliament **cannot curtail the jurisdiction and powers of the Supreme Court**; however, the parliament can extend its power and jurisdiction.
- The Constitution directs the state to separate judiciary from executive in the public services (Art 50). For its implementation, judicial powers of executives are taken away after enactment of Cr.P.C).

6. Jurisdiction of Supreme Court

The Supreme Court has original, writ, appellate and advisory jurisdiction - **Articles 32, Articles 131-144**. It is not only a Federal Court but also the final court of Appeal, final interpreter of Constitution and guarantor of Fundamental Rights of Citizens. Further, it has advisory and supervisory powers.

6.1. Original jurisdiction

The court has **exclusive** original jurisdiction over under **Article 131**:

1. Dispute between the Government of India and one or more States
2. Dispute between the Government of India and any State or States on one side and one or more States on the other.
3. Between two or more States, if the dispute involves any question on which the existence or extent of a legal right depends.

This means no other court can entertain such a dispute. A dispute to qualify under Article 131, it has to necessarily be between states and the Centre and must **involve a question of law or fact on which the existence of a legal right of the state or the Centre depends**.

- In the **State of Karnataka v Union of India, Case, 1978** Justice P N Bhagwati had said that for the Supreme Court to accept a suit under Article 131, the state need not show that its legal right is violated, but only that the dispute involves a legal question.

- It cannot be used to settle political differences between state and central governments headed by different parties.

Student Notes:

Election Disputes- The Supreme Court decides the disputes regarding the election of the President and the Vice-president. In this regard, it has the original, exclusive and final authority.

This jurisdiction of the Supreme Court does not extend to the following:

- Inter-State Water disputes;
- matters referred to the Finance Commission;
- adjustment of expenses between the Centre and the States;
- ordinary dispute of commercial nature;
- dispute arising out of pre-Constitution treaty or agreement;
- any treaty or agreement, which specifically provides that the said jurisdiction does not extend to the dispute.

Recent Development

Recently Kerala and Chhattisgarh have filed a suit in the Supreme court challenging the constitutional validity of various central laws such as **Citizenship Amendment Act 2019** (Kerala) and the **National Investigation Agency Act 2008** (Chhattisgarh), under Article 131 of the Indian Constitution.

Why the states have challenged the Centre under article 131?

- **Kerala:**
 - Kerala has filed a suit to challenge the Citizenship (Amendment) Act, 2019, stating that it is violative of Articles 14 (equality before the law), 21 (protection of life and personal liberty) and 25 (freedom of religion) as well as against the secular fabric of the nation.
 - It also challenges the Passport (Entry to India) Amendment Rules 2015, and Foreigners (Amendment) Order 2015, which had regularised the stay of non-Muslim migrants from Pakistan, Bangladesh and Afghanistan, who had entered India before December 31, 2014, on the condition that they had fled religious persecution from their home countries.
- **Chhattisgarh**
 - It has sought a declaration that the NIA Act, 2008, is unconstitutional on the ground that it is "beyond the legislative competence of Parliament".
 - As 'Police' is a subject reserved for the States, having a central police agency, which has overriding powers over the State police, with no provision for consent from the State government for its operations, is against the division of legislative powers between the Centre and the States.
 - And thus NIA, is against the federal spirit of the Constitution.

Significance of Article 131

- **India's quasi-federal constitutional structure:** Inter-governmental disputes are not uncommon; therefore, the framers of the Constitution expected such differences, and added the exclusive original jurisdiction of the Supreme Court for their resolution.
- **Resolve disputes between states:** Unlike individuals, State governments cannot complain of fundamental rights being violated or cannot move to the courts under article 32 (Remedies for enforcement of rights). Therefore, the Constitution provides that whenever a State feels that its legal rights are under threat or have been violated, it can take the "dispute" to the Supreme Court.
 - States have filed such cases under Article 131 against neighbouring States in respect of river water sharing and boundary disputes.

Way forward

Supreme Court should constitute a larger bench to decide the question whether the suits challenging central laws are maintainable under article 131 or not. In that case, if the suits are declared maintainable, the same bench may also adjudicate the disputes.

6.2. Writ jurisdiction

The Supreme Court has writ jurisdiction (concurrent with high courts, not exclusive) in regard to enforcement of Fundamental Rights. The Supreme Court is empowered to issue directions or

orders or writs, including writs in the nature of ***Habeas corpus, mandamus, prohibition, quo warranto and certiorari***, whichever may be appropriate for the enforcement of fundamental rights conferred by the Constitution (**Article 32**).

Student Notes:

In this regard, the Supreme Court has **original jurisdiction** in the sense that an aggrieved citizen can directly go to the Supreme Court, not necessarily by way of appeal. (The difference in the Writ jurisdiction of Supreme Court and High Court is explained later).

Parliament by law can confer on the Supreme Court, power to issue directions or orders or writs for other purposes (than enforcement of fundamental rights) as well. (**Article 139**)

6.3. Appellate jurisdiction

The Supreme Court replaced the **British Privy Council** as the highest Court of Appeal after independence. The Appellate jurisdiction can be classified under the following four heads:

1. **Constitutional Matters:** The appellate jurisdiction of the Supreme Court can be invoked by a certificate granted by the High Court in a case that involves substantial questions of law that requires the interpretation of the Constitution - **Articles 132**
2. **Civil Matters:** Appeals also lie to the Supreme Court in civil matters if the High Court concerned certifies that the case involves a substantial question of law of general importance, and in High Court's opinion, it needs to be decided by the Supreme Court (**Article 133**).
3. **Criminal Matters:** In criminal cases, an appeal lies to the Supreme Court if the High Court (**Article 134**)
 - a) Has reversed an order of acquittal of an accused on appeal and sentenced him to death (Parliament may by law expand the situation, where certificate is not required, to imprisonment for life or for 10 years)
 - b) Has taken before itself any case for trial from any subordinate Court and has convicted the accused and sentenced him to death (Parliament may by law expand the situation, where certificate is not required, to imprisonment for life or for 10 years).
 - c) Certifies that the case is a fit one for appeal to the Supreme Court
4. Parliament is authorized to confer on the Supreme Court any further powers to entertain and hear appeals from any judgement, final order or sentence in a criminal proceeding of a High Court. (**Article 134(2)**)
5. **Appeal by Special Leave:** The Supreme Court can also grant special leave to appeal from a judgement or order of any non-military Indian court or tribunal- **Article 136(1)**. Such leave for appeal will be discretionary power of Supreme Court and may be related to any matter. The scope of this provision is very wide and it vests the Supreme Court with plenary jurisdiction to hear appeals. On the exercise of this power, SC itself held that "being an exceptional and overriding power, it has to be exercised sparingly and with caution and only in special extraordinary situations".

6.4. Advisory jurisdiction

The Supreme Court has special advisory jurisdiction in matters, which may specifically be referred to it by the President of India – (**Article 143**). These matters fall in two categories

- a. On any question of law or fact of public importance, which has arisen or which is likely to arise.
- b. On any dispute arising out of any pre-Constitution treaty, agreement, covenant, engagement, sanad or other similar instruments.

In the first case, the Supreme Court may advice or may refuse to tender its advice, while in the second case the Supreme Court must tender its opinion to the president. However, in both the cases opinion of the Supreme Court is not binding upon the President. He may or may not follow the opinion of Supreme Court.

There are provisions for reference or appeal to this Court under article **317(1)** (for removal of a member of Public Service Commission) of the Constitution and several other Acts of Parliament as well.

Student Notes:

6.5. Supreme Court as a court of record (Article 129)

It has two powers as a Court of Record:

- a) The judgments, proceedings and acts of the Supreme Court are recorded as memory and testimony. These records are recognized as legal precedents and references. These records can be admitted as evidences and cannot be questioned when produced before any court.
- b) It has power to punish for contempt of court, either with simple imprisonment for a term upto six months or with fine up to 2000 or with both. It can punish for contempt not only of itself but also of high courts, subordinate courts and tribunals in the entire country. There can be civil or criminal contempt. Civil contempt means willful disobedience to any judgment, order, writ or other process of court or willful breach of undertaking given to the court. Criminal contempt means the publication of any matter or doing any act, which scandalizes or lowers the authority of a court; prejudices or interferes with due course of judicial proceeding; obstructs or interferes the administration of justice in any manner.

6.6. Review of judgements or orders (Revisory jurisdiction)

The Supreme Court has power to review any judgment pronounced or order made by it. (**Article 137**). While this article doesn't limit the grounds for review of the judgment however, grounds for exercising this power can be restricted by Parliamentary legislation or Rules made by the Supreme Court itself under **Article 145**.

The petition filed to review its judgement is called '**Review Petition**' while second review petition is called '**Curative Petition**'. It is filed when a party thinks that justice was not done to it or the Court has failed to take certain facts into consideration while deciding the case. E.g. the landmark case of **Rupa Ashok Hurra vs Ashok Hurra 2002** and the recent example of Delhi Gang Rape Case were taken up under this jurisdiction.

6.7. Power of Judicial review

The Supreme Court can declare legislative enactments of the Centre and states and any executive orders as null and void if they violate the Constitution (ultra-vires in nature). Judicial review serves the purpose of upholding supremacy of constitution, maintaining federal equilibrium, and to protect the fundamental rights of citizens. The Supreme Court used this power (**Judicial activism**) in various cases like *Golaknath case (1967)*, *The Bank Nationalization case (1970)*, *The Kesavananda Bharati case (1973)*, *the Minerva Mills case(1980)*, etc.

The constitutional validity of a legislative enactment or an executive order can be challenged in the Supreme Court on the following three grounds:

- i. It infringes the fundamental rights (Part III);
- ii. It is outside the competence of the authority, which has framed it; and
- iii. It is repugnant to the constitutional provision.

Interestingly, though the phrase 'Judicial Review' has nowhere been used in the Constitution, the provisions of several articles explicitly confers the power of judicial review on the Supreme Court.

To understand the process and basis of judicial review we need to know the details of the two doctrines, namely 'Procedure established by Law' and 'Due process of Law', which are discussed earlier.

Some other important doctrines, which are used in case of judicial review are:

Doctrine of Severability

Article 13(1) and (2) use the words to the extent of inconsistency or contravention, while stating that a law violating a fundamental right shall be void. The words 'to the extent' restrict the effect of inconsistency or contravention. These words have made it clear that only that part of law would become void which is repugnant, subject to the doctrine of **Severability**. The doctrine of **Severability** is that if the offending provision of an Act, which is contrary to a fundamental right or is unconstitutional, is severable from rest of the act, only the offending provision would be declared null and void and not the whole act.

Doctrine of Progressive Interpretation

This means that the Constitution cannot be interpreted in the **same way as an ordinary statute**. Rather, it must be read within the context of society to ensure that it adapts and reflects changes. If constitutional interpretation adheres to the framer's intent and remains rooted in the past, the Constitution would not be reflective of the society and eventually fall into disuse. The Supreme Court follows the doctrine of progressive interpretation and that is quite evident in the case of Art. 21; interpretation of Article 21, the Right to Life, has been changing consistently according to the society

Student Notes:

6.8. Other Powers of Supreme Court

- **Highest Court of Law-** It is the ultimate interpreter of the Constitution. It can give final version to the spirit and content of the provisions of the Constitution and the verbiage used in the Constitution. Its law is binding on all courts in India. Its decree or order is enforceable throughout the country. All authorities (civil and judicial) in the country should act in aid of the Supreme Court. E.g. The SC convicted a high court Judge, **Justice CS Karnan of Calcutta High Court**. The judge had earlier sentenced Chief Justice of India and six other judges of the Supreme Court to five years in jail under the SC/ST act.
- **Control over subordinate courts-** It is authorised to withdraw the cases pending before the high courts and dispose them by itself. It can also transfer a case or appeal pending before one high court to another high court. It has power of judicial superintendence and control over all the courts and tribunals functioning in the entire territory of the country.
- **Self-correcting agency-** It has power to review its own judgement or order. Thus, it is not bound by its previous decision and can depart from it in the interest of justice or community welfare. For example, in the Kesavananda Bharati case (1973), the Supreme Court departed from its previous judgement in the Golak Nath case (1967).
- **Enquiry of Conduct-** It enquires into the conduct and behaviour of the chairman and members of the Union Public Service Commission on a reference made by the president. If it finds them guilty of misbehaviour, it can recommend to the president for their removal. The advice tendered by the Supreme Court in this regard is binding on the President.
- **Contempt of Court-** It can issue notice and punish anyone including Judges of the High Court for its contempt or contempt of any subordinate courts.
- **Complete Justice-** It may pass such decree or make such order as is necessary for doing **complete justice** in any cause or matter pending before it.

The Supreme Court's jurisdiction and powers with respect to matters in the Union list can be enlarged by the Parliament. Further, its jurisdiction and powers with respect to other matters can be enlarged by a special agreement of the Centre and the states.

7. Supreme Court Advocates

Every advocate is not allowed to practice law in the Supreme court. Only the following three categories of advocates are entitled to do so-

7.1. Senior Advocates

The Supreme Court of India or any High Court can designate any Advocate, with his consent, as Senior Advocate if in its opinion by virtue of his ability, standing at the Bar or special knowledge or experience in law the said Advocate is deserving of such distinction.

- A Senior Advocate is not entitled to appear without an Advocate-on-Record in the Supreme Court or without a junior in any other court or tribunal in India.
- He is also not entitled to accept instructions to draw pleadings or affidavits, advise on evidence or do any drafting work of an analogous kind in any court or tribunal in India or undertake conveyancing work of any kind whatsoever but this prohibition shall not extend to settling any such matter as aforesaid in consultation with a junior.

7.2. Advocates-on-Record

Only these advocates are entitled to file any matter or document before the Supreme Court. They can also file an appearance or act for a party in the Supreme Court.

7.3. Other Advocates

These are advocates whose names are entered on the roll of any State Bar Council maintained under the Advocates Act, 1961 and they can appear and argue any matter on behalf of a party in the Supreme Court but they are not entitled to file any document or matter before the Court.

8. Issues faced in the India Judicial System

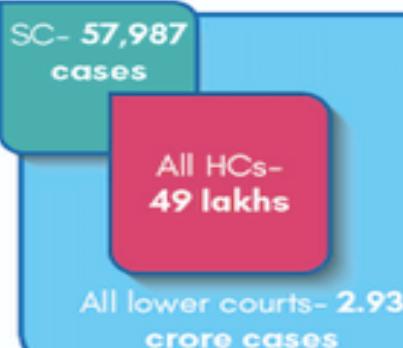
8.1. Judicial Pendency and Delay

Background

Recently the Delhi High Court has released the report on its pilot project titled "Zero Pendency Courts" which has highlighted that pendency of cases in the courts is the biggest challenge that Indian Judiciary is facing today.

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THE STATE OF PENDENCY OF CASES



At all three levels, courts are unable to keep up with new cases, and they dispose of fewer cases than are filed



- Between 2006 and 2018 (up to April), there has been an 8.6% rise in the pendency of cases across all courts.
- Pendency before Supreme Court increased by 36%, High Courts by 17%, and subordinate courts by 7%.
- The disposal rate has stayed between 55% to 59% in the Supreme Court, at 28% in the High Courts, and at 40% in the subordinate courts.
- Five states which account for the highest pendency are Uttar Pradesh (61.58 lakh), Maharashtra (33.22 lakh), West Bengal (17.59 lakh), Bihar (16.58 lakh) and Gujarat (16.45 lakh).
- A Law Commission report in 2009 had quoted that it would require 464 years to clear the arrears with the present strength of judges.

Source- As per the National Judicial Data Grid (NJDG), 2018

Reasons for Judicial Pendency

- **Shortage of judges** - India has only 17 judges per million population and nearly 5000 posts in subordinate courts are vacant. In contrast, US has 151 and China has 170 judges for a million population.
 - The Law Commission in 1987 had proposed 50 judges per million population.

- Around 5,580 or 25% of posts are lying empty in the sub-ordinate courts..
- **Impasses over appointments of judges:** Memorandum of Procedures for appointment of judges remains work in progress while vacancies in various High Courts have reached nearly 50% of their sanctioned strength.
- **Huge workload:** Judges in high courts hear between 20 and 150 cases every day, or an average of 70 hearings daily. The average time that the judges have for each hearing could be as little as 2 minutes.
- **Government the biggest litigant:** 46% of all litigation across courts were cases or appeals filed by state or central governments.
- **Increasing admission of SLP-** The **Special Leave Petition** cases in the Supreme Court, currently comprises to 40% of the court's pendency. Which eventually leads to reduced time for the cases related to constitutional issues.
- **Frequent adjournments-** The laid down procedure of allowing a maximum of three adjournments per case is not followed in over 50 per cent of the matters being heard by courts, leading to rising pendency of cases.
- **Judges Vacation-** SC works on average for 188 days a year, while apex court rules specify minimum of 225 days of work. Recently, at least 15 judges of the Supreme Court decided that they will be sitting in the forthcoming summer vacation to deal with three cases of Constitutional importance.
- **Low budgetary allocation leading to poor infrastructure-** India spends only about 0.09% of its GDP to maintain the judicial infrastructure. Infrastructure status of lower courts of the country is miserably grim due to which they fail to deliver quality judgements.
 - A 2016 report published by the Supreme Court showed that existing infrastructure could accommodate only 15,540 judicial officers against the all-India sanctioned strength of 20,558.
- **Lack of court management systems-** Courts have created dedicated posts for court managers to help improve court operations, optimize case movement and judicial time. However only few courts have filled up such posts so far.
- **Not utilizing the court managers potential:** Courts have created dedicated posts for court managers to help improve court operations, optimize case movement and judicial time. But more often their duties are restricted to organizing court events and running errands.
- **Inefficient investigation-** Police lacks training for scientific collection of evidences and also police and prison official often fail to fulfil their duty leading to long delays in trial.
- **Increasing legal literacy-** With people becoming more aware of their rights and the obligations of the State towards them, they approach the courts more frequently in case of any violation.

Impacts of Judicial Pendency

- **Denial of 'timely justice' amounts to denial of 'justice' itself-** Timely disposal of cases is essential to maintain rule of law and provide access to justice. Speedy trial is a part of right to life and liberty guaranteed under Article 21 of the Constitution.
- **Erodes social infrastructure-** a weak judiciary has a negative effect on social development, which leads to lower per capita income; higher poverty rates; poorer public infrastructure; and, higher crime rates.
- **Overcrowding of the prisons,** already infrastructure deficient, in some cases beyond 150% of the capacity, results in "violation of human rights".
- **Affects the economy of the country** as it was estimated that judicial delays cost India around 1.5% of its Gross Domestic Product annually.
 - As per the Economic Survey 2017-18 pendency hampers dispute resolution, contract enforcement, discourage investments, stall projects, hamper tax collection and escalate legal costs which leads to Increasing cost of doing business.

- **Violation of Fundamental Right:** Supreme Court has said that Article 21 of the Constitution entitles prisoners to a fair and speedy trial as part of their fundamental right to life and liberty.
- **Quality of judgement suffers:** It is not uncommon to see over 100 matters listed before a judge in a day leading to very less time on analyzing every facts of the case.

Steps taken

- **Legal Information Management & Briefing System (LIMBS)-** It is a web-based portal developed by Ministry of Law & Justice for monitoring and handling of various court cases of Government Departments and Ministries.
- **Time bound hearing-** The Supreme Court issued guidelines for fixed time-bound hearing and disposing of criminal cases.

Measures which can be taken

- **Improving infrastructure for quality justice-** The Parliamentary Standing Committee which presented its report on Infrastructure Development and Strengthening of Subordinate Courts, suggested:
 - States should provide suitable land for construction of court buildings etc. It should undertake vertical construction in light of shortage of land.
 - Timeline set out for computerisation of all the courts, as a necessary step towards setting up of e-courts.
- **Addressing the Issue of Vacancies-** Ensure the appointments of the judges be done in an efficient way by arriving at an optimal judge strength to handle the cases pending in the system. The 120th Law Commission of India report for the first time, suggested a judge strength fixation formula.
 - Supreme Court and High Courts should appoint efficient and experienced judges as Ad-hoc judges in accordance with the Constitution.
 - All India Judicial Service, which would benefit the subordinate judiciary by increasing quality of judges and help reduce the pendency.
- **Annual targets and action plans** must be fixed for the judicial officers to dispose of old cases where accused is in custody for over two years.
- **Setting standards of judicial recruitment examinations** to improve the quality of district judges.
- Implement the **concept of evening courts** where the services of the retired judges may be taken along with the law graduates to train the young incumbents as well as reduce the pendency.
- **230th Law Commission in its report “reform in Judiciary”** in 2009 recommended
 - There must be full utilization of the court working hours and Grant of adjournment must be guided strictly by the provisions of Order 17 of the Civil Procedure Code.
 - Cases of **similar nature should be clubbed** with the help of technology and used to dispose other such cases on a priority basis;
 - Judges must deliver judgments within a reasonable time both in civil and criminal matters.
 - Vacations in the higher judiciary must be curtailed by at least 10 to 15 days and the court working hours should be extended by at least half-an hour
 - Lawyers must curtail prolix and repetitive arguments and length of the oral argument in any case should not exceed one hour and thirty minutes, unless the case involves complicated questions of law or interpretation of Constitution.
 - Judgments must be clear and decisive and free from ambiguity, and should not generate further litigation.
- **Strict regulation of adjournments** and imposition of exemplary costs for seeking it on flimsy grounds especially at the trial stage and not permitting dilution of time frames specified in Civil Procedure Code.

- **Better Court Management System & Reliable Data Collection:** For this categorization of cases on the basis of urgency and priority along with bunching of cases should be done.
- **Use of Information technology (IT) solutions-** The use of technology for tracking and monitoring cases and in providing relevant information to make justice litigant friendly. A greater impetus should be given to
 - Process reengineering- Involves redesigning of core business processes to achieve dramatic improvements in productivity and quality by incorporating the use of technology in court rules. It will include:
 - Electronic filing of cases: e-Courts are a welcome step in this direction, as they give case status and case history of all the pending cases across High courts and Subordinate courts bringing ease of access to information.
 - Revamping of National Judicial Data Grid by introducing a new type of search known as elastic search, which is closer to the artificial intelligence.
- **Alternate dispute resolution (ADR)-**
 - As stated in the Conference on National Initiative to Reduce Pendency and Delay in Judicial System- Legal Services Authorities should undertake pre-litigation mediation so that the inflow of cases into courts can be regulated.
 - The Lok Adalat should be organized regularly for settling civil and family matters.
 - Gram Nyayalayas, as an effective way to manage small claim disputes from rural areas which will help in decreasing the workload of the judicial institution.
 - Village Legal Care & Support Centre can also be established by the High Courts to work at grass root level to make the State litigation friendly.
- **Police Reforms:** The police administration need to be provided with more resources - financial and human both for its effective functioning and improvement of investigation system.

Way Forward

Economic Survey 2017-18 called for **coordinated action between government and judiciary** to reduce pendency of commercial litigation for improving ease of doing business (EODB) and boost economic activities.

The fundamental requirement of a good judicial administration is accessibility, affordability and speedy justice, which will not be realized until and unless the justice delivery system is made within the reach of the individual in a time bound manner and within a reasonable cost. Therefore, continuous formative assessment is the key to strengthen and reinforce the justice delivery system in India.

8.2. Demand for Larger Benches

Setting up of 9-judge bench to hear case of right to privacy has once again renewed the debate on setting up of larger constitutional benches to deal with important cases.

Rationale behind demand for larger benches:

- **Article 145(3) of constitution:** states that any “substantial question of law” relating to the interpretation of the Constitution must be heard by benches of at least five judges.
- More judges mean that there will be **more points of view**, greater reflection and more thorough analysis in vital cases. It will also add to **legitimacy**, thus, minimizing coming up of same issue frequently. For example, the issue of privacy itself has been debated in eight or more instances.
- It is more **difficult to overturn** a five-judge bench than a two- or three-judge bench, meaning the public can have more confidence in the stability of the law.
- Stability would also set the **doctrine of precedent** because as of now both High Courts and lower courts are left confused as to which of the various pronouncements they are meant to follow.

8.3. Judicial Transparency

Student Notes:

8.3.1. Installation of CCTV cameras

Supreme Court has ordered installation of **CCTV cameras** in **courtrooms** and its **premises**, without audio recording, in at least in **two districts** of all states and union territories within three months. Such a move came after several rounds of deliberations happened between **Union Executive** and **Supreme Court India** to record court proceedings.

However, SC made it clear that footage of the CCTV cameras **will not be available** under **Right to Information Act** and anybody who want the video footage of court proceedings have to get permission of **concerned High Court**.

8.3.2. Live Streaming of Supreme Court Proceedings

Background

- Supreme Court (SC) approves live-streaming of court proceedings and directed the centre to frame rules for this.
- The SC agreed that live-streaming of court proceedings would serve as an instrument for greater accountability and formed part of the Code of Criminal Procedure, 1973.
- The SC held that the right to justice under **Article 21** of the Constitution would be meaningful only if the public gets access to the proceedings and to witness proceedings live.

Arguments in favour

- **Concept of open courts:** Indian legal system is built on the concept of open courts, which means that the proceedings are open to all members of the public.
- **To promote transparency:** Live-streaming has been allowed for both Lok Sabha and Rajya Sabha proceedings since 2004.
- **Lack of physical Infrastructure:** On any given day, only a handful of people can be physically present and are allowed in the courtroom.
- **Digitization:** While the courts are opting for digitisation, with online records of all cases, filing FIRs online etc. there is a need to make live streaming of the proceedings also.
- **Public Interest Issues:** Matters which have a bearing on important public interest issues such as entry of women to the Sabarimala temple, or the scope of the right to the choice of one's food should be available for all to watch which helps to build the right perception.
- **The right to information**, access to justice and need to educate common people on how the judiciary functions are all strong reasons in favour of allowing live-streaming.

Arguments against

- **The unwanted public gaze** caused by live-streaming will tend to make judges subject to popular public opinion and accountable to the general public.
- The role of the judiciary cannot be equated with the roles of the legislature and the executive. The broadcasting of parliamentary proceedings may be good for ensuring accountability, this is not the case with the courts.
- The individuality of judges is more likely to become a subject of public debate through live streaming, creating problems of its own. The focus should be on the judgment delivered.
- There is a **greater likelihood of lawyers aspiring to publicise themselves** tend to address not only the judges but also the public watching them which will hamper their objectivity.
- Instead of live-streaming, audio and video recordings of court proceedings would **reform the administration of justice**. These can be used at the time of review or appeal of a case.

Way forward

- Only a specified category of cases or cases of constitutional and national importance being argued for final hearing before the Constitution Bench be live streamed as a pilot project.

- The discretion of the Court to grant or refuse to grant such permission should be, inter alia, guided by the following considerations:
 - Unanimous consent of the parties involved and the sensitivity of the subject matter.
 - Any other reason considered necessary or appropriate in the larger interest of administration of justice, including as to whether such broadcast will affect the dignity of the court itself or interfere with/prejudice the rights of the parties to a fair trial.
- Provide for transcribing facilities and archive the audio-visual record of the proceedings to litigants and other interested persons who are unable to witness the hearings on account of constraints of time, resources, or the ability to travel long distances.

Student Notes:

8.4. Judicial Accountability

Background

Recently, there was an allegation of sexual harassment against the Chief Justice of India (CJI) made by a former Supreme Court employee, which has yet again triggered a debate between judicial independence and judicial accountability.

Earlier, four senior judges of SC conducted a press conference over their differences with CJI, a first in the history of the country. Also, a sitting judge of Madras High Court Justice CS Karnan remained in controversy for his behaviour. This issue has thrown light on various issues & problems in Judiciary.

Indian Democracy runs on the principle of ‘rule of law’, which implies that ‘no one is above the law’. The Constitution of India gives the role of its guardian and protector to the Judiciary of India. The Judiciary is the watchdog, which preserves and enforces the fundamental and legal rights against any arbitrary violations. However, there have been many areas and instances, where the actions of judiciary itself have been questioned on being contrary to this and hence the issue of accountability of the judiciary has sprung up.

Meaning of Accountability

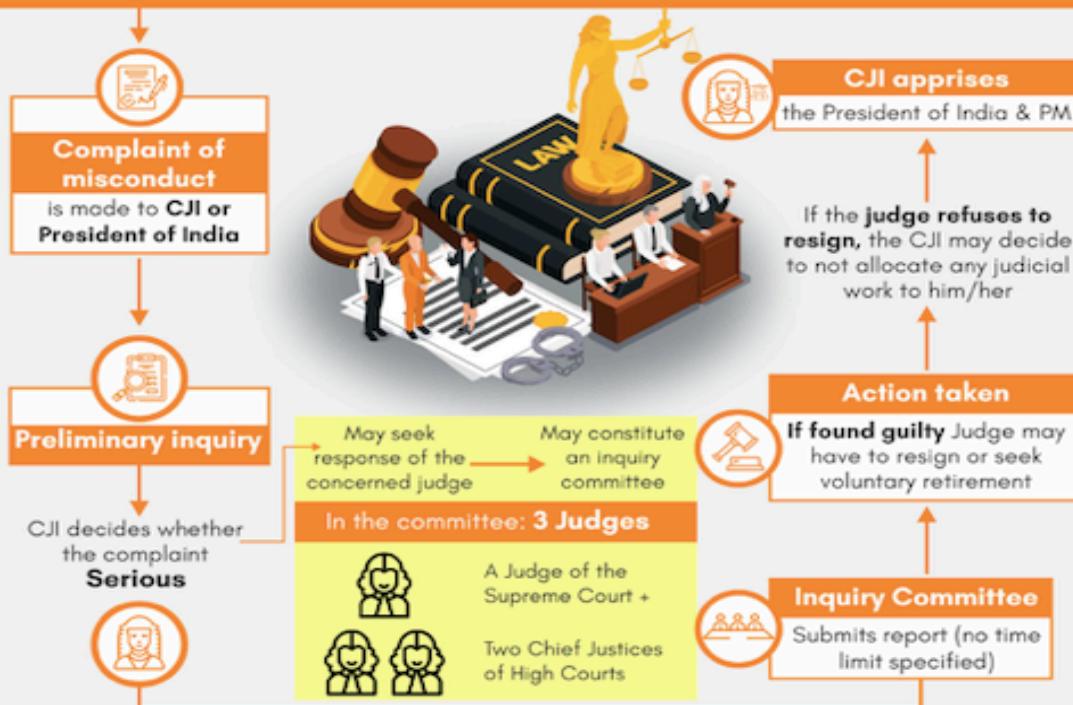
Accountability means any action taken by any authority requires **justifiable explanation for that particular action**. All public institutions and functionaries, whatever their role may be or wherever they stand in the hierarchy have to be accountable for their actions to the people of India.

The Constitution follows the **principle of separation of power** where checks and balances exist on every organ’s conduct. The two organs of the state of India- The Legislature and the Executive are accountable to the Judiciary and to the people at large. But, the question, which has come up, is, “**to whom is the judiciary accountable?**” and “**who is judging the judges?**”

WHEN JUDGES ARE JUDGED

Mechanisms to investigate charges against a Supreme Court judge

In-house Procedure of Supreme Court



Judicial Standards and Accountability Bill, 2010

- Judges will be required to declare their assets and liabilities, and also that of their spouse and children.
- It establishes the National Judicial Oversight Committee, the Complaints Scrutiny Panel and an investigation committee.
- Any person can make a complaint against a judge to the Oversight Committee on grounds of 'misbehaviour'.
- A **motion for removal of a judge** on grounds of misbehaviour can also be moved in Parliament. Such a motion will be referred for further inquiry to the Oversight Committee.
- Complaints and inquiries against judges will be confidential and frivolous complaints will be penalised.
- The Oversight Committee may issue advisories or warnings to judges, and also recommend their removal to the President.

Areas where Judicial Accountability has been found lacking

- **Appointment and Removal of Judges.** – The collegium system in India presents a unique system wherein the democratically elected executive and Parliament at large has no say in appointing judges.
 - Impeachment of judges is a long-drawn-out and difficult process along with its political overtones.
- **Conduct of Judges**- where judges have been alleged to have indulged in corruption (Justice Ramaswami Case, Justice Soumitra Sen), misappropriation, sexual harassment, taking post retirement jobs among others.
- **Opacity in the operations of Judiciary**- The judiciary claims that any outside body having disciplinary powers over them who compromise their independence so they have set up an

"in-house mechanism" investigating corruption.

- **Information asymmetry with Judiciary-** Judiciary has virtually kept itself outside the purview of the Right of Information Act.
- **Contempt of Court-** Using the powers under the Contempt of Court Act, judiciary has been alleged to silence the rightful critics also.
- **Judicial Overreach-** Judiciary has been praised on its activism towards resolving citizen's grievances, however, in this process some of the decisions have encroached the line of overreach also.

Implications

- Erosion of **public trust in judges and judicial system** when there are issues of integrity and accountability of Judiciary.
- Impacts the **Independence of Judiciary**- when there is lack of accountability to match it.
- **Against the principles of Natural Justice**- e.g. when the Chief Justice decides the "Master of the Rolls" and himself/herself is a party in any case.
- **Mockery of democracy and rule of law** particularly because of continuance as judge for long after indisciplined behavior.
- It goes against the **freedom of expression**. Stopping media from publishing any statements by any judge, is unreasonable from the point of view of freedom of speech and expression.

Steps taken so far

- **Contempt of Court (Amendment) Bill, 2003** was introduced.
- **Judicial Standards and Accountability Bill, 2010** was introduced.
- Unanimous passing of the **National Judicial Appointments Commission Act** by the Parliament and state legislatures, which was struck down by the Judiciary.
- Draft **Memorandum of Procedure, 2016** is been discussed.

Measures which can be taken

- A more **formal and comprehensive Code of Conduct for Judges** should be put in place, which is enforceable by law.
- The **Contempt of Court Act** could be amended with following provisions-
 - Cases of contempt should not be tried by courts but by an independent commission of concerned district.
 - The Act should be amended to remove words, 'scandalizing the court or lowering the authority of the court' from the definition of criminal contempt.
 - However, there must be stringent punishment against its misuse on false and malicious allegations made against honest judges.
- A **two-level judicial discipline model** with first level as a disciplinary system that can reprimand, fine or suspend judges for misdemeanors along with providing them some limited measures of immunity; and, second level as a system of removal of judges for serious misconduct, including corruption must be established.
- **Increasing the transparency in public hearing in the courtrooms**- Last year, the Supreme Court approved the live-streaming of court proceedings of cases of constitutional importance. This provision could be extended to the other cases and High Courts also.
- **Independent judicial Lokpal** may be set up with power to take up complaints and initiate action against judges should be set up to ensure accountability of the judiciary. It should be independent from both the judiciary and the government.

Way Forward

- Bringing a **new Judicial Standards and Accountability bill** along the lines of Judicial Standards and Accountability Bill 2010 (which lapsed) to establish a set of legally enforceable standards to uphold the dignity of superior judiciary and establish a new architecture to process the public complaints leveled against the judges.

- **Authority outside judiciary to take disciplinary actions:** This is one solution being discussed. However, it has several shortcomings:
 - potential threat to judicial independence
 - may inject fear in judges while taking any decision that it may annoy powers as seen during the time of emergency
 - design of constitution has been to ensure absolute judicial independence, with no scope for Parliament or the executive interference in judicial conduct or decisions.
- **Appointment:** the collegium should take adequate safeguards so that only judges of high caliber and impeccable integrity are appointed to the higher courts. This requires infusion of **greater transparency** in the selection of judges.
- **Greater Internal regulation:** disciplinary actions should be taken promptly at the very first instance of misconduct. For this, a **National Judicial Oversight Committee** should be created by the Parliament which shall develop its own procedures to scrutinize the complaints and investigation. The composition of such committee should not affect judicial independence.

Student Notes:

8.4.1. Court's reluctance to come under Right to Information (RTI)

Background

Numerous petitions seeking information from the court under RTI are asked to be applied under SC rules. Apart from this various courts have also framed their own rules under which various regulations. Further, although the courts were included in the definition of Public Authorities (section 2 (h)) most of the HCs did not even appoint Public Information Officers (PIOs) even months after this act came to force which denied people their right to information.

However, the **Supreme Court Rules undermined the RTI in four key areas**. Unlike the RTI Act, the Rules do not provide for:

- a time frame for furnishing information
- an appeal mechanism
- penalties for delays or wrongful refusal of information
- makes disclosures to citizens contingent upon “good cause shown”

In sum, the Rules allowed the judiciary to provide information at its unquestionable discretion, violating the text and spirit of the RTI. The RTI Act does not permit any appeals to be entertained by any court under Section 23. Section 23 of RTI Act forbids courts from entertaining “any suit, application or other proceeding in respect of any order made under this Act”. Nevertheless, the contradiction arises from the fact that the Indian Constitution gives powers to the Supreme Court and the high courts that override any statute.

Further, SC has said that the decision of the Registrar General of the Court will be final and not subject to any independent appeal to Central Information Commission. These issues have brought the credibility of judges further under question.

Arguments in favour of bringing judiciary under RTI

- The lack of stringent in-house accountability and transparency mechanisms has allowed the judiciary to keep itself free from regular public scrutiny. The Right to Information Act is a step forward towards opening a closed and secretive judicial system.
- It will increase the amount of transparency in judiciary in case of appointment of judges as it may decrease nepotism and despotism as criticized to be present in judiciary.
- Courts have always been questioned for pending cases. RTI can place yardstick among judiciary for timely disposal of justice.
- It will increase accountability of judiciary as judges can be held accountable for their decisions.
- It will increase the faith of people if they could also know about judicial working.

- In the famous Raj Narain Vs Indira Gandhi case, the SC laid down the foundation of Right to Information in India stating that the people of the country have the right to know about every public act. Thus, The Supreme Court should begin practicing what it preaches.

Student Notes:

Argument against bringing judiciary under RTI

- Collegium discussions can be freewheeling and include the examination of fairly invasive government intelligence reports and the expression of judges' personal opinions.
- For judges, their credibility and reputation is hugely important, and many feel that the slightest potential slight on this could be debilitating and prevent judges from doing their job.
- It may compromise secrecy & security involved in certain cases. This may prove detrimental for our country.
- It may compromise independence of judiciary as specified by constitution and may lead to politicization of judiciary.
- It may create extra burden on judiciary and delays in judicial appointments & transfers as an over conscious approach may be adopted to avoid conflicts.

Way Forward

In a democracy all institutions, including the judiciary, must be transparent and accountable. Transparency in judicial functioning and accountability for judicial actions and inactions inspire public faith and confidence in the institution.

The higher judiciary can be brought under RTI Act with following limitations:

- Sub-judice case where disclosed information can influence judge's verdict.
- Confidential information to maintain unity and integrity of nation.
- If the information does not deal with issue of a public importance and doesn't affect the person in any way.

The Chief Justice of India, as the high priest of the legal system, must uphold the RTI Act and realise that no institution can be considered credible and inspire public confidence unless it is open and transparent. The judiciary can only occupy the high moral ground it often claims, by setting an example, and leading from the frontlines of transparency, not by hiding behind the veil of secrecy.

8.4.2. Need for larger benches

Background

In the early years, all 8 judges including chief justice sat together to hear the cases. With the increase in workload, Parliament increased the number of judges gradually from 8 in 1950 to the present 34 and the constitution of benches also changed and they sat in smaller benches of two and three to dispose of backlogs (currently about 60,000 cases)

In the 1960s, Supreme Court heard about 100 five-judge or larger benches a year. By the first decade of the 2000s, the court averaged only about 10 constitution benches a year. Thus, various important cases are being heard by smaller benches such as RTE act case was decided by three judges, Naz Foundation case by just two judges etc. However, focusing more judges on constitution benches also comes with a concern that it could come at the cost of less access to the court for other matters.

Reason for demands for larger benches:

- Article 145(3) of constitution:** states that any "substantial question of law" relating to the interpretation of the Constitution must be heard by benches of at least five judges. More judges mean that there will be more points of view, greater reflection and more thorough analysis in vital cases. It will also add to legitimacy thus, minimizing coming up of same

issue frequently. For example - The issue of privacy itself has been debated in eight or more instances

- It is more **difficult to overturn a five-judge bench** than a two- or three-judge bench, meaning the public can have more confidence in the stability of the law
- Stability would also set the **doctrine of precedent** because as of now both High Courts and lower courts are left confused as to which of the various pronouncements they are meant to follow.

Way forward

There needs to be clarity in determining when a case involves a “substantial question” of constitutional law and so requires a larger bench. Also, explanation needs to be given to justify why the matter was being heard by less than five judges.

8.4.3. Frequent use of Article 142

Background

There are criticisms on the frequent usage of Article 142 by the apex court in various cases such as highway liquor ban, ordering joint trial of the two Babri Masjid demolition cases, etc.

Article 142 states that “the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing **complete justice** in any cause or matter pending before it...”

Causes of Concern

- **Unlimited power:** Article 142 is not a source of unlimited power and there should be self-restraint in using it that the orders under 142 does not amount to **judicial overreach**.
- **Unconstitutional:** It is against the **doctrine of ‘separation of powers’**, which is part of the basic structure of the Constitution.
- **Uncertainty about discretion as** in the apex court, 31 judges sit in thirteen divisions of two or three to decide the cases and each bench is independent of the other.

Way out

- Although apex court has used Article 142 in good ways such as Union carbide case, cleansing of Taj Mahal, release of undertrials in jail etc., yet following restraints should be considered to bring complete justice to various deprived sections of society under Article 142 in general:
- Cases invoking Article 142 should be referred to a Constitution Bench of at least five judges to decrease uncertainty around article 142.
- In cases where the court invokes Article 142, the government must bring out a white paper to study the beneficial as well as the negative effects of the judgment after a period of six months or so from its date.
- Supreme Court should follow its much reiterated principle that recourse to Article 142 of the Constitution is inappropriate, wherever a statutory remedy is available.

8.5. Contempt of Court

Background

India's courts have routinely invoked its contempt powers to often punish expressions of dissent on purported grounds of such speech undermining or scandalizing the judiciary's authority.

- In a first, the Supreme Court started contempt proceedings against Justice C S Karnan, a sitting judge of the Calcutta High Court.
- Recently, the Supreme Court issued the suo motu contempt notice to civil rights lawyer Prashant Bhushan against him on his tweets against the CJI.

Meaning of Contempt of Court

- Contempt of court consists of words spoken or written which tend to bring the administration of Justice into contempt, to prejudice the fair trial of any cause or matter which is the subject of Civil or Criminal proceeding or in any way to obstruct the cause of Justice.
- Article 129 and Article 142 (2)** of the Constitution enables the Supreme Court to issue notice and punish any one including Judges of the High Court for its contempt or contempt of any subordinate courts.
 - The Judiciary was provided with this power under **Contempt of Court Act, 1971** which defines contempt powers of judiciary.

Rationale behind Contempt of Court

- To ensure that the **Judges do not come under any kind pressure** either from media criticisms or by general public opinion and discharge their duties without any kind of fear and favour or any external influence whatsoever.
- Prevent scandalisation or lowering the authority of any court.
- Prevent interference with the due course of any judicial proceedings.
- Strengthen court's image as legal authority and that no one is above the law.
- Ensure one could not defy court orders according to one's own free will.

Arguments against Contempt of Court

- Contempt of Court proceedings have the **effect of muzzling free speech** guaranteed under Article 19(1)(a) of the Indian Constitution.
- Article 19(2) includes 'contempt of court' as a reasonable restriction on free speech but its justification in its present form is not tenable in a democracy.
- Pandit Thakur Das Bhargava** in the Constituent Assembly said that powers to reprimand contempt concerned only actions such as the disobedience of an order or direction of a court, which were already punishable infractions.
- Speech in criticism of the courts, ought not to be considered as contumacious, for it would simply open up the possibility of gross judicial abuse of such powers; which has now been proved true in many instances.
- Interestingly, in England, whose laws of contempt we have adopted, there hasn't been a single conviction for scandalizing the court in more than eight decades.

Law Commission's Stand

- According to 274th Law Commission Report no changes are required to the 1971 statute.
- There are several safeguards built into the Act to protect against its misuse. For instance, the Act contains provisions which lays down cases that do not amount to contempt and cases where contempt is not punishable. These provisions suggest that the courts will not prosecute all cases of contempt.
- The Commission further noted that the Act had withstood judicial scrutiny, and therefore, there was no reason to amend it. In fact, the statute, by laying down procedure, restricts the vast authority of the courts in wielding contempt powers.
- Amending the definition of contempt will lead to ambiguity. This is because the superior courts will continue to exercise contempt powers under the Constitution. If there is no definition for criminal contempt in the Act, superior courts may give multiple definitions and interpretations to what constitutes contempt.
- Even in the absence of the legislation, the Courts have the power to punish for their contempt under the constitution as the Act 1971 is not the source of 'power to punish for contempt' but a procedural statute that guides the enforcement and regulation of such power.

Student Notes:

The Contempt powers should be used in such a way as not to violate Right to Freedom of Speech while also ensuring independence of the Judges. The judiciary must be highly liberal while respecting freedom of speech and allow fair criticism as permitted under 1971 Act.

In addition to that, the **Contempt of Court Act, 1971** must be suitably amended or repealed on the lines of United Kingdom and United States where such a law does not exist. But amendment in 1971 act in 2006 also did not lead to restrain by judiciary. Thus, the right balance between freedom of speech and contempt powers of court can be achieved by the judiciary itself.

8.6. Master of the Roster

Background

In last few years, there has been a heated debate on the topic of 'Master of Roaster'. The recent debate all started with when a public interest lawyer filed a petition in the Supreme Court in the Judges bribery case and asking the Chief Justice of India to recuse in the matter, to which he refused.

Later on, four senior most judges of the Supreme Court came out to do a press conference and blamed the then Chief Justice of India for selectively allotting cases to preferred benches. In response to that, the CJI published a new subject wise roster for allocation of cases. However, this allocation, did little to pacify the judges as the CJI allocated most important public litigations matters to himself.

Meaning of Master of Roster

'Roster' as 'a list of people's names and the jobs they have to do at a particular time.' **Master of Roster** is a judge appointed by the SC to list out the allocation of cases to different judges, for preventing two different benches from hearing the same kind of case. It allows effective case management, by allocating similar cases to judges with more experience.

In the Indian context, it usually refers to the administrative power of the **Chief Justice of India** and the **Chief Justices of the High Courts** to allocate the matters that their brother and sister judges shall be hearing, respectively.

WORKING OF SUPREME COURT OF INDIA

HOW SC WORKS

31 JUDGES

12 Courts Usually

Numbered 1 to 12
Court No.1 is the CJ,
Court No.2 is Justice Chelameswar as the second seniormost, and so forth..

CJI is master of roster; decides on administrative side the bench that will hear a particular 'sensitive case'

- ▶ Court number indicates seniority of SC judge who presides over the bench in that court
- ▶ Normally, **Sensitive cases** are assigned to benches headed by **seniormost** judges
- ▶ For last five to six years, the **court No.1 or Chief Justice's court** has been hearing most of the important & sensitive cases
- ▶ Only a few important cases get assigned to other benches
- ▶ Otherwise, there is a **computer devised coding system that lists cases**, depending on subject matter, to a particular bench

There has been several judgments of the High Courts and the Supreme Court interpreting the correct positions of 'Master of Roster'. Recently also after this debate, it was formalised that the CJI is *sui generis* (unique) and hence the master of roster.

Concerns raised-

- The concentration of **immense powers on a single person** also against the principles of democracy.
- There are allegations of corruption in the courts. By giving power of deciding the case, it violates the basic principle of law i.e. that no one should be **a judge in his own case**.
- A just and fair roster must be one that is divided subject-wise among judges according to their experience and expertise in those subjects.
- **Politically sensitive matters** should be before the **five senior judges** of the Supreme Court.

Arguments against such concerns-

- According to another recent judgment also, **seniority in terms of appointment** has no bearing on which cases a judge should hear. To suggest that one judge is more capable of deciding particular cases or that certain categories of cases should be assigned only to the senior-most among the judges of the Supreme Court has no foundation in principle or precedent. To hold otherwise would be to cast a reflection on the competence and ability of other judges to deal with cases assigned to them by the Chief Justice.
- The CJI is only "**the first among equals**" as a judge, but is **sui generis** (one of his kind) in other capacities.
 - Entrustment of such authority in the Chief Justice is necessary for safeguarding the Supreme Court as an "independent safeguard for the preservation of personal liberty".
- The CJI has made the roster system public and portfolios are now being published on the Supreme Court website.

The Chief Justice is entrusted with the function because such an entrustment is necessary for efficient transaction of administrative and judicial work of Supreme Court. The purpose behind this authority to Chief Justice is to ensure that Supreme Court is able to fulfill and discharge constitutional obligations, which govern and provide the rationale for its existence.

Judges need to trust each other. The CJI must also ensure that the allotments of cases to the benches are in an independent and an impartial manner. He should not only act as unbiased but also seem to do so to instill confidence in his colleagues. He should not brush aside any reasonable suggestions in this regard from his colleagues.

8.7. Judges and Post-Retirement Positions

Background

- Recently, the President nominated the former Chief Justice of India, Ranjan Gogoi to the Rajya Sabha.
- The President has used his powers under Article 80 (1)(a) to nominate 12 persons having special knowledge or practical experience in respect of such matters as the following: Literature, science, art and social service.
- Ranjan Gogoi was nominated to the Rajya Sabha within six months of his retirement as the 46th Chief Justice of India
- There has been a number of reactions and counter-reactions to it. A public interest litigation has also been filed in the Supreme Court against this move.

Arguments in favour

- No legal/ constitutional bar-** the Article 124(7) provides that a retired Supreme Court judge cannot “plead or act in any court or before any authority within the territory of India”.
 - This provision only restricts post-retirement appointments in Judiciary itself, but not in posts of president, governor, member of parliament, etc.
 - There is no cooling off period before a Judge following his/her retirement.
- Not a strict separation of power-** the Indian constitution does not provide for a strict separation of powers as available in the American constitution.
 - Further, the legislature and judiciary can work together for nation-building, if there are such exchange of personalities.
 - The presence of judges in Parliament will be an opportunity to project the views of the judiciary before the legislature and vice versa.
- Other instances of post-retirement appointments of judges-** in other domains and areas such as Justice P. Sathasivam was appointed the Governor of Kerala and Justice Hidayatullah became the Vice President of India.
- Has not joined any political party-** The given instance is of nomination of judge. There is a crucial difference between elected and nominated members.
 - Those who are elected to a house from a party are subject to whip of that party. They are bound to vote the way the party directs them, and in general, they can't criticise the party and the govt if the party is in power.
 - On the other hand, a nominated member is an independent member, not subject to any party whip.

Previous Instances of such appointments-

- Justice Ranganath Mishra- He was appointed to the Rajya Sabha six years after he demitted office as CJI.
- Justice Baharul Islam- He was a Rajya Sabha member and then became a High Court judge, then Supreme Court judge and finally became a Rajya Sabha member again.
- Justice Kawdoor Sadananda Hegde- He served as a member of the Rajya Sabha prior to his joining the Madras High Court. He was sworn into the Supreme Court in 1967.

- **Legal knowledge:** The valuable experience and insights that judges acquire during their period of service cannot be wasted after retirement.
 - **Adds value to the Rajya Sabha debates-** Eminent judges can contribute towards more nuanced law making in the country and strengthen Rajya Sabha as the conscience keeper of the Parliament.

Student Notes:

Arguments against

- **Separation of powers and judicial independence:** Justice should not only be done, but seen to be done. Here, accepting and offering post retirement jobs bridges the constitutional distance which executive and judiciary needs to have, creating the perception of bias. This hampers judicial independence when positions are taken within a short time of retirement or accepted before retirement.
- **Conflict of interest-** Positions at tribunals and constitutional bodies create a conflict as Government itself is a litigant and appointment authority at the same time. The first Law Commission, headed by M C Setalvad, had recommended that judges of the higher judiciary should not accept any government job after retirement.
- **Compromises the independence of judiciary-** The acceptance of post-retirement jobs leaves newly retired judges open to political criticism from the opposition, who use it to cast aspersions on the Court, the Judicial system, and the judgments and orders passed by these judges while in office.
 - It sends out the message that if a judge gives ruling in favour of the executive, he/she will be rewarded.
 - More than being a reward for the retired judge, the offer of a plum post-retirement job, sends a message to judges who are still working.
- **Integrity of the judges-** the judges are expected to conduct themselves in such a manner even after their retirement so as not to create an adverse impression about the independence of judiciary.
 - The judges are expected to work without fear or favour and remain above political divides or affiliation in their career.
- **Erode people's trust-** The judiciary thrives on perception and faith. Such actions can shake people's confidence and faith in the independence of judiciary.

Practices Worldwide

USA: No Supreme Court judge retires lifelong. Done to prevent conflict of interest

UK: Supreme Court judges retire at the age of 70. No law stopping judges from taking post-retirement jobs but no judge has taken such a post

What can be done to strike a balance?

- **Mandatory cooling off period-** for judges for taking up government assignments after retiring.
 - The cooling-off period will minimise the chances of judgments getting influenced by post-retirement allurements.
 - This cooling-off period can be of six years and no judge should be appointed before completing this period, as the government's tenure is of five years.
- **Increase age of retirement:** Unlike in many other countries, a judge of the higher judiciary in India retires at a comparatively young age and is capable of many more years of productive work.
- **Enact a law:** to set up a commission made up of a majority, if not exclusively, of retired judges to make appointments of competent retired judges to tribunals and judicial bodies. In the meantime, judges themselves can fill the legislative void by giving suitable directions.
 - **Extend the application of other statutes to judges-** such as Section 8 of the Lokpal and Lokayukta Act, 2013, which barred its chairman and members from re-employment or taking any assignments as diplomat and Governor and other posts, on ex-judges of the Supreme Court and high courts.

- **Envisioning a transparent process:** Former Chief Justice R M Lodha, had suggested that before a judge retires, the government should provide option of either being a pensioner or continue to draw existing salary. If they opt for pension, government jobs are out but if they opted for full salary, that name should be put in a panel. When a vacancy arises, these persons can be considered and the process becomes devoid of allegations of appeasement, favouritism etc.
- **Amending the constitution:** by incorporating a provision similar to Articles 148 (barring CAG from post retirement job) or 319 (similar provision for UPSC members).

Student Notes:

9. Recent Developments

9.1. Public Interest Litigation (PIL)

Recent Developments

- Recently, while hearing public interest litigation (PIL) challenging the allocation of 4G spectrum to Reliance Jio, Supreme Court (SC) voiced its concerns on the NGO becoming a “**proxy litigant**” and a front for settling corporate rivalry or personal vendetta.
- This observation by SC, once again brought into focus the debate on the proper role of the PIL in the legal system.

Positive Contributions of PIL

- Bringing courts closer to the disadvantaged sections of society such as prisoners, destitute, child or bonded labourers, women, and scheduled castes/tribes.
- PIL has become a **vehicle to bring social revolution through constitutional means**.
- It has also **helped in expanding the jurisprudence of fundamental (human) rights in India**.
- PIL also become an instrument to promote rule of law, demand fairness and transparency, fight corruption in administration, and enhance the overall accountability of the government agencies.
- PIL has enabled civil society to play an active role in spreading **social awareness** about human rights, in providing voice to the marginalized sections of society, and in allowing their participation in government decision making.
- Through PIL, judiciary also initiated legislative reforms and filled in legislative gaps in important areas. For example – **Vishaka guidelines** on sexual harassment at workplace.
- PIL has helped the Indian **judiciary to gain public confidence and establish legitimacy in the society**.

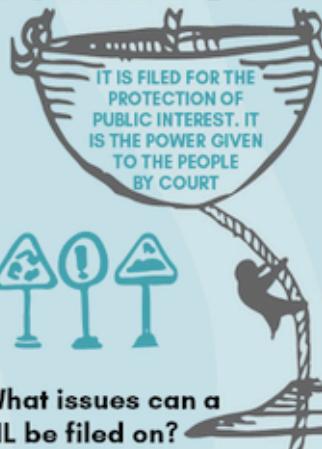


HOW TO FILE A PUBLIC INTEREST LITIGATION



Who can file a PIL?

Any member of the public- even a non-governmental organisation, an institution or an individual



Where can PILs be filed?

Any member of the public can approach the Supreme Court, a High Court or a Magistrate Court, and seek justice for people's welfare

What are a PIL's merits

Citizens of the country can find legal remedy to larger issues by spending very little in court fees. The litigants can achieve results pertaining to larger public issues, especially those concerning human rights and consumer welfare

What issues can a PIL be filed on?

A PIL can be filed in the courts for any matter of public interest, from environmental pollution to road safety and construction hazards

However, the person filing the petition must prove to the court that it is being filed in public interest, and not as frivolous litigation

Evolution of PIL in India

- Principles enshrined in Article 39A of the Constitution of India to protect and deliver prompt social justice with the help of law can be sought as the basis of the concept of PIL.
- Before 1980, only aggrieved party could approach the court for justice (principle of locus standi) but after the emergency era, the court reached out to the people, devising a means for any person of the public (or an NGO) to approach the court seeking legal remedy in case where the public interest is at stake. Justice P.N. Bhagwati and Justice V.R Krishna Iyer were among the first judges to admit PILs in court.

Present Status

- Spectrum of issues raised in PIL have expanded tremendously—from the protection of environment to corruption-free administration, right to education, sexual harassment at the workplace, relocation of industries, rule of law, good governance, and the general accountability of the Government.
- In recent years, anyone could file a PIL for almost anything. It seems that there is a further expansion of issues that could be raised as PIL, e.g. calling back the Indian cricket team from the Australia tour.
- This is contradictory to the main objective of the PIL, which is meant to provide the remedial jurisprudence for those who can't approach the court on account of poverty or some other disability.

- **An unanticipated increase in the workload of the superior courts:** PILs have interfered with the normal judicial functioning of the court leading to increase in the number of pending cases before Supreme Court and High Courts, resulting in the choking of the legal system.
- **Abuse of process:** PILs have been vastly misused where it has degenerated into private interest litigation. It has given rise to the filing of frivolous and vexatious petitions, filed before the court.
- **Friction and confrontation with fellow organs of the government:** A major criticism of PILs is that through this medium judiciary is encroaching the domain of Executive and Legislature. Over the years, the social action dimension of PIL has been diluted and eclipsed by another type of “public cause litigation” in courts. In this type of litigation, the court’s intervention is not sought for enforcing the rights of the disadvantaged or poor sections of the society, but simply for correcting the actions or omissions of the executive or public officials or departments of government or public bodies.

Steps taken to prevent misuse of PILs

- The SC has warned that the court shall have the power to impose exemplary compensation on the parties that misuse the PIL. Further, a party that brings a PIL in the court shall have to *prima facie* establish a case before the court, before the court takes up the case for further action.
- The court has also started establishing the Scrutiny Committees consisting of public-spirited lawyers, social workers etc. to scrutinize the PIL filed and submit the report to the court explaining the merit in the case if there is any to save the court’s precious time. In this regard, the court has also been taking help of Amicus Curiae (friend of the court). The Supreme Court also cautioned the high courts to be cautious while taking up a PIL that it should not interfere in the policy issues of executives.
- The Supreme Court has devised guidelines defining the process and the issues, which can be accepted as PIL.

Way Forward

- Striking a balance in allowing legitimate PIL cases and discouraging frivolous ones.
- One way to achieve this objective could be to confine PIL primarily to those cases where access to justice is undermined by some kind of disability.
- The other useful device could be to offer economic disincentives to those who are found to employ PIL for ulterior purposes.

9.2. Affordable Justice Delivery

Recently, the Supreme Court introduced ‘**Middle Income Group Scheme**’ to provide affordable legal services where fees would be charged as per the schedule attached to the scheme. The scheme will be administered through a society named ‘**Supreme Court Middle Income Group (MIG) Legal Aid Society**’ registered for this purpose. The Patron-in-Chief of the society is Chief Justice of India and the Attorney General is its ex-officio Vice President. Its **beneficiaries** will be litigants in the SC whose gross income is less than Rs. 60,000 per month or Rs. 7.5 lakh per annum.

Significance

- Right to **free legal aid or free legal service** is an essential fundamental right guaranteed by the Constitution and forms the basis of reasonable, fair and just liberty under Article 21 of the Constitution of India.
- **Article 39-A** says that the State shall “ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.”

9.3. Online Justice Delivery

Student Notes:

Background

The Supreme Court recently passed directions for all courts across the country to extensively use video-conferencing for judicial proceedings so that the congregation of lawyers and litigants can be avoided to maintain social distancing amid the coronavirus pandemic.

Supreme Court invoked its power under Article 142 of the Constitution to validate all proceedings through video-conferencing. Earlier, Kerala High Court also conducted court proceedings through video conferencing and also live streamed the proceedings.

How online delivery of judicial services help in tackling various issues in judicial system?

- **High pendency:** Between 2006 -2019, there has been an overall increase of 22% in the pendency of cases across all courts. Online judicial services can provide additional aid to clear this backlog and reduce the time and cost involved.
- **Enhanced efficiency of courts:** Standard system generated formats of routine judgments and orders, particularly in civil cases, can be used by courts for quick delivery of judgments.
 - Reduction of paperwork will relieve judges and other court staff from administrative duties and allow them to focus on judicial functions.
 - Real-time online data would facilitate better identification and classification of cases and also enable High Courts to exercise proper supervision and control over subordinate courts.
- **Tackling Infrastructural constraints:** Video and audio enabled hearings can save significant court costs in terms of building, staff, infrastructure, security, transportation costs for all parties to the court proceedings.
- **Availability of judicial data:** The Law Commission of India in its 245th Report noted that the lack of comprehensive and accurate data relating to cases from courts across the country poses a hurdle to efficient policymaking by the government. Digital databases created by online judicial services can address this need.
- **Improving transparency and accountability in the judicial system:** Allowing audio-video recordings of court proceedings can contribute to transparency of court processes by allowing a precise record of the proceedings and at the same time discourage improper conduct in courts and wastage of court time.
 - Information related to judicial statistics placed in the public domain can help the key stakeholders like advocates, litigants, researchers and the public at large to be better informed about the state of the judicial system
- **Promoting ease of doing business:** Online resolution of contractual disputes will boost the confidence of domestic and foreign businesses as they explore investments in India.

Challenges

- **Lack of investment in court and IT infrastructure:** State of the art e-courts require the deployment of new age technology like high speed internet connection, latest audio and video equipments, cloud computing, availability of sufficient bandwidth etc.
- **Lack of technical knowhow** among court officials and staff and absence of dedicated in-house technical support.
- **Low awareness amongst litigants and advocates:** As per a survey less than 40 per cent of cases were filed exclusively through a computerized system.
- **Digital divide in access to justice:** due to insufficient infrastructure, non-availability of electricity and internet connectivity and low digital literacy in rural areas.
- **Interdepartmental Challenges:** due to lack of coordination, communication and interoperability of software between various departments.
- **Cyber security threats:** Judicial data comprise of sensitive case information and litigant data, their electronic storing and transmission fuels security and privacy concerns.

- Procedural problems:** like admissibility and authenticity of the evidence received through the video and/or audio transmissions, the identity of the witness and/or individuals subject of the hearings, confidentiality of the hearings etc.

Student Notes:

Judicial Reforms Undertaken

Integrated Case Management Information System (ICMIS) <ul style="list-style-type: none"> It has been introduced in the apex court for digital filing. Its functions include the option of e-filing cases, checking listing dates, case status, online service of notice/summons, office reports and overall tracking of progress of a case filed with the apex court registry. This will streamline the filing process for both the advocates and the registry. It will ensure transparency, provide easy access to case information and help in reducing the time in filing pleadings which, in turn, would increase the pace of judicial process. 	e-Committee of Supreme Court <ul style="list-style-type: none"> It is a body constituted by the Government of India in the Supreme Court to assist the Chief Justice of India in formulating a National policy on computerization of Indian Judiciary and advice on technological communication and management related changes.
National Judicial Data Grid <ul style="list-style-type: none"> It is a web portal that provides data related to the number of cases pending in any court in the country. 	Re-engineering committees in High Courts <ul style="list-style-type: none"> These have been established as per the order of the eCommittee of the Supreme Court. The role of these committees is to undertake judicial process re-engineering by streamlining and improvising current court processes, eliminating redundant processes and designing new processes with respect to making court processes ICT enabled.
eCourts Mission Mode Project <ul style="list-style-type: none"> It is a Pan-India Project, monitored and funded by Department of Justice, Ministry of Law and Justice, Government of India for the District Courts across the country. The objective of the eCourts Project is to provide designated services to the citizens as well courts by ICT enablement of all district and subordinate courts in the country. The services being delivered to citizens include status of registration of cases, Case status, Case list, daily order sheets and final orders/judgments. e-Courts Services Mobile application and e-Courts National Portal have also been developed. 	Legal Information Management & Briefing System (LIMBS) <ul style="list-style-type: none"> It is a web based portal developed by Department of Legal Affairs, Ministry of Law & Justice for monitoring and handling of various court cases of Govt. Departments and Ministries.
Judicial Service Centre <ul style="list-style-type: none"> JSCs have been established at all computerised courts which serve as a single window for filing petitions and applications by litigants/ lawyers as also obtaining information on ongoing cases and copies of orders and judgments etc. 	Interoperable Criminal Justice System (ICJS) <ul style="list-style-type: none"> It is aimed at integrating the Crime and Criminals Tracking Network and Systems (CCTNS) project with the e-Courts and e-Prisons databases, as well as with other pillars of the criminal justice system such as forensics, prosecution and juvenile homes in a phased manner.

Way Forward

- Development of supporting infrastructure at every level such as facilitation centres with facilities for e-filing and video conferencing at the entrances of court complexes; integrated softwares etc.
- Making rules for use of electronic evidence: Procedural laws / rules may also need to be amended to incorporate the suggestions of having audio-video recording of court proceedings and maintaining standard system generated formats of routine judgments and orders.
- Design and impart regular training courses: for judges, court staff and paralegals for using online systems and maintenance of e-data (such as records of e-file minute entries, summons, warrants, bail orders, order etc). Courses should optimize the use of virtual teaching tools to maximize reach.
- Creating a user friendly e-courts mechanism and awareness generation: which is simple and easily accessible by the common public and provides information in multiple Indian languages.
- Clear rules on data privacy: These must include consequences of data breach, infringement of privacy etc. and an appropriate grievance redressal mechanism.

10. Articles Related to the Supreme Court

Article No.	Subject Matter
Article 124	Establishment and Constitution of Supreme Court
Article 124A	National Judicial Appointments Commission (Repealed)
Article 125	Salaries, etc., of Judges
Article 126	Appointment of acting Chief Justice
Article 127	Appointment of ad hoc Judges
Article 128	Attendance of retired Judges at sittings of the Supreme Court
Article 129	Supreme Court to be a court of record

Article 130	Seat of Supreme Court
Article 131	Original jurisdiction of the Supreme Court
Article 131A	Exclusive jurisdiction of the Supreme Court in regard to questions as to constitutional validity of Central Laws (Repealed)
Article 132	Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases
Article 133	Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters
Article 134	Appellate jurisdiction of Supreme Court in regard to criminal matters
Article 134A	Certificate for appeal to the Supreme Court
Article 135	Jurisdiction and powers of the Federal Court under existing law to be exercisable by the Supreme Court
Article 136	Special leave to appeal by the Supreme Court
Article 137	Review of judgments or orders by the Supreme Court
Article 138	Enlargement of the jurisdiction of the Supreme Court
Article 139	Conferment on the Supreme Court of powers to issue certain writs
Article 139A	Transfer of certain cases
Article 140	Ancillary powers of Supreme Court
Article 141	Law declared by Supreme Court to be binding on all courts
Article 142	Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.
Article 143	Power of President to consult Supreme Court
Article 144	Civil and judicial authorities to act in aid of the Supreme Court
Article 144A	Special provisions as to disposal of questions relating to constitutional validity of laws (Repealed)
Article 145	Rules of court, etc.
Article 146	Officers and servants and the expenses of the Supreme Court
Article 147	Interpretation

Student Notes:

11. Previous year UPSC Prelims Questions

2019

- 1.** Consider the following statements:

 1. The motion to impeach a Judge of the Supreme Court of India cannot be rejected by the Speaker of the Lok Sabha as per the Judges (Inquiry) Act, 1968.
 2. The Constitution of India defines and gives details of what constitutes ‘incapacity and proved misbehaviour’ of the Judges of the Supreme Court of India.
 3. The details of the process of impeachment of the Judges of the Supreme Court of India are given in the Judges (Inquiry) Act, 1968.
 4. If the motion for the impeachment of a Judge is taken up for voting, the law requires the motion to be backed by each House of the Parliament and supported by a majority of total membership of that House and by not less than two-thirds of total members of that House present and voting

Which of the statements given above is/are correct?

- (a) 1 and 2 (b) 3 only (c) 3 and 4 only (d) 1, 3 and 4

Ans (c)

2. With reference to the Constitution of prohibition or limitations or provisions contained in ordinary laws cannot act as prohibitions or limitations on the constitutional powers under Article 142. It could mean which one of the following?

 - (a) The decisions taken by the Election Commission of India while discharging its duties cannot be challenged in any court of law.
 - (b) The Supreme Court of India is not constrained in the exercise of its powers by laws made by the Parliament.**
 - (c) In the event of grave financial crisis in the country, the President of India can declare Financial Emergency without the counsel from the Cabinet.
 - (d) State Legislatures cannot make laws on certain matters without the concurrence of Union Legislature.

Student Notes:

Ans (d)

2017

- 1.** In India, Judicial Review implies

 - (a) the power of the Judiciary to pronounce upon the constitutionality of laws and executive orders.**
 - (b) the power of the Judiciary to question the wisdom of the laws enacted by the Legislatures.**
 - (c) the power of the Judiciary to review all the legislative enactments before they are assented to by the President.**
 - (d) the power of the Judiciary to review its own judgements given earlier in similar or different cases.**

2015

- 1.** Who/Which of the following is the Custodian of the Constitution of India?

 - (a) The President of India
 - (b) The Prime Minister of India
 - (c) The Lok Sabha Secretariat
 - (d) The Supreme Court of India**

2014

1. The power of the Supreme Court of India to decide disputes between the Centre and the States falls under its
(a) advisory jurisdiction
(b) appellate jurisdiction.
(c) original jurisdiction
(d) writ jurisdiction

2. The power to increase the number of judges in the Supreme Court of India is vested in
(a) the President of India
(b) the Parliament
(c) the Chief Justice of India
(d) The Law Commission

2012

- 1.** Which of the following are included in the original jurisdiction of the Supreme Court?

 1. A dispute between the Government of India and one or more States.
 2. A dispute regarding elections to either House of the Parliament or that of Legislature of a State.
 3. A dispute between the Government of India and a Union Territory.
 4. A dispute between two or more States.

Select the correct answer using the codes given below:

Ans (c)

2010

Student Notes:

Ans. (b)

2005

Ans. (b)

2001

4. The Supreme Court of India tenders advice to the President on a matter of law of fact

 - (a) On its own initiative
 - (b) Only if he seeks such advice
 - (c) Only if the matter relates to the Fundamental Rights of citizens
 - (d) Only if the issue poses a threat to the unity and integrity of the country

Ans. (b)

12. Previous year UPSC GS Mains Questions

1. Explain the scope of the Advisory jurisdiction of the Supreme Court of India. (150 words) (92/II/4b/20)
 2. What is the position of the Supreme Court under the Constitution of India? Discuss its role as a guardian of the Constitution. (About 250 words) (95/II/1b/40)
 3. What is the position of the Supreme Court under the Constitution of India? How far does it play its role as the guardian of the Constitution? (250 words) (02/I/7a/30)
 4. How can a judge of the Supreme Court be removed? (20 words) (04/I/9d/2)
 5. How will you define 'judicial review'. (82/II/8c(A)/3)
 6. The Supreme Court of India keeps a check on arbitrary power of the Parliament in amending the Constitution. Discuss critically.
 7. 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.
 8. What was held in the Coelho case? In this context, can you say that judicial review is of key importance amongst the basic features of the Constitution?
 9. Critically examine the Supreme Court's judgement on 'National Judicial Appointments Commission Act, 2014' with reference to appointment of judges of higher judiciary in India.

13. Previous Year Vision IAS GS Mains Test Series Questions

Student Notes:

1. *While judiciary has been seen as a harbinger of promoting transparency and accountability in governmental functions, it needs to promote the same regarding its own functioning. Comment w.r.t. the need for judicial reforms in India.*

Approach:

Answer should focus on the twin issues of judicial accountability and independence. Also the question asks for need for reforms and not the reforms themselves. Hence there is no need to go into various recommendations for judicial reforms. Rather the logic behind these recommendations should be highlighted.

Answer:

- Judiciary's image has received a serious setback in the past few years. Several judges have come under the ambit of all kinds of allegations like corruption, sexual misconduct and favoritism in the appointment of judges. Also the intellectual quality of many judicial pronouncements has been perceived to be mediocre. Cumulatively, this has led to two specific demands.
 - a) First, there is a need to reform the process of judicial appointments; and
 - b) Second, some mechanism needs to be devised to hold judges accountable. Judicial independence and accountability should go together.
- In India, it is only a collegium of judges that recommends to the President, names for elevation to the bench and there is no outside advice available for this purpose. Judicial pronouncements have made the recommendation binding. The current system of appointments is not open to public scrutiny and thus lacks accountability and transparency.
- A closely related aspect related to accountability of judges is the mechanism for removal of judges for deviant behaviour. Other than impeachment under Articles 124(4) and 217(1), there is no mechanism to proceed against any inappropriate behaviour or misdemeanour of judges. At the time of framing the Constitution, it was felt that judicial conventions and norms would constitute strong checks. However, the impeachment provisions have turned out to be impracticable as it is virtually impossible to initiate any impeachment proceedings, let alone successfully conclude them.
- Associated with the above important issues are the need for a cooling off period for judges before taking up government appointments and measures for tackling the problems of judicial backlog.
- The recent episodes regarding sexual misconduct, corruption and nepotism clearly indicate that the credibility of judiciary is now at stake. The NJAC appears to be a step in the right direction but what needs to be ensured is that it functions in a transparent and impartial manner. The entire process should ensure that while judiciary is accountable to the public at large, at the same time, it is free from any unwanted interference. This would need some delicate balancing.

2. *What is the importance of an independent judiciary in a democracy? Highlight the safeguards in our political-constitutional setup to ensure the independence of judiciary.*

Approach:

- Describe the meaning of independence of judiciary.
- Briefly state the need for the independence of the judiciary.

- Mention various provisions to ensure independence of judiciary.
- Conclude with the need to balance judicial independence with judicial accountability.

Student Notes:

Answer:

Democracy in India rests on the constitutional scheme of separation of powers between the three organs of the government, with adequate checks and balances to ensure that the rights of the citizens are duly protected and there is no misuse of power. A judiciary free from encroachments, pressures and interference is an integral part of this scheme.

The Indian judiciary, with the Supreme Court (SC) at the apex and High Courts (HCs) at the state level, has been assigned a very significant role in the Indian democratic system. The SC is a federal court, the highest court of appeal and the guardian of the Constitution. Along with the HCs, it is the guarantor of the fundamental rights of the citizens.

Independence of judiciary is ensured by following safeguards:

- **Mode of appointment** – Appointment of judges of the SC and the HC is done by the President on the recommendation of the collegium of the judiciary. This ensures that absolute discretion of the executive is curtailed and judicial appointments are not based on political considerations.
- **Security of tenure** – Judges can be removed only on the grounds mentioned in the constitution.
- **Conduct of Judges cannot be discussed** in any legislature except when impeachment motion is under consideration.
- **Fixed service conditions** – The salary, allowances, privileges etc. cannot be changed to their disadvantage after appointment
- **Expenses charged on Consolidated Fund** – therefore free from annual parliamentary voting.
- **Power to punish for its contempt** – Thus, its actions and decisions cannot be opposed or criticised arbitrarily.
- **Other provisions** – such as Ban on practice after retirement, no power with Parliament to curtail its jurisdiction, Freedom to appoint its staff etc. also helps in maintaining its independence.

In a democratic polity, all power is held in trust of the people and must be exercised for the people. Therefore, while safeguarding judicial independence, it is essential to balance it with judicial accountability and transparency.

3. A dysfunctional judicial delivery system is a serious impediment to establishing the rule of law in our nation. Examine the statement in the context of the problem of case pendency and judicial vacancies in India.

Approach:

- Bring out the facts to present the current picture of judiciary.
- Mention the important issues related to dysfunctional judicial system and explain the reason behind the problem of case pendency and judicial vacancies.
- Provide the probable solutions to deal with the problem.

Answer:

There are more than 2.18 crore cases pending in various courts and around 485 top judicial posts are needed to be filled up in high courts. It leads to judicial delays and deprives people of speedy justice.

Issues associated with pendency of cases:

- Frequent adjournments and delays in trial have led to increase in the number of under trial prisoners. Trials take decades to complete pointing to the inefficiency of judicial system.
- Many frivolous cases filed by corporates against their business rivals take up too much time of the courts.
- Misuse of PILs take up a lot of time of court, further aggravating the problem.
- Thus while poor suffer due to lack of resources, the powerful misuse the judicial process to suit their needs which is an impediment to the rule of law.

Issues associated with Judicial Vacancies:

- Judiciary requires more than 70,000 judges to clear the mounting backlog of cases.
- Judicial infrastructure has not kept pace with the rate of litigation. If all the posts of judges in the judiciary are filled, then there wouldn't be enough courtrooms to accommodate all of them.
- Lack of consensus among the collegium members over recommendations. There is further tussle between executive and judiciary over appointments, due to which many posts have remained vacant.

To uphold the rule of law both these interrelated problems require steps from executive as well as judiciary. Following steps need to be taken:

- As the economic cost of the delay is pegged at 0.5% of gross domestic product. There is urgent need for increased budgetary allocation to cope up with increased number of litigations.
- Government should speed up the process of drafting the memorandum of procedure with consensus of judiciary.
- Government and judiciary should initiate recruitment process six months prior to occurrence of vacancy.
- Frivolous cases should be dealt with a heavy hand and exemplary costs should be imposed on such litigation.
- Provide effective and continuous training for judges and court officers to enhance the quality of dispensation of Justice.
- Need to promote judicial education for enhancing the quality and improving the standards of justice.
- More focus on alternative dispute resolution mechanism like Lok Adalats, Arbitration and Conciliation etc. is required. Promoting Gram Nyayalayas is also desirable.
- Government, which is the biggest litigant, needs to simplify laws and enhance ease of doing business to avoid litigations in the first place.
- Other options, such as changes in procedure, improved quality of law graduates, greater use of information technology must all be explored to ameliorate the situation.

- 4. Despite long term recognition of the problem of pendency of cases in the courts, limited progress has been made in reducing their number. What are the possible reasons for such a scenario? Suggest a framework of measures that can be taken to address this issue.**

Approach:

- Introduce by giving a brief description of the statement, 'justice delayed is justice denied.'
- Mention the reasons for long judicial pendency in disposing cases across India.

- Provide factual information to back the same.
- Suggest measures to reduce judicial backlog.

Student Notes:

Answer:

More than 22 million cases are currently pending in India's district courts. Six million of those have lasted longer than five years. Another 4.5 million are waiting to be heard in the high courts and more than 60,000 in the Supreme Court, according to government data. These figures are increasing according to the decennial reports.

The following causes have been identified for pendency of cases - litigation explosion; inadequacy of the staff attached to the high courts; inordinate concentration of work in the hands of a few members of the Bar; lack of punctuality among judges; inadequate supply of the copies of judgments and orders, and so on.

Despite recognition of these causes, limited progress has been made in reducing pendency of cases due to the following:

- The number of judges in the country is inadequate to cope with the staggering pendency of cases in different courts. The rise in the number of cases has not been matched by an increase in the number of judges. There are 10-12 judges per million people in India. In developed countries, there are 50 judges per million people.
- However, increasing the number of judges is not the only answer. Some urgent institutional changes are called for. The critical test is not the judge-population ratio but the judge-docket ratio. Docket refers to the list of cases to be tried and is an accurate indication of the work load of a judge. In India, the docket ratio per judge is 987 whereas it is 3,235 per judge in the United States of America. The answer perhaps lies in effective court management, which has not been seriously attempted at by the Indian judiciary. For example, computers have not been used adequately to improve court management.
- Even though Section 301 of the Code of Criminal Procedure provides for the holding of trial proceedings expeditiously, it is an open secret that there is enormous delay in the disposal of cases because of frequent adjournments.
- The glut of cases in the lower courts is where the root of the problem lies. A number of courts still do not have data under the "Date filed" column, the most crucial piece for identifying delays.
- The proportion of cases that are stuck pending police investigations has little bearing in the ability of the courts to speedily finish trials. For instance, in Gujarat, where 92 out of every 100 cases are pending before the court, only 11.5% are waiting for police investigations to be completed. On the other hand, in Assam where 80 out of 100 cases are waiting to be picked up the court, about 59% of cases are awaiting police investigations.
- Inadequate strength of the police force has also played its part in the pile up of cases before the courts.

Measures needed to reduce judicial backlog:

- Annual targets and action plans must be fixed for the judicial officers to dispose of old cases where accused is in custody for over two years.
- Quarterly review of judicial officers' performance to curb malpractices like hasty disposal which undermined the quality of justice dispensed, must be made.
- Expeditiously filling vacant posts, improving Court infrastructure and setting standards of judicial recruitment examinations are other measures to improve the quality of district judges.

- Further perceptions of irregularities in judge selection deserve consideration; in this context the National District Judge Recruitment Examination mooted by the Supreme Court must be given a serious thought.
 - Incremental measures like restricting adjournments, curbing summer vacations, and audio-visual recording of court proceedings along with real-time data monitoring of case status will produce a transformative effect.
 - Case Flow Management (CFM) rules can be incorporated by looking into the recommendations of committees formed by the Supreme Court such as the Justice M. Jagannatha Rao committee.
 - Encouraging Alternate Dispute Redressal Mechanisms such as Arbitration, Mediation, Conciliation and Lok Adalats along with fast track courts.
 - Separation of traffic cases from ordinary courts.
 - Improve the quality of subordinate judges, at the level of recruitment as well as on the job training.
 - Implement the concept of evening courts where the services of the retired judges may be taken along with the law graduates. It would be beneficial in two ways: help training the young incumbents and reducing the pendency.
- To conclude, other states should follow the footsteps of Haryana, Chandigarh, Punjab, Himachal Pradesh and Kerala where cases pending over 10 years have been reduced to 1% of the total pendency. In addition the recommendations of the 245th Law Commission Report on "Arrears and Backlogs: Creating Additional Judicial Womanpower must be implemented.

5. *While the power to punish for the contempt of court is a much needed tool to protect the administration of justice from being maligned, it is time that it be relooked into. Critically analyse.*

Approach:

- Define contempt of court and give the constitutional and legislative provisions.
- Give arguments in favor of retaining the contempt of court provisions
- Discuss the issues with the current provisions of contempt of court.

Answer:

Articles 129, 142 and 215 of the Indian Constitution and the Contempt of Courts Act, 1971 vest the Superior Courts with the power to punish for their contempt. This is also facilitated by the article 19 (2). The purpose behind the contempt provision is to protect the administration of justice from being maligned and to ensure compliance with judicial orders.

The 1971 Act defines civil and criminal contempt. Civil contempt is when a person willfully disobeys any order of a court. Criminal contempt is interfering with the administration of justice, or scandalizing the court or lowering its authority. Hence, it gives the courts wide powers to restrict an individual's fundamental right to personal liberty.

There have been several instances where fair criticism of the judiciary has invited the threat of contempt proceedings, thus thwarting the fundamental right of freedom of speech and expression. This has necessitated a relook into the criminal contempt provisions.

Relevance of power to punish for the Contempt of Court

- Power to punish for non-compliance of its orders is essential to maintain the confidence in the judiciary and ensure the rule of law.
- It enforces the equality before law - Acts as a tool against the rich and the powerful by forcing compliance with the orders of the court.

- According to 274th Law Commission Report no changes are required to the 1971 statute. Even in the absence of the legislation, the Courts have the power to punish for their contempt under the constitution. In fact, by laying down the procedure, the act restricts the vast authority of the courts in wielding contempt powers.
- It is also needed to maintain credibility and efficiency of judiciary. For example, the Supreme Court issued contempt proceedings against Justice Karnan for his demeaning behavior.
- It is needed for the independence of the judiciary and protect its functioning from the opinion of media and the public.

Arguments for relook

- It goes against the fundamental right of Free Speech and Expression.
- In a democracy, judicial accountability is also required. For example, terming FIR against a sitting judge as contempt of court raises the question of its accountability.
- The grounds, on which contempt proceedings can be initiated such as 'scandalizing the court', are open ended and vague which are prone to misuse.
- In UK as well, the offence of 'scandalizing the court' as a ground for criminal contempt has been abolished in 2013.

Law of contempt of court, along with other laws, like sedition, is a remnant of our colonial past, enacted to curtail public scrutiny. A mature approach to criticism will inspire public confidence in judiciary. These laws should be examined to refine the broad provisions prone to misuse. Further, care should be taken that dilution of the Act does not interfere with independent functioning of judicial system in India.

6. *"The process of justice delivery in India has become a punishment in itself". In reference to the above, examine the causes for a large number of under trials in the country. Do you think Supreme Court's recent directive on Section 436A of CrPC would be able to address the issue?*

Approach:

The answer should be divided into two parts, the first one addressing the causes for large number of undetrials in India. The second part should bring out why SC ruling is not enough for solving the problem. Reasons must be cited to justify the stand. Finally, end on the kind of reforms that are needed to truly solve the problem of large number of undetrials in India.

Answer:

The Under trial problem is defined as number of under trials in proportion to convicts in Indian Prison system. The primary constitutional and moral concern with undertrial detention is that it violates the normative principle that there should be no punishment before a finding of guilt by due process.

Some of the causes of large number of undetrials in India are:

- The disproportionately small number of courts in a country with a large population
- The perennially increasing rights and obligations created by ever increasing pieces of legislation
- The low level of efficiency of the judicial system and ;
- The multi-tier appellate system primarily caused the huge backlog in the justice delivery system.
- Another major reason for the large volume of pending cases is the inability of undetrials to furnish a bail bond

The Supreme Court of India based on Section 436A of the CrPC, has recently passed a judgment for states to release under trials who have already served more than half the sentence had they been convicted within two months. Even though the move is well intended there a number of the concerns remain with Section 436A:

- On average over 80 per cent of undertrials in India spend less than one year in prison during the years under consideration. Most of them are unlikely to have spent half of their likely prison term.
- So even though this would help those who have been undertrial for a long period of time it certainly wouldn't solve the problem of undertrials in India.
- Single largest category of crime for undertrials in India is murder which entails sentence of larger duration. Ruling will not benefit them murder being heinous crime.
- Various reports and studies suggest that illiterates, poor and other vulnerable section are over represented in the undertrial population. Justice system must address this systemic bias.

Arguably, the high proportion of undertrials is a reflection of the pathological failure of the criminal justice system to successfully convict and thereby secure peace and security. This failure must be resolved by focussing on systematic institutional reform of the investigation and prosecution of offences. Second, our current legal strategy assumes inordinately long periods of undertrial detention and we show that a Section 436A-focussed strategy will have minimal impact on the undertrial population overall.

Without substantive reforms to the investigation and trial process, early release of undertrials may further aggravate the pathologically low rates of conviction and incarceration in the Indian criminal justice system.

7. Article 145(3) of the Indian Constitution says that any “substantial question of law” relating to the interpretation of the Constitution must be heard by benches of at least five judges. But some of the most important constitutional cases, like Salwa Judum and Naz foundation, were decided by smaller benches. Why is there a need for larger benches? What are the possible reasons for smaller benches hearing such important cases?

Approach:

- Answer should focus on the reasons for smaller benches and problems associated with them.
- There is no need to go into a broad discussion of Salwa Judum or Naz Foundation cases.

Answer:

- The requirement for large benches is straight forward and logical also. The Constitution is explicit that for important constitutional matters larger benches are needed. Benefits of larger benches hearing important cases can be discussed as under:
 - More judges mean that there will be more points of view, greater reflection and more thorough analysis offered in these vital cases that will help set the direction of the country for decades to come.
 - It also gives such judgments added value and legitimacy. It is more difficult to overturn a five-judge bench than a two- or three-judge bench, meaning the public can have more confidence in the stability of the law on issues that affect millions of lives.

- More judges also mean that it is likelier that the opinion of the bench will reflect that of the overall Supreme Court and not just two or three judges with a minority viewpoint. This is all the more critical in cases where novel questions of law are being addressed and there is no clear precedent on the issue.
- Alternatively, when there is a clear precedent, more judges are required to overturn the decisions of these earlier benches. It is already worrying that some of today's smaller benches are effectively ignoring or de-emphasising judgments of earlier and larger constitution benches. This is undermining the court's entire system of precedent.
- Given all these benefits to larger benches, there must be some reasons because of which they are not being constituted more often. Some of those reasons are as below:
 - As the court has found itself bogged down with more and more cases (over 50,000 are currently pending), it has become more difficult to have larger benches. They take judges away from disposing of the long line of backlogged matters.
 - Also there are no clear cut guidelines on how to determine when a case involves a "substantial question" of constitutional law and so requires a larger bench.
- So there are no alternatives to larger benches as constitution explicitly mandates it. There are no easy answers here, but the court should lay out a vision for how it wants to balance the many competing pressures on its time and judges.

8. *While Public Interest Litigations have provided access to justice for the poor and the marginalized sections of the society but many vested interests have also misused it. In this context, examine the utility of PILs as a tool of social justice.*

Approach:

- Highlight how Public Interest Litigations have benefitted the poor and marginalized by illustrating the link between positive contribution of PILs and Judicial Activism.
- Also, discuss the misuse and pitfalls of PIL.
- Conclude by presenting a forward outlook.

Answer:

Public interest litigation means any litigation conducted for the benefit of public or for the removal of some public grievance. Any public spirited person can move the court for public cause by filing a petition in the Supreme Court under Article 32 of the Constitution or in the High Court under Article 226 of the constitution or before the Court of Magistrate under sec.133 of Code of Criminal Procedure, 1973 . The traditional requirement of 'locus standi' is relaxed in PIL.

To achieve justice in the society, Public Interest Litigation (PIL) has proved to be a useful tool. It provides a means to justice to disadvantaged sections of society and enables civil society to not only spread awareness about human rights and also allows them to participate in government decision making.

- The most important contribution of PIL has been to bring courts closer to the disadvantaged sections of society such as prisoners, destitute, child or bonded labourers, women, and scheduled castes/tribes.
- As Directive Principles are not justiciable, the courts imported some of these principles into the FRs thus making various socio-economic rights as important—at least in theory—as civil and political rights. This resulted in the legal recognition of rights as important as education, health, livelihood, pollution-free environment, privacy and speedy trial.

- PIL is also an instrument to promote rule of law, demand fairness and transparency, fight corruption in administration, and enhance the overall accountability of the government agencies.
- Through PIL, judiciary also triggered legislative reforms and filled in legislative gaps in important areas. For instance, the Supreme Court in the Vishaka case laid down detailed guidelines on sexual harassment at the workplace.
- The Indian judiciary, courtesy of PIL, has helped in ensuring the reservation of seats for SCs/STs and other backwards classes in employment or educational institutions.

Ulterior purpose: While PIL has proved to be a useful tool for the marginalized disadvantaged groups, it is being misused by people agitating for private grievances in the grab of public interest and seeking publicity rather than espousing public causes.

Almost any issue is presented to the courts in the guise of public interest because of the allurements that the PIL jurisprudence offers (e.g. inexpensive, quick response, and high impact). Frivolous PIL plaintiffs waste the time and energy of the courts, the judiciary and add to the burden of increasing backlog.

Although the Supreme Court has compiled a set of “Guidelines to be Followed for Entertaining Letters/Petitions Received by it as PIL” it is critical to ensure that PIL does not become a back-door to enter the courts to fulfill private interests, settle political scores or simply to gain easy publicity.

PIL enables civil society to play an active role in spreading social awareness about human rights, in providing voice to the marginalised sections of society, and in allowing their participation in government decision making. If civil society and disadvantaged groups lose faith in the efficacy of PIL, that would sound a death knell for it.

9. ***While it has been argued that the judiciary should be brought under RTI, a balance also needs to be maintained between independence of the judiciary and the right of people to know. In this context, discuss the pros and cons of bringing the judiciary under the ambit of RTI.***

Approach:

- Introduce the debate around the issue of bringing judiciary under RTI
- Analyse the pros and cons of bringing judiciary under the ambit of RTI. Conclude with suggestions for the same.

Answer:

Recently honorable Supreme Court has referred to a five bench judges Constitution Bench, the question whether disclosure of information about judicial appointments, transfers of HC judges amounts to interference in judicial independence. Amidst the controversy of annulment of NJAC by the Supreme Court, the debate of bringing judiciary fully under the ambit of RTI is gaining ground.

Some of the rationale and benefits in bringing judiciary under RTI can be enumerated as-

- **Appointments** through proceedings of the collegium are **absolutely opaque** and inaccessible for public. RTI umbrella over judiciary will bring in transparency and will curb nepotism in appointments. It will also curb instances like superseding of the senior judges for promotions etc.
- The **law of contempt has been often misused** to punish outspoken criticism and exposure of judicial misconducts. Even an FIR cannot be registered against the judges under the Prevention of Corruption Act. RTI will ensure accountability and will act as a key tool in eliminating misconduct by judges.

- While acting on the premise of judicial independence, judges expediently exclude themselves from disclosure of any kind of information to public. If brought under RTI, such disclosure will create public trust.
- RTI will help in curbing red-tapism and will ensure rationality and logic in judgements.

Student Notes:

However there are some cons of bringing judiciary wholly under RTI.

- There is apprehension that it might undermine the independence of judiciary and the decisions as judges would be apprehensive of public pressure
- Apprehensions that RTI disclosure may affect credibility of the decisions and free and frank expression of judges.
- The disclosure of personal details of judges might be a cause of concern for national security.
- Sometime details of appointments are closely linked with personal details like medical conditions, disclosure of which will undermine the right to privacy.
- Some of the RTI applications may be frivolous and politically motivated.

However, it needs to be noted that judiciary is not an exemption under RTI. Judiciary plays a dual role of administrative functions and the other of judicial decision making and most of administrative functions are under ambit of RTI. The judicial decisions can also be brought under RTI but there is requirement of drawing balance between independence of judiciary and the fundamental right of right to know of people so that judiciary remains people last hope in democracy.

- 10. Criticism about the judiciary should be welcomed, so long as criticisms do not hamper the “administration of justice”. In this context discuss whether the power of contempt of court given to the higher judiciary limits the freedom granted by Article 19(1)(a) and whether these two can be reconciled.**

Approach:

- In the introduction briefly address the key concern of the statement and link it to the argument on power of contempt and freedom of speech and expression.
- Discuss the need of contempt powers with judiciary.
- Discuss the implications of contempt powers on freedom of speech.
- Discuss how these two can be reconciled.

Answer:

Administration of justice requires strong safeguards for the judiciary. Thus:

- Article 129 and 215 of the Constitution of India empower the Supreme Court and High Court respectively to punish people for their contempt.

The Contempt of Court Act, 1971 delineate contempt powers of judiciary to:

- Prevent scandalisation or lowering the authority of any court.
- Prevent interference with the due course of any judicial proceedings.
- Strengthen court's image as legal authority and that no one is above the law.
- Ensure one could not defy court orders according to one's own free will.

In the context freedom of speech and expression, a right underpinned by article 19 1(a), contempt of court is considered a reasonable restriction under Article 19 (2), which empowers contempt laws.

Critics observe that:

Student Notes:

- Judiciary has routinely invoked its contempt powers to punish expressions of dissent on grounds of such speech undermining or scandalising the judiciary's authority.
- Acts of speech and expression that do not necessarily impede with the actual administration of justice have been punished invoking the idea of reputation of judiciary in the eyes of the public.

Rights under article 19 (1) (a) are important as they:

- Empower citizens to express their opinion which is necessary for good public policies.
- Are important in themselves for ensuring a good life, also enshrined under Article 21 of the constitution.

Thus, it becomes imperative to reconcile the freedom of speech and the contempt power of the courts. It can be ensured by taking the following into consideration:

- Judiciary itself underlined guidelines that envisage economic use of the jurisdiction on the one hand and harmonization between free criticism and the judiciary, e.g. Mulgaonkar case 1978. Also, of note are observations in cases such as Ram Dayal Markarha v. state of Madhya Pradesh 1978; Conscientious Group v. Mohammed Yunus 1987; P.N. Duda b. P. Shiv Shankar 1988; Sanjay Narayan, Hindustan Times v. High Court of Allahabad 2011.
- The 2006 amendment in the Contempt of Courts Act, 1971 states that "court may permit, in any proceedings for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bonafide".

International standards and laws of other democracies would be informative and enable us to arrive at the right standards. e.g. in European democracies such as Germany, France, Belgium, Austria, Italy, there is no power to commit for contempt for scandalising the court. In the U.K., the offence of scandalising the court has become obsolete. In the United States, contempt power is used against the press and publication only if there is a clear imminent and present danger to the disposal of a pending case.

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JUDICIARY- HIGH COURT, SUBORDINATE COURTS, ISSUES, JUDICIAL REFORMS AND JUDICIAL ACTIVISM

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1. High Court

The **Article 214** of the Indian Constitution provides for a High Court for each state, but the Seventh Constitutional Amendment Act of 1956 authorized the Parliament under **Article 231** to establish a common High Court for two or more states and a union territory. Articles 214 to 231 of the Constitution deals with the organization, independence, jurisdiction, powers, procedures and other issues related to the High Courts.

At present, there are **25 High Courts** for the states and union territories in the country. The High Courts of Madras, Bombay, Calcutta and Allahabad were the first four High Courts in India, established by the Indian High Courts Act, 1861. Andhra Pradesh is the recent state to have the High Court which was established in 2019.

- The Bombay High Court's jurisdiction extends over Maharashtra, Goa, Dadra and Nagar Haveli, and Daman and Diu.
- Calcutta High court jurisdiction is over West Bengal and Andaman and Nicobar Islands.
- Gauhati High Court has jurisdiction over Arunachal Pradesh, Assam, Nagaland and Mizoram.
- Kerala High Court covers Kerala and Lakshadweep.
- Madras High Court has jurisdiction over Tamil Nadu and Puducherry.
- Punjab and Haryana High Court has jurisdiction over the states of Punjab and Haryana, along with UT of Chandigarh.
- Delhi is the only UT that has a High Court of its own.

As per **Article 230** of the Indian Constitution, Parliament may by law extend the jurisdiction of a High Court to any union territory or exclude the jurisdiction of a High Court from any union territory.

1.1. Organization of High Court

Every high court (whether exclusive or common) consists of a Chief justice and such other judges as the President may from time to time deem necessary to appoint. The President has the power to determine the strength of a high court from time to time depending on its workload.

1.2. Eligibility Criteria for High Court Judges

A person to be appointed as a High Court Judge must fulfill the following criteria:

- a. He should be a citizen of India,
- b. He should have held a judicial office in territory of India for 10 years, or
- c. He should have been an advocate of High Court for at least 10 years (this is similar to the qualification required in case of SC judges too).

Thus, the Constitution does not prescribe a minimum age for appointment as a judge of a high court. However, there's no provision in the Constitution for appointment of a distinguished jurist as a High Court Judge, unlike that of the Supreme Court.

1.3. Tenure of Judges

The Constitution has not provided a fixed tenure to a judge of a High Court. However, it provides the following provisions:

- a) He holds office until he attains the age of 62 years. Any question regarding age should be decided by the President in consultation with the Chief Justice of India and decision of the President shall be final.
- b) He can resign from his office by writing to the President.
- c) He can be removed from his office by the President on recommendation of the Parliament.

- d) He vacates his office when he is appointed as a judge of the Supreme Court or when he is transferred to another high court.

Student Notes:

1.4. Appointment of Judges

High Court has the following categories of judges:

Regular Judges (Art. 217(1))

- They are appointed by the President in consultation with the Chief Justice of India and Governor of the state concerned.
- For appointment of other Judges of the high court the chief justice of concerned high court is also consulted.
- In case of common high court of two or more states, Governors of all the states concerned are consulted by the President.
- Following the ruling of *Second Judges case* (1993) and *Third Judges case* (1998), in case of appointment of high court judges the opinion of collegium consisting of Chief justice of India and two senior most judges of Supreme Court judges must be sought.

Acting Chief Justice (Art. 223)

The President can appoint a judge of a High Court as an acting chief justice of High Court when:

- The office of Chief Justice is vacant;
- The Chief Justice of the High Court is temporarily absent; or
- The Chief Justice of High Court is unable to perform the duties of his office.

Additional and Acting Judges (Art. 224)

A duly qualified person can be appointed as an additional judge by the President for a temporary period of not more than two years, if:

1. There is a temporary increase in the business of high court,
2. There are arrears of work in high court.

Similarly, a duly qualified person can be appointed as an acting judge by the President when a judge of that high court (other than chief justice) is:

1. Unable to perform the duties of his office due to absence or any other reason.
2. Appointed to act temporarily as chief justice of that high court.

An Acting Judge holds office until the permanent judge resumes his office, however both the additional and acting judges cannot hold office after attaining the age of 62 years.

Retired Judges (Art.224A)

The Chief Justice of a High Court can request a retired judge of that High Court or any other High Court to sit and act as a judge of High Court for that state. The President's previous consent is necessary. Such a person will enjoy all the Jurisdiction, powers and privileges of a Supreme Court Judge. But, he will not otherwise be deemed to be a judge of that High Court.

1.5. Oath

Every person appointed to be a Judge of a High Court before he enters upon his office, make and subscribe before the Governor of the State, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule of the Indian Constitution.

Judge of High Court takes oath to bear true faith and allegiance to the Constitution of India as by law established, uphold the sovereignty and integrity of India and duly and faithfully and to the best of ability, knowledge and judgment perform the duties of the office without fear or favour, affection or ill-will and uphold the Constitution and the laws.

1.6. Salaries of Judges

- The salaries and allowances of state high court judges including chief justices are charged from the Consolidated Fund of State (Art.266).
- Retired Judges of all the High Courts are entitled to pension which is drawn from the Consolidated Fund of India (Art.266).
- The salaries of the Judges of High Courts are decided by the Parliament by law according to the Article 221 of the Constitution of India.

1.7. Removal of Judges

Article 217 (b) provides that the removal of the High Court judges will be done in a manner similar to that provided under Article 124(4) for the Supreme Court judges. Thus, based upon that, along with Judges Inquiry Act 1968, the impeachment of judges can be done only on grounds of 'proved misbehaviour' or 'incapacity' in a process explained for the Supreme Court judges.

1.8. Transfer of Judges

Article 222 of the Constitution makes provision for the transfer of a Judge (including Chief Justice) from one High Court to any other High Court. The initiation of the proposal for the transfer of a Judge should be made by the Chief Justice of India (CJI). Consent of the Judge for transfer would not be required. CJI is expected to take into account the views of the Chief Justice of the High Court from which the Judge is to be transferred and Chief Justice of the High Court to which the transfer is to be effected.

The proposal once referred to the Government, the Union Minister of Law, Justice and Company Affairs would submit a recommendation to the Prime Minister who will then advise the President as to the transfer of the Judge concerned. After the President approves the transfer, the notification will be gazette and the judge remains transferred. In case of transfer, the judge is entitled to receive compensatory allowances in addition to his salary as determined by the President.

The Supreme Court ruled that transfer of High Court Judges could be resorted to only as an exceptional measure and only in public interest, not by way of punishment. In **Third Judges case (1998)**, the Supreme Court opined that in case of transfer of judges, Chief Justice of India should consult in addition to collegiums of four senior most judges of Supreme Court, the Chief Justices of two High Courts (one from which the judge is being transferred and other receiving him). The Supreme Court also ruled that judicial review is necessary to check arbitrariness in transfer of judges, but only the judge who is transferred can challenge it.

1.9. Jurisdiction and Powers of High Court

Besides being the protector of Fundamental Rights of citizens, the high court is the highest court of appeal in the state. It is vested with power to interpret the Constitution along with the supervisory and consultative roles. However, no detailed provisions with regard to jurisdiction and powers of the High Court are mentioned in the Constitution. It only lays down that the jurisdiction and powers of a high court are to be the same as immediately before the commencement of the Constitution. New additions post-independence are jurisdictions over revenue matters, writ jurisdiction, power of superintendence, etc.

At present, a high court enjoys the following jurisdiction and powers:

1.9.1. Original Jurisdiction

- Enforcement of Fundamental Rights (**under Article 226**).
- Cases ordered to be transferred from a subordinate court involving the interpretation of the Constitution to its own file.

3. Matters related to will, marriage, divorce, company laws and contempt of court.
4. Disputes relating to the election of members of parliament and state legislature.
5. Regarding revenue matter or an act ordered or done in revenue collection.
6. The four High Courts (i.e. Calcutta, Bombay, Madras and Delhi) have original civil jurisdiction in cases of higher value.

Student Notes:

The three Presidency towns of Calcutta, Bombay and Madras had Original jurisdiction, both civil and criminal, over cases arising within their respective territory. However, the original criminal jurisdiction has been completely taken away by the Code of Criminal Procedure, 1973.

1.9.2. Writ Jurisdiction

Article 226 empowers High Court to issue writs, including ***habeas corpus, mandamus, certiorari, prohibition and quo warranto*** for enforcing fundamental rights and for any other purpose as well (**enforcement of an ordinary legal right**). The High Court can issue writs to any government authority, any person not only within its territorial jurisdiction, but also outside it if the cause of action arises within its territorial jurisdiction.

The writ jurisdiction of the High Court is wider than that of the Supreme Court. The Supreme Court can issue writs only to enforce fundamental rights whereas the High Court can issue writs for the breach of any ordinary legal right. Writ jurisdiction of the High Court is also the part of basic structure of the constitution.

1.9.3. Appellate Jurisdiction

This is for cases where people have risen a complaint about a review of the judgement given by the district level or subordinate court of that territory. It is further divided into two categories:

Civil Jurisdiction:

1. On civil side appeal to high court is either first appeal or second appeal.
2. Appeals from decisions of District Judges and from those of subordinate judges in cases of higher value (broadly speaking) lie direct to the high court on questions of fact as well as law.
3. When any subordinate court decides an appeal from decision of an inferior court, a second appeal lies to the high court from the decision of lower appellate court, but on question of law only not questions of facts.
4. Provisions for Intra-court appeals in Calcutta, Bombay and Madras high court are there if a case is decided by a single judge then an appeal lies to the division bench of same court.
5. In 1997, the Supreme Court ruled that the tribunals are subject to the writ jurisdiction of high court. Thus, an individual cannot go directly to Supreme Court against the decision of a tribunal rather he has to go to high court first.

Criminal Matters:

1. The decisions of Sessions Judge or an Additional Sessions Judge can be appealed in the high court where the sentence of imprisonment exceeds seven years. Any death sentence awarded by lower court should be confirmed by the High Court whether there's an appeal or not.
2. Appeals from the judgments of Assistant Sessions Judge, Metropolitan Magistrate or other Judicial Magistrates in certain specified cases other than petty cases.

1.9.4. Power of Superintendence

A High Court has also the power of superintendence over all the Courts and Tribunals except those dealing with the armed forces functioning in the State. In exercise of this power it may:

1. Call for returns from such Courts.
2. Make and issue, general rules and prescribe forms for regulating the practice and proceedings of such Courts, and

3. Prescribe forms in which books and accounts are being kept by the Officers of any Court.
4. May settle the fees payable to the sheriff, clerks, officers and legal practitioners of them.

Student Notes:

This power has made the **High Court responsible for the entire administration of Justice in the State**. It is **both judicial as well as administrative** in nature. The Constitution does not place any restriction on its power of superintendence over the subordinate Courts and this power can be exercised *suo-motu*. It may be noted the Supreme Court has no similar power vis-a-vis the High Court.

Control over Subordinate Court

- a. A High court is consulted by the governor in the matters of appointment, posting, and promotion of the district judges and in the appointments of persons to the judicial service of the state other than the district judges.
- b. It deals with matters of posting, promotion, grant of leave, transfers and discipline of the members of the judicial service of the state (other than the district judges).
- c. It can withdraw a case pending in a subordinate court if it involves a substantial question of law that requires interpretation of constitution. It can either dispose the case itself or determine the question and return it to subordinate court with its judgment.
- d. Its law is binding on all subordinate courts functioning within its territorial jurisdiction.

1.9.5. A Court of Record

The powers of a High Court as a Court of Record are identical to that of Supreme Court. It involves recording of judgments, proceedings and acts of high courts to be recorded for the perpetual memory. These records cannot be further questioned in any court. On the basis of this record, it has power to punish for the contempt of court either with simple imprisonment or with fine or both.

1.9.6. Power of Judicial Review (Art. 13 and Art. 226)

The High Court has the power to examine the constitutionality of legislative and executive orders of both central and state government. Though, the word judicial review is nowhere mentioned in the Constitution but the Article 13 and 226 explicitly provide High Court with this power.

So the High Court can declare any legislative enactments of centre and states and any executive orders as null and void if they violate constitution. The constitutional validity of legislative enactments and executive orders can be challenged in a high court on following three grounds:

1. If it infringes the fundamental rights,
2. It is outside the competence of authority which frames it,
3. It is repugnant to the constitutional provisions.

2. Subordinate Courts

Articles 233 to 237 in Part VI of the Constitution makes following provisions to regulate the organization of subordinate courts and ensures their independence from the executive.

Appointment of District Judges (Art.233)

The appointment, posting and promotion of district judges in a state are made by the Governor of State, in consultation with the High Court. The qualifications of a person for appointment to the post are:

1. He should not already be in the service of the central or state government.
2. He should have been an advocate or pleader for not less than seven years
3. He should be recommended by the high court for appointment.

The term 'District Judge' includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, session's judge, additional session's judge and assistant session's judge.

Appointment of other Judges (Art.234)

Appointments of persons (other than district judges) to the judicial services of a state are made by the Governor of the state after consultation with State Public Service Commission and the concerned High Court.

Control over Subordinate Courts (Art.235)

The control over the district courts and other subordinate courts, including the posting, promotion, and leave of the persons belonging to the judicial service of a state and holding any post inferior to the post of district judge is vested in the High Court.

Structure and Jurisdiction

Structure of subordinate courts has been explained in the diagram at the beginning of the chapter of Supreme Court – General Structure of Indian Judiciary.

The architecture of subordinate judiciary varies across the states and is broadly classified as shown in figure. At the lowest stage, two branches of justice - civil and criminal are bifurcated. The Panchayat courts functioning in civil and criminal areas under various regional names like Nyaya Panchayat, Panchayat Adalat, Gram Kutchery etc.

Munsiff's courts are next level civil courts, the jurisdictions of which are determined by High Courts. Above Munsiffs are subordinate judges who have unlimited pecuniary jurisdiction and act as first appeals from munsiffs.

At District level, District Judge is the highest judicial authority in the district having original and appellate jurisdiction in both civil and criminal matters. The District judge hears first appeals from subordinate judges as well as Munsiffs (unless dealt by subordinate judges) and possess unlimited jurisdiction over both civil and criminal suits. He also has supervisory powers over subordinate judges. He's known as district judge when he deals with civil cases and session's judge when dealing with criminal cases. Appeals against his order lie with the High Court. The Sessions judge can impose any sentence including life imprisonment and capital punishment. However, the High Court needs to confirm the sentence of capital punishment even if there is no appeal from the convict. Since enactment of the Code of Criminal Procedure, 1973, trial of criminal cases is done by the judicial magistrates only.

The Judicial and Metropolitan magistrates discharge judicial functions under administrative control of High Courts in contrast to Executive Magistrates who discharge executive function of maintaining law and order, under control of the state government. The civil judicial administration in previously presidency towns is currently taken up by metropolitan courts. Original jurisdiction of High Courts tries bigger civil suits arising within the previously presidency areas. Civil suits of lower value are tried by civil courts.

2.1. Gram Nyayalayas Act, 2008

The act is aimed at providing speedy and inexpensive justice to people in rural areas at their doorsteps by establishing a village court at the grassroot level. This came into force from 2nd October, 2009. This system was also aimed to clear the **backlog of more than 2.6 crore cases** that are pending before the subordinate courts.

2.1.1. Structure

The Gram Nyayalaya is court of Judicial Magistrate of the first class and its Presiding Officer (Nyayadhikari) is appointed by the State Government in consultation with the High Court. The

Gram Nyayalayas are established for every Panchayat at intermediate level or a group of contiguous Panchayats at intermediate level in a district or for a group of Panchayats if there is no Panchayat at intermediate level. The Nyayadhikaris who preside over these Gram Nyayalayas are strictly judicial officers and draw the same salary, deriving the same powers as First Class Magistrates working under the High Courts.

2.1.2. Jurisdiction

The Gram Nyayalaya is a mobile court and exercises the powers of both Criminal and Civil Courts. The seat of the Gram Nyayalaya is located at the headquarters of the intermediate Panchayat, but they go to villages, work there and dispose of the cases. The Gram Nyayalayas try criminal cases (where the alleged offence attracts a punishment of not more than 2 years or when the value of the property involved in criminal case is not more than 20000 rupees), civil suits(cases over cattle trespassing act, minimum wages act, protection of women from domestic violence act and property disputes etc.), claims or disputes.

2.1.3. Procedure followed by Gram Nyayalayas

Gram Nyayalayas can follow special procedures in civil matters, in a manner it deems just and reasonable in the interest of Justice. They, in the first instance, allow for conciliation of the dispute and settlement of the same. The Gram Nyayalayas are not strictly bound by the rules of evidence provided in the Indian Evidence Act, 1872 but are guided by the principles of natural justice and subject to any rule made by the High Court.

2.1.4. Appeal against the decision of Nyayalayas

An appeal in criminal cases shall be made before the Session court, which shall be heard and disposed of within a period of six months from the date of filing of such appeal.

An appeal in civil cases shall be made before the District Court, which shall be heard and disposed of within a period of six months from the date of filing of the appeal.

2.1.5. Issue with Gram Nyayalayas

So far only 11 states have taken steps to notify Gram Nyayalayas. Several states have issued notifications for establishing 'Gram Nyayalayas' but all of them were not functioning except in Kerala, Maharashtra and Rajasthan.

At present, only 208 'Gram Nyayalayas' are functioning in the country as against 2,500 estimated to be required by the 12th Five Year Plan.

2.2. Alternative Dispute Resolution (ADR)

ADR is a mechanism of dispute resolution that is non adversarial, i.e. working together co-operatively to reach the best resolution for everyone. Section 89(1) of Civil Procedure Code (CPC) provides an option for the settlement of dispute outside the court. Such dispute resolution without a trial can be brought about with the help of negotiation, good office (friendly third party different from mediator), mediation, conciliation, arbitration etc. where the parties to the disputes are encouraged to resolve their dispute amicably without taking reports to the regular courts.

It not only benefits the litigants, but also helps in reducing the number of cases before the subordinate courts. Arbitration and Conciliation Act, 1996 is a standard western approach towards ADR, while the Lok Adalat system constituted under National Legal Services Authority Act, 1987 is a uniquely Indian approach. Apart from this, a vision document prepared by Ministry of Law and Justice provided for this and ADR centers are established in each district. It also provides for extended financial assistance by Centre to state to hold 10 mega Lok Adalats per high court every year along with holding the regular five Lok Adalats every year in each judicial district of the state.

2.2.1. Tools of Alternative Dispute Redressal

- **Arbitration** is a process in which a neutral third party or parties render a decision based on the merits of the case. It is less formal than a trial, and the rules of evidence are often relaxed.
 - It can start only if there exists a valid arbitration agreement between the parties prior to the emergence of the dispute.
- **Mediation** is a process in which a non-partisan third party “the mediator” facilitates the development of a consensual solution by the disputing parties.
 - The mediator does not decide the dispute but helps the parties communicate so they can try to settle the dispute themselves. The authority of the mediator vests on the consent of the parties that he should facilitate their negotiations.
- **Conciliation** is a process by which resolution of disputes is achieved by compromise or voluntary agreement. It is a less formal form of arbitration.
 - In contrast to arbitration, the conciliator does not render a binding award. The parties are free to accept or reject the recommendations of the conciliator.

2.2.2. Advantages of ADRs

- The resolution of disputes takes place usually in private which helps in maintaining confidentiality.
- It seems more viable, economic, and efficient as compared to conventional trials.
- It often results in creative solutions, sustainable outcomes, greater satisfaction of the parties, and improved relationships between the parties involved.
- Procedural flexibility saves the valuable time and money and absence of stress of a conventional trial.
- The possibility of ensuring that specialized expertise is available on the tribunal in the person of the arbitrator, mediator, conciliator or neutral adviser.
- Further, it offers greater direct control over the outcome. Personal relationships may also suffer less.

2.2.3. Disadvantages of ADRs

- There is no guaranteed resolution. With the exception of arbitration, alternative dispute resolution processes do not always lead to a resolution and still ends up having to proceed with litigation.
- The finality and binding nature of an arbitrator's decision can sometimes be viewed as a disadvantage because it may not always please the parties and courts will often refuse to review it.
- The neutral party – arbitrator, mediator, conciliator, will charge a fee for their time and expertise and depending on their popularity, these fees may be substantial. A judge, on the other hand, charges no fee for his decision.
- Non-binding arbitration. Sometimes the court may order nonbinding or Judicial Arbitration. This means that if a party is not satisfied with the decision of the arbitrator, they can file a request for trial with the court within a specified time period after the arbitration award. Depending on the process ordered, if that party does not receive a more favorable result at trial, they may have to pay a penalty or fees to the other side.

2.2.4. High Level Committee on institutionalization of arbitration

A High-Level Committee, under the **Chairmanship of Justice B. N. Srikrishna**, to review the institutionalization of arbitration mechanism and suggest reforms thereto has submitted its report recently.

The Committee has divided its Report in three parts:

The **first part** is devoted to suggest measures to improve the overall quality and performance of arbitral institutions in India and to promote the standing of the country as preferred seat of arbitration. In this direction the Committee recommended:

- (i) Setting up an **Autonomous Body, styled the Arbitration Promotion Council of India (APCI)**, having representatives from all stakeholders for grading arbitral institutions in India.
- (ii) The APCI may recognize professional institutes providing for **accreditation of arbitrators**.
- (iii) The APCI may also hold **training workshops** and interact with law firms and law schools to train advocates with interest in arbitration and with a goal to create a specialist arbitration bar comprising of advocates dedicated to the field.
- (iv) Creation of a **specialist Arbitration Bench** to deal with such Commercial disputes, in the domain of the Courts.
- (v) Changes have been suggested to **make arbitration speedier and more efficacious and incorporate international best practices**.
- (vi) The Committee are also of the opinion that the **National Litigation Policy (NLP)** must promote arbitration in Government Contracts.

The Committee in **Part II** of the Report reviewed the working of the International Centre for Alternative Dispute Resolution (**ICADR**) working under the aegis of the Ministry of Law and Justice, Department of Legal Affairs. The Institution was set up with the objective of promoting ADR methods and providing requisite facilities for the same. The committee recommended declaring the ICADR as an Institution of national importance and takeover of the institution by a statute as revamped ICADR has the potential be a globally competitive institution.

As regards the role of arbitrations in matters involving the Union of India, including bilateral investment treaties (BIT) arbitrations, the Committee in **Part III** of the Report has *recommended* for creation of the post of an '**International Law Adviser**' (**ILA**). It shall advise the Government and coordinate dispute resolution strategy for the Government in disputes arising out of its international law obligations, particularly disputes arising out of BITs. The Committee has emphasized that ILA may be consulted by the Department of Economic Affairs (DEA), at the time of negotiating and entering into BITs.

The roadmap of suggested reforms after an in depth examination of the issues, by the High Level Committee can result in a paradigm shift from the current perception of delay in resolution of commercial disputes in India to it being viewed as an investor friendly destination. The suggested reforms will not only lessen the burden of the judiciary, but give a boost to the development agenda of the Government and aid the financial strength of the country and serve the goal of welfare of the citizens.

3. The National Legal Services Authority

The National Legal Services Authority (NALSA) has been constituted under the Legal Services Authorities Act, 1987 to provide free Legal Services to the weaker sections of the society and to organize Lok Adalats for amicable settlement of disputes.

NALSA lays down policies, principles, guidelines and frames effective and economical schemes for the State Legal Services Authorities to implement the Legal Services Programmes throughout the country.

Primarily, the State Legal Services Authorities, District Legal Services Authorities, Taluk Legal Services Committees, etc. have been asked to discharge the following **main functions** on regular basis:

1. To provide **Free and Competent Legal Services** to the eligible persons;
2. To **organize Lok Adalats** for amicable settlement of disputes; and

3. To organize legal awareness camps in the rural areas.

Student Notes:

The Free Legal Services include:-

- a) Payment of court fee, process fees and all other charges payable or incurred in connection with any legal proceedings;
- b) Providing service of lawyers in legal proceedings;
- c) Obtaining and supply of certified copies of orders and other documents in legal proceedings.
- d) Preparation of appeal, paper book including printing and translation of documents in legal proceedings.

3.1. NALSA Eligibility Criteria for Free Legal Services

Article 39 A of the Constitution of India provides for free legal aid to the poor and weaker sections of the society, to promote justice on the basis of equal opportunity. **Articles 14 and 22(1) of the Constitution** also make it obligatory for the State to ensure equality before law and a legal system, which promotes justice on the basis of equal opportunity to all. To receive those services, the person acquiring them should fall under the following categories:

- People with disability
- Women and children
- People who are members of SC & ST communities
- Victims of poverty (beggars) and human trafficking
- Industrial workmen
- People under custody
- People who are victims of natural disasters, caste or ethnic violence, etc.
- People with an annual income lower than 1 lakh

Supreme Court Legal Services Committee has also been constituted to administer and implement the legal services programme so far as it relates to the Supreme Court of India.

4. Lok Adalats

Lok Adalat, meaning '**People's Court**' is one of ADR (Alternative Dispute Redressal) mechanism. They are based on Gandhian principles, aims to settle disputes through arbitration at the grass-root level. They were given the **statutory status under the Legal Services Authorities Act, 1987** which aims to constitute legal service authorities to provide free legal services to the weaker sections of the society according to Article 39 A of the Indian Constitution.

Lok Adalat is presided by a sitting or a retired judicial officer as Chairman with two other members usually a lawyer and a social worker. The parties are not allowed to be represented by the lawyers and encouraged to interact with judge who helps in arriving at amicable settlement. No fee is paid by the parties. Strict rule of Civil Procedural Court and evidence is not applied. Decision is by informal sitting and binding on the parties and **no appeal lies against the order of the Lok Adalat.**

It disposes of largely cases involving claims in the form of Motor Vehicle accident claims, Electricity and water bill related cases, land acquisition, Matrimonial and Family cases, Cheque dishonor etc.

4.1. Levels of Lok Adalat

1. **State Authority Level:** The benches at this level would be constituted by the Member Secretary of the State Legal Services Authority organising the Lok Adalat. Each bench would comprise of sitting or retired High Court Judge or a sitting or retired judicial officer, a member from the legal profession, and a social worker. This social worker should be involved in the upliftment of the weaker areas and must be interested in the implementation of legal services, plans or projects.

2. **High Court Level:** The Secretary of the High Court Legal Services Committee constitutes benches for Lok Adalat at High Court level. Each bench will be consist of a sitting or retired judge of the High Court and any one or both of either a member from the legal profession and/or a social worker, who should be involved in the upliftment of the weaker areas.
3. **District Level:** At this level, the Secretary of the District Legal Services Authority will establish benches of Lok Adalat. The bench consists of sitting or retired judicial officer and any one or both of either a member from the legal profession and/or social worker engaged in the upliftment of the weaker sections of the society. This social worker must also be interested in the implementation of legal services schemes or programmes or a person involved in para-legal activities in the area and should preferably be a woman.
4. **Taluk Level:** The Secretary of the Taluk Legal Services Committee establishes benches of Lok Adalat. Each bench consists of a sitting or retired legal officer and any one or both of either a member from the legal profession as well as a social worker involved in the upliftment of the weaker areas. The social worker must be interested in the execution of the legal services or should be involved in para-legal exercises of the area, ideally a woman.

Student Notes:

4.2. Types of Lok Adalat

1. **National Lok Adalat:** National Level Lok Adalats are held for at regular intervals on a single day throughout the nation, in every one of the courts, from the Supreme Court till the Taluk Levels, wherein the cases are disposed of in huge numbers. They are held every two months across the country to dispose of the pending cases. According to the statistics of the Ministry of Law, more than 50 lakh cases are disposed of annually on an average by these courts.
2. **Permanent Lok Adalat:** It was established according to Section 22 B of the Legal Service Authorities Act, 1987. These are permanent bodies with a Chairman and two members giving an obligatory pre-litigation system for conciliation and settlement of cases pertaining to public utility services. In these courts, even if there is a failure in reaching settlement, the Permanent Lok Adalat has the jurisdiction to decide the matter, provided, the dispute does not relate to any offence. The award given by the Permanent Lok Adalat is last and official for every one of the parties. The jurisdiction of Permanent Lok Adalat is up to Rs.10 Lakhs.
3. **Portable Lok Adalats:** These are mobile dispute settlement bodies and are set up in different parts of the country to resolve matters by encouraging resolution of disputes and easing the burden on the formal judiciary.

4.3. Criticism of Lok Adalats

1. They meet infrequently and disposes of a large number of cases on a single day without giving the parties enough time to discuss the issue properly and arrive at a certain settlement (**justice hurried is justice buried**).
2. If the parties do not arrive at a consensus, the case is either returned to the court of law or the parties are advised to seek a remedy in the court of law. It leads to unnecessary delays in the dispensation of justice.
3. There are also instances of parties pressurising their lawyers to stick up to strict procedures of the court.

5. Fast Track Courts (FTCs)

These are additional Session Courts set up for speeding up the trials of long pending cases, particularly those involving under trials.

5.1. Evolution and Structure

Fast Track Courts were initially established for a period of five years (2000-2005). The 11th Finance Commission recommended for establishment of 1734 FTCs for expeditious disposal of cases pending in lower courts. FTCs were established by state governments in consultation

with respective high courts. Judges of these FTCs were appointed on an adhoc basis and they were selected by the High Court of respective states.

Student Notes:

There are primarily three sources of recruitment:

- by promoting members from amongst the eligible judicial officers;
- by appointing retired high court judges and
- recruited from amongst the member of bar of the respected state.

The cases are heard on a daily basis and no adjournments are allowed in the fast track courts.

The cases are disposed within a given time frame.

In 2005, the Supreme Court directed the central government to continue with the FTC scheme, which was extended until 2010-2011. Subsequently, the government discontinued the FTC scheme in March 2011 due to financial problems and stopped financing FTCs. But as state governments enjoyed liberty to continue if they want, some states like Arunachal Pradesh, Assam, Maharashtra, Tamil Nadu and Kerala decided to continue with FTCs, while Haryana and Chhattisgarh discontinued. Some states like Delhi and Karnataka extended for a limited period of time. After the Delhi Rape Case, High Court of Delhi directed the state government to establish FTCs for the expeditious adjudication of cases relating to sexual assault. Some other states like Maharashtra and Tamil Nadu have also begun the process of establishing FTCs for rape cases.

5.2. Challenges

FTCs were established for speeding up long pending trials. However, success rate of FTCs in disposing of pending criminal cases is a mixed one. Southern states, along with Gujarat and Maharashtra have succeeded in making good use of FTCs. Bihar and UP, which account for 40% of all pending criminal cases have not succeeded much. Further, FTCs are accused of speeding up the trial so fast that they look like summary trials where enough opportunity is not given to the defender to present the case. Therefore, it is said that in fast track court justice is hurried that is equivalent to justice buried. The lack of mechanisms of judicial accountability for retired judges is another issue, which needs to be tackled for effectiveness of FTCs.

6. Commercial Courts

The Law Commission of India, in its 253rd report, had recommended for the establishment of the Commercial Courts at various level for speedy disposal of commercial disputes. The bill for the same was introduced in the Rajya Sabha in April 2015 and passed through Lok Sabha on December 2015. Subsequently **the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act** was passed. The commercial courts have started functioning under the jurisdiction of the Delhi High Court, Bombay High Court, Himachal Pradesh High Court and the Gujarat High Court.

6.1. Key features of the 2015 Act

- The term “Commercial Dispute” has been very broadly defined in the Act to encompass almost every kind of transaction that gives rise to a commercial relationship.
- The Section 3 of the Act provided for the constitution of “Commercial Courts” in every district in all states and union territories where the High Court of that state or union territory does not have/exercise ordinary original civil jurisdiction and “Commercial Divisions” within High Courts exercising ordinary original civil jurisdiction.
- The Act provided for the adjudication of Commercial Disputes of more than INR 1,00,00,000 (defined as “Specified Value” in the Act), by the Commercial Courts/Divisions.
- All suits and/or applications relating to a Commercial Dispute of a Specified Value pending before any civil court are required to be transferred to the constituted Commercial Courts/Divisions for fast and speedy disposal of cases.

- In line with the Arbitration and Conciliation (Amendment) Act, 2015, all matters pertaining to international commercial arbitrations were brought within the purview of the High Court,
- Applications and appeals arising out of domestic arbitrations involving purely local Indian parties, which would ordinarily lie before any principal civil court of original jurisdiction (not being a High Court), will now lie before a Commercial Court (where constituted) exercising territorial jurisdiction over such arbitration.
- The provisions of the CPC, to the extent of its application to any suit in respect of a Commercial Dispute have been amended by the Act to streamline the conduct of Commercial Disputes.
- The Act had also introduced strict timelines to ensure prompt resolution of disputes including but not limited to all appeals to the Commercial Appellate Division must be filed within 60 days from the impugned judgment and the Commercial Appellate Division must endeavour to dispose of the case within a period of 6 months
- The Act required appointment of persons having such experience to be judges of the Commercial Courts/Divisions.
- The Act sets an outer limit of 120 days for filing defense beyond which the right to file the defense is forfeited and the Court would be bound to not take such a delayed submission on record.

6.2. Significance

It will not only change the speed at which Commercial Disputes will attain finality, but also improve the perception of investors about India as an investment destination.

6.3. Issues

- **Vagueness**
 - The definition of “Commercial Disputes” is very vague and wide. The list is not exhaustive and hence it can give rise to a number of litigations.
 - It is extremely difficult to ascertain the value of an intellectual property right and this can give rise to a number of litigations.
- **Exclusion**
 - Breach of confidentiality disputes has not been included in the definition of “Commercial Disputes”, which are really common in this era of competition.
- The qualification that the immovable property must be used exclusively in trade or commerce could raise debates as to whether the property must have been in use for trade or commerce before an agreement is entered into or whether it would also cover agreements entered into for the purpose of using immovable property for the first time for commercial purposes.
- Having the same pecuniary value limit for all High Courts does not take into account the variable factor in such dispute cases.
- Conflict with regular courts
 - Keeping in mind the Act’s objective to reduce pendency, one must recognize the need for appointment of more judges.
 - There is overlapping jurisdiction of the Commercial Divisions proposed for in the five High Courts exercising original jurisdiction.
 - The transfer of pending cases in civil courts to these Commercial Court/Divisions may lead to practical and logistical difficulties.
 - The Act also does not provide for a statutory right to appeal to the Supreme Court from an order of the Commercial Appellate Division.

The Act does not provide for any new or technologically advanced method of conducting the court procedures. For example, the suggestions of e-filing, video conferencing of witness and

use of latest technology will go a long way in making these courts at par with the systems being followed in some countries.

Student Notes:

6.4. The 2018 Amendment to the Act

It seeks to achieve the following objectives:

- The Bill **brings down the specified value of a commercial dispute to 3 Lakhs** from the present one Crore. Therefore, commercial disputes of a reasonable value can be decided by commercial courts. This would bring down the time taken (presently 1445 days) in resolution of commercial disputes of lesser value and thus further improve India's ranking in the Ease of Doing Business.
- The amendment provides for **establishment of Commercial Courts at district Judge level for the territories over which respective High Courts have ordinary original civil jurisdiction** i.e in the cities of Chennai, Delhi, Kolkata, Mumbai and State of Himachal Pradesh. The State Governments, in such territories may by notification specify such pecuniary value of commercial disputes to be adjudicated at the district level, which shall 'not be less than three lakhs rupees and not more than the pecuniary jurisdiction of the district court. In the jurisdiction of High Courts other than those exercising ordinary original jurisdiction a forum of Appeal in commercial dispute decided by commercial courts below the level of District judge is being provided, in the form of Commercial Appellate Courts to be at district judge level.
- The introduction of the **Pre-Institution Mediation process** in cases where no urgent, interim relief is contemplated will provide an opportunity to the parties to resolve the commercial disputes outside the ambit of the courts through the authorities constituted under the Legal Services Authorities Act, 1987.will also help in reinforcing investor's confidence in the resolution of commercial disputes.
- Insertion of **new section of 21A** which enables the Central Government to make rules and procedures for Pre-Institution Mediation.
- To **give prospective effect to the amendment** so as not to disturb the authority of the judicial forum presently adjudicating the commercial disputes as per the extant provisions of the Act.

7. All India Judicial Service (AIJS)

7.1. Historical background

- The proposal for an All-India Judicial Service (AIJS) in lines of All-India Services was proposed as early as 1950. The First Law Commission of India (LCI) in its 14th Report on Reforms on the Judicial Administration, recommended an AIJS in the interests of efficiency of the judiciary. In its 77th Report the LCI once again said the AIJS needed serious consideration.
- Further idea of creation of All-India Judicial Services was favoured by the Chief Justices conferences in 1961, 1963, and 1965 and even the Law Commissions (8th and 11th, 116th) suggested for the creation of the service. However, each time it was faced with opposition.
- After the Swaran Singh Committee's recommendations in 1976, Article 312 was modified to include the judicial services.
- Most recently the Central Government revisited the possibility of recruiting judges through an All India Judicial Service (AIJS).

7.2. Rationale for AIJS

- It **focuses on quality** of judges rather than quantity.
- Appropriate way to **recruit the best talent required** for fulfilling the role that is demanded of a judge.

- **Currently**, the subordinate judiciary depends entirely on **state recruitment**. But the brighter law students do not join the state judicial services because they are **not attractive**.
- With **no career progression**, no one with a respectable Bar practice wants to become an additional district judge, and deal with the hassles of transfers and postings. Hence, the quality of the subordinate judiciary is by and large average.
- In this scheme of things, the measure of uniformity in the standards for selection will improve the quality of personnel in different High Courts, as one-third of the judges come there on promotion from the subordinate courts.
- In addition, the objective of inducting an outside element in High Court benches can be achieved in better way as a member of an all India judicial service will have no mental block about interstate transfers.

7.3. Arguments against AIJS

- Issue of **differences in laws** across states.
- Difference in **local languages and dialects**.
- **Mismanagement of legal education** by Bar Council and UGC. Except for a few national law schools, others do not prioritize the legal education too much.
- **Low pay** is a big issue. Despite an effort by the Supreme Court to ensure uniformity in pay scales across States in the All India Judges' Association case, it is still very low.
- **Fewer avenues for growth**, promotion and limited avenues for career advancement.
- **Low district judge representation in the High Courts**, as less than a third of seats in the High Courts is filled by judges from district cadre. The rest are appointed directly from the Bar.
- It will **increase the competition** and it will be difficult from less privileged background to enter the profession.
- Legal education would be commercialized and **aid coachings**.
- Currently, the judges of subordinate courts are appointed by the governor in consultation with the High Court which will not be so if AIJS is implemented. Hence, it **will go against the Independence of Judiciary** as some other body will have a control in appointment and integration because in the judiciary, higher level controls and evaluates lower level.

Hence, it is argued that without addressing these identifiable lacunae, any new reform will not make a difference. A career judicial service will make the judiciary more accountable, more professional, and arguably, also more equitable. This can have far-reaching impact on the quality of justice and on people's access to justice as well.

8. Judicial Activism and Judicial Overreach

The Supreme Court has cautioned judges many times against judicial overreach and advised that judges must remain within the limits of the law and not peddle individual perceptions and notions of justice.

8.1. Difference between Judicial Activism and Judicial Overreach

Under our Constitutional scheme, the judiciary has to enforce the laws laid down by the legislature in accordance with our Constitution for which it has wide powers ranging from issuing writs of certain nature to the entertainment of petitions by special leave etc.

- Further, new innovations like the concept of Public Interest Litigations in recent times, has led to an enormous expansion of unaccountable judicial power in the nation's politics.
- Thus, the exercise of judicial powers in a manner which leads to redefinition of power equations between different organs of the state and the judiciary is called as judicial activism.
- However, Judicial Activism doesn't necessary mean that judiciary is inclined to expand its powers. It is more about the positive role played by the judiciary owing to the factors like a

- near collapse of responsible government, a legislative vacuum due to coalition governments and public confidence in the judiciary.
- Judicial Activism when overtly exercised results in usurping the powers of the Executive or the Legislature, which are the other two important organs of governance and is called as Judicial Overreach.
 - The power to legislate is squarely conferred on the Legislature by the Constitution. No such legislative power is given to the Courts by the Constitution. Judicial Activism cannot be used for filling up the lacunae in Legislation or for providing rights or creating liabilities not provided by the Legislation.

What did the Supreme Court say in its recent judgment?

- The court said that judges should not peddle individual perceptions and notions of justice. A judge's solemn pledge has to remain embedded to Constitution and the laws.
- The apex court said if a judge considered himself or herself a "candle of hope" and took decisions under the influence of such a notion, it might do more harm than good to the society.
- While using the power one has to bear in mind that 'discipline' and 'restriction' are the two basic golden virtues within which a judge functions as per the Supreme Court.

Way Forward

- There is a very fine line between Judicial Activism and Judicial Overreach. It would be in the best interest of our country if judges understand this and restrain themselves from crossing this line too often.
- The judiciary cannot rule the nation by legislating as well as executing through its judgments. It's simply not meant to do that. It can rightly be argued that a legitimate judicial intervention is the one which clearly falls within the permissible scope of judicial review.
- Purely political questions and policy matters not involving decision of a core legal issue should therefore remain outside the domain of judiciary.

8.2. Examples of Judicial Activism in India

Following are some of the examples of Judicial Activism in India:

8.2.1. Persons in custody to be debarred from contesting elections

As per the 2004 judgment of the Patna High Court in **Jan Chaukidari vs. Union of India** — upheld by the Supreme Court in July, 2013— all those in lawful police or judicial custody, other than those held in preventive detention, will forfeit their right to stand for election. The judges relied on the Representation of the People Act 1951 (RPA), which says that one of the qualifications for membership of Parliament or State legislature is that the contestant must be an 'elector'. Since Section 62(5) of the Act prevents those in lawful custody from voting, the reasoning goes, those in such custody are not qualified for membership of legislative bodies.

Reasoning Against the Judgment:

For a person to be qualified for the membership of legislature, RPA, 1951 states that one has to be an 'elector' as defined in Section 2(e). Section 2(e) defines an elector as "a person whose name is entered in the electoral roll of that constituency and who is not subject to any of the disqualifications mentioned in Section 16 of the RPA, 1950."

Since the law mentions Section 16 of RPA, 1950 as the basis of disqualification from being an elector, the SC relied on Section 62(5), which does not define 'elector' and only debars a person in jail from voting, not from contesting an election. Thus, Section 62(5) distinguishes between an 'elector' and a 'voter'.

The Supreme Court's judgement effectively amends the law passed by the Parliament.

8.2.2. MPs, MLAs to be Disqualified on Date of Criminal Conviction

Student Notes:

In *Lily Thomas v. Union of India* case in 2013, the Supreme Court declared **Section 8 (4)** of the Representation of the People Act, 1951, (RPA) which allowed legislators a three-month window to appeal against their conviction — effectively delaying their disqualification until such appeals were exhausted — as unconstitutional.

Section 8 of the Representation of People Act, 1951 deals with disqualification on conviction for certain offences: A person convicted of any offence and sentenced to imprisonment for varying terms under Sections 8 (1) (2) and (3) shall be disqualified from the date of conviction and shall continue to be disqualified for a further period of six years since his release. But **Section 8 (4) of the RP Act gives protection to MPs and MLAs as they can continue in office even after conviction if an appeal is filed within three months.**

The Bench found it unconstitutional that the convicted persons could be disqualified from contesting the elections but could continue to be the Members of Parliament and State Legislatures, once elected.

Reasoning Against the Judgment:

The Constitution enlists the disqualification criteria in Article 102(1), which is on the basis of office of profit, unsound mind, undischarged insolvency and citizenship. This article also empowers the Parliament to make law specifying any other criterion for disqualification. In accordance with the constitutional mandate, the Parliament enacted the RPA 1951, mentioning the disqualification criteria in Section 8.

The Supreme Court has given two reasons for its verdict:

First, it held Section 8(4) to be in violation of Article 102, and its corresponding provision for the States, Article 191, of the Constitution. A careful reading of the article 102 clearly empowers the Parliament to define the criterion for disqualification by enacting a law and none of the five clauses of Article 102(1) are attracted to invalidate Section 8(4).

Second, the Supreme Court has held that Parliament had no legislative competence to enact Section 8(4). This reasoning, too, is difficult to accept because Entry 72 to List 1 of the 7th Schedule in the Constitution specifically allows Parliament to legislate on elections to the Parliament or the State legislatures. It is well settled that legislative entries in the Constitution are to be widely construed, and in any case the Parliament has residual power to legislate under Entry 97 to List 1.

8.2.3. SC Ruling on Appointments in Central Information Commission

The Supreme Court in September 2012 ruled that only sitting or retired Chief Justices of High Courts or a Supreme Court judge can head the Central and State Information Commissions and that hearing can only be carried out by benches having a judicial member and an expert.

This judgment amounted to a *suo-motu* amendment in the Right to Information Act, 2005 by the Supreme Court. The reasoning stated by the SC was that since the work of the Commission was quasi-judicial in nature it should be manned by the judges. Interestingly enough, the retirement age for Central Information Commission (CIC) is 65 years, while the retirement age for judges is 65 in SC. Thus, it is practically impossible to have a retired SC judge as the head of the CIC.

The aim of SC was to ensure that a rational and transparent process be used to fill the vacancies in the CIC. But any aim, however noble, cannot justify the means used in a scenario when a clear separation of powers is enunciated in the Constitution.

In 2013, the above judgement was recalled by the Supreme Court.

8.2.4. Supreme Court's Ruling on Fixed Tenure for Bureaucrats

To insulate the bureaucracy from political interference and to put an end to frequent transfers of civil servants by political bosses, the Supreme Court in October, 2013 directed the Centre and

the States to set up a **Civil Services Board (CSB)** for the management of transfers, postings, inquiries, process of promotion, reward, punishment and disciplinary matters. A Bench also said that the bureaucrats should not act on verbal orders given by politicians and suggested a fixed tenure for them.

The Bench asked the **Parliament to enact a Civil Services Act under Article 309** of the Constitution, setting up a CSB, "which can guide and advise the political executive transfer and postings, disciplinary action, etc." The Bench directed the Centre, State governments and the Union Territories to constitute such Boards "within three months, if not already constituted, till the Parliament brings in a proper legislation in setting up CSB."

The decision clearly encroached the legislative domain of the Parliament.

8.2.5. Voter's right to cast negative vote

With a view to bring about purity in elections, the Supreme Court held that a voter could exercise the option of negative voting and reject all candidates as unworthy of being elected. The voter could press the 'None of the Above' (NOTA) button in the electronic voting machine. The Court directed the Election Commission to provide the NOTA button in the EVM.

The NOTA option would indeed compel political parties to nominate sound candidates. The bench noted that giving right to a voter to not vote for any candidate, while protecting his right of secrecy is extremely important in a democracy. Such an option gives the voter the right to express his disapproval to the kind of candidates being put up by the Political Parties. Gradually, there will be a systemic change and the Parties will be forced to accept the will of the people and field candidates who are known for their integrity.

The right to cast a negative vote will foster the purity of the electoral process and also fulfill one of its objectives, namely, wide participation of people. Not allowing a person to cast a negative vote defeats the freedom of expression and the right to liberty.

The Bench held that Election Conduct Rules 41(2) and (3) and 49-O of the Rules were *ultra vires* Section 128 of the Representation of the People Act and Article 19(1)(a) of the Constitution to the extent they violate the secrecy of voting.

8.2.6. The VVPAT Ruling

Supreme Court (SC), in the case of **Subramanian Swamy vs. Election Commission of India (ECI)**, has held that VVPAT (Vote Verifiable Paper Audit Trial) is "indispensable for free and fair elections". In accordance to that, the Supreme Court has directed the ECI to equip Electronic Voting Machines (EVMs) with VVPAT systems to "ensure accuracy of the VVPAT system". The Court directed the government to provide key financial assistance to the ECI to cause VVPAT systems to be deployed along with EVMs. Reiterating the stand of the Delhi High Court in an earlier judgment, the Apex Court maintained that costs and finances cannot and should not be a deterrent to the conduct of free and fair elections. This ruling is obviously a victory for accountable voting in India, but it leaves a few questions unanswered. While it was an exclusive prerogative of the Executive to decide the manner in which fair and efficient elections can be held, but in this case the court not only decided the mechanism but also asked the government to allocate funds.

8.2.7. Ruling on Election Manifesto

On a petition filed by an advocate S Subramaniam Balaji, challenging the state's decision to distribute freebies, the Supreme Court said that freebies promised by political parties in their election manifestos shake the roots of free and fair polls, and directed the Election Commission to frame guidelines for regulating content of manifestos.

It was stated in the petition that freebies amount to bribery under Section 123(1).The Supreme Court rejected the contention that the promises made by a political party are violative of Section 123(1) of the RPA. The provisions of the RPA place no fetter on the power of political parties to make promises in the election manifesto, the Court held.

Secondly, the Court held that the concept of state largesse is essentially linked to the Directive Principles of State Policy. Whether the state should frame a scheme, which directly gives benefits to improve the living standards or indirectly does so by increasing the means of livelihood, is for the state to decide and the role of the Court is very limited in this regard. It held that judicial interference was permissible when the action of the government was unconstitutional and not when such action was unwise or when the extent of expenditure was not for the good of the state.

The Court, however, agreed with the appellant that distribution of freebies of any kind undoubtedly influenced all people. "Freebies shake the root of free and fair elections to a large degree," it said.

Considering that there was no enactment that directly governed the contents of the election manifesto, the Court directed the E.C. to frame guidelines for the same in consultation with all the recognised political parties. The Court also suggested the enactment of a separate law for governing political parties.

8.2.8. Stay on Caste-Based Rallies in UP

The Allahabad High Court stayed caste-based rallies in Uttar Pradesh, a move that will block off a key avenue that the major political parties use to expand their support base, especially before elections.

The Lucknow bench of the High Court sent a notice staying caste-based rallies to four major political parties, the Union and the State governments, and the Election Commission. The four parties are the Congress, the Bharatiya Janata Party (BJP), the Samajwadi Party (SP) and the Bahujan Samaj Party (BSP).

Holding political rallies by certain groups to address issues specific to them and seeking to win their electoral support is a common practice in the country, most prominently in Uttar Pradesh, where two of the major parties have specific caste bases. The petitioner said there had been a spurt of such rallies in the state, damaging social unity and harmony, and that they were against the spirit of the Constitution.

There is no legal bar to a caste rally, as long as no law is violated. In fact, Article 19(1)(b) of the Constitution gives citizens a Fundamental Right to assemble peacefully. A political party can call a meeting of a caste to discuss the problems facing that community, and there is no law barring such a meeting.

The aforementioned decisions of the Supreme Court and the Allahabad High Court may be perceived as making or amending the law, a function that is in the domain of the legislature.

8.2.9. Ruling on Nomination Papers

The Supreme Court in September, 2013 ruled that a returning officer could reject nomination papers of a candidate for non-disclosure and suppression of information, including that of assets and their criminal background.

The apex court said that voters have a fundamental right to know about their candidates and leaving columns blank in the nomination paper amounts to violation of their right.

The Court passed the judgment on a **Public Interest Litigation filed in 2008 by NGO Resurgence India**, a civil rights group, which detected a trend among candidates of leaving blank the columns demanding critical information about them.

The Election Commission had supported the NGO's plea that no column should be allowed to be left blank, which tantamount to concealing information and not filing a complete affidavit.

It had also taken a stand that the returning officer should be empowered to reject the nomination papers of a candidate who provides incomplete information by leaving some columns blank in the affidavit.

8.2.10. Judgment on Commutation of Death Sentence

Student Notes:

In a landmark judgment, the Supreme Court in January, 2014 ruled that an inexplicable, inordinate delay in deciding on mercy plea of a death row convict is sufficient ground for commutation of death sentence to life. The Court said that the government cannot keep mercy pleas pending for years. It said that if there is a procedural lapse in deciding on the mercy plea of a death row convict then it can be a ground for commuting death sentence to life. The Apex Court also laid down important guidelines on dealing with death row convicts and their mercy pleas.

The Court directed that death row convicts should not be placed under solitary confinement. Also, such convicts must be provided all legal aid if he/she wishes to submit a mercy plea. The Court also mandated the respective state governments to place necessary material before the Governor while sending the mercy plea. Once the mercy plea is rejected, it should be conveyed in writing to the convict.

8.2.11. Supreme Court's Ruling on Acid Sale

In July, 2013 the Supreme Court issued detailed directions to all State governments and Union Territories to frame rules within three months for regulating the sale of acid. In December, 2013 the Supreme Court gave another four-month time to the States and Union Territories to frame rules for regulating the sale of acid. A Bench headed by Justice R M Lodha also asked all Chief Secretaries to file a response on providing free-of-cost treatment, including plastic surgery, to acid attack victims.

It directed that whenever an FIR is lodged in an acid attack case, the Sub-Divisional Magistrate (SDM) of the area concerned will hold inquiry into the procurement of acid by the "wrongdoer". Taking the Haryana government schemes as model, the SC asks the government to respond why they should not bear cost of corrective plastic surgery required by acid attack victims and follow up psychiatric treatment to enable the victim to recover from the horrific experience.

The SC also asked the police to inform the concerned SDM immediately about an acid attack case so that he could inquire how the corrosive substance was procured.

8.2.12. Interlinking of Rivers

The Supreme Court directed the Centre to constitute a 'Special Committee' forthwith for inter-linking of rivers for the benefit of the entire nation.

A Bench of Chief Justice S.H. Kapadia and Justices A.K. Patnaik and Swatanter Kumar, in its judgment in a 2002 case relating to networking of rivers, said the committee should submit a bi-annual report to the Union Cabinet, which must consider the report and take decisions.

The bench noted, "As pointed out in the report by National Council of Applied Economic Research and by the Standing Committee, the delay has adversely affected the financial benefits that could have accrued to the concerned parties and the people at large, and is in fact now putting a financial strain on all concerned."

8.2.13. Earlier Cases of Judicial Activism

Judicial activism was made possible largely due to PILs (Public Interest Litigation). PIL, a manifestation of judicial activism, has introduced a new dimension regarding judiciary's involvement in public administration. The sanctity of *locus standi* and the procedural complexities are totally side-tracked in the cases brought before the courts through PIL. In the beginning, the application of PIL was confined only to improving the lot of the disadvantaged sections of the society, who by reason of their poverty and ignorance, were not in a position to seek justice from the Courts and, therefore, any member of the public was permitted to maintain an application for appropriate directions.

After the Constitution (Twenty-fifth Amendment) Act, 1971, by which primacy was accorded to a limited extent to the Directive Principles vis-a-vis the Fundamental Rights making the former

enforceable rights, the expectations of the public soared high and demands on the courts to improve the administration by giving appropriate directions for ensuring compliance with statutory and constitutional prescriptions have increased. Beginning with the **Ratlam Municipality** case, the sweep of PIL had encompassed a variety of causes. Ensuring green belts and open spaces for maintaining ecological balance; forbidding stone-crushing activities near residential complexes; earmarking a part of the reserved forest for Adivasis to ensure their habitat and means of livelihood; compelling the municipal authorities of the Delhi Municipal Corporation to perform their statutory obligations for protecting the health of the community; compelling the industrial units to set up effluent treatment plants; directing installation of air-pollution-controlling devices for preventing air pollution; directing closure of recalcitrant factories in order to save the community from the hazards of environmental pollution.

The decision of the Supreme Court in **Bela Banerjee case**, in which even after the Constitution (Fourth Amendment) Act, 1955 specifically laying down that no law concerning acquisition of property for a public purpose shall be called in question on the ground that the compensation provided by that law is not adequate, the Supreme Court reiterated its earlier view expressed in **Subodh Gopal and Dwarkadas cases** to the effect that compensation is a justiciable issue and what is provided by way of compensation must be "**a just equivalent of what the owner has been deprived of**".

Golak Nath case is also an example of judicial activism in that the Supreme Court for the first time, by a majority of 6 against 5, despite the earlier holding that the Parliament in exercise of its constituent power can amend any provision of the Constitution, declared that the fundamental rights as enshrined in Part III of the Constitution are immutable and so beyond the reach of the amendment process. The doctrine of "prospective overruling", a feature of the American Constitutional Law, was invoked by the Supreme Court to avoid unsettling matters, which attained finality because of the earlier amendments to the Constitution. The declaration of law by the Supreme Court that the Indian Parliament has no power to amend any of the provisions of Part III of the Constitution became the subject matter of animated discussion.

Kesavananda Bharati case had given a quietus to the controversy as to the immutability of any of the provisions of the Constitution. By a majority of seven against six, the Court held that under Article 368 of the Constitution, Parliament has power to amend any provision in the Constitution, but the amendment power does not extend to alter the **basic structure** or framework of the Constitution. Illustratively, it was pointed out by the Supreme Court that the following, among others, are the basic features: (i) Supremacy of the Constitution; (ii) Republican and Democratic form of Government; (iii) Secularism; (iv) Separation of powers between the legislature, the executive and the judiciary; and (v) Federal character of the Constitution. Supremacy and permanence of the Constitution have thus been ensured by the pronouncement of the summit court of the country with the result that the **basic features of the Constitution** are now beyond the reach of Parliament.

Vishakha vs. State of Rajasthan case

Vishakha, a non-governmental organization working for gender equality, had filed a writ petition seeking the upholding of the fundamental rights of working women under Article 21 of the constitution. The immediate reason for the petition was the gang rape of a *saath in* (a social worker involved in women's development programme) of Rajasthan in 1992. The assault was an act of revenge as the saath in had intervened to prevent a child marriage. The Supreme Court provided a landmark judgment in the area of sexual harassment against women. Since in this particular aspect there was no law or enactment by the legislature, so the judiciary applied its activist power and provided some guidelines.

After providing the guidelines, the Court said "Accordingly, we direct that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the rights to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field".

Supreme Court directives on Police Reform

In 1996, two former Director Generals of Police took the issue to the Supreme Court, requesting the Court to direct central and state governments to address the most glaring gaps and bad practice in the functioning of the police.

On 22 September 2006, the Supreme Court of India delivered a historic judgement in **Prakash Singh vs. Union of India** case instructing central and state governments to comply with a set of seven directives laying down practical mechanisms to kick-start police reform. The Court's directives seek to achieve two main objectives:

- 1. Functional Autonomy for Police:** through security of tenure, streamlined appointment and transfer processes, and the creation of a "buffer body" between the police and the government
- 2. Enhanced Police Accountability:** both for organizational performance and individual misconduct.

The Supreme Court required all governments, at centre and state levels, to comply with its directives and file affidavits of compliance.

9. Comparison between the Supreme Court and High Court

BASIS FOR COMPARISON	SUPREME COURT	HIGH COURT
 Meaning	The Supreme Court is the primary court of justice in the country. (Articles 124-147) in Part V	The High Court is the apex judiciary body of a State's administration. (Articles 214-231) in Part VI
 Articles in the Constitution	It is headed by the Chief Justice of India.	It is headed by the Chief Justice of the State.
 Headed by	There is only one Supreme Court in India.	There are total 25 High Courts in India, three of which have jurisdiction in more than one state.
 Number of Courts	Over all courts and tribunals of the country.	Over all courts, under its jurisdiction, which in turn is limited by the boundary of the concerned state.
 Superintendence/ Territorial jurisdiction	Supreme Court can issue writs only where a fundamental right has been infringed.	High Courts can issue writs for enforcement of Fundamental Rights as well as for any other purpose i.e. ordinary legal rights of the citizen.
 Writ jurisdiction	He should <ul style="list-style-type: none"> <input type="radio"/> be a citizen of India. <input type="radio"/> have been a judge of a High Court (or high courts in succession) for five years; or <input type="radio"/> have been an advocate of a High Court (or High Courts in succession) for ten years; or <input type="radio"/> be a distinguished jurist in the opinion of the President. 	He should <ul style="list-style-type: none"> <input type="radio"/> be a citizen of India. <input type="radio"/> have been a Barrister for more than five years; or <input type="radio"/> been a civil servant for over 10 years along with serving the Zila court for at least 3 years; or <input type="radio"/> have been a pleader for over 10 years in any High Court.
 Qualifications of Judges	By the President by warrant under his/her hand and seal after consultation with such of the Judges of the Supreme Court and of the High Court in the States.	By the President in consultation with the Chief Justice of India and the Governor of the state in question.
 Appointment of Judges	31 judges (including the Chief Justice and 30 other judges). Recently, the strength was increased from 31 to 34.	For every High Court, there is a Chief Justice and many other judges. The number of judges appointed is defined by the President of India.
 Number of judges	Judges retire at the age of 65 years.	Judges retire at the age of 62 years.
 Retirement of Judges	The judge of Supreme Court cannot plead before any court during his or her tenure or after his or her retirement.	The judge of High Court cannot plead before any court during his or her tenure and after retirement cannot plead in a court below the high court.
 Pleading	The President can issue the removal order only after an address by Parliament which must be supported by a special majority of each House of Parliament.	He can be removed by President on recommendation of Parliament.
 Removal/Transfer of Judge	The salaries and allowances of Chief Justice of India and Supreme Court judges are charged from Consolidated Fund of India.	The salaries and allowances of state high court judges including chief justices are charged from Consolidated Fund of State while pension is drawn from Consolidated Fund of India.
 Salaries and Pensions		

Student Notes:

10. Previous Year UPSC GS Prelims Questions

Student Notes:

2019

1. With reference to the Constitution of India, consider the following statements:
1. No High Court shall have the jurisdiction to declare any central law to be constitutionally invalid.
 2. An amendment to the Constitution of India cannot be called into question by the Supreme Court of India.
- Which of the statements given above is/are correct?
- (a) 1 only
(b) 2 only
(c) Both 1 and 2
(d) Neither 1 nor 2
- Ans. (d)**

2016

2. With reference to the 'Gram Nyayalaya Act', which of the following statements is/are correct?
1. As per the Act, Gram Nyayalayas can hear only civil cases and not criminal cases.
 2. The Act allows local social activists as mediators/reconciliators.
- Select the correct answer using the code given below.
- (a) 1 only
(b) 2 only
(c) Both 1 and 2
(d) Neither 1 nor 2
- Ans. (b)**

2013

3. With reference to National Legal Services Authority consider the following statements:
1. Its objective is to provide free and competent legal services to the weaker section of the society on the basis of equal opportunity.
 2. It issues guidelines for the State Legal Services Authorities to implement the legal programmes and schemes throughout the country.
- Which of the statements given above is/are correct?
- (a) 1 only
(b) 2 only
(c) Both 1 and 2
(d) Neither 1 nor 2
- Ans. (c)**

2008

4. How many High Courts in India have jurisdiction over more than one State (Union Territories not included)?
- (a) 2
(b) 3
(c) 4
(d) 5
- Ans. (b)**

2007

5. Consider the following statements:
1. The mode of removal of a Judge of a High Court in India is same as that removal of a Judge of the Supreme Court.

2. After retirement from the office, a permanent Judge of a High Court cannot plead or act in any court or before any authority in India.

Student Notes:

Which of the statements given above is/are correct?

- (a) 1 only
- (b) 2 only
- (c) Both 1 and 2
- (d) Neither 1 nor 2

Ans. (a)

2006

6. **Assertion (A):** In India, every state has a High Court in its territory.

Reason (R): The Constitution of India provides for a High Court for each state.

Which of the statements given above is/are correct?

- (a) Both reason and assertion are true and (R) is a correct explanation of (A).
- (b) Both reason and assertion are true but (R) is not a correct explanation of (A).
- (c) Assertion (A) is right while reason (R) is wrong.
- (d) Assertion (A) is wrong while reason (R) is right.

Ans. (d)

7. Consider the following statements:

1. A person who has held office as a permanent Judge of a High Court cannot plead or act in any court or before any authority in India except the Supreme Court.
2. A person is not qualified for appointment as a Judge of a High Court in India unless he has for at least five years held a judicial office in the territory of India.

Which of the statements given above is/are correct?

- (a) 1 only
- (b) 2 only
- (c) Both 1 and 2
- (d) Neither 1 nor 2

Ans. (d)

2005

8. Consider the following statements:

1. There are 25 High Courts in India
2. Punjab, Haryana and the Union Territory of Chandigarh have a common High Court.
3. National Capital Territory of Delhi has a High Court of its own.

Which of the statements given above is/are correct?

- (a) 2 and 3
- (b) 1 and 2
- (c) 1, 2 and 3
- (d) 3 only

Ans. (a)

2005

9. Consider the following:

1. Disputes with mobile cellular companies
2. Motor accident cases
3. Pension cases

For which of the above are Lok Adalats held?

- (a) 1 only
- (d) 1 and 2
- (c) 2 only
- (d) 1, 2 and 3

Ans (c)

2004

Student Notes:

10. Consider the following statements:

1. The highest criminal court of the district is the Court of District and Sessions Judge.
2. The District Judges are appointed by the Governor in consultation with the High Courts.
3. A person to be eligible for appointment as a District Judge should be an advocate or a pleader of seven years' standing or more, or an officer in judicial service of the Union or the State.
4. When the Sessions Judge awards death sentence, it must be confirmed by the High Court before it is carried out.

Which of the statements given above are correct?

- (a) 1 and 2
- (b) 2, 3 and 4
- (c) 3 and 4
- (d) 1, 2, 3 and 4

Ans. (d)

2003

11. Which one of the following High Courts has the Territorial Jurisdiction over Andaman and Nicobar Islands?

- (a) Andhra Pradesh
- (b) Calcutta
- (c) Madras
- (d) Orissa

Ans. (b)

2002

12. The salaries and allowances of the Judges of the High Court are charged to the

- (a) Consolidated Fund of India
- (b) Consolidated Fund of the State
- (c) Contingency Fund of India
- (d) Contingency Fund of the State

Ans. (a)

2001

13. Consider the following statements regarding the High Courts in India:

1. There are eighteen High Courts in the country.
2. Three of them have jurisdiction over more than one state.
3. No Union Territory has a High Court of its own.
4. Judges of the High Court hold office till the age of 62.

Which of these statements is/are correct?

- (a) 1, 2 and 4
- (b) 2 and 4
- (c) 1 and 4
- (d) 4 only

Ans. (b)

11. Previous Year UPSC GS Mains Questions

Student Notes:

1. How are Chief Justices of High Courts in India appointed? 3 marks (1987)
2. Bring out the issues involved in the appointments and transfer of judges of the Supreme Court and High courts in India. 6 marks (1998)
3. What is the common point between Articles 14 and 226 of the Indian Constitution? 20 marks (2008)
4. Is the High Courts' power to issue 'writs' wider than that of the Supreme Court of India? 15 marks (2006)
5. Write short notes, notes not exceeding 150 words on Role of the Judiciary in India. 20 marks (1979)
6. Discuss the importance of the independence of judiciary in a democracy. 20 marks (1984)
7. Present your views for and against the creation of an All India Judicial Service. 20 marks (1997)
8. What constitutes the doctrine of 'basic features' as introduced into the Constitution of India by the Judiciary? 30marks (2000)
9. Write notes on the Lokpal bill. 10 marks (2007)
10. Do you think there is a need for a review of the Indian Constitution? Justify your view. 30 marks (2008)
11. What are the major changes brought in the Arbitration and Conciliation Act, 1966 through the recent ordinance promulgated by the President? How far will it improve India's dispute resolution mechanism? Discuss. 12.5 marks (2015)

12. Previous Year Vision IAS GS Mains Questions

1. *Examine the need of ADR mechanisms in India and comment on their efficacy in dispute redressal.*

Approach:

- The question is about the need and efficacy of ADR mechanisms. First and foremost one should know what ADR mechanisms are.
- The need of ADR mechanisms can be examined by highlighting the shortcomings that exist in the formal justice system. It also needs to be explained how the ADR mechanisms curb these shortcomings.
- Thereafter, the efficacy should be examined. While doing this, the limitations that exist in the ADR mechanisms should be discussed. A trade-off between the strengths and weaknesses would explain whether these are effective or not vis. a vis. the formal justice system.

Answer:

Justice delivery system plays a fundamental role in promoting public interest and preservation of order in the society. An effective system for resolution of disputes is essential for dispensing justice. However, the formal justice delivery system suffers from various limitations. Consider for instance, the following:

- To get justice through courts one has to often go through difficult and expensive procedures involved in litigation. Moreover, there exist serious concerns regarding costs, delays and congestion in the courts.
- Dispute resolution through legal proceedings in the courts has become excessively procedural and adversarial in nature, thereby resulting in undue delays, high costs and unfairness in litigation. Huge pendency of cases has created serious implications for the trust and credibility, which the society is supposed to have in the judicial system.

- Besides this, the adversarial nature of litigation in formal courts is found to be unconducive to social and business relationships, which need to be preserved. Thus this system neither generates a climate of consensus, compromise and co-operation nor does it end in harmony. This state of affair often causes dissatisfaction among disputants and creates a need for a more flexible means of dispute resolution.

It is in light of these limitations that the need for Alternative Dispute Resolution (ADR) mechanisms arise. Under ADR disputes are settled with the assistance of a neutral third person, who is generally of parties' own choice. Moreover, this person is usually familiar with the nature of dispute.

Further, the proceedings are informal, without any procedural technicalities. The process is not only expeditious, inexpensive and confidential, but it also aims at substantial justice. The goal here is to provide more effective dispute resolution. Thus, the availability of ADR creates more choices within the justice system. This is how the shortcomings faced in the formal justice delivery system can be overcome through the ADR methods.

However, despite the advantages that ADR enjoys over the formal justice system, it is not a substitute to litigation. There exists a different set of limitations in the ADR too. For instance:

- ADR processes cannot be used in those situations where the dispute is regarding systematic injustice, discrimination, and violation of human rights or serious frauds.
- ADR processes do not set precedent, since they function in private. They seek to resolve individual disputes. Moreover, resolution may be different in two similar cases, depending on the surrounding conditions.
- In cases that involve an extreme power imbalance between the parties, ADR processes cannot work well. A more powerful party may coerce the weaker party to accept the unfair consensus.
- In multi-party disputes, ADR processes cannot work effectively, if some of the parties do not participate.
- ADR settlements do not have any educational or deterrent effect on the public, since they are settled privately. Only courts can award punitive damages.
- Many people are not aware of the existence of ADR methods. Unless they are aware they cannot use these methods.

So, the efficacy of ADR depends on the trade-off between its benefits and limitations. It needs to be stressed once again that though ADR mechanisms are effective, they cannot be a substitute for litigation and a formal justice system.

2. Elaborate the functions and structure of Nyaya Panchayats. Also discuss how it works at the grass-root level for the dispensation of justice.

Approach:

- Brief introduction of Nyaya Panchayats.
- Briefly write the structure
- Functions or objectives of Nyaya Panchayats
- Analysis of its working at the grass-root level.

Answer:

- Nyaya Panchayats can be described as village courts. It works on principles of natural justice and tends to remain procedurally as simple as possible. It helps in

- settlement of disputes at the local level, thus speeding up of justice and decongesting mainstream courts.
- Structure of Nyaya Panchayats:
 - Nyaya Panchayats are constituted for every Village Panchayat area or a group of Village Panchayat areas depending on the population and area
 - Nyaya Panchayats consist of five Panchas who are elected by the voters enrolled in the voter's list of that Village Panchayat or group of Village panchayats
 - Every Panch holds the office of Nyaya Pramukh for a period of one year by rotation on the basis of seniority by age.
 - Functions of Nyaya Panchayats
 - To provide speedy and cheap disposal of cases.
 - To bring justice nearer to the grass root levels without involving the expenditure which would otherwise have to be incurred in establishing regular courts.
 - To dispose of a large number of cases and thus relieve the burden of regular courts.
 - To succeed in getting a large number of cases compromised through peaceful conciliation.
 - To provide better chances of conciliatory method of approach.
 - Though Nyaya Panchayats do not exist throughout the country, but its positives in various states can be taken up as:
 - To a large extent, they have justified their existence.
 - They have brought justice to the very doorsteps of villagers –which is cheap, speedy and free from procedural techniques.
 - They have helped the parties in reaching compromise which reduced burden of the regular courts.
 - Yet it also suffers from limitations and defects:
 - The big land holders, casteism, social and religious taboos continue to play a major role in influencing the Nyaya Panchayats.
 - Low budget reduces Nyaya Panchayats activities considerably.
 - Fear of official favouritism and factionalism
 - Low educational level of Panchs makes it difficult to handle Nyaya Panchayat operations.

3. If the Supreme Court and the High Courts both were to be thought of as brothers in the administration of justice, the High Court has a larger jurisdiction but the Supreme Court still remains the elder brother. -Justice R.C Lahoti. In the context of the above statements describe the relationship between the apex court and the high courts in India.

Approach:

The Answer needs to highlight how both Supreme Court and High Courts have defined areas of jurisdiction under the provisions of constitution. Mention the provisions that make Supreme Court the apex court within India as well as the provisions that provide High Court a wider Jurisdiction. Keep in mind particularly Articles 132 to 136, 139A, 141, 144, 226 and 227. Also Remember Tirupati Balaji Developers Pvt. Ltd. and Ors. Vs. State of Bihar Case 2003.

Answer:

The relationship between the Supreme Court and High court in the constitutional scheme of things includes independence and hierarchy both. There are provisions

which give an edge, and assign a superior place in the hierarchy, to Supreme Court over High Courts. For instance,

- Article 139-A empowers the Apex Court to transfer any case pending before one High Court to another High Court or may withdraw the case to itself.
- Article 141 makes the law declared by the Supreme Court binding on all courts, including High Courts, within the territory of India. And
- Article 144 mandates that all authorities, civil and judicial, in the territory of India — and that would include High Court as well — shall act in aid of the Supreme Court.

The cases involving the interpretation of the Constitution are decided only by the Supreme Court, while the cases of constitutional interpretation cannot be decided by the High courts, the High Court issues the certificates that the cases require constitutional interpretations and should be taken by the Supreme court. The Constitutional provisions that attest to a larger jurisdiction of High Court are:

- Under Article 226 regarding writ jurisdiction the high court has wider powers than the Supreme Court. However, power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme court by clause (2) of Article 32.
- Article 227 of the Constitution confers on every High Court the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction excepting any court or tribunal constituted by or under any law relating to the armed forces.

The Supreme Courts apex status in judicial matters is further affirmed by the Article 136 which provides an extraordinary jurisdiction to it. However, the Constitution has clearly divided the jurisdiction between these two institutions in exercise of their constitutional mandate but while doing so these institutions have to have mutual respect for each other as was observed Justice Lahoti by in the Tirupati Balaji Developers Pvt. Ltd. and Ors. Vs. State of Bihar Case 2003.

4. *Give an account of the factors responsible for the limited success of Lok Adalats. What measures are required to ensure that Lok Adalats function as an effective dispute redressal mechanism?*

Approach:

- Factors responsible for limited success of Lok Adalats
- Measures to improve functioning of Lok Adalats

Answer:

Lok Adalat is one of the alternative dispute redressal mechanisms, it is a forum where disputes/cases pending in the court of law or at pre-litigation stage are settled/compromised amicably. Lok Adalats have been given statutory status under the Legal Services Authorities Act, 1987. Lok Adalats serve very crucial functions in India due to many factors like pending cases, illiteracy, poverty, high vacancy in courts etc.

Several limitations of Lok Adalats include:

- **LOK ADALATS ARE NOT APPROPRIATE FOR COMPLEX CASES:** the biggest disadvantage with Lok Adalats is that repeated sittings at short intervals with the same judge are almost not possible which breaks the continuity of the deliberations.
- **LACK OF CONFIDENTIALITY:** Lok Adalat proceedings are held in the open court and any member of public may witness these proceedings. Thus, the element of confidentiality is also lacking.

Student Notes:

This also impedes the process of exploration of various resolution options and ultimately the success rate in matters where parties desire confidentiality.

Student Notes:

- **AURA OF COURT PROCEEDINGS:** Lok Adalats are forums where voluntary efforts intended to bring about settlement of disputes between the parties are made through conciliatory and persuasive efforts. However, they are conducted in regular courts only. Therefore some amount of formality still remains attached with Lok Adalats.
- **DIMINISHED PARTY AUTONOMY:** It cannot be said that the parties remain in absolute control of the proceedings in contradistinction to what happens in mediation.
- **NEEDS CONSENT OF BOTH THE PARTIES:** The most important factor to be considered while deciding the cases at the Lok Adalat is the consent of both the parties. It cannot be forced on any party that the matter has to be decided by the Lok Adalat.

At this juncture the endeavour should be to organize more and more Lok Adalats, ensure greater participation, reduce formalism, spare more time and personalized attention thereby ensuring quality justice through Lok Adalats.

Measures to improve functioning of Lok Adalats

- Establishing permanent and continuous Lok Adalats in all the Districts in the country for the disposal of pending matters as well as disputes at pre-litigative stage.
- Establishing separate Permanent and Continuous Lok Adalats for Government departments, PSUs etc. for disposal of pending cases.
- Accreditation of NGOs for Legal Literacy and Legal Awareness Campaign
- Appointment of "Legal Aid Counsel" in all Courts of Magistrates in the country.
- Sensitization of Judicial officers in regard of legal Services Scheme.
- Legal literacy and legal aid programmes need to expand to take care of poor and ignorant by organizing awareness camps at grass-root level besides, the mass media like newspapers, television and radios can also be desirable for this purpose.
- To increase its utility, the concerned Legal services Authority or Committee should disseminate information to the public about the holding of various Lok Adalat by it and success achieved thereby in providing speedy, equitable and inexpensive justice.
- There is need for improvement in quality of legal aid provided by lawyers and advocates. The remunerations offered from legal services authorities to lawyers should be revised and thus encouraged to render effective legal assistance to needy persons.

The Lok Adalat Movement can be successful only if the people participate on voluntary basis in the functioning of Lok Adalat. This can be achieved by restraining themselves from invoking the jurisdiction of traditional Courts in trifling disputes.

5. Centralising recruitment through an All-India Judicial Service (AIJS) will not address the multiple problems in the judiciary and cause new ones instead. Critically evaluate.

Approach:

- Briefly discuss the problems being faced by the judiciary.
- Discuss whether the government's proposal of an All-India Judicial Service (AIJS) will address the problems or further exacerbate them.
- Suggest a way forward.

Indian Judiciary has been battling multiple issues that have affected speed, efficiency and quality of justice. For example:

- Steady increase in number of cases reaching higher courts from lower levels, indicating substandard justice delivery.
- In 2015, approximately 25-30 million cases were pending in various courts.
- In 2015, there were about 400 vacancies of judges in 24 High Courts. Judge-population ratio of 10.5-11 to one million is one of the lowest in world.
- Corruption and lack of transparency in the appointment of judges.
- Issues such as large number of undertrails, long duration of resolution, inefficient and time consuming processes etc.

In this context, All India Judicial Services (AIJS) has been proposed through which district judges will get recruited centrally through an all-India examination and allocated to each State. The rationale of recruitment through AIJS is based on the following grounds:

- **Wide selection pool:** Through AIJS, judges will be selected at the national level and thus it is expected to make judiciary more professional and equitable leading to an improvement in the quality of judgments.
- **Reduction in vacancy:** It is expected to reduce vacancies by avoiding delays in examinations and recruitment.
- **Attractive career option:** Currently, the subordinate judiciary depends entirely on state level recruitment by respective High Courts. But the brighter among the law students do not join the state judicial services because they are not attractive. An 'All India Service' status with associated privileges may change this.
- **Uniform standards:** The measure of uniformity in the standards for selection will improve the quality of personnel in different High Courts, as one-third of the judges come there on promotion from the subordinate courts.

However, the idea has been criticized for not addressing core issues and creating new ones. For example:

- It ignores the fact that Bar Council of India has mismanaged legal education and there has been a lack of effort to improve the standard of legal education in the country.
- While efforts have been taken by the Supreme Court to promote uniform pay scales across States, pay is abysmally low when compared to the private sector.
- Trial court judges face similar problems in case of transfers and other issues as civil servants and have even lesser avenues for growth and promotion.
- Those High court judges appointed from District cadre are already in advanced stage of their careers and have shorter tenures than judges appointed directly from the Bar.

New problems that may arise due to AIJS:

- Being a centralised recruitment, it risks preventing the less privileged from entering judicial services.
- Also, it may be difficult for it to take into account local language, laws, practices and customs, which vary across States.

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