

**NATIONAL COMMISSION TO REVIEW THE WORKING OF
THE CONSTITUTION**

A

Consultation Paper*

on

ALL INDIA JUDICIAL SERVICE

* The views expressed and the suggestions contained in this paper are intended for the sole purpose of generating public debate and eliciting public response.

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Advisory Panel

on

**Strengthening of the institutions of Parliamentary Democracy;
(Working of the Legislature, Executive and Judiciary;
their accountability; problems of Administrative,
Social and Economic Cost of Political
Instability; Exploring the possibilities
of stability within the discipline
of Parliamentary Democracy)**

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I. Basic Constitutional Provisions relating to Subordinate Judiciary

Chapter VI of Part VI of the Constitution of India deals with subordinate courts. Clause (1) of Article 233 says that “appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.” Clause (2) is not relevant for the purpose. Article 233A is also not relevant since it deals with validation of appointments of, and judgments, etc. delivered by certain district judges whose appointment was declared to be illegal by the Supreme Court. Article 234 says that appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with the rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. Article 235 vests control over the subordinate courts in the High Court. It reads “The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any posts inferior to the post of district

judges shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorizing the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law". Article 236 is an interpretation clause. It defines the expressions "district judge" and "judicial service" respectively. It is sufficient to notice the definition of "district judge". It 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, sessions judge, additional sessions judge and assistant sessions judge". It is not necessary to notice article 237 for the present purpose.

II. All – India Judicial Service

2. Article 309 of the Constitution which occurs in chapter 1 of Part XIV deals with the recruitment and conditions of service of persons serving the Union or a State. It empowers the appropriate Legislature to regulate the recruitment and conditions of service of persons appointed to public services and post in connection with the affairs of the Union or of any State. The proviso however says that until the appropriate Legislature shall make the rules, it shall be open to the President, in the case of services under the Union, and to the Governor, in respect of the services under the State, to make rules for the said purpose. Article 310, which incorporates pleasure clauses, is not relevant for the present purpose. Article 311 contains three clauses. Clause (1) says that no member of a civil service, whether of the Union or the State, shall be dismissed or removed by an authority subordinate to that by which he was appointed. Clauses (2) and (3) go together. Clause (2) provides for a disciplinary inquiry to be held against a member of civil service before a punishment is imposed upon him. The proviso to Clause (2) creates three exceptions to the above rule which again is not necessary to notice for the present purpose. Clause (3) which qualifies the second proviso can equally be omitted from consideration. Article 312 deals with the All-India services. Prior to the Constitution (Forty-second Amendment) Act, 1976, it did not specifically refer to an All-India Judicial Service. It was however brought in along with Clauses (3) and (4) by the Constitution Amendment Act. As it stands today, Article 312 reads as thus:

"312. All-India services- (1) Notwithstanding anything in [Chapter VI of Part VI or Part XI], if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, Parliament may by law provide for the creation of one or more all-India services [(including an all-India judicial service)] common to the Union and the States, and, subject to the other provisions of this Chapter, regulate the recruitment, and the conditions of service of persons appointed, to any such service.

(2) The services known at the commencement of this Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this article.

(3) The all-India judicial service referred to in clause (1) shall not include any post inferior to that of a district judge as defined in article 236.

(4) The Law providing for the creation of the all-India judicial service aforesaid may contain such provisions for the amendment of Chapter VI of Part VI as may be necessary for giving effect to the provisions of that law and no such law shall be deemed to be an amendment of this Constitution for the purposes of Article 368."

3. A reading of the afore-mentioned provision of the Constitution yields the following features:-

- (i) The subordinate courts/subordinate judiciary is a State subject. The appointment of the members of the subordinate judiciary is to be made by the Governor. However such appointment is to be made in the case of district judge, in consultation with the High Court and in the case of other posts, in consultation with the Public Service Commission and the High Court. As matter of practice, selection of district judges is made by the High Court on the basis of which, formal order of appointment is issued by the Governor. In case of Munsiff/ Magistrates, the selection is made by the State Public Service Commission and the concerned High Court acting together and orders of appointment are issued by the Governor on the basis of such selection.
- (ii) Though Clause (1) of Article 233 does not expressly say that the appointment of district judges can be regulated by the rules made under the proviso to Article 309, a conjoint reading of both the provisions would show that rules can be made under the proviso to Article 309 with respect to method of appointment of district judges also subject of course to the provisions to the Constitution including Articles 233 and 160. As a matter of fact, such rules have been made in several States.
- (iii) The control over the subordinate courts is vested in the High Court. The expression "control" has been construed in a highly expansive manner by the Supreme Court to take in posting, transfer, disciplinary matters and all other conditions of service.
- (iv) If the Council of States (Rajya Sabha) declares by resolution supported by not less than two-third of members present and voting that it is necessary or expedient in the national interest to do so, Parliament may by law provide for creation of an All-India Judicial Service (AIJS) common to the Union and the States and also to regulate the recruitment and conditions of service of persons appointed to such All-India service. This proviso is made notwithstanding the provisions contained in chapter VI of Part VI of the Constitution. However, the All-India judicial service cannot include any post inferior to that of district judge (as defined in Article 236). The law made by Parliament providing for creation of AIJS as contemplated by Clause (1) of Article 312 may contain such provisions for the amendment of chapter VI of Part VI, as may be necessary to give effect to the provisions of that clause but no such law shall be deemed to be an amendment of the Constitution within the meaning of Article 368.

4. So far no such All-India Judicial Service has been constituted though this matter has been receiving the attention of several concerned bodies and organizations for the last few decades. It would be appropriate to refer to the several suggestions made in this behalf.

III. Suggestions of the 1st Law Commission

5. The first Law Commission recommended in its fourteenth report (volume 1, Chapter IX, Para 59, page 184) the creation of an AIJS. It opined that such a course is necessary in the interest of efficiency of the subordinate judiciary. This proposal was considered in the Law Ministers' Conference held in the year 1960 where strong opinions were expressed for and against the said proposal. The proposal was accordingly shelved. It appears that the Chief Justices Conferences held in 1961, 1963 and 1965

favoured the said recommendation but when the views of the State Governments and the High Courts were sought, there was a difference of opinion. More than half of the States and High Courts opposed to the proposal.

IV. Later Recommendations of the Law Commission

6. In August 1969, the Government requested the then Chief Justice of India to offer his views on the said proposal. The learned Chief Justice opined that the proposal was not feasible in the face of the then obtaining provisions of the Constitution. In March 1972, however, the learned Chief Justice while suggesting to the Government to improve the conditions of service of subordinate judiciary, also suggested examination of the question of having an AIJS.

7. The 8th Law Commission while examining the problem of arrears in trial courts, recommended formation of an AIJS. (77th Report Chapter IX Para 9.6, page 32)

8. Even after the amendment of Article 312 by the forty-second amendment, expressly providing for the formation of an AIJS, the opposition to this idea from several High Courts and State Governments has not abated.

9. This matter was again considered by the Law Commission in its 116th report (submitted in November, 1986). The report dealt with three objections, generally put forward against said proposal, namely :-

- (a) inadequate knowledge of regional language would corrode judicial efficiency both with regard to understanding and appreciating parole evidence pronouncing judgments;
- (b) promotional avenues of the members of the State judiciary would be severely curtailed causing heart burning to those who have already entered the service and manning of the State judicial service would be adversely effected; and
- (c) erosion of control of the High Court over subordinate judiciary would impair independence of the judiciary.

10. The Law Commission considered each of the above objections at length and rejected them as unsubstantial. It held that a member of the All-India Judicial Service would be required to learn one more language over and above his mother tongue and once he is allotted to a State keeping in view the said fact, no problems would arise on the ground of language. Reference was made to members of Indian Administrative Service in this behalf. It also referred to the fact that prior to the independence there were provinces like Bombay and Madras, which comprised more than one linguistic area. For example, the

Bombay province comprised Gujarati speaking, Marathi speaking and Kannada speaking areas and Madras province included Tamil speaking, Telugu speaking and Malayalam speaking areas. If no difficulty was found in those provinces at that time, the Commission observed, there is no reason to feel that the language question should pose a problem. With respect to the second objection, the Commission observed that in as much as according to the present rules in force in various States about 50% (if not, more) vacancies in the cadre of District Judges are reserved to be filled by promotion from the lower cadres and because the members of AIJS will be allocated only against the vacancies to be filled by direct recruitment, the promotional prospects of judicial officers (below district judge level) will in no way be affected. Similarly, it was held with respect to the third objection, that the control of the High Court will in no manner be diminished or curtailed because on allotment to a State, the allottees (members of AIJS) would become members of the State Judicial Service for all practical purposes with the difference that "while at present it (High Court) recommends various things such as promotion or disciplinary action to the Governor, it would be recommending the same to the National Judicial Service Commission which, in turn, would make necessary recommendation to the President of India but the President of India will act in the same manner as at present it is done by the Governor having regard to the almost binding character of the recommendation of the High Court." Besides rejecting the third criticism, the Law Commission also emphasized the desirability of such an All-India Judicial Service in the interest of efficiency. It made elaborate recommendations with respect to the method of recruitment, holding of examinations, scales of pay, initial pay, seniority, probation, training and so on. (It also recommended by a separate report creation of a National Judicial Service Commission).

V. Recommendations of the National Judicial Pay Commission

11. This matter has been examined by the first National Judicial Pay Commission headed by Justice K. Jagannatha Shetty, former Judge of the Supreme Court (and comprising two retired Judges of the High Court). Their report was submitted in the year 1999. In the summary of recommendations published by the said Commission, it supported and reiterated the recommendations of the Law Commission contained in its Fourteenth Report (referred to herein above) for the creation of an All-India Judicial Service. It fully supported the reasoning given by the Law Commission in support of the said recommendation. It then referred to the observation of the Supreme Court in the All India Judges case (AIR 1992 S.C. 165) to the effect that "the feasibility of the implementation of the recommendations of the Law Commission may be examined expeditiously and implemented as early as possible. It is in the interest of the health of the judiciary throughout the country that this should be done. The report of the Pay Commission then refers to the fact that the Government of India had elicited the opinions of the State Governments and High Courts in this behalf and that whereas eight State Governments agreed with the proposal and another eight State Governments gave conditional approval to the proposal, seven State Governments have opposed the same. So far as the High Courts are concerned, it is stated that four High Courts have favoured the idea, four have given their conditional approval while three have opposed and five High Courts did not offer any opinion in the light of the judgment Supreme Court. The Pay Commission had also invited the views and comments on the methodology of constituting an All India Judicial Service after considering which it made the following recommendations:-

- (i) The AIJS should be constituted only in the cadre of District Judges as per provisions of Article 312 (3) of the Constitution. The District Judges directly recruited and promoted should constitute the AIJS.

- (ii) The selection for direct recruitment should be by the National Judicial Commission / UPSC and the promotees by the respective High Courts.
- (iii) The qualification for direct recruitment to AIJS should be in conformity with that prescribed under Article 233(2) of the Constitution.
- (iv) Service Judges also should be allowed to compete for recruitment of AIJS, by appropriately amending Article 233(2) of the Constitution.
- (v) Not exceeding 25% of the posts in the cadre of District Judges in every State should be earmarked for direct recruitment.
- (vi) The age limit for recruitment to AIJS should be between 35 years to 45 years.
- (vii) The procedure for selection shall be by written examination followed by viva voce.
- (viii) Appointment : The National Judicial Commission / UPSC, after selecting the candidates for direct recruitment to the cadre of District Judges, must allocate to the States / UTs, the candidates equal to the vacancies that are surrendered by them. The High Court thereupon will recommend those names to the Governor for appointment as per Article 233 of the Constitution.
- (ix) Training : The prescribed training is only after the appointment.
- (x) Seniority : All India seniority is as per the ranking in the select list.
- (xi) Inter-se Seniority in the State/UT : The inter-se seniority between direct recruits and promotees shall be determined according to the date of allotment and date of promotion. Such direct recruits must thus be annexed to the respective State Judicial Service within the three-tier system.

- (xii) Court Language: Recording of the deposition should be: (1) Regional Language (to be recorded by the Court Officer); and (2) English (by the Presiding Officer).

VI. Some relevant considerations

12. The National Commission to Review the Working of the Constitution is of the opinion that while examining the idea of All-India Judicial Service the following factors may also have to be kept in view:-

- (a) Whether the creation of AIJS would lead to further erosion of the powers of the States whose powers under the present dispensation are not many. By virtue of several entries in the Union List (which provide for the Union taking over certain subjects within the State List in case the Parliament declares it to be expedient in public interest) and as a result of the 42nd Amendment to the Constitution, the powers of the States have already been adversely affected. Is it advisable to diminish them further by taking away the power of selection from the High Courts and by vesting it in a Central body?
- (b) The provisions of Article 312 of the Constitution as amended by the Constitution (Forty-second Amendment) Act have really created a problem. According to clause (3) of the said Article, such service shall not include any post inferior to that of a "district judge" as defined in Article 236. Now if the idea is to induct bright and young persons to the service from the age group 24 to 30, such persons have to be posted soon after selection and training as district judges. District judges not only try serious criminal cases like murder and dacoity but also exercise appellate jurisdiction in both criminal and civil matters. They also exercise original jurisdiction in certain civil matters. Would it be advisable to entrust the direct recruits of the said age group with such vast powers and would they be able to take upon such task? However if the idea is (as recommended by the first National Judicial Pay Commission) that the direct recruits are to be drawn from the age group 35 to 45 would there be any improvement over the present position? This is because age group 35 to 45 means that they are all practicing lawyers. If a practicing lawyer does not make good in his profession by the time he reaches the said age group, it means that he is no good. In other words, a practicing lawyer who has made good by the said age in the profession would not like to join the AIJS and face the prospect of being posted to some other State and subject to transfer from time to time. Indeed that is the present difficulty faced by the High Court as well. A lawyer who is reasonably intelligent and competent is bound to establish himself in profession by the time he reaches the age 35-40. Such a lawyer is not generally inclined to leave his practice and join the service as district judge where he is likely to be transferred from time to time even though within the State. That is the reason why many competent people are not coming forward to join the service, and if the service is made an All-India service, with the attending possibility of being allocated to any other State in India, and then again transfers within that State, would they not be all the more reluctant to join such a service?

- (c) There is yet another circumstance. If you select persons between the age group 24 to 30 or 24 to 32 and post them as district judges, they would be ripe for being considered for appointment to the High Court within about 10 to 15 years. (It may be remembered that in every High Court a particular quota is reserved to be filled from among the members of the subordinate judiciary. (The quota so reserved varies today from 40% to 50%.) This means that a member of AIJS would be ripe for being considered for appointment to the High Court even before he may have reached the age of 40. Desirability of such possibility should also have to be kept in mind, particularly in view of the fact that the nature of the work at the level of the High Court is of a varied character involving fields not dealt with by District Judges in the subordinate courts.
- (d) Would it be advisable to amend Article 312 again by removing clause (3)? In such a case, it will be possible to recruit young and bright persons between the age group 24-30 to AIJS and to post them as Munsiff/magistrate to start with and then they would go up the ladder in course of time. But this course would mean that even the selection and appointment of magistrates would also be removed from the purview of the State and would stand transferred to a Central body. The desirability of this course is also a matter to be kept in mind. It may also have to be considered whether such a course would really mean any improvement over the existing situation or would it be merely a re-incarnation of the existing system with a slight modification i.e., selection and appointment (and allocation) by a central body rather than by the High Court/Public Service Commission/State Government?

QUESTIONNAIRE
ON
ALL INDIA JUDICIAL SERVICE

1. Do you support the idea of constituting an “All India Judicial Service”?

2. If you answer to Question No. 1 is in the affirmative, what should be the eligibility criteria for the candidates? How do you meet the handicap of not knowing the local language in which the subordinate courts transact most of their work?

3. Do you agree that amendment of Article 312 effected by the Constitution (42nd Amendment) Act, 1976 has created difficulties in the way of constitution of an All India Judicial Service? If yes, do you agree with the proposal to delete clause (3) of Article 312 as suggested at page 18 of the Consultation Paper?

4. What are your views on the idea and queries posed in sub-paragraphs (a) to (c) at pages 14 to 17 of the Consultation Paper ?

5. Have you any other suggestions to make on the issues discussed in the Consultation Paper? If so, please state them.