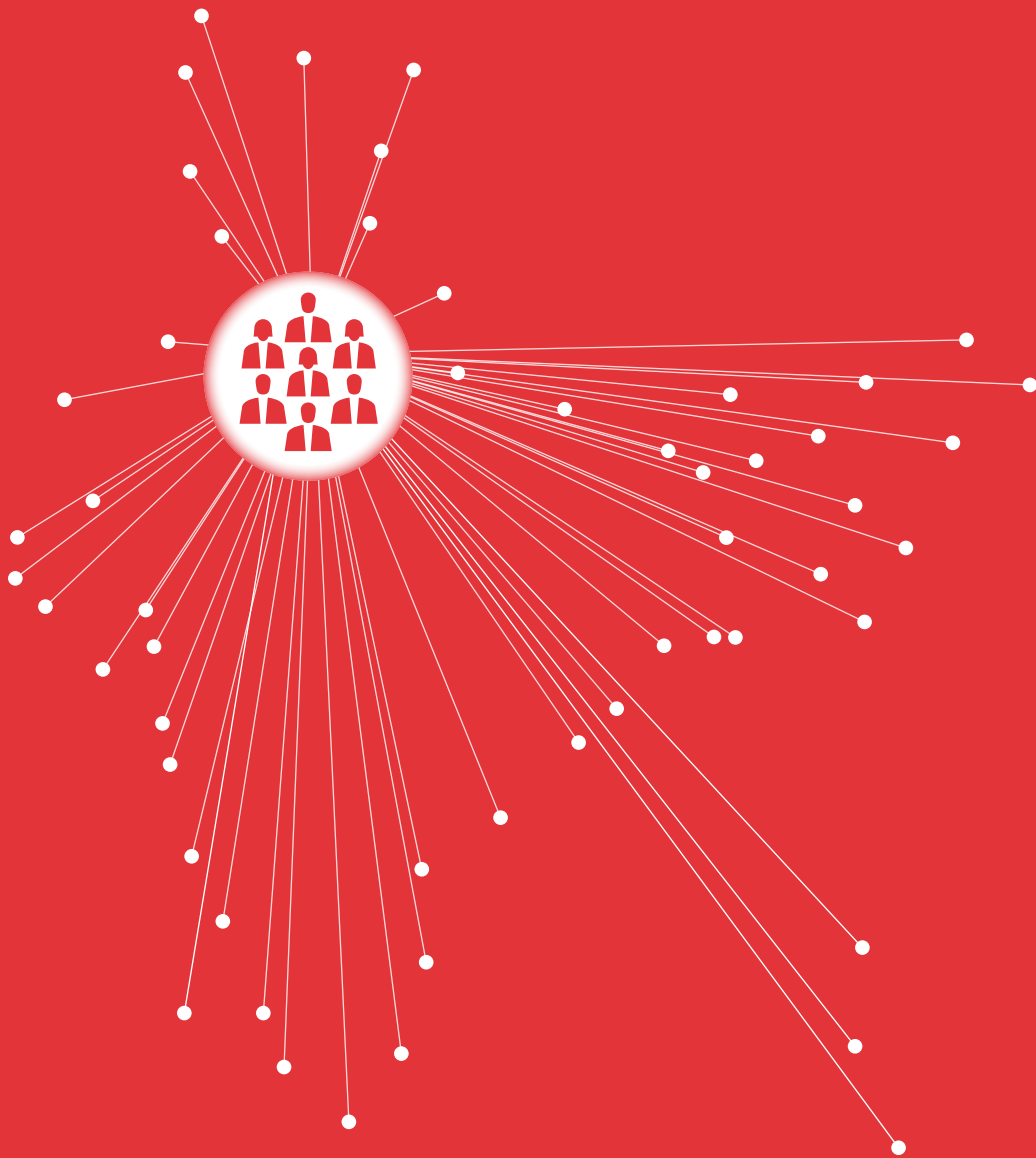


A Primer On The All India Judicial Service

A Solution In Search Of A Problem?



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Introduction

Since it was first proposed by the 14th Report of the Law Commission of India¹, in 1958, the All India Judicial Service (AIJS) has lingered in the backdrop of the judicial reforms debate for sixty years. Aimed at creating a centralized cadre of District Judges, the creation of an AIJS will necessarily mean transferring the recruitment and appointment powers of these judges, from the High Courts and State Governments, to a centralized system, as exists for other All India Services. The exact nature of this centralization is not clear because most supporters of the idea of the AIJS have never really articulated their vision in much detail.

From the fifties to the eighties, the Law Commission and the Chief Justices' Conferences were the main backers of the idea of the AIJS.² During the Emergency, it was the Indira Gandhi government that mysteriously amended the Constitution, with little debate or consultation, to enable the creation of the AIJS.³ In the nineties, it was the Supreme Court and the National Judicial Pay Commission, a.k.a. the Shetty Commission Report which backed the creation of the AIJS.⁴ With the turn of the century, it was the Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice which supported the creation of the AIJS in several of its reports assessing demands for grants.⁵ In the last few years, the Union Law Minister, along with others, have repeatedly voiced their support for the creation of the AIJS, in both the first and second term of the NDA government.⁶ However, there is no consensus on the creation of the AIJS since the idea has several opponents, which includes the National Commission to Review the Working of the Constitution⁷, as well as several High Courts and State Governments.⁸

The idea of the AIJS therefore would appear to win the popularity contest amongst stakeholders in Delhi, since it involves the centralisation of power but faces opposition from the High Courts and State Governments. Despite the existence of the idea since the fifties, there does not exist a single white paper on the AIJS, apart from one Law Commission report written in 1986.⁹

Given the growing calls for the creation of the AIJS, we thought it would be useful to create a primer explaining the many justifications provided for the creation of the AIJS and whether these justifications still hold true. We also present the possible challenges and pitfalls in creating such a service and the political capital that will be required by any government that pushes ahead with the creation of such a service. Based on our study, we conclude towards the end of our report, that many of the justifications for the creation of the AIJS no longer exist.

¹ Law Commission of India, *Reforms of the Judicial Administration* (Report No. 14(1), 1958) 164.

² Law Minister's Conference (1960); Chief Justices' Conference (1961); Chief Justices' Conference (1963); Chief Justices' Conference (1965).

³ The Constitution (Forty-Second Amendment) Act, 1976.

⁴ *All India Judges' Association v. Union of India* 1992 AIR 1965 ("There is considerable force and merit in the view expressed by the Law Commission. An All India Judicial Service essentially for manning the higher services in the subordinate judiciary is very much necessary. The reasons advanced by the Law Commission for recommending the setting up of an All India Judicial Service appeal to us."); The National Judicial Pay Commission (Justice Jagannatha Shetty Commission), *All India Judicial Service* (November 1999) para 26.8.

⁵ Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, *Demand for Grants Report* Nos. 20th (May 2007), 26th (April 2008), 32 nd (December 2008), 52 nd (May 2012), 57th (March 2013), 64th (December 2013), 96th (March 2018) <https://rajyasabha.nic.in/rsnew/Committee_site/MainPage.aspx> accessed on 25 November 2019.

⁶ PTI, 'Time to set-up All India Judicial Services says Law Minister' NDTV, 2 January 2019 <<https://www.ndtv.com/india-news/time-to-set-up-all-india-judicial-services-says-law-minister-1971486>>; Tribune News Service, 'Need to set up All India Judicial Services' *The Tribune* (4 June 2019) accessed on 26 November 2019 <<https://www.tribuneindia.com/news/nation/need-to-set-up-all-india-judicial-services-prasad/782696.html>> accessed on 26 November 2019.

⁷ Report of the National Commission to Review the Working of the Constitution, (Vol 1. 2002) para 7.16 <<http://legalaffairs.gov.in/sites/default/files/chapter%207.pdf>>. accessed on 26 November 2019.

⁸ Q. No. 1913, Verappa Moily (7 December 2009), Q. No. 1004 Ashwani Kumar (3 December 2012); Q. No. 4881 Salman Khurshid (21 May 2012), Responses to questions on All India Judicial Service in the Rajya Sabha.

⁹ Law Commission of India, *Formation of an All India Judicial Service* (Report No 116), 1986.

I The timeline of the debate on the All India Judicial Service

Over the years, the idea of creating an AIJS has been discussed on multiple occasions by successive Law Ministers during Question House in Parliament, the Law Commission of India, Parliamentary Standing Committees and other expert commissions. The following timeline captures some of these discussions since 1954.¹⁰

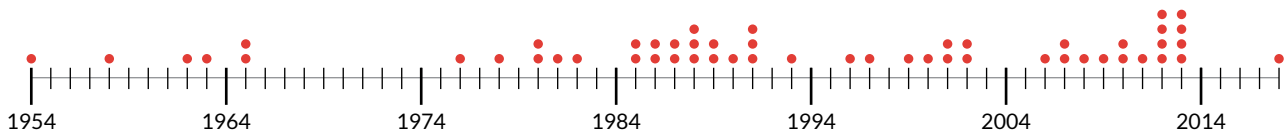


Fig. 1 : AIJS discussions across decades from 1954 - 2018

<p>Key</p> <p>Red Text: Details of the Minister/ Legislation/Standing Committee of Parliament/Commission</p> <p>Black Text: Comments regarding the All India Judicial Service (AIJS)</p>	<p>■ Indicates continuation</p>
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<p>1954 — 30 September Q. 611., B. N. Datar, Deputy Minister for Home Affairs Denied the existence of any plan by the government to set up an AIJS.</p> <p>1958 — 14th Law Commission Report - Reforms of Judicial Administration Recommended the setting up of an AIJS with little detail on how exactly the service would be structured. The Law Commission hoped that creating an All India Service for the judiciary, would like other All India Services, attract the best talent.</p> <p>1960 — 30 November Q. 37., Govind Ballabh Pant, Minister of Home Affairs Denied any plans to set up an AIJS</p> <p>1963 — 3-5 June Resolutions of the Chief Justices' Conference held at New Delhi Item 17 of the resolution backed the idea of the AIJS while Item 13(i) stated that it was imperative that High Courts exercise complete control over the subordinate judiciary, and that suitable</p>	<p>amendments be made to Articles 233 and 234, as recommended in the 14th Law Commission report.</p> <p>1965 — 5-7 March Resolutions of the Chief Justices' Conference held at New Delhi Item 25 of the resolution reiterated that the conference continued to back the creation of an AIJS.</p> <p>7 May Q. 139., L. N. Mishra, Deputy Minister in the Ministry of Home Affairs The minister indicated that while no representation was received from any Government, the matter was under consideration of the government.</p> <p>1976 — 42nd Constitutional (Amendment) Act Amended Article 312 of the Constitution, to allow for the Rajya Sabha to create an All India Service for the post of District Judges, only.</p> <p>1978 — 77th Law Commission Report - Delays and Arrears in Trial Courts Reiterated its conclusions in the 14th report calling for the creation of an AIJS.</p>
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¹⁰ The contents in the timeline prefaced with Q. is a summary of a response by Law Ministers responding to questions regarding the AIJS in Parliament. Most of the questions covered in this timeline were raised in the Rajya Sabha. If a question number is prefaced with a 'LS', it signifies that the question was posed in the Lok Sabha. Most of our responses are from the Rajya Sabha rather than the Lok Sabha because the former's website has archived its records more accurately and also because it has a better search functionality. Our timeline does not capture all discussions in the Lok Sabha and must not be considered comprehensive in this regard.

1980

24 November

Q. 556, Shiv Shankar, Minister of Law, Justice and Company Affairs

Stated that the creation of the AIJS was under the consideration of the government. Also stated that Parliamentary legislation would be necessary to create the service and that a similar proposal was rejected in 1978 by the previous government.

8 December

Q. 1655., Shiv Shankar, Minister of Law, Justice and Company Affairs

Replied that in March 1966, out of 17 State Governments, 7 States were in favour of creation of AIJS but 10 States were opposed to the proposal. The Chief Justices of the High Courts were not consulted. The Chief Justice of India who was consulted in 1969, was of the view that “the proposal was not feasible in the circumstances”.

1981

18 August

Q. 76., P. Shiv Shankar, Minister of Law, Justice and Company Affairs

Informed the house that the 77 Law Commission Report had recommended the creation of the AIJS. The Central Government had sought the views of the State Governments on the creation of the AIJS and that their replies were awaited.

1982

8 March

Q. 1216., Jagan Nath Kaushal, Minister of Law, Justice and Company Affairs

Informed the Rajya Sabha that the views of State Governments and Chief Justices of High Courts have been sought on the issue and a detailed scheme for the AIJS would be drafted only after receiving such responses.

13 July

Q. 54., Jagannath Kaushal, Minister of Law, Justice and Company Affairs

The earlier response was repeated.

1985

6 May

Q. 557., H. R. Bhardwaj, Minister of State in the Ministry of Law and Justice

Informed the Rajya Sabha that the Central Government had not taken any decision on the creation of the AIJS and that it was not possible to lay down a timeline for the creation of the AIJS. The House was also informed that 6 High Courts supported the creation of the AIJS with 11 High Courts against the proposal. Similarly, 13 States were in favour of forming AIJS while 8 were opposed to it with one State not offering any comments.

18 November

Q. 1262., H. R. Bharadwaj, Minister of State in the Ministry of Law and Justice

Highlighted that it is not possible to indicate the

time by which the Service will be constituted and that the matter was not discussed in the Conference of the Chief Justices, Chief Ministers and Law Ministers of States held on 31st August and 1st September 1985.

1986

28 July

Q. 147., H. R. Bhardwaj, Minister of State in the Ministry of Law and Justice

Upon receiving a proposal from the All India Judicial Officers' Association, in 1982, demanding the creation of an AIJS, the question has been referred to the Law Commission for detailed study and recommendations.

116th Law Commission Report - Formation of an All India Judicial Service

Recommended the creation of an AIJS to attract better talent to the judicial services. The AIJS was to be subordinate to the states and HCs. It was to have 40% of its strength through direct recruitment, 40% by promotion of subordinate judges and 20% elevation from Bar. The rules for the service, the examination and promotions were to be controlled by a proposed National Judicial Service Commission.

1987

3 August

Q. 903., Hans Raj Bhardwaj, Minister of State in the Ministry of Law and Justice

Acknowledged the submission of 116 Law Commission Report and informed the Rajya Sabha that it is under consideration.

12 November

Q. 559., Hans Raj Bhardwaj, Minister of State in the Ministry of Law and Justice

Proceedings of the Chief Justices' Conference were awaited by the Government.

1988

1 September

Q. 3094., Hans Raj Bhardwaj,

The proposal for creation of the AIJS was to be discussed at the Chief Justices' Conference in October, 1988.

15 November

Q. 559., Hans Raj Bhardwaj, Minister of State in the Ministry of Law and Justice

Proceedings of the Chief Justices' Conference were awaited by the Government.

22 November

Q. 164., B. Shankaranand, Minister of Law and Justice

Re-confirmed that the proceedings of the Chief Justices's Conference were awaited.

1989

3 August

Q. 2040., B. Shankaranand, Minister of Law and Justice

Highlighted the recommendations of 116LCR as response to how AIJS will be structured.

30 March

Q. 409., B. Shankaranand, Minister of Law and Justice

Informed the House that consultations with State Governments have been ongoing since 1987 on AIJS.

1990

29 March

Q. 2129., Arif Mohd. Khan, Minister of Energy with Additional Charge of Ministry of Civil Aviation

Informed the House that a majority of the State Governments whose comments have been received on the 116th Law Commission Report, have opposed the formation of such services. The proposal also did not find favour at the Chief Justices' Conference held in October, 1988. As such the proposal for the creation of the All India Judicial Service was dropped.

1991

All India Judges Association v. Union of India AIR 1992 SC 165

"We are of the view that the Law Commission's recommendation [in its 116th report] should not have been dropped lightly. There is considerable force and merit in the view expressed by the Law Commission. An All India Judicial Service essentially for manning the higher services in the subordinate judiciary is very much necessary. The reasons advanced by the Law Commission for recommending the setting up of an All India Judicial Service appeal to us."

3 September

Q.307., Rangarajan Kumarmangalam, Minister of State in the Ministry of Law, Justice and Company Affairs

The proposal was considered at the Chief Justices' Conference held in October, 1988 wherein a resolution was passed that it is neither necessary nor expedient in the national interest to create an AIJS. Most of the States/UTs, who had given their views, also did not favour it. As such the proposal was dropped again.

3 December

Q. 1105., Rangarajan Kumarmangalam, Minister of Law, Justice and Company Affairs

Highlighting that the SC had asked the government to study the feasibility of creating an AIJS, the Minister stated that the matter was being examined.

1993

All India Judges Association v. Union of India AIR 1993 4 SC 288

Reiterated that Supreme Court's earlier decision on the creation of the AIJS was merely recommendatory in nature.

1996

10 September

Q. 3630., Ramakant D. Khalap, Minister of State of the Department of Legal Affairs, Legislative Department and Department of Justice

Informed the House that there was no AIJS in India informing that the matter was still under consideration in consultation with HCs and State Governments.

1997

Status Report submitted by the Central Government to the First National Judicial Pay Commission (Also known as the Shetty Commission)

Laid out a roadmap for the creation of the AIJS. Also mentions that the State Governments of Goa, U.P., Mizoram, Punjab, Kerala, Tripura, Sikkim and Orissa are in favour of an AIJS while the State Governments of Himachal Pradesh, Haryana, Tamil Nadu, Madhya Pradesh, Maharashtra, West Bengal, Assam and Rajasthan gave conditional approval to the proposal. The State Governments of Arunachal Pradesh, Nagaland, Karnataka, Gujarat, Jammu & Kashmir, Manipur and Andhra Pradesh did not favour the creation of the AIJS.

The Report also stated that the High Courts of Allahabad, Patna, Guwahati and Rajasthan have favoured the creation of the AIJS while Orissa, Sikkim, Andhra Pradesh and Kerala gave their conditional approval to the proposal. The High Courts of Mumbai, Karnataka, Gujarat, Delhi and Madhya Pradesh had no views to offer in this regard and the High Courts at Himachal Pradesh, Punjab & Haryana and Madras did not favour the setting up of an AIJS.

1999

First National Judicial Pay Commission

The Commission had again asked all the States and High Courts for their views on the AIJS and noted the following as the response from the State Governments and the High Courts:

The High Courts of Andhra Pradesh, Patna, Madhya Pradesh, Maharashtra, Orissa, Rajasthan, Uttar Pradesh, and Calcutta agreed to the creation of an AIJS subject to conditions.

The High Courts of Madras, Punjab & Haryana and Gujarat did not favour the creation of the AIJS. The High Courts of Jammu & Kashmir, Karnataka, Kerala and Bombay have no views in this regard.

Very few governments responded to the Commission. Only the State Governments of West Bengal, Tamil Nadu, Karnataka, Gujarat and Andhra Pradesh stated that they were against the setting up of AIJS while Kerala had no views.

The State Governments of Uttar Pradesh, Maharashtra gave conditional nod for the creation of AIJS.

2000

3 August

LS. Q. 173., Arun Jaitley, Minister of Law, Justice and Company Affairs & Shipping

Informed the House that no proposal for the creation of an AIJS was under consideration of the Government and that most State Governments and HCs are in favour of the proposal.

2001

30 July

Q. 866., Arun Jaitley, Minister of Law, Justice and Company Affairs & Shipping

No proposal to set up an All India Judicial Service Commission was under consideration but the question of creation is being considered.

27 August

Q. 3748., Arun Jaitley, Minister of Law, Justice and Company Affairs & Shipping

Consultation was in progress with States and HCs and no definitive time frame could be given.

2002

Report of the National Commission to Review the Working of the Constitution

After circulating a consultation paper for public opinion, the Commission was of the view that an AIJS would not be a better alternative to the existing system.

1 August

LS. Q.2676 K Jana Krishnamurthi Minister of Law and Justice

Informed the House that the AIJS was under consideration for a long time and that no definite time frame could be fixed because cooperation of states and High Courts was required and a resolution would need to be passed by the Rajya Sabha.

2006

7 August

Q. 1394., K. Venkatapathy, Minister of State in the Ministry of Law and Justice

Informed the House that there was no Government decision on the creation of Judicial Services at the national level.

2007

26 February

Q. 14., H.R. Bhardwaj, Minister of Law and Justice

Informed the House that no proposal for legislation covering all issues relevant to judicial reforms (such as establishment of AIJS) was under consideration of Government.

10 May

20th Report on Demand for Grants (2007-08) of the Ministry of Law & Justice by the Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice

Recommended that a constitutional amendment if necessary, be taken up expeditiously to set up an AIJS.

2008

29 April

26th Report on Demand for Grants (2008-09) of the Ministry of Law and Justice by the Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice

The committee was of the view that creation of AIJS on the line of Civil Services Examination would attract the best of talent to join the Indian judiciary and naturally improve upon the deteriorating quality of language used in judgments delivered by Courts (excluding the Apex Court). It also reiterated its earlier recommendation to amend the Constitution to facilitate the setting up of the AIJS.

2009

7 December

Q. 1917., Veerappa Moily, Minister of Law and Justice

Informed the House that the Government had not taken any decision so far on the constitution or structure of the proposed All India Judicial Service and that it was waiting to hear back from the State Governments and the High Courts before taking a decision in this regard.

2010

22 April

LS.Q. 4393., Veerappa Moily, Minister of Law and Justice

Formation of an All India Judicial Service was being discussed with State Governments and High Courts. In consultation however only 7 states/UTs and 14 HCs have sent their views.

12 August

LS.Q. 3144 Veerappa Moily, Minister of Law and Justice

Informed that House that the views of the State Governments and High Courts were being sought on the matter of creating an AIJS. Also informed the House that no consultation paper had been prepared on the issue of the AIJS. The House was also informed that the creation of an AIJS would attract brilliant young men and women to the judiciary and improve the overall justice delivery system.

2011

18 August

LS.Q. 2978 Salman Khurshid Minister of Law and Justice

Informed the House that the Central Government was seized of the matter of creation of an AIJS.

2012

17 May

LS.Q. 6685 Salman Khurshid Minister of Law and Justice

Informed the House of a lack of consensus amongst High Courts and State Governments on the creation of a possible AIJS and that the Government would continue to pursue the idea, by proposing a more acceptable formulation of the AIJS.

21 May

52nd Report on Demand for Grants (2012-13) of the Ministry of Law and Justice by Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice

Noting the opposition of certain states to the creation of the AIJS and the shortage of judges, the Committee recommended that the Central Government could begin by holding a common examination for recruiting judges at the all India level for all States that agreed to participate or accept candidates selected on the basis of the said recruitment.

3 December

Q. 1004., Ashwani Kumar, Minister of Law and Justice

Informed the House that the State Governments of Bihar, Haryana, Himachal Pradesh, Jharkhand, Maharashtra, Odisha, Punjab, Rajasthan and Uttar Pradesh were in agreement to create an AIJS while the State Governments of Arunachal Pradesh, Chhattisgarh, Karnataka, Meghalaya, Mizoram, Nagaland and Tamil Nadu opposed the idea. The State Governments of Andhra Pradesh, Madhya Pradesh and Sikkim reportedly had no views on this matter.

Further, the High Courts of Allahabad, Bombay, Chhattisgarh, Gujarat, Jharkhand, Karnataka, Kerala, Madhya Pradesh, Madras, Uttarakhand and Sikkim opposed the idea while the High Courts of Odisha, Patna and Rajasthan were in favour of creating the AIJS. The High Courts of Andhra Pradesh, Delhi and Himachal Pradesh had no views in this regard.

21 May

Q. 4881., Salman Khurshid, Minister of Law and Justice

The House was informed that although the creation of an AIJS was supported by the Law Commission, the National Judicial Pay Commission and the Department Related Parliamentary Standing Committee, there was no consensus amongst the High Courts and State Government in favour of creating an AIJS.

The House was also informed that the State Governments of Bihar, Haryana, Himachal Pradesh, Jharkhand, Maharashtra, Odisha, Punjab, Rajasthan and Uttar Pradesh were in favour of creating an AIJS while the State Governments of Arunachal Pradesh, Chhattisgarh, Karnataka, Meghalaya, Mizoram, Nagaland and Tamil Nadu opposed the idea. The State Governments of Andhra Pradesh, Madhya Pradesh and Sikkim reportedly had no views on this matter.

2013

21 March

57th Report of the Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice on the Action Taken by the Government on the recommendations made in the 52nd Report

Noting the view of the government and the Attorney General on the issue of setting up the AIJS, the Committee recommended the government to proceed further in this matter.

2 May

LS.Q. 5912 Ashwani Kumar, Minister of Law and Justice

Reiterated that there has been no consensus among states and HCs and that further consultation is required.

9 December

64th Report on the Judicial Appointments Commission Bill, 2013 by the Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice

Expressing concern over delay in its creation, the Committee suggested that AIJS be created without further delay to attract the best talent to the subordinate judiciary from where 33 percent of the judicial officers would be elevated to the High Courts. The committee also recommended that posts be reserved in such an AIJS as per existing Government policy.

18 December

LS.Q. 2241 Kapil Sibal, Minister of Law and Justice, Communications and IT

The House was informed that no consensus had been reached among State Governments and High Courts on the creation of the AIJS and that a further consultation was required.

2018

14 March

96th Report on Demand for Grants (2018-19) of the Ministry of Law and Justice by Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice

The Committee recommended to the Department of Justice to explore the option of creating an AIJS to fill vacancies across the country at the level of the District and Subordinate Judiciary.

II AIJS and the federalism debate

The debate over the creation of an AIJS is essentially a debate about constitutional federalism. Although the Indian Constitution avoids using the words ‘federal’ or ‘federalism’,¹¹ the Supreme Court of India, has held ‘federalism’ to be one of the features of the ‘basic structure’ of the Indian Constitution.¹²

The term ‘federalism’ does not have a single definition. It is generally understood to be a “political mechanism involving at least two orders of government in the same political space with shared as well as self-rule in constitutionally divided jurisdictions, such that each is meaningfully autonomous in its exclusive areas and both are functionally interdependent and cooperative in their concurrent areas”.¹³ As per this definition, India can be classified as a federal country with a division of powers between Parliament and the State Legislatures. However, unlike other federal jurisdictions such as the United States, the Indian Constitution tilts in favour of centralization of powers. The centralized design of the Constitution was likely influenced by various political events in the late fifties such as partition, the integration of princely states and the drive towards a planned economy.¹⁴

The Indian debate on federalism has mostly revolved around the issues of group identities and administrative efficiency. The reorganization of states on linguistic lines shortly after independence and the recognition of unique administrative units in the north eastern part of India in response to the demands by an ethnically diverse population, are examples of Indian federalism being driven by group identities.¹⁵ Reform measures like the creation of the goods and services tax (GST), where states surrendered their individual taxation powers to a central collective, were driven by the promise of greater administrative efficiency and improving the ease of doing business in India.¹⁶

There has been relatively little writing or debate on the organizational structure of the Indian judiciary, in context of federalism. At the time the Constitution was being drafted, there appears to have been unanimity of opinion favouring a ‘single judiciary’ wherein a single judicial system would enforce both central and state laws.¹⁷ During the Constituent Assembly debates, Dr. Ambedkar accepted that although the logical consequence of a dual polity in a federal structure, was a dual judicial system, India was opting for a single judicial system. In pertinent part, he stated the following:

“A dual judiciary, a duality of legal codes and a duality of civil services, as I said, are the logical consequences of a dual polity which is inherent in a federation. In the U. S. A., the Federal Judiciary and the State Judiciary are separate and independent of each other. The Indian Federation though a Dual Polity has no Dual Judiciary at all. The High Courts and the Supreme Court form one single integrated Judiciary having jurisdiction and providing remedies in all cases arising under constitutional law, civil law or criminal law.”¹⁸

As explained by Ambedkar, the Indian system is different from other federal nations like the United States where the federal unit and state units have their own respective judiciaries. Typically, the federal judiciary can hear only disputes under federal law, while the state judiciary is limited to hearing disputes under state laws.

Although India has a single judiciary for the purpose of enforcing laws, it has a federated system for judicial administration. By this, we mean, that even though the structure of the judiciary for the purpose of adjudicating the law is a singular pyramid, the responsibility of appointments and funding for the District and Subordinate Judiciary falls upon the State Governments.¹⁹ The Central Government has the responsibility of appointing judges to

¹¹ G. Rao and N. Singh, *Political Economy of Federalism* (Oxford University Press 2006) 20.

¹² *Kesavananda Bharati Sripadagalvaru v. State of Kerala* (1973) AIR SC 1461; *SR Bommai v Union of India* (1994) 3 SCC 1.

¹³ MP Singh and V Kukreja, *Federalism in South Asia* (1 st Edn Routledge, 2014) 1.

¹⁴ Arun K. Thiruvengadam, *The Constitution of India – A Contextual Analysis (Constitutional Systems of the World)* (Hart Publishing, 2017) 77-79.

¹⁵ G. Rao and N. Singh (n 10) 17, 67.

¹⁶ PTI, ‘Venkaiah Naidu says GST will usher economic freedom’, *The New Indian Express*, 1 July 2017 <<https://www.newindianexpress.com/nation/2017/jul/01/venkaiah-naidu-says-gst-will-usher-in-economic-freedom-1623007.html>> accessed on 26 November 2019.

¹⁷ Granville Austin, *The Indian Constitution – Cornerstone of a Nation*, (1 st Edn. OUP, 1972) 184.

¹⁸ *Constituent Assembly Debates*, Lok Sabha Secretariat (4 November 1948) <http://164.100.47.194/Loksabha/Debates/Result_Nw_15.aspx?dbsl=144&ser=&smode=> accessed on 26 November 2019.

¹⁹ The Constitution of India, *Subordinate Courts*, Chapter VI, Part VI.

the High Court and Supreme Court. This system, is mostly a continuation of the system put in place by the Government of India Act, 1935 enacted by the British Parliament.²⁰

Since there is very little literature available to explain the rationale for allowing State Governments to control the power of judicial appointments to the District and Subordinate Judiciary, it may help to look at the issue through the lens of group identities and increased administrative efficiency, both of which have defined debates on federalism in India. By allowing individual states to lay down norms for recruitment, the Constitution allows states to choose judges who are best suited to judge the disputes arising in their unique socio-economic context. The simple act of setting an examination paper for a judicial service examination can influence outcomes in the kind of judges that are selected for a particular state. In a country like India, with such diversity of customs, religion and language, it may be more politically prudent, to maintain a decentralized system of recruiting judges for the District and Subordinate Judiciary since these judges are the first point of contact for millions of Indians seeking justice before Indian courts. Local administrators, well versed with the affairs of the state may be better informed of the kind of judges that need to be recruited for a particular area given its unique customs or languages. The spectre of an outsider, not familiar with the customs of the state, deciding cases may affect the legitimacy of the judicial system in the eyes of local population and reduce its efficiency. A federated system of judicial administration may help to increase efficiency, by allowing for State Governments to fashion qualification and recruitment criteria keeping in mind the unique administrative and cultural identities of their local population.

As we will demonstrate through this report, the argument for the creation of a centralized service like the AIJS, is primarily an argument for increased administrative efficiency, without paying much attention to the other political aspects of federalism.

The original idea for the AIJS was borne out of the 14th report of the Law Commission that was submitted to the government in 1958. The Law Commission had pitched the idea of the AIJS, with the hope that an All India Service would draw better talent to the District and Subordinate Judiciary at a time when these layers of the judiciary were supposedly facing a talent crunch.²¹

After the 14th report of the Law Commission, there appears to have been little public debate on the AIJS, until the declaration of Emergency when Parliament through the infamous The Constitution (Forty-Second Amendment) Act, 1976 amended Article 312 of the Constitution to enable the creation of the AIJS, solely for the cadre of District Judges (as defined under Article 236). This was unlike the proposal of the Law Commission which aimed at creating an AIJS for all cadres that form the District and Subordinate Judiciary i.e. Civil Judges (Junior Division), Civil Judges (Senior Division) and District Judge.

As was the case with many of the amendments enacted during the Emergency, the amendments to Article 312 do not appear to have been deliberated upon in great detail, since many politicians from the Opposition were imprisoned during the Emergency.²² The amendment to Article 312 established a relatively simple pathway to create the AIJS without having to go through the rigours of the procedure laid down in Article 368 to amend the Constitution.²³ As per Article 312, the process can be initiated by the Rajya Sabha bypassing a resolution asking for the creation of such a service with a two-thirds majority. Once such a resolution is passed, Article 312(4) allows Parliament to amend Chapter VI of Part VI of the Constitution (i.e. the chapter dealing with the District and Subordinate Judiciary) through an ordinary law, rather than the procedure prescribed under Article 368 for any amendments to the Constitution. This would mean that Chapter VI of Part VI of the Constitution can be amended through a law supported by the simple majority of the Lok Sabha and Rajya Sabha, rather than the two thirds majority that is required under Article 368.

During the parliamentary debates that preceded the vote on the 42nd Constitutional (Amendment) Act, 1976 there was at least one Member of Parliament who strenuously objected to the amendment to Article 312 on the grounds that Parliament's constituent authority was different from its legislative authority and that the procedure prescribed under Article 368 could not be ignored while amending the Constitution.²⁴ These amendments to Chapter VI of Part VI are not required to be ratified by the State Legislatures. The likely logic for not requiring the states to assent to the loss of their powers to recruit and appoint District Judges, is that the Rajya Sabha is the Council of States, with representation from all states and that its members would vote in the interests of their respective states.

²⁰ Government of India Act 1935, *Administration of Federal Affairs*, Chapter II, Part IX.

²¹ Law Commission of India, Report No. 14(1) (n 1).

²² Ramchandra Guha, *Autumn of the Matriarch, India After Gandhi: The History of the World's Largest Democracy*, (Pan Macmillan India 2017).

²³ The Constitution (Forty-second Amendment) Act 1976, Amendment of Article 312 s 45.

²⁴ C.M. Stephen, Debate on 44th Amendment Bill, Lok Sabha (1 November 1976) <<http://164.100.47.194/Loksabha/Debates/Debatetextsearch16.aspx>> accessed on 25 November 2019.

Any such future amendment, under Article 312, would presumably amend Articles 233 and 234 of the Constitution which currently vests the power of recruitment and appointment of District Judges, in the office of the Governor of the State acting in consultation with relevant High Court. Any attempt to create the AIJS would necessarily have to shift this power of selection and appointment to some centralized institution, although the identity of this institution remains unclear. Only the 116th Report of the Law Commission recommends that this power be vested in a new body that was to be called the National Judicial Service Commission, which did not exist at the time.²⁵ This body was never created.

In addition to the amendment to Article 312, the 42nd Constitutional Amendment also amended Entry 3 of List II of Schedule VII to shift the power of “Administration of justice; constitution and organization of all courts, except the Supreme Court and the High Court” to Entry 11A of List III of Schedule VII.²⁶ By shifting this entry, from the State List, to the Concurrent List, the amendment allows both Parliament and the State Legislatures to enact laws with respect to the constitution and organization of District and Subordinate courts. Prior to this amendment, only State Legislatures could enact laws pertaining to the District and Subordinate Judiciary.

While most of the 42nd Constitution (Amendment) Act, 1976 was repealed, post the lifting of the Emergency, by the Constitution (Forty-Fourth Amendment) Act, 1978, the amendments to Article 312 and Entry 11A of List III, in 1976 were untouched. As a result, if the Central Government can garner support from two-thirds of the Rajya Sabha for a resolution supporting the AIJS, it could push through Parliament a subsequent amendment as per Article 312 to amend, Part VI of Chapter VI of the Constitution to create the AIJS.

It is however, not clear whether the amendment to Article 312 of the Constitution in 1976 would withstand a challenge on the grounds that it is a violation of the basic structure doctrine that was laid down by the Supreme Court in the landmark case of *Keshavananda Bharti v. State of Kerala*²⁷. In this case, the Supreme Court held that while Parliament could amend the Constitution, it could not amend those provisions which constitute the ‘basic structure’ of the Constitution. While the precise contours of the ‘basic structure’ doctrine have never been defined by the Supreme Court, there appears to be a consensus that the following five features are covered under this doctrine:

secularism, democracy, rule of law, federalism and an independent judiciary with the power of judicial review.²⁸ While it is not within the scope of this primer to explore this issue in more detail, it maybe worthwhile for the government to seek an opinion from the Attorney General on this issue since most of the opposition to the idea of an AIJS comes from State Governments and some of them are bound to raise this ground of challenge since the basic structure doctrine is relatively open-ended.

²⁵ Law Commission of India, Report No 116 (n 9) 21, 23.

²⁶ The Constitution (Forty-second Amendment) Act 1976, s 57(b)(ii).

²⁷ (1973) AIR SC 1461.

²⁸ Sudhir Krishnaswamy, *Democracy and Constitutionalism in India - A Study of the Basic Structure Doctrine*, (Oxford University Press 2010) 159.

III Will the creation of the AIJS solve the problem of vacancies at the level of the District & Subordinate Judiciary?

One of the more recent justifications for the creation of the AIJS has been that a centralized service would help fill the approximately 5,000 vacancies across the District and Subordinate Judiciary in India. This justification has been provided by both the Union Law Minister²⁹ as well as the Parliamentary Standing Committee on Law and Justice. In 2013, the Parliamentary Standing Committee on Law and Justice in a discussion on the broader question of judicial vacancies, stated the following while pitching the AIJS as a potential solution to the vacancies in the District and Subordinate Judiciary:³⁰

“While deliberating on the vacancies in the higher judiciary and the long time taken in the disposal of cases pending before the courts, the Committee pointed out the feasibility of having an All India Judicial Service... The Committee feels that there is a shortage of judges at all levels, be it in the higher judiciary or in the subordinate courts and this is one of the major factors for delay in the adjudication of cases. Shortage of judges is also a major constraint for setting up of new courts. The Committee appreciates and welcomes the idea of having in place an All India Judicial Service but, in case, certain States have issues in this proposal, the Committee feels that the Central Government can at least make a beginning by holding an examination for recruiting judges at the all India level, covering States that agree to participate or accept candidates selected on the basis of the said recruitment. The Committee feels such a move would ensure an all-time availability of qualified and deserving candidates for appointment in subordinate courts.”

While acknowledging the contentiousness of the proposal to set up an AIJS, the Standing Committee seemingly concluded that it would facilitate a continuous availability of exemplary legal talent, thus reducing judicial vacancies. This claim that an AIJS will solve the vacancy problem, merits a more detailed examination.

Currently individual High Courts, in consultation with the State Governments are responsible for recruitments of judges for the District and Subordinate Judiciary. As per widely reported statistics in the media, there is a shortage of 5,000 vacancies at this level of the judiciary.³¹ The table below, which provides a state-wise breakup of vacancies based on data published in the last Annual Report of the Supreme Court³², clearly demonstrates that it is only certain High Courts which account for a majority of the approximately 5,000 vacancies amongst the District and Subordinate Judiciary:

As is obvious from the data, (see **Fig. 2**) only certain jurisdictions such as those falling under the Allahabad High Court, the Patna High Court etc., account for the approximately 5,000 vacancies while the vacancy rates for the majority of judicial services under the Rajasthan High Court, the Madhya Pradesh High Court, the Bombay High Court and the Calcutta High Court are hovering between 1% and 12%. In other words, different High Courts are demonstrating different levels of efficiencies when it comes to recruitments.

We also tried to compile data regarding vacancies specifically at the level of District Judges, since the AIJS, as per Article 312 can be created only for the cadre of District Judges and not the Subordinate judiciary which consists of Civil Judges (Junior Division) and Civil Judges (Senior Division). Since the Annual Reports of the Supreme Court

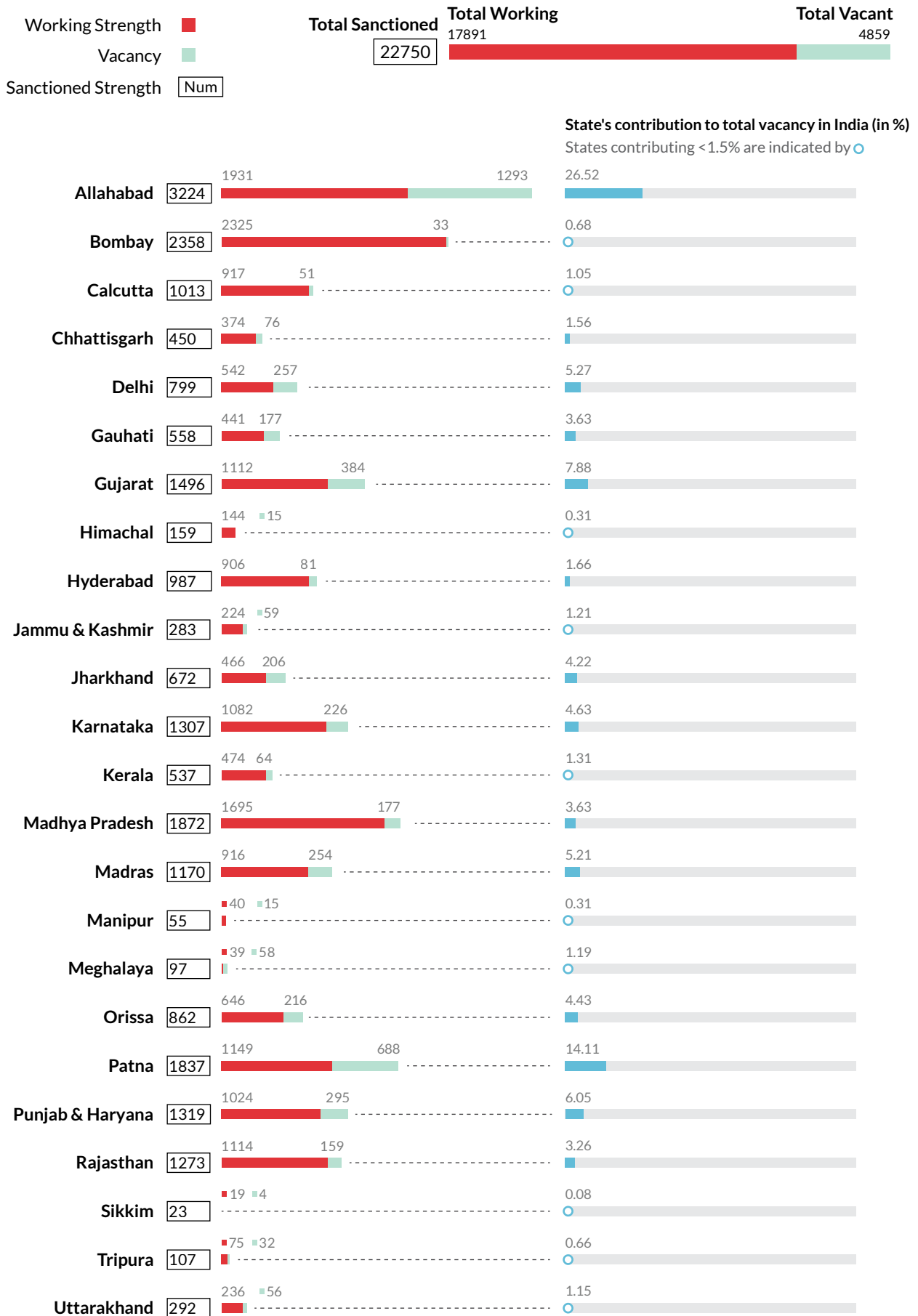
²⁹ Kaunain Sheriff M, 'Ravi Shankar Prasad's priority: Filling vacancies in lower judiciary' *The Indian Express*, 1 June 2019 <<https://indianexpress.com/article/india/ravi-shankar-prasads-priority-filling-vacancies-in-lower-judiciary-5759469/>> accessed on 26 November 2019.

³⁰ Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, *Demand for Grants Report* No 52 (May 2012) para 6.71 and 6.72.

³¹ Sriharsha Devulapalli, Vishnu Padmanabhan, 'What is clogging up India's district courts?' *The Livemint*, 24 July 2019 <<https://www.livemint.com/news/india/what-is-clogging-up-india-s-district-courts-1563952086072.html>> accessed on 26 November 2019.

³² Supreme Court of India, *Indian Judiciary, Annual Report 2017-18* (October 2018) <<https://main.sci.gov.in/pdf/AnnualReports/Annual%20Report%202018-light.pdf>> accessed on 27 November 2019.

Fig. 2 : Representation of the contribution of every state to total vacancy in India



Data Source: Supreme Court of India, Indian Judiciary, Annual Report 2017-18, October 2018

do not provide a breakup of vacancies for each cadre of judges per state, we had to derive this data through other sources, including our judicial vacancies data portal³³ and RTI replies filed with all High Courts asking for information regarding sanctioned strength of District Judges.³⁴ We could determine these figures for only certain states who responded to our RTI applications. The same is reproduced in the table below:

These figures again demonstrate that the vacancies at the level of District Judges, which is the only cadre for which an AIJS can be created as per Article 312 of the Constitution, is not uniform across states. It is only some High Courts which are unable to fill vacancies for the post of District Judges. Therefore, even if an AIJS was to hypothetically be created as per Article 312, only a small percentage of the 5,000 vacancies would be filled.

In our opinion, rather than proposing an AIJS as a solution for judicial vacancies, it may be more prudent to investigate the reasons and causes for the large number of vacancies in the poorly performing states. In our experience, the reasons for these vacancies could be varied, ranging from lack of adequate court rooms to hurdles in the recruitment process.³⁵ For example, in recent litigation before the Supreme Court on the issue of vacancies, the Allahabad High Court filed an affidavit stating that they lacked courtrooms to house additional judges.³⁶ Thus, merely centralizing recruitment through the creation of an AIJS will not be a silver bullet to address the large number of vacancies in a few states.

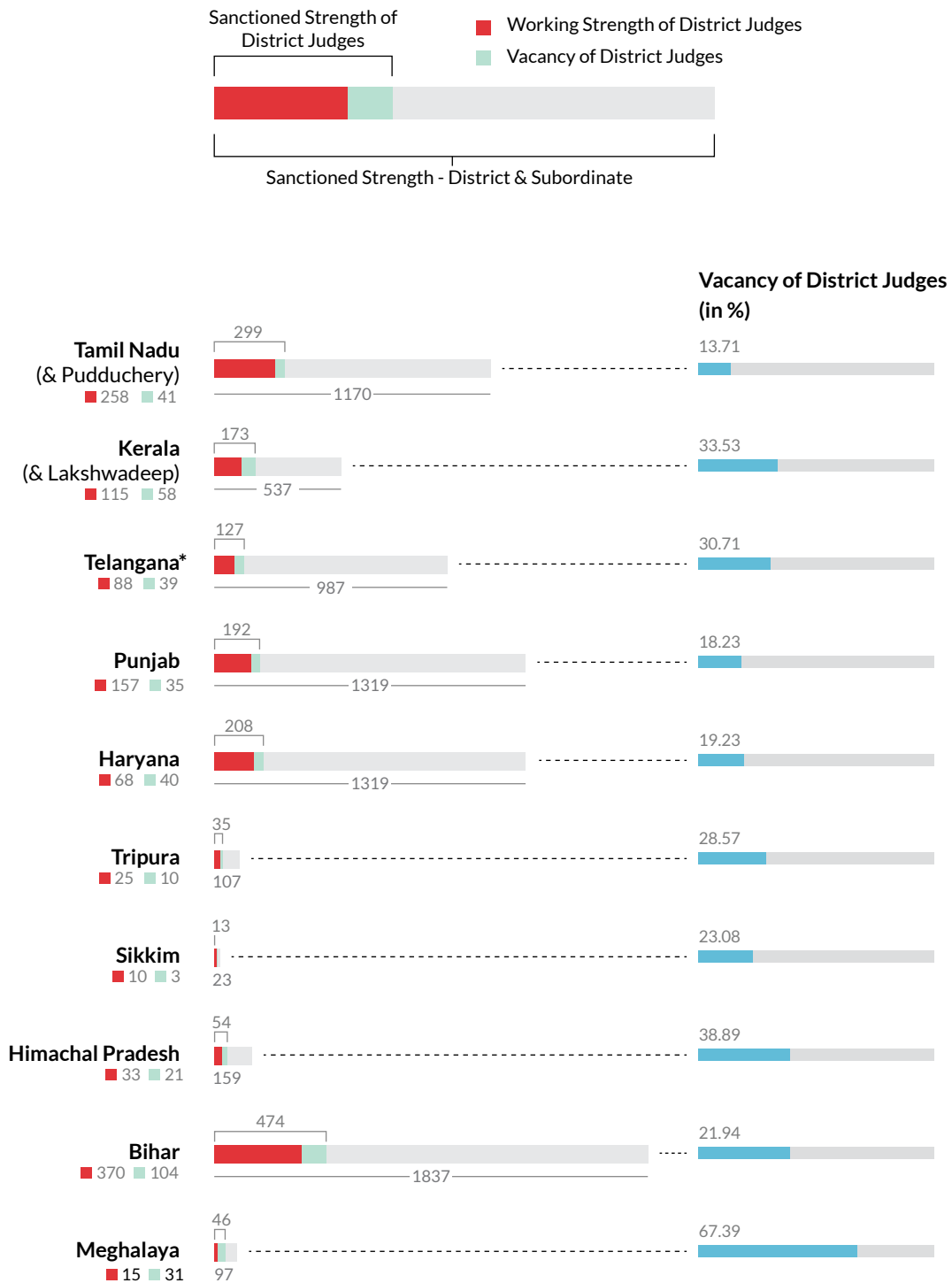
³³ Judicial Vacancies in India, Justice Access and Lowering Delays in India Portal, Vidhi Centre for Legal Policy <http://data.vidhilegalpolicy.in/dashboard/judicial_vacancy/index.html> accessed on 26 November 2019.

³⁴ Filed by Vaidehi Misra on 07 August 2019, Research Fellow at Vidhi Centre for Legal Policy (Replies on file with authors).

³⁵ Diksha Sanyal, Nitika Khaitan, Shalini Seetharam and Shriyam Gupta, *Report on Ranking Lower Judiciary Appointments* (Vidhi Centre for Legal Policy, November 2017) <https://vidhilegalpolicy.in/2017/11/29/2017-11-29-report-on-ranking-lower-judiciary-appointments/> accessed on 26 November 2019; Chittrakshi Jain, Shreya Tripathy, Tarika Jain, *Budgeting Better for Courts: An Evaluation of the Rs 7460 Crores Released Under the Centrally Sponsored Scheme for Judicial Infrastructure* (Vidhi Centre for Legal Policy, September 2019). <<https://vidhilegalpolicy.in/2019/09/03/budgeting-better-for-courts-an-evaluation-of-the-rs-7460-crores-released-under-the-centrally-sponsored-scheme-for-judicial-infrastructure/>> accessed on 27 November 2019; Diksha Sanyal and Shriyam Gupta, *Discretion and Delay: Challenges in Becoming a District and Civil Judge*, (Vidhi Centre for Legal Policy, January 2019) <<https://vidhilegalpolicy.in/2019/01/07/2019-1-7-discretion-and-delay-challenges-of-becoming-a-district-and-civil-judge/>> accessed on 26 November 2019.

³⁶ Affidavit filed by the State Government of Uttar Pradesh in *In Re Vacancies in the Cadres of Judicial Officers v. Chairman UP Public Service Commission & Ors.* PIL 4215 of 2018; (on file with authors).

Fig. 3 : Vacancies in the district judiciary cadre for 10 states



*Sanctioned strength for district and subordinate judiciary of Telangana includes Andhra Pradesh as well.

Sources:

Sanctioned Strength of District and Subordinate Judiciary : Supreme Court of India, Indian Judiciary, Annual Report 2017-18, October 2018
 Sanctioned strength, working strength and vacancy of district judges : Based on replies received for RTI applications filed on 07 August 2019

Can the AIJS increase representation of marginalized communities in the District and Subordinate Judiciary?

In 2018, India witnessed an unprecedented backlash from the Scheduled Caste community after the Supreme Court of India diluted the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 through one of its judgments.³⁷ In the immediate aftermath of the judgment, prominent political leaders from the marginalized communities pitched for the creation of the AIJS, with the condition that certain number of posts within this service would be reserved for the marginalized communities.³⁸ This is not the first time, that such a demand has been made. Earlier the National Commission for Scheduled Castes, in a report on reservations in the judiciary, had also supported the creation of an AIJS, with the hope that the service would provide for reservations on the lines of the other All India Services of the Government of India.³⁹

The incumbent Union Law Minister has also made several statements on similar lines, stating that the government would reserve posts for the Scheduled Caste (SC) and Scheduled Tribe (ST) communities in any future AIJS with the aim of providing them with better representation in the judiciary.⁴⁰ This claim that the AIJS will necessarily increase representation of marginalized communities in the Indian judiciary merits a more detailed evaluation. We began the process of evaluating the existing state of affairs under the individual State Judicial Services Rules, which are notified by the respective Governors, in consultation with the High Courts.

Interestingly, we discovered that many states already reserve posts under their State Judicial Service Rules for different communities and classes. These include quotas for SC, ST, other backward communities (OBCs), women

and rural candidates. Fig. 4 (next page) illustrates the breakup of posts that are reserved under the State Judicial Service Rules for different communities and classes:

From Fig. 4, it is obvious that many States are already reserving posts under their respective judicial services for marginalized communities, for persons with disabilities and women. Since we were unable to access all the State Judicial Service rules, the above list is merely representative and not exhaustive. It is possible that there are more States that are reserving posts under their judicial service rules. As per the judicial service rules of Delhi, Gujarat, Haryana, Himachal Pradesh, Manipur, Meghalaya, Nagaland and Uttar Pradesh, the State Governments and/or High Courts issue orders from time to time regarding reservation policies for recruitment. Since we were not able to source these orders, the numbers have not been represented here. Hence, this list should not be treated as comprehensive. For most part, it appears that States have extended the reservation quotas provided to their bureaucracies to even the District and Subordinate Judiciary. It is also interesting to note that many States reserve posts for classes of persons who are not provided any form of reservation quotas under existing central government norms. For example, women do not have reservation quotas for any central government jobs but many states do provide reservation quotas for women in the state judicial services.

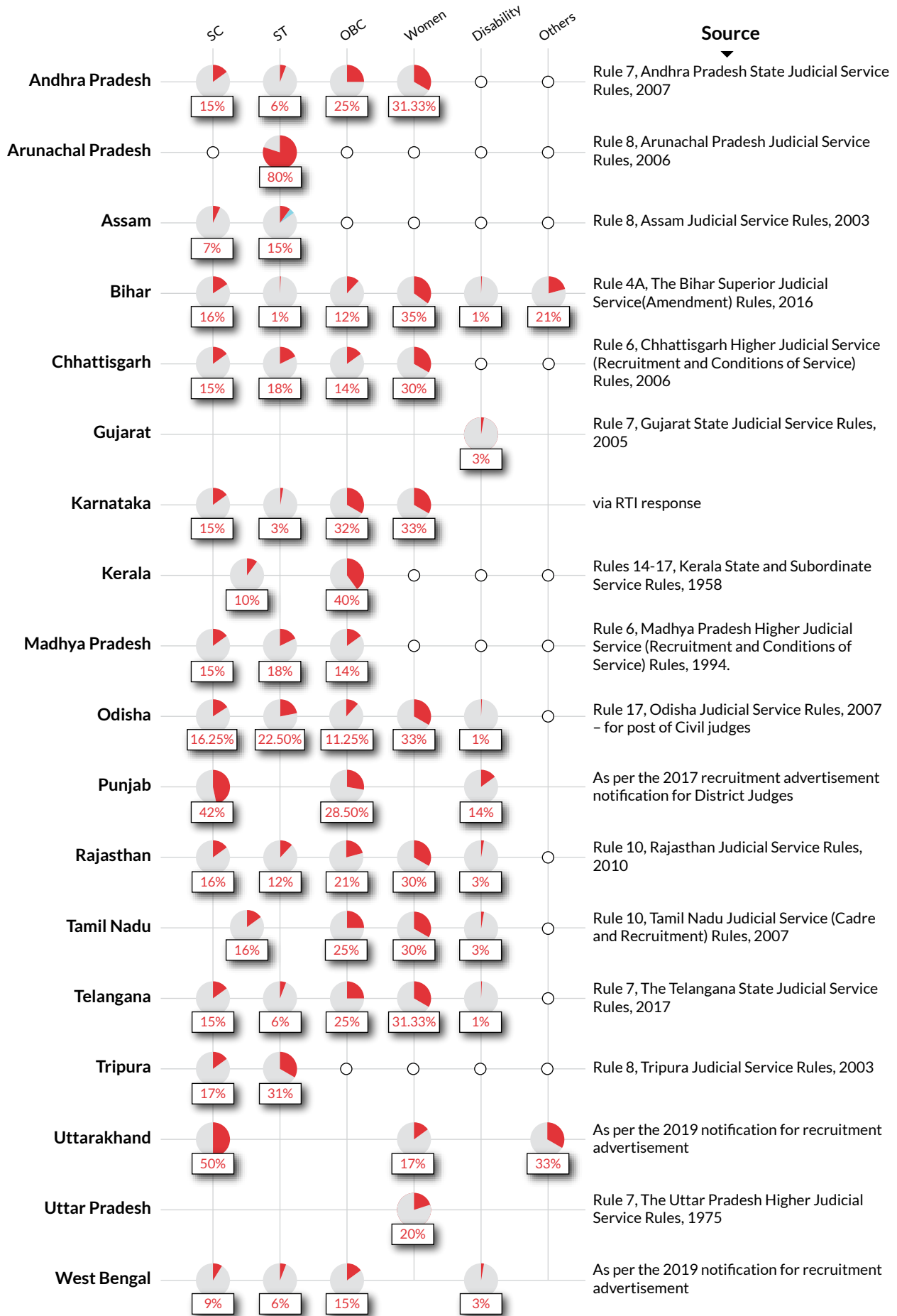
Given the weight of the evidence above, it is quite clear that some of the statements referenced earlier in this chapter, regarding the lack of representation for marginalized communities in the District and Subordinate Judiciary may not have been accurate. It is very likely that many of these communities who currently benefit from the state quotas,

³⁷ *Subhash Kashinath Mahajan v State of Maharashtra* (2017) SCC OnLine SC 1629; Priyanka Mittal, 'Why Supreme Court ruling on SC/ST Act faces Dalit protests' *The Livemint*, 2 April 2017 <<https://www.livemint.com/Politics/bzk9UVPf6hJXjLv0DIJkO/Why-Supreme-Court-ruling-on-SCST-Act-faces-Dalit-protests.html>> accessed on 25 November 2019; *Union of India v. State of Maharashtra* Review Petition(Criminal) No. 228 of 2018 in Criminal Appeal 416 of 218; Krishnadas Rajagopal 'SC recalls verdict diluting SC/ST anti-atrocities law', *The Hindu*, 1 October 2019 <<https://www.thehindu.com/news/national/sc-recalls-its-2018-directions-virtually-diluting-provisions-of-arrest-under-sbst-act/article29564466.ece>> accessed on 26 November 2019.

³⁸ Web Bureau, 'Ram Vilas Paswan Pitches For Broader Consensus For Setting Up Judicial Services, Reservation In Judiciary' *The Outlook*, 26 August 2018 <<https://www.outlookindia.com/website/story/ram-vilas-paswan-pitches-for-broader-consensus-for-setting-up-judicial-services-/315572>> accessed on 27 November 2019.

³⁹ The National Commission for Scheduled Castes, *Reservation in Judiciary* <<http://ncsc.nic.in/files/Reservation%20in%20Judiciary.pdf>> accessed on 26 November 2019.

⁴⁰ 'Now, law minister pushes for SC/ST quota in judiciary', *The Times of India*, 26 December 2018, <https://timesofindia.indiatimes.com/india/now-law-minister-pushes-for-sc/st-quota-in-judiciary/articleshow/67249375.cms?utm_campaign=andapp&utm_medium=referral&utm_source=native_share_tray> accessed on 26 November 2019



will oppose the creation of the AIJS. This is because the communities recognized as Other Backward Classes by State Governments may or may not be classified as OBCs by the Central Government and can therefore not apply for the posts reserved under a potential AIJS. If this means that certain communities are going to lose their existing quotas, they are quite likely to protest, especially since there is keen competition for jobs in the judicial services.⁴¹ Thus, any decision to proceed with the creation of the AIJS has to factor in a possible political backlash in certain states.

⁴¹ PTI, 'Civil Judge exam: Only 9 selected of 14,000 candidates, SC appoints ex-judge to check evaluation' *India Today*, 4 May 2019 <<https://www.indiatoday.in/education-today/news/story/civil-judge-exam-only-9-selected-of-14-000-candidates-1517024-2019-05-04>> accessed on 27 November 2019.

Fig. 4 : States with reservation quota for various categories

Will the creation of the AIJS attract better talent to the District Judiciary by offering better pay and a more efficient system of recruitment through the Union Public Service Commission (UPSC)?

The original justification provided by the Law Commission in 1958 and then again in 1986, was that the creation of a central service, on the lines of the other All India Services, would help incentivize better talent to join the District and Subordinate Judiciary. The reasons put forth by the Law Commission for this conclusion are two-fold. First, it was of the opinion that the All India Services enjoyed more prestige and since graduates could join the All India Services soon after graduating, unlike the judicial services which required mandatory practical experience of a certain number of years at the bar as a qualification criteria, the best graduates were opting for the All India Services over the judicial services.⁴² As a result, those joining the judicial services would be older and would end up earning less than their colleagues of the same age who joined the bureaucracy at a younger age.⁴³ Second, the Law Commission commented on how the selection process of judges for the District and Subordinate Judiciary in different states has been rife with parochialism and nepotism thereby affecting the quality of appointments.⁴⁴

Similar concerns, were reflected in much more blunt terms by the Law Commission in its 116th report submitted in 1986. In pertinent part, the Law Commission stated the following:

“Having regard to the present state of the judicial service below the High Court, the malaise that has set in, the inadequacy of the talent being attracted, varying conditions of service and ineffective voice of the High Court in the matter of recruitment, failure of Public Service Commissions on this front, utter and total antipathy of State Governments have contributed in no uncertain measure to the falling standards in the State Judicial Service.”⁴⁴

While not clearly stated, it appears that the Law Commission was of the opinion that the Government of India would ensure better pay scales for judges who form part of an AIJS, while also ensuring a more efficient recruitment process through the Union Public Service Commission (UPSC). Since the Law Commission reports are short on empirical details, it is difficult to critically analyse its claims that state judicial services are underpaid or marred by a nepotistic and inefficient appointment process. On the point of efficiency of the UPSC, it has been pointed out by commentators that despite having a centralized mechanism system through the UPSC, the All India Services suffer from higher vacancy rates as the District and Subordinate Judiciary.⁴⁶ Even at the beginning of 2019, the Indian Administrative Service (IAS) which has a sanctioned strength of 6,699 officers, was reportedly short of 1,500 officers which is a vacancy rate of 22.4%.⁴⁷

On the issue of pay, it should however be mentioned that a lot has changed over the last few decades for the judicial services. For instance, the Government of India has set up two National Judicial Pay Commissions to recommend pay revisions for state judicial services.⁴⁸ Both these Commissions are progressive steps to ensure better service conditions for the state judicial services, although it is up to the State Governments to accept or reject their recommendations.

In any event, it must be pointed out that like the State Governments, even the Central Government works on the assumption that there should be parity between members of the executive branch and judicial branch. For example, the Cabinet Secretary, who is the senior most bureaucrat

⁴² Law Commission of India, Report No 14 (n 1) 182.

⁴³ *ibid.*

⁴⁴ Law Commission of India, Report No 14 (n 1) 171.

⁴⁵ Law Commission of India, Report No 116 (n 9) 18.

⁴⁶ Alok Prasanna Kumar 'No Case for an All India Judicial Service', *The Hindu*, 15 August 2017 <<https://www.thehindu.com/opinion/op-ed/no-case-for-an-all-india-judicial-service/article19498261.ece>> accessed on 26 November 2019.

⁴⁷ PTI, 'Shortage of nearly 1,500 IAS officers: Govt', *LiveMint*, 10 July 2019 <<https://www.livemint.com/news/india/shortage-of-nearly-1-500-ias-officers-govt-1562761206394.html>> accessed on 25 November 2019

⁴⁸ The National Judicial Pay Commission (Justice Jagannatha Shetty Commission), (n 4); Consultation Paper, Second National Judicial Pay Commission (July 2018).

gets paid as much as a Supreme Court judge.⁴⁹ So even if an AIJS is created, its salary will be pegged to that of the Central Government's bureaucracy.

Regarding the allegations made by the Law Commission of parochialism, regionalism and efficiency in the recruitment process for state judicial services, it should be mentioned that those allegations were made many decades ago. A lot has changed since then. Many State Governments have built up considerable administrative capacity. From the few studies conducted by our colleagues, it appears that the degree of efficiency in recruitment to judicial services varies greatly amongst different states.⁵⁰ Thus, generalized allegations of the kind made by the Law Commission may not be warranted.

⁴⁹ Consultation Paper, Second National Judicial Pay Commission, July 2018, Page 28, <https://doj.gov.in/sites/default/files/Consultation-Paper.pdf>; India Today, 'Supreme Court and High Court judges to get salary hike with the 15th Finance Commission', 23 November 2017 <https://www.indiatoday.in/business/story/supreme-court-and-high-court-judges-salary-hike-1092335-2017-11-23> accessed on 27 November 2019.

⁵⁰ Diksha Sanyal and Shriyam Gupta, *Discretion and Delay: Challenges in Becoming a District and Civil Judge*, (n 35).

VI Will the AIJS be equipped to deal with local languages and customs?

One of the arguments made against the creation of the AIJS, is that judges recruited through this process will not know the local languages of the states in which they are posted. As per, the Code of Civil Procedure, 1908 and Code of Criminal Procedure, 1973 the proceedings of civil and criminal courts are to be conducted in a language prescribed by the State Government.⁵¹ Most State Governments prescribe the language of the state as the language of the civil and criminal courts. Only High Courts are required to conduct their proceedings in English, although some High Court have a special exemption and conduct their proceedings in Hindi.⁵²

The 14th report of the Law Commission had dismissed the language issue as a “faint objection”.⁵³ The 116th report of the Law Commission also dismissed the language-based opposition. In both cases, the Law Commission simply pointed to the existing All India Services, such as the Indian Administrative Service (IAS) and the Indian Police Service (IPS) and explained how officers from one state were able to function in another state after being trained in the local language of the state.⁵⁴ In addition, the 116th report also pointed out how many of the large states in the pre-colonial age such as the State of Bombay or Bengal were actually bilingual or trilingual and yet administered through a single judicial service.⁵⁵

The problem with this line of argument, is that it fails to appreciate the fact that the All India Services discharges entirely different tasks when compared to the judiciary. Services like the IAS and IPS are typically management posts, with the lower bureaucracy of non-gazetted officers, who are locals, being responsible for direct interactions with the citizens. The gazetted officers of the IAS and IPS require local language skills primarily to supervise the non-gazetted officers rather than dealing with local citizens.

A bureaucratic error, due to a misunderstanding based on language, may at most, result in a denial of service or inconvenience for a citizen.

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

If qualified candidates, who are native speakers of the local language are available in a state, it makes no logical sense to recruit out of state candidates and then train them in the local language and dialects.

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

“[The] State is predominantly a tribal State with a number of different tribes having their own time tested customary laws and practices whereunder various disputes and differences of each tribe are settled without having to go to a court of law. Village Councils try and settle cases of both Civil and

⁵¹ Criminal Procedure Code 1973, s 272; Code of Civil Procedure 1908, s 137(2).

⁵² The Constitution of India, Art. 348.

⁵³ Law Commission of India, Report No. 14(1) (n 1) para 74, 191-192.

⁵⁴ Law Commission of India, Report no. 116(n 9) 9-10.

⁵⁵ *ibid.*

Criminal nature. A Member of AIJS cadre from other parts of the country would face language problems and more particularly in recording oral evidences.”⁵⁶

Meghalaya recorded similar opposition to the idea of an AIJS:

“State of Meghalaya having regard to the historical background of the tribal areas within the State and being governed by the provisions of the Sixth Schedule to the Constitution, particularly in the Khasi States Ares, it would not at be in the interest of the public at large to have an AIJS. It is apprehended that such service may create serious practical problems in implementation. As such, the present system of administration of justice should continue for some more time and an AIJS may await for a while.”⁵⁷

Chhattisgarh responded with the following statement:

“All India Judicial Service would be detrimental to the interest of the people of under-privileged and backward States like Chhattisgarh.”⁵⁸

Given the diversity of customs and traditional practices across the country, the above concerns raised by Arunachal Pradesh, Chhattisgarh and Meghalaya are relevant to the entire country. The Law Commission reports do not deal with these aspects in their reports. The issues of local language and customs are issues that deserve serious consideration before moving ahead with the creation of the AIJS.

⁵⁶ Q. No. 4881, Salman Khurshid, Minister of Law and Justice, Response in Rajya Sabha on Question Relating to All India Judicial Service (21 May 2012).

⁵⁷ *ibid.*

⁵⁸ *ibid.*

VII Ensuring judicial independence in context of the AIJS

One of the issues which has received relatively little attention in context of the AIJS debate, is the issue of preserving the judicial independence of District Judges who may be part of such a service in the future.

Currently, the independence of District Judges from the State Governments, is guaranteed by the fact that the High Courts play a significant role in the appointment, transfer and removal of District Judges. Article 233 of the Constitution is quite clear that the appointments of persons to the post of District Judges shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction over such State. The High Courts typically set the question papers for the examinations and conduct the interviews of the candidates for the post of District Judge. Additionally Article 235 of the Constitution has been interpreted by the Supreme Court to vest the power to 'control' District Judges with the supervising High Court.⁵⁹ Since the independence of the judges of the High Court is guaranteed by the Constitution, it follows that any institution, such as District Courts which are subject to the control of High Court judges, will enjoy a similar degree of independence from the State Governments.

If the Central Government does intend to create an AIJS, it needs to explain the manner in which such a service is insulated from the influence of both the Central Government and State Government, right from the process of appointment to the process of removal. The 14th report of the Law Commission, did not deal with this aspect in its report. The 116th report of the Law Commission dealt with this issue by recommending that appointments, postings and promotions to the AIJS be made by a proposed National Judicial Service Commission consisting of retired and sitting judges of the Supreme Courts, members of the bar and legal academics.⁶⁰ The creation of such a body will result in the immense concentration of power in few hands.

Designing such a Commission to ensure judicial independence is not an easy task. The National Judicial Appointments Commission (NJAC) created for the purpose of appointments to the Supreme Court and High Courts was challenged on the grounds that it lacked judicial

independence and was struck down by the Supreme Court on these grounds.⁶¹ In other words, the creation of a National Judicial Service Commission has the potential to stir the pot and the government will have to tread carefully.

If the Central Government does not favour the creation of a National Judicial Service Commission, it should conduct wide-ranging deliberations regarding an alternative institutional arrangement to control the AIJS and instill confidence in the bar, bench and citizens of India, so that the AIJS would enjoy the highest standards of judicial independence from both the Central Government and State Governments. Only when there is a wide-ranging consensus on the shape of the institutional arrangement to control the AIJS, should the Government of India proceed with its creation.

⁵⁹ *The State Of West Bengal v Nripendra Nath Bagchi* (1966) AIR 447; *State Of Bihar & Anr v Bal Mukund Sah* (2000) 4 SCC 640; *State Of Kerala v A. Lakshmikutty & Ors* (1987) AIR 331; *M.M. Gupta And Ors. Etc. v State Of Jammu & Kashmir & Ors* (1982) AIR 1579.

⁶⁰ Law Commission of India Report No. 116 (n 9) 32.

⁶¹ *Supreme Court Advocates-on-Record Association v Union of India* (2015) 6 SCC 408.

Conclusion

The AIJS has been pitched as a solution to judicial vacancies, lack of representation for the marginalised on the bench and the failure to attract the best candidate. As demonstrated in this primer, many of these issues have been incorrectly diagnosed.

Many States are able to ensure timely and efficient recruitments. The States which are unable to tackle their vacancy problem efficiently enough, may be facing other difficulties such as lack of courtrooms or lack of administrative capacity. These are problems that will not be solved through the creation of an AIJS. It may be more prudent to diagnose the underlying problems in individual states that are falling behind in appointments. Similarly, on the issue of ensuring better remuneration and pay, there now exists a system of National Judicial Pay Commissions making recommendations to improve pay and service conditions, although it is up to states to implement their recommendations. Even presuming an AIJS is created, it is most likely that the Central Government will benchmark the pay for such a service against the pay for officers in the central bureaucracy. Thus, there may not be a large variation in the pay for a future AIJS. Lastly, on the issue of increasing representation of marginalized communities within the judiciary by reserving certain number of posts for certain communities, it is clear that many States are already reserving posts for marginalized communities and women.

So why then is an AIJS still being proposed? The answer to this question is not clear because the Law Ministry has never made public a whitepaper or position paper to initiate a public debate on the topic. It would be a grave folly to depend on Law Commission reports written in 1958 or 1986 to justify the creation of an AIJS in 2020.

In any event, if the Law Ministry is still keen on proceeding with the AIJS, it can initiate the process once the Rajya Sabha passes a resolution, by two-thirds majority supporting the creation of the All India Judicial Service for the posts of District Judge. Once such a resolution is passed Parliament can by simple majority amend Articles 233 and 234 of the Constitution to create an AIJS. In other words, if Parliament decides to go ahead with the creation

of the AIJS, State legislatures will have to be a silent spectator in the process. Therefore, the States and High Courts must think long and hard before supporting, being indifferent to or rejecting the idea of an AIJS. The Central Government must also make public the legal framework that it proposes to ensure the judicial independence of the AIJS, without which the proposal of the AIJS will not win public confidence.

At a time when judicial vacancies are being constantly monitored by the Supreme Court⁶², it may be more prudent to fix processes related to recruitments, budgeting in various High Courts. Exams should be conducted periodically within the mandated time frames, timelines for each stage of the judicial services examination should be clearly prescribed, evaluation process should be standardised with qualifying marks for mains and interviews, specified roles of responsibility of members of the recruiting authorities should be laid down so that the process is transparent.⁶³

As this primer would have helped in understanding most of the reasons for the creation of the AIJS no longer exist or have been resolved through changes in rules, regulations and practices. While the primary objective of this primer was to debunk some of the age-old justifications supporting the creation of the AIJS, it is also aimed at being a conversation starter to discuss the actual systemic challenges being faced by the judiciary. It is time we recognize that the AIJS cannot be the answer to these systemic problems, especially when it is an unproven solution to unproven problems.

⁶² PTI, 'Nothing can be more important than filling up judicial vacancies: Supreme Court' *Financial Express*, 30 July 2019 <<https://www.financialexpress.com/india-news/nothing-can-be-more-important-than-filling-up-judicial-vacancies-supreme-court/1661089/>> accessed on 26 November 2019.

⁶³ Diksha Sanyal and Shriyam Gupta, *Discretion and Delay: Challenges in Becoming a District and Civil Judge* (n 35).

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