Judiciary: The Bulwark of Liberal Democracies

What is the issue?

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- Currently, our judiciary is undergoing a crisis of sorts.
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- In this context, this article comprehensively explores the various facets of the challenges that is staring our judiciary.
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What is current crisis in our judiciary?

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- India’s judiciary is in the midst of a crisis that has partly arisen due to the prevailing extraordinary socio-political situation.
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- The judiciary is being repeatedly accused of overreach lately, and it also presently facing unprecedented divisions among its ranks.
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- Notably, four senior judges went public in early 2018 with grievances against the Chief Justice of India (CJI) and even seemed to question his neutrality.
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- The issues substantively raised concerns about the CJI’s alleged bias in allocating benches for cases autocratically and nefarious manner.
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- Subsequently, a motion of impeachment was moved against the CJI and the integrity of the institution stood to critical scrutiny.
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- Presently, a compromise is said to have reached and the CJI has apparently commissioned a more inclusive approach for allocation of cases to judges.
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What is the tussle regarding the appointment of judges?

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- The collegium system was constituted to end government's control over appointments and insulate the institution from executive bias.
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- Nonetheless, as collegium has been a very opaque, it isn't constitutionally prudent to demand that the acceptance of all judicially recommended names.
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- The current system has hence inherently led to tensions between the government and the judges due to this structural flaw.
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- But, the NJAC (National Judicial Appointments Commission), which was proposed to replace the collegium, was struck down by the Supreme Court.
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- Notably, there was near unanimity in the political class that judges should not have absolute power to appoint other judges.
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- A "Memorandum of Procedure" for appointments is now being drawn by the courts to replace collegium, but the delay is eroding the credibility of judges.
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How has judiciary-executive tussle fared in the initial years?

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- During the initial years of our republic, most of the MP's were freedom fighters and the government reposed faith in their intent and vision.
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- But over the years, as there was a clear erosion of nobility in law making, the courts had to step in to protect constitutional values.
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- **Tension -** In the Golaknath case in 1967, Supreme Court categorically stated that the parliament can't amend the fundamental rights.
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- But the subsequent Sankari Prasad case and Sajjan Singh case restored parliament's right to alter any part of the constitution.
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- These judgements stress the need for constitution to remain a dynamic document across ages, which can be changed as per the needs of the time.
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- But nonetheless, as a consequence, this implicitly provided room for parliamentary dictatorship to emerge.
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- **Compromise -** These tensions finally culminated in the evolution of a “basic structure doctrine”, which was a compromise between extremes.
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- The courts upheld the power of the parliament to amend anything in the constitution as long as it didn’t violate the Basic Values and Structures in it.
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- Interestingly, the Basic Structure was defined broadly by the judges, and has thus far proved robust to judge issues on a case by case basis.
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- In other words, it means, while adhering to the constitution (the letter), a government also needs adhere to constitutionalism (the spirit).
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Why should judiciary be independent?

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- India has designed its polity as a federal democracy, with clear vertical division of power between the union government and states governments.
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- Additionally, there is also a horizontal division of power between different organs of the state like legislature, and executive.
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- In this context, disputes are bound to arise due to some overlapping domains and other aspects that are open to interpretation.
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- As these are disputes between constitutional authorities, there is an inherent need for a constitutionally protected independent judiciary to address them.
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- Also, people have some inherent rights and other constitutionally guaranteed rights, and the responsibility of protecting them is vested with the government.
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- An independent judiciary is also needed to ensure that people’s rights are protected and governments are held accountable for violations in this regard.
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- Independence of judiciary is vital for successful democracies and consequently, judges also need to be neutral and independent for the same.
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Why should judiciary be empowered to block some policies and bills?

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- Independent judiciary constrains the functionality of democratically elected governments and hence the latter tends to curtail the former's freedom.
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- Even our first PM Nehru, had iterated that judiciary can point of certain mistakes made by the government/parliament, but can't dictate terms to it.
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- The "Kesavananda Bharati Verdict" that propounded the "Basic Structure Doctrine" was a significant landmark in judicial independence.
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- It sought to elevate judiciary's right to strike down even popularly voted legislations, if it violated the basic contours of the constitution.
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- In essence, this safeguards minorities and politically under-represented and vulnerable sections from being subjected to authoritative majoritarianism.
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- Notably, in our "First Past the Post" election, there is always the risk of even parties that aggregate 30% votes to possibly secure full majority.
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- This being the case, it is important to force governments to build consensus (over and above mere numbers) for ensuring inclusive governance.
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- It is also to be noted that our very constitution was built through consensus and not through majority in the houses.
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Why is there a need for judiciary to be innovative?

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- Governments of the 1970s and 80s (when tensions began) sought a conformist judiciary that would merely tow the constitution in letter.
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- This implies, recognizing the right of the parliament to amend any part of the constitution at will and also to not interfere in government policy decisions.
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- But innovative judges of the time held steadfast to ensure that constitution was protected in spirit, even if it meant tweaking it a little in letter.
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- Their view was that, innovation in judiciary is indispensible for establishing a liberal social and democratic order in the Indian context.
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- Notably, in the aftermath of the national emergency in 1975, judiciary as an institution was strengthened greatly by enhancing its autonomy.
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- Importantly, the concept of “Public Interest Litigation” (PIL), which developed in the late 80s, was a vital judicial innovation that has helped further justice.
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- Nonetheless, it is vital to recognize the thin line between judicial activism (innovative outreach) and judicial adventurism.
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- Judicial adventurism would mean intruding into policy decisions of the government, and dictating legislative or executive action.
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What are the other accessory issues?

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- There have been demands for multi-religious benches for matters related to religion and also separate boards for religious law related cases.
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- These demands are unfounded and there is considerable trust that our judges function independent of religious bias.
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- Post Retirement – The possibility of being appointed as Governors after retirement could possibly influence judges during their tenure in office.
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- This is a genuine risk and it would be good if judges are kept out from such enticing appointments.
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- On the contrary, the appointment process for the “National Human Rights Commission” (NHRC) or Lokpal is a more inclusive.
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- Hence, judges can be considered for such appointments alone.
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Source: Indian Express

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