6.1 Introduction

The roots of the present day human institutions lie deeply buried in the past. The same is true of a country’s law and legal institutions. As M.P. Jain stated “The legal system of a country at a given time is not the creation of one man or of one day; it represents the cumulative fruit of the endeavour, experience, thoughtful planning and patient labour of a large number of people through generations. To comprehend, understand and appreciate the present judicial system adequately, it is necessary, therefore, to acquire background knowledge of the course of its growth and development.”1 Hence, the judicial system in India has not grown over night or in any particular period of history; its roots go back to the distant past. To understand the conditions of judicial independence and accountability in India, it is necessary to understand some of this history of the evolution of the judiciary.

This chapter addresses the evolution of the judiciary during the ancient or Hindu, medieval or Muslim and British periods with special reference to the conditions of judicial independence and accountability and focuses more specifically on the debates in the Constituent Assembly of India. The main purpose of this chapter is to identify the links between the history of the judicial systems and the concepts of judicial independence and accountability in India and to give an outline of the current judicial system.

6.2 Judicial System in Ancient Period

The concept of judicial independence and accountability in India evolved through a long and gradual process, its foundations deeply rooted in the past, for instance, an early idea of judicial independence is to be found in ancient Hindu judicial culture.

There prevailed a golden age of harmony and happiness, when people led happy and peaceful lives on account of their innate virtuous disposition, there existed no

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government to see that the laws of nature were respected and followed. The Santiparva goes on to narrate that ‘society flourished without a King or law court for a long time; however, later, there was moral degeneration. People fell from rectitude; greed, selfishness and cupidity began to sway their minds and the earthly paradise which they had been enjoying was soon converted into a ‘veritable hell.’ Bramhadeva created a King to frame law to control society.”

In ancient India, the King was the supreme authority of the state and personified ‘justice;’ the King was the ‘fountainhead’ of justice. The administration of justice was done in the name of the King. Manusmriti explains the importance of the King and declares that, the King is God in human form as it is he who gives full protection to the people according to Dharma against external enemies and internal wrongdoers and looks after their welfare. The Smritis greatly emphasized that it was the responsibility of the King to protect the people through proper and impartial administration of justice and that alone could bring peace and prosperity to the King as well as people. Though the King was the head of ‘the judiciary,’ he was not supposed to act single handedly. According to Yajnavalkya a King should enter the hall of justice along with scholastic Brahmins and experienced ministers and decide the cases according to rules of Dharmashastra. Narada states that attending to the dictates of the law books and adhering to the opinion of the chief justice, let the King try the cases in due order with great care. Katyayana held that in the discharge of his judicial functions the King was assisted by Brahmins, the chief justice (Pradvivaka) and other judges, ministers and

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3 Matsyanyana; Ibid, p.27.
4 The Dharmasatra and Nitisstra literature regards the King as the fountain source of all justice.
5 Chapter- VII. Various aspects of power of the State and how to wield it are all dealt with in this Chapter. Further the codes of conduct to be followed by the Rulers have also been laid down which hold good for all times.
6 Chapter VII, No.144.
10 Ibid.
11 Brahmins were people learned in the law and religious textbooks.
learned men.\textsuperscript{12} The ‘King’s court’ was the highest ‘court of appeal,’ as well as having original jurisdiction over serious crimes against the state. Below the ‘King’s court’ was the ‘court of the Pradvivaka’ (the chief justice),\textsuperscript{13} in which other puisne judges were appointed to assist the chief justice.\textsuperscript{14}

In appointing the chief justice and other judges, class considerations, which crystallized later into caste, played an important role. Castes were the social groups comprised solely of persons born into the groups.\textsuperscript{15} Society was divided into four main castes, namely, Brahmins, Kshatriya, Vaisyas and Sudras.\textsuperscript{16} The Brahmins were considered to have priority for appointment as chief justice or puisne judges.\textsuperscript{17} The Kshatriyas and Vaisyas were in order of next preference, but no person belonging to the Sudras was appointed as a judge. Moreover, in no case was a woman appointed a judge.\textsuperscript{18}

In towns and districts government officers presided over the King’s courts, administering justice under the authority of the King.\textsuperscript{19} They were entrusted with judicial and administrative functions, but in exercising judicial functions they were assisted by two magistrates. At village level, justice was dispensed by the local village council known as the Kulani or Panchayat. It consisted of a broad of five or more elders of the locality. In each village a local headman, who was the leader of the village, acted as the mediator in government matters between the villagers and the government. He was also a member of the village council and maintained the links between the village council and the government.\textsuperscript{20}

\begin{itemize}
\item\textsuperscript{13} The word; Saida-Vivaka is contravention of prada and vivaka. Prada means one who puts questions as the suitor-from the root-preach and vivaka means who spreads out or a analysis of truth-from the root Vai or Vi- a person who is well versed in the eighteen titles of law and their eight thousand sub-divisions, and who is proficient in logic (Tarka), interpretation (Mimamsa) and other relevant subjects, who is master of Vedas and Smritis, who has the capacity to extract the truth from the judicial proceedings by application of the law, should be appointed as the Chief Justice.
\item\textsuperscript{14} V. D. Kulashrestha, \textit{Landmarks in Indian Legal and Constitutional History}, 6\textsuperscript{th} ed., (Lucknow: Eastern Book Company, 1989), p.5.
\item\textsuperscript{15} Dr. P.V. Kane, \textit{History of Dharmasastra}, Vol.III, 2\textsuperscript{nd} ed., (Poona: Bhandarkar Oriental Research Institute, 1973), pp.272-275.
\item\textsuperscript{16} V. D. Kulashrestha, \textit{supra note} 14, p.2.
\item\textsuperscript{18} V. D. Kulashrestha, \textit{supra note} 14, p.9.
\item\textsuperscript{19} \textit{Ibid}, p.6.
\item\textsuperscript{20} Gopal Das Khosla, \textit{supra note} 17, p.16.
\end{itemize}
The judge was commonly called the Dharmadhikarana, the Pradister or the Pandita. The King appointed, as members of the court of justice, honorable men of tried integrity who were able to bear of burden of the administration of justice and who were well versed in the sacred laws, rule of prudence, who were noble and impartial, equally, towards friends or foes. In *Rajadharma*, the King was advised to appoint suitable judges, indicating therein the qualities of a person to be a judge. According to *Yajnavalkya, Vishnu, Katyayana, Narada* and *Sukra*, the judge was required to be vested with the following qualities: a person who was (i) well versed in *Vyavahara* (laws regulating judicial proceedings) and *Dharma* (Law on all topics), (ii) a *Bahushruta* (profound scholar), (iii) a *Pramanajna* (well versed in the law of evidence) (iv) *Nyayasastravalam bingh* (law abiding) and (v) well versed in the *Tarka* (logic) (vi) should be impartial to friend or foe (vii) should be steady (viii) should be devoted to his work (ix) intelligent (x) hereditary and (xi) proficient in the *Arthasastra*.

The King however was expected to be strictly impartial in deciding the cases or appeals that came before him without being influenced by anger or greed [*Yajnavalkya* II-1]. He was to decide disputes according to law (*Dharmasastra*); otherwise he would be guilty. Five causes which give rise to the charge of partiality (against the judge) were identified- they are (i) *Raga* [affection in favour of a party]; (ii) *Lobha* [greed]; (iii) *Bhaya* [fear]; (iv) *Dvesha* [ill-will against a party]; and (iv) *Vadinosa Rahashrutihi* [the judge meeting and hearing a party to a case covertly]. It is interesting to note that these verses of *Shukraniti*, composed several centuries ago, indicate the appropriate code of conduct for judges and that these very words are incorporated in the oath to be taken by the judges of the High Courts and Supreme Court, under Schedule III of the *Constitution of India*. Even *Brihaspathi* states “A Judge should decide cases without consideration of

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26 Ibid.
personal gain or prejudice or any kind of bias (now-a-days the term used is “Without fear or favour”). Dishonesty in a judge was regarded as the most reprehensible crime.27

According to Manusmriti a judge should have knowledge of what we might call ‘legal psychology’. Having dressed himself in a befitting manner and having prayed to the God of justice, the judge should begin the trial in a peaceful frame of mind. He should know the expedient and the inexpedient, pure justice and injustice. He should discover by external signs, the internal disposition of men, voice, colour, motion, eyes and gait, gesture and speech; changes in eyes and faces, are all indices of the working of the inner mind. A judge ought to understand and interpret all these physical signs.28

The courts of law, in ancient India were held in great esteem. The court-house was considered sacred; the independence and integrity of the judges were watched jealously.29 The efficient working of courts had the necessary result of reducing crime and litigation. Strict enforcement of penalties kept the people honest.30

However, as the judiciary was headed by the King himself and he was free to make any changes in the structure of the courts, the independence of judges was not beyond question. Judges were appointed by the King and the tenure of their office depended entirely on the King’s pleasure. Therefore, it is difficult to determine the degree of freedom enjoyed by judges in the exercise of their judicial functions, although it is likely that judges were more accountable to the King than to the public.31 Next to the King, the chief justice was responsible for justice, but he was an official who combined judicial and administrative functions. The subordinate courts were presided over by government servants. Therefore, technically all judicial institutions were under the exclusive control of the King who was also the supreme executive authority of the state. However, day-to-day control was in the chief justice and the government.

29 Gopal Das Khosla, supra note 17, p.24.
6.3 Judicial System in the Medieval Period

The Muslim period began with the conquest of India by Muslim invaders. The object of Muslim rule in India was its self preservation and political domination over Hindus. The Muslim Kings regarded themselves as God’s humble servants. The ruler was his delegate. The Muslim policy was based on the conception of the legal sovereignty of the Sharia or Islamic law. The judicial system of India, during the medieval Muslim period, may be divided and studied under two separate periods, the Sultanate of Delhi and the Mughal period. The judicial reforms of Sher Shah formed a bridge between the two periods.

6.3.1 Sultanate Period

During the Sultanate period the judicial system was set up on the basis of the administrative divisions of the Kingdom. A systematic classification and gradation of the courts existed in the Capital, Provinces (Subah), Districts (Sarkar), Parganahs and villages. The highest court in the capital was the King’s Court, which exercised both original and appellate jurisdiction. It was presided over by the Sultan himself, assisted by two legal experts of high reputation known as Muftis. There were two other high courts of civil appeal and criminal appeal respectively known as Diwan-e-Risalat and Diwan-e-Mazalim. The chief justice (Quazi-ul-Qazat) was the highest judicial officer, next to the Sultan. During 1206 to 1248 the chief justice used to preside over these two courts but in

32 The period of conquest commenced in the year 712 when Muhammad Bin Qasim, the famous Arab general, defeating King Dahir and conquered Sindh and Multan. After conquering the Provinces, Mohammad Bin Qasim did not establish any Muslim government. He entrusted the internal administration to the Indians who held important positions during the reign of King Dahir. He merely appointed a Muslim Governor and left some Muslim soldiers under the governor and the administrative and judicial functions of the conquered Provinces were carried out by Hindu officials in accordance with their own laws. From 991 successive invasions began with incursions from different generals. These continued until permanent conquest of India by Muhammad Ghori in 1016. During this period, Sultan Muhammad of Ghazni, a Muslim of Turkish race, led a series of raids on north-west India, but he made no attempt to establish any stable government or a dynasty. In 1192 Afghan ruler Muhammad Ghori, defeated the Hindu King Prithvi Raj and occupied Delhi. He established a Muslim Sultanate at Delhi conquering most of northern India. Thereafter, the Muslim rulers gradually conquered most of India and established a settled Muslim government in India from 1016.

33 Giriraj Shah, supra note 9, p.89.

34 The Kingdom was divided into Subahs (Province), The Subah was composed of Sarkars (Districts) and each Sarkar was further divided into Parganahs. A group of villages constituted a Parhanah. V. D. Kulashrestha, supra note 14, p.18.
1248 Sultan Nasir-ub-din, created a superior post of Sadre Jahan and since then Sadre Jahan became a chief head of the judiciary.

In each district (Sarkar) there were the courts of the Qazi, Fauzdar, Kotwal, Sadre and Amil. The court of the District Qazi was authorized to try all original civil and criminal cases. It was empowered to hear appeals from courts of Paraganah Qazi, Kotwal and Village Panchayats. The District Qazi was appointed on the recommendation of the chief provincial Qazi or directly by the Sadre Jahan. The Fauzdar was the Chief executive and Police Officer of the district and he tried petty criminal cases relating to security and suspected criminal offences. At each Parganah there were two courts, Qazi-e-Parganah and Kotwal. The court of Qazi-e-Parganah exercised original jurisdiction in all civil and criminal cases. The Kotwal was the principal executive officer in the towns and he tried petty criminal cases. At the village level, there was a village assembly or Panchayat for a group of villages. The assembly was a body of five leading men and it was empowered to look after the executive and judicial affairs of the villages. The chairman of this assembly was appointed by the Nazim (Governor of the province) or Faujdar (Chief Executive of the district). The village assembly had jurisdiction to try civil and criminal cases of a ‘purely local character.’

In 1540, Sher Shah came to power and he ruled for five years. He was famous not only for his heroic deeds but also for his administrative and judicial abilities. He introduced various remarkable reforms in the administrative and judicial system of his kingdom. At each Paraganah headquarters he introduced a civil judge called the Munsif, a designation which persists even today. The judicial officers below the Chief Provincial Qazi, were subject to transfer every two or three years. All executive, judicial, legislative

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35 The court of the District Qazi was authorized to try all original civil and criminal cases. It was empowered to hear appeals from courts of Paraganah Qazi, Kotwal and Village Panchayat. The District Qazi was appointed on the recommendation of the chief provincial Qazi or directly by the Sadre Jahan.
36 The Fauzdar was the Chief executive and Police Officer of the district and he tried petty criminal cases relating to security and suspected criminal offences.
37 The Kotwal of the district was the commanding officer next to the Fauzdar. He was empowered to try petty crimes and police cases.
38 The court of the Sadre was empowered to try cases relating to grants and registration of land.
39 The court of the Amil was to deal with the cases concerning land revenue and appeals from this court were allowed to the court of Dewan-e-Subah. V. D. Kulashrestha, supra note 14, p.21.
40 Ibid.
41 Ibid.
and military power resided in the Emperor who was considered to be ‘the fountain of justice.’

In Sultanate period judges were appointed on the basis of their high standard of learning in law. Incompetent and corrupt judges were condemned, degraded or dismissed from their offices. Every possible effort was made to maintain the high standard of the judiciary.

6.3.2 Mughal Period

During the Mughal period the Emperor was regarded as the source of justice. With a view to administering justice properly the Emperor established a separate department of justice known as the Muhukma-e-Adalat. Similar to the Sultanate period, a systematic classification and gradation of courts existed all over the empire.

In the capital there were three important courts: the Emperor’s Court, the Court of the Qazi-ul-quzat (Chief Justice) and the Court of Dewan-e-Ala (Chief Chancellor of Exchequer). In exercising judicial functions the Emperor was assisted by a Darogha-e-Adalat (Superintendent of the Court), a Mufti (learned jurist or law-officer), a Mir Adl (Chief Civil Judge), the Mohtasib-e-Mumalik or the Chief Mohtasib (Chief Public Censor), Qazis (judges of Canon Law) and the Qazi-ul-Quzat. The Qazi-ul-Quzat was assisted by one or two puisne judges or Qazis. In addition, Darogha-e-Adalat, Mufti, Mohtasib and Mir Adl were attached to this Court. However, the chief justice and also the Dewan-e-Ala were appointed by the Emperor. Therefore, they were not completely independent of the executive. The composition, powers and jurisdiction of Provincial courts, District courts, Parganah courts and village courts were very similar to those of the courts in the Sultanate period. Contempt of the court was considered a serious offence and was severely punished during Muslim period.

Administration of justice in the Muslim period reveals that the head of the State, Sultan or Emperor, was the supreme authority to administer justice. Therefore, the

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42 Ibid.
43 The Emperor’s Court and the Court of the Qazi-ul-Qazat were similar to the King’s Court and Qazi-ul-Quzat’s Court of the Sultanate period. The Court of the Dewan-e-Ala was the highest Court of Appeal deciding revenue cases. V. D. Kulashrestha, supra note 14, p.24.
44 Ibid, p.23.
judiciary was not free from the control of executive authority and there was a combination of executive and judicial functions in one hand.

6.4 Judicial System During the British Period

During the British rule in India the judicial system was gradually changed under different schemes introduced by the British rulers. The main features of the important schemes of regulating the administration of justice are discussed briefly below.

6.4.1 Administration of Justice in the Initial Stages

In the initial stages Charters of 1616, 1622 and 1661 were passed by the British Parliament to create English Courts of justice in India. The first serious courts in British India were established in the three Presidency towns of Madras, Bombay, and Calcutta- the Mayor’s Courts set up by the Charter of King George I in 1726. The Mayor’s Courts were staffed by three non-professional judges, drawn from amongst the Mayor and aldermen of the corporation in each Presidency town.

The Regulating Act in 1773 authorized the Crown to establish a Supreme Court, and in 1774, the Crown established a Supreme Court in Calcutta. The Supreme Court consisted of a Chief Justice and three puisne judges. Only a barrister of five year’s standing could be appointed a judge on the court. A Supreme Court was similarly established later in Madras (1800) and Bombay (1823).

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46 The Charter 1616 is passed by British Parliament, through this Royal Grant of the 14th December, 1615-16, the Commander or General was appointed by Crown and had power to decided criminal cases, when the company was authorized to issue Commissions to their captains to try all offences, with a proviso requiring the verdict of jury in the case of a capital offence.

47 Royal Charter of the 14th February 1622 granted to chastise and correct all English persons, residing in the East Indies and committing any misdemeanor, in accordance with Martial or other law. The Company, under this power, authorized the Presidents of the Factories and other Chief Officers to punish offences committed by its servants on land, subject to a similar proviso for trial by Jury in capital cases.

48 The Charter granted to the company was empowered to appoint Governors and other officers in its factories; and such Governor and council of each factory were authorized ‘to judge all persons, belonging to the said Governor and Company, or that shall live under them, in all causes, whether civil or criminal, according to the laws of this Kingdom and to execute judgment accordingly.’ By the aforesaid Charter and that it was re-introduced on three successive occasions by the later Charters of 1726, 1753 and 1774.


50 Gradually, as more territories were added to the presidency towns, these became provinces.


52 Section 13, the East India Company Act, 1773, 13 Geo.3, c.63.

53 Section 13, the East India Company Act, 1773; the court’s first Chief Justice was Sir Elijah Impey, and its other judges were Robert Chambers, Stephen Caesar LeMaistre, and John Hyde.

54 B.S. Sinha, supra note 51, pp.86-92; M. P. Jain, supra note 1, pp.101-106.
Before 1861, a dual system of courts prevailed in British India. On the one hand, there was a Supreme Court in each of the three Presidency towns, which was distinctly British in flavor. On the other hand, in the rural districts of British India called the ‘Mofussils,’ there were civil courts (Diwani Adalats) and criminal courts (Nizamat or Fozdari Adalats), from which appeals lay to civil appellate courts (Sadar Diwani Adalats) and criminal appellate courts (Sadar Nizamat Adalats). The Supreme Courts of the Presidency towns were bound by English law, whereas the Sadar Adalats applied local personal laws.

6.4.2 The Indian High Courts Act, 1861

The Supreme Court derived its legitimacy from the Crown, and the Sadar Adalats, from the East India Company. In 1861, Britain’s Parliament enacted the Indian High Courts Act, 1861 authorizing the Crown ‘by Letters Patent under the Great Seal of the United Kingdom’ to ‘erect and establish’ High Courts of Judicature at Fort William in Bengal (that is, Calcutta), Madras and Bombay. Each High Court was to have one chief justice and not more than 15 puisne judges.

The Indian High Courts Act, 1861 discriminated between British-trained barristers and Indian-trained pleaders- the former could become judges only five years into their practices, while the latter had to wait 10 years. However, for the first time, Indian lawyers could become judges on superior appellate courts in British India. All

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55 The Supreme Court also exercised personal jurisdiction beyond the presidency towns over certain classes of individuals, namely, British subjects and servants of the East India Company.
56 M. P. Jain, supra note 1, pp.53-62.
57 Ibid.
59 Section 2, Indian High Courts Act, 1861. Later, under the Indian High Courts Act, 1911, 1 & 2 Geo. 5. C.18, the number was increased to 20 (including the chief justice).
judges were to hold office ‘during Her Majesty’s Pleasure,’ meaning that there was formally no security of tenure for judges. The Chief Justice of a High Court had to be a barrister - in other words a member of the civil service or an Indian pleader could not rise to the position of Chief Justice of a High Court. Significantly, the Chief Justice of each High Court was given the power to determine the composition of benches. Queen Victoria issued Charters which established a High Court in each of the three Presidency towns, formally bringing an end to the dual system of courts prevalent in the Presidency towns.

The Indian High Courts Act, 1861, also contained an interesting provision, which established a hierarchy amongst judges appointed to the High Court’s in India. It provides that ‘all judges of each High Court shall have rank and precedence according to the seniority of their appointments.’ Once appointed to a High Court, a judge was not formally considered to be of equal status as the rest of his brethren- he had ‘rank and precedence’ to those appointed after him, and he was subject to the ‘rank and precedence’ of those appointed before him. However, this type of provision was not unique to British India. The salaries, allowances, retirement pensions and (where necessary) expenses for equipment of the judge were to be fixed by the Secretary of State in Council. Not much of the constitution of the courts changed as a result of the Government of India Act, 1915. If there was one institution which commanded the respect and the confidence of

61 Section 4, Indian High Courts Act, 1861.
62 Ibid, Section 2.
63 Ibid, Section 14.
64 Ibid, Section 8.
65 Ibid, Section 5.
66 For example, in Britain at the time, section III of the Court of Chancery Act, 1851, c.83, provided that Lords Justices of the Court of Appeal in Chancery had ‘Rank and Precedence’ after the Lord Chief Baron of the Court of Exchequer, and as between themselves, accordingly to the order and time of their appointment. Even in the United States, section 1 of the Judiciary Act, 1789 provided that the associate justices of the Supreme Court had ‘precedence according to the date of their commissions,’ or if their commissions bore the same date, ‘according to their respective ages.’
67 Section 6, Indian High Court Act, 1861.
68 Under section 101(3), Government of India Act, 1915, 5 & 6 Geo. 5, c.61, in order to be considered eligible for appointment to a high court, a person had to be:
(a) A barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland, of not less than five years’ standing; or (b) a member of the Indian Civil Service of not less than ten years’ standing and having for at least three years served as, or exercised the powers of, a district judge; or (c) a person having held judicial office, not inferior to that of a subordinate judge or a judge of a small cause court, for a period of not less than five years; or (d) a person having been a pleader of a high court for a period of not less than ten years.
the people during the British rule in India it was the High Courts. A distinguished line of English and Indian High Court judges had established a tradition of independent and fearless administration of justice in British India.

6.4.3 The Government of India Act, 1935

A resolution to establish a ‘Court of Ultimate Appeal in India’ was first introduced in the Central Legislative Assembly of British India on 26th March, 1921, by Dr. Hari Singh Gour, who hoped that British India would follow the example of ‘the great colonies of England, such as Canada, Australia and South Africa, by setting up a Supreme Court in India. Dr. Hari Singh Gour urged three grounds in support of his proposed resolution: first, it was too expensive to file an appeal before the Privy Council; second, there was invariably a delay of around two to five years as a consequence of filing an appeal before the Privy council, and third, the method of disposing cases was unsatisfactory, particularly because the Privy Council did not have advisers on Hindu and Muhammadan Law and law which is not founded on English law. One objection was that a Federal Court in India would ‘impair the independence of the High Courts’ since judges would seek appointment to this ‘court of ultimate appeals’ and incentive to perhaps, favour the executive. Finally the resolution was defeated by a vote of 15-56. Then the suggestion to set up a Supreme Court in India was contained in the Nehru Report of 1928, but in ‘its official thinking’ the idea of a Federal Court first took practical shape when, following three Round Table Conferences in 1930, 1931 and

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71 Dr. Hari Singh Gour was a lawyer, later the first Vice Chancellor of the University of Delhi, the leader of the National Party in the Assembly, and leader of the opposition.
72 Legislative Assembly Debates, dated 26 March 1921, Vol.1, no.15, p.1606.
73 Abhinav Chandrachud, *supra* note 60, p.27.
74 George H. Gadbois, Jr., *supra* note 70, p.24.
75 Legislative Assembly Debates, 17 February 1925, p.1180.
76 The *Nehru Report* was submitted by Motilal Nehru, Chairman of the committee appointed by the All Parties Conference in Bombay (19 May 1928). Articles 46-51 of the ‘draft bill’ dealt with the federal judiciary. In particular, Article 46 called for the establishment of a supreme court, consisting of a Lord President and other Justices, as ‘Parliament may fix,’ to ‘exercise such jurisdiction as Parliament shall determine.’
77 At the second Round Table Conference held in 1931, one of the sub-committees presented a report to the conference in which it opined that the Federal Court should consist of a Chief Justice and a fixed number of puisne judges, appointed by the Crown, holding office during good behavior, retiring at age 65, removable before that age only on an address passed by both houses of the legislature, and ‘moved with
1932, the British Government evolved a federal scheme for India’s Constitution. The White Paper proposals for 1933 recommended the establishment of two courts at the Centre.

Soon, a Joint Committee on Indian Constitutional Reform was established to discuss the White Paper’s proposals. The Report of the Joint Committee was a key document which shaped the subsequent Government of India Act, 1935. In its report, the Joint Committee recommended various suggestions for the establishment of a Federal Court of India.

The Government of India Act, 1935 was enacted on 2nd August, 1935. Section 200 of the Act established a Federal Court in India consisting of a ‘Chief Justice of India’...
and not more than six puisne judges. Security of tenure for judges was now formally a part of the Constitution.\textsuperscript{84} The Act crystallized that convention, according to which judges could only be removed for ‘misbehaviour’ or ‘infirmity of mind or body’, if the Privy Council made a recommendation that the judge be so removed.\textsuperscript{85} The doctrine of ‘pleasure,’ under which judges held office only during the pleasure of the Crown, was accordingly done away with. Section 200 provided that, Federal Court judges would retire at the age of 65.\textsuperscript{86} High Court judges were now to formally retire at the age of 60.\textsuperscript{87} The salaries and rights, in respect of leave of absence or pension, could not be varied to a judge’s disadvantage after appointment, in order to ensure judicial independence and freedom from executive pressure.\textsuperscript{88} However, there was no elaborate impeachment process for the removal of a judge by the federal legislature. Most importantly, however, Section 200(3) set out the qualifications for judges of the Federal Court of India.\textsuperscript{89} The Act removed the distinction between British-trained barristers and Indian-trained pleaders- either could be appointed to the Federal Court or to the High Court after 10 years of practice, and either could become the Chief Justice of India or the Chief Justice of a High Court. The Chief Justice of India was required to be a suitably qualified lawyer before he was first appointed a judge. This was to ensure that members of the Indian Civil Service- ‘The bureaucracy’ (ICS) - could not hold the post of Chief Justice of India.\textsuperscript{90} At the time, there was a strong public sentiment in India against civil service judges, who were perceived to entertain a natural bias towards the government.

\textsuperscript{84} Earlier, high court judges could be removed by the Crown at any time, although that convention had evolved that they would not be removed except under the rarest of circumstances.
\textsuperscript{85} Sections 200(2)(b) and 220(2)(b), Government of India Act, 1935.
\textsuperscript{86} Section 200(2).
\textsuperscript{87} Section 220(2).
\textsuperscript{88} Proviso to Section 201, Government of India Act, 1935. This was also a safeguard for high court judges. Proviso to Section 221.
\textsuperscript{89} Section 200(3) A Person shall not be qualified for appointment as a judge of the Federal Court unless he: (a) has been for at least five years a judge of a High Court in British India or in a Federal States; or (b) is a barrister or England or Northern Ireland of at least ten years’ standing, or a member of the Faculty of Advocates in Scotland of at least ten years standing; or (c) has been for at least ten years a pleader of a High Court in British India or in a Federated State or of two or more such Courts in succession. A proviso to Section 200(3) set out certain additional qualifications necessary for appointment to the post of Chief Justice of India: (i) a person shall not be qualified for appointment as Chief Justice of India unless he is, or when first appointed to judicial office was, a barrister, a member of the Faculty of Advocates or a pleader; and (ii) in relation to the Chief Justice of India, for the references in paragraphs (b) and (c) of this subsection to ten years there shall be substituted references to fifteen years.
\textsuperscript{90} George H. Gadbois, Jr., supra note 70, pp.253-315.
The Federal Court had original,\textsuperscript{91} appellate\textsuperscript{92} and advisory jurisdictions.\textsuperscript{93} A decision of the Federal Court could be appealed before the Privy Council, without leave, if the decision was issued under the Court’s original jurisdiction and involved a certain type of dispute, but with leave of either the Federal Court or Privy Council in other cases.\textsuperscript{94} Finally the Federal Court of India was established on 1\textsuperscript{st} October, 1937.\textsuperscript{95} In short, the Federal Court under the \textit{Government of India Act, 1935} was a weak court, with limited jurisdiction- importantly, it had no appellate jurisdiction in criminal or civil cases; it did not swallow all direct appeals from a High Court to the Privy Council, and its decisions could be appealed before the Privy Council. After independence the Central Legislature enacted the \textit{Federal Court (Enlargement of Jurisdiction) Act}, 1948 which enlarged the appellate jurisdiction of the Federal Court in civil cases and correspondingly restricted appeals to the Privy Council. Finally the \textit{Abolition of Privy Council Jurisdiction Act}, 1949 abolished the jurisdiction of the Privy Council in respect of appeals from India, as an interim measure and invested the Federal Court with the same jurisdiction and powers as the Privy Council had, had.\textsuperscript{96}

\subsection*{6.5 Constituent Assembly of India}

The history of the enactment of the Indian Constitution, including some of the debates\textsuperscript{97} concerning the judiciary is important for the purpose of this research, it is not necessary to comprehensively deal with this history, but only to recap key events in order to contextualize the debate surrounding judicial appointments, removal, age of retirement and other relevant provisions relating to the judiciary. Fortunately those entrusted with

\begin{itemize}
\item \textsuperscript{91}Section 204. Its original jurisdiction extended to federal disputes.
\item \textsuperscript{92}In British India, its appellate jurisdiction extended to decisions of the high courts, only if the high court issued a certificate that the case involved a substantial question of law as to the interpretation of the Constitution, not in civil and criminal cases. Section 205. \textit{Government of India Act}, 1935.
\item \textsuperscript{93}The Governor General could invoke the court’s advisory jurisdiction, in his discretion, on questions of public importance. Section 213, \textit{Government of India Act, 1935}.
\item \textsuperscript{94}Section 208, \textit{Government of India Act, 1935}.
\item \textsuperscript{95}When its first three judges were sworn in by the Governor General at the Viceregal Lodge in Simla, six months after the inauguration of provincial autonomy. However, it was formally inaugurated only on 6 December 1937. M. V. Pylee, \textit{Supra} note 82, p.xi; Harihar Prasad Dubey, \textit{A Short History of the Judicial Systems of India and Some Foreign Countries}, (Bombay: Tripathi, 1968), p.350.
\item \textsuperscript{97}The debates in the Constituent Assembly fill 11 large volumes. Large parts of its deliberations reflect the anxiety of members of that body for the need to forge political unity out of a multilingual, multi-religious assortment of people at varied stages of development. Fali S. Nariman, \textit{The State of the Nation}, (New Delhi: Hay House Publishers (India) Pvt. Ltd., 2013), p.27.
\end{itemize}
the task of framing the Constitution of India were fully alive to their historic role and the supreme importance of their assignment. As H. R. Khanna J. has said:

“The Constituent Assembly as such represented the very cream of those in the public life of the country. Apart from the fact that its members were inspired by a high sense of idealism and were sincerely attached to the great values of life, it was a body of persons who, for sheer brilliance and talent, for breadth of vision and comprehension of basic problems, for deep learning and erudition was unrivalled in our history. In the discharge of their duties, they spared no pains and strove for the very best. The result was that when the Constitution took its shape, it was hailed by many, not only in India but also elsewhere, as a landmark in the art of constitution making.”

6.5.1 The Union Judiciary

The proceedings of the Constituent Assembly show that the Supreme Court attracted the considerable interest of the members. Next to fundamental rights, the Court captured their imagination and brought a touch of idealism in the deliberations about the court.

The Constituent Assembly was duly constituted in accordance with the proposals of the Cabinet Mission Plain in 1946. A Drafting Committee was set up by the Constituent Assembly of India under the chairmanship of Dr. B.R. Ambedkar, to carry out the task of drafting the Constitution. On 30th April, 1947, a 15 member committee (known as the Union Constitution Committee) was set up to prepare a report on the broad principles for the new Union Constitution. A special committee (also called an ‘ad hoc Committee on the Supreme Court) was also set up to opine on the powers of the Supreme Court that was to be established. The Committee, in its Report, suggested two alternative methods for making judicial appointments –(a) Supreme Court judges could either be appointed by the President of India in consultation with the Chief Justice, and then confirmed by at least seven out of a panel of 11 members- a panel composed of High Court Chief Justices, members of the Central Legislature, and law officers of the Union;

100 H.R.Khanna, supra note 98, p.79.
101 The office of the Constituent Assembly was set up on 1 July 1946, with B.N. Rau in charge as Constitutional Adviser. Its first session was held on 9 December 1946.
102 C.A.D., Vol.III, pp.471-473. A 25- member committee was also set up to prepare principles of a model constitution.
103 The committee’s members included a former judge of the Federal Court (S. Varadachariar), and a former Advocate General to the Federal Court (B.L.Mitter), in addition to other noted jurists- Alladi Krishnaswamy Ayyer, K.M.Munshi and B.N. Rau).
or (b) the panel would recommend three names for appointment to the Supreme Court, out of which a judge would be appointed by the President in consultation with the Chief Justice.\textsuperscript{104}

The Union Constitution Committee prepared a report on the principles of the Union Constitution, and submitted it to the Constituent Assembly of India on 4 July 1947.\textsuperscript{105} Clause 18 of the report dealt with the federal judiciary. The committee agreed with the proposals of the \textit{ad hoc} committee on the Supreme Court, with one exception: judges were to be appointed by the President after consulting the Chief Justice and such other judges of the Supreme Court as also judges of the High Court’s as may be necessary for the purpose.\textsuperscript{106}

The Constituent Assembly discussed Clause 18 of the Union Constitution Committee’s report and summarised,\textsuperscript{107} five broad matters- as to: (a) who would appoint Supreme Court judges, (b) who would remove Supreme Court judges, (c) qualifications for being appointed a Supreme Court judge, (d) who would determine the salary and emoluments of judges, and (e) what would be the Court’s jurisdiction.\textsuperscript{108}

After partition, the character of the Constituent Assembly changed. It functioned as a sovereign body unfettered by any restrictions on its powers, for it had to frame a Constitution for India alone.\textsuperscript{109} On October 1947, the first draft of a new Constitution for India was presented to the Constituent Assembly of India. Articles 87-109 dealt with the federal judiciary. On 21 February 1948, the second draft of the Constitution was placed before the Constituent Assembly of India. Articles 103-125 dealt with the federal judicature and it was submitted for public comments in February 1948. A Conference of the Judges of the Federal Court and Chief Justices of many High Courts, was convened to discuss the provisions of the second draft Constitution. In their joint memorandum to the Constituent Assembly, the Conference strongly advised against permitting High Court

\textsuperscript{104} \textit{C.A.D.}, Vol. IV, p.733.
\textsuperscript{106} \textit{C.A.D.}, Vol. IV, p.727. This appeared to be consistent with the recommendations of the Sapru Committee made in 1945.
\textsuperscript{108} H.R.Khanna, \textit{supra} note 98, p.84; \textit{C.A.D.}, Vol. VI, p.579.
and Supreme Court judges to retire at the same age. If the retirement age at High Courts and the Supreme Court was to be same, they opined that High Court judges and Chief Justices would not accept a position on the new Supreme Court of India. The ‘honour and prestige’ of being appointed to the Supreme Court would not offset the sacrifice that a senior High Court judge or Chief Justice would have to make in order to give up his position of seniority on a prestigious High Court, in return for a junior position on a relatively new court, with perhaps a lighter case load. Allowing Supreme Court judges to retire after High Court judges, would ensure that senior High Court judges would have an incentive to serve on the Supreme Court- an enhanced term in service. This was very similar to the rationale adopted by the Joint Committee prior to the enactment of the Government of India Act, 1935 for maintaining a ‘retirement age gap’ between the Federal Court and High Courts.\(^{110}\)

In addition, the memorandum asked that the Chief Justice of India not merely be ‘consulted’ in the matter of appointments, but that his ‘concurrence’ be obtained; that is, his recommendation should be binding on the executive. This was felt necessary in order to prevent judicial appointments from being made on political, communal, or partisan grounds, which was increasingly becoming prevalent.\(^{111}\) Several other suggestions were received by the Constituent Assembly, on 24\(^{th}\) May 1949; the Constituent Assembly discussed provisions of the draft Constitution relating to the appointment of the federal judiciary. A host of amendments were proposed to the provisions dealing with federal judges. In his speech, Dr. B.R. Ambedkar placed these into three categories: (a) amendments concerning methods of appointing Supreme Court judges, (b) amendments concerning the age of retirement of Supreme Court judges, and (c) amendments concerning the acceptance by retired judges of positions after retirement.

Three types of amendments were proposed on how to appoint judges to the Supreme Court of India: first, it was suggested that judges should be appointed with the concurrence of (and not merely after consultations with) the Chief Justice;\(^{112}\) second, it

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\(^{112}\) Mr. Mahboob Ali Baig Sahib proposed that the judges should be appointed with the concurrence of the Chief Justice of India. *C.A.D.*, Vol. VIII, p.238.
was suggested that the appointment of judges should be subjects to confirmation by a two-thirds vote of Parliament; and third, it was suggested that judges be appointed in consultation with the Council of States. Each of these suggestions was rejected by Dr. B.R. Ambedkar. He recommended ‘steering a middle course’:

“With regard to this matter, I quite agree that the point raised is of the greatest importance. There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objectives could be secured. There are two in other countries. In Great Britain the appointments are made by the Crown, without any kind of limitation whatsoever, which means by the Executive of the day. There is the opposite system in the United States where, for instance, officers of the Supreme Court as well as other officers of the State shall be made only with the concurrence of the Senate in the United States.”

“…it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the Legislature is also not a very suitable provision… with regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that that is also a dangerous proposition.

As regards the age of retirement, various views were expressed. Jawaharlal Nehru spoke against lowering the retirement age of Supreme Court judges and cited the example of Albert Einstein and Oliver Wendell Holmes- arguing that just as Einstein or Holmes did their best work later on in their lives, ‘first-rate’ judges could be older than 65. However, he concluded by stating that 65 was ‘by no means unfair.’ Jaspat Roy Kapoor had suggested that judges of the Supreme Court should retire at sixty, but proposed to confer on the President, the powers to grant extensions in individual cases from year to year.

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113 Prof. Shibban Lal Saksena suggested that the Chief Justice of India should be appointed by the President subject to confirmation by two-third majority of the total number of members of Parliament assembled in a joint session of both the Houses of Parliament. *C.A.D.*, Vol. VIII, p.230.

114 The third suggestion was that of Prof. K.T. Shah that in the appointment of judges the President should also consult the Council of States. *C.A.D.*, Vol. VIII, p.234. It was similar to the provision laid down in Section 2 of Article II of the American Constitution.


year up to sixty-five years; B. Pocker Sahib wanted the age of retirement to be raised to sixty-eight; and Satish Chandra had moved an amendment that the age of retirement should be fixed by Acts of Parliament from time to time. Dr. B.R. Ambedkar dealt with these suggestions. He was of the view that the age of superannuation should be laid down in the Constitution itself and not left to be decided from time to time by Act of Parliament. He pointed out that before accepting a place on the Bench an incumbent would like to know how long, in the normal course, he would hold office. He admitted that sixty-five could not always be regarded as zero hour in a man’s intellectual ability; but he drew attention to draft article 107 under which it would be open to the Chief Justice to call a retired judge to sit and decide particular cases; there would consequently be less possibility of losing the talent of individuals. Dr. B.R. Ambedkar urged the Assembly to accept the retirement age of 65.117

On the third issue of acceptance of office after retirement, two members (K.T. Shah and Jaspat Roy Kapoor) had suggested that retired judges should not hold any office of profit. Ambedkar pointed out that the judiciary normally decided cases in which the Government had ‘remote’ interest. It would be engaged in deciding issues between citizens; and the chances of influencing the conduct of a member of the judiciary by the Government would be very remote. Besides, there were many cases where the employment of judicial talent in a specialized form would become very necessary. For these reasons he opposed the proposal to ban the acceptance of office by judges after retirement.118

In the Constituent Assembly, there has been surprisingly little attention paid to the kind of judges who should be appointed to the Supreme Court. The only suggestion made in the debate in this regard was a suggestion made by Mrs. Durgabai that every judge must be a citizen of India.119 Importantly, H.V. Kamath suggested that the draft Constitution be amended to enable the President of India to appoint a ‘distinguished jurist’ as a Supreme Court judge.120 He argued that this would ‘open a wider field of

118 B. Shiva Rao, supra note 79, p.492.
choice’ for the President. Another member of the Assembly, M. Ananthasayanam Ayyangar, spoke in support of the amendment, citing Frankfurter as a great example of the erudition that a law professor could bring to the court. The amendment was accepted by B.R. Ambedkar, although with some hesitation as to its language.

The strongest debate took place on how Supreme Court judges should be removed. Alladi Krishnaswami Ayyar moved an amendment specifically declaring that a judge of the Supreme Court could not be removed from his office except ‘on the ground of proved misbehaviour or incapacity’ and that too only by the President on an address from both Houses of Parliament in the same session. He commented:

“The best testimony to such power is that it has never been exercised. It is a wholesome provision intended to be a salutary check on misbehaviour, not intended to be used frequently, and I have no doubt that the future Legislatures of India which are invested with this power will act with that wisdom and that sobriety which have characterized the great Houses of Parliament… Secondly, there must be ‘proved misbehaviour or incapacity;’ adequate machinery to ‘prove the charges’ would be necessary but this could be left to be provided by federal law.”

6.5.2 High Courts

The task of the Constituent Assembly in regard to the provisions regarding the High Courts was comparatively simple. The High Court’s as institutions had been functioning in India for nearly ninety years and built up a tradition for independence and impartiality. The Government of India Act, 1935, as well as the constitutional enactments preceding it, included well thought-out provisions laying down the constitution of High Courts, provisions as to judges, the administrative powers of the

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121 This suggestion had been borrowed from provisions relating to judges of the International Court of Justice at the Hague. C.A.D., Vol. VIII, p.241.
122 M. Ananthasayanam Ayyangar argued that “In various cases a Supreme Court has to deal with constitutional issues. A practicing lawyer rarely comes across constitutional problems. A person may enter the profession of law straightaway. He might be a member of a Law College or be a Dean of the Faculty of Law in a University. There are many eminent persons, there are many writers, there are jurists of great eminence. Why should it not be made possible for the President to appoint a jurist of distinction, if it is necessary? As a matter of fact, I would advise that out of the seven judges, one of them must be a jurist of great reputation… in the USA Philip Frankfurter, a professor in the Harvard University. That was a novel experiment that he made… this experiment has proved enormously successful. He is considered to be one of the foremost judges, one of the most eminent judges in the U.S.A.” C.A.D., Vol. VIII, p.254.
123 He was unsure of whether the word ‘eminent’ should be used instead of ‘distinguished’, C.A.D., Vol. VIII, p.257.
125 The jurisdiction and powers of the High Court’s rested almost entirely on the provisions of the enactments made by the various Legislatures in India. B. Shiva Rao, supra note 79, p.496.
courts, their powers over subordinate courts and other matters, both judicial and administrative. In the earlier stages of Constitution-making, therefore, the main question to engage considerations was the independence of the judges.\textsuperscript{126}

B.N. Rau’s proposal was that High Court judges’ should be appointed by the Governors with the approval of two-thirds of the members of the Council of State.\textsuperscript{127} But this proposal was rejected by the Provincial Constitution Committee and it proposed that judges of High Courts should be appointed by the President in consultation with the Chief Justice of India, the Governor of the Province and the Chief Justice of High Court of the Province. Explaining this proposal in the Assembly Sardar Vallabhbhai Patel said that these proposals were designed to ensure fair appointments to the High Courts’ so that the judiciary would be above even the suspicion of party influence.\textsuperscript{128}

The Chief Justice of the Federal Court, H.J. Kania wrote a letter to Jawaharlal Nehru. Kania made no comment on the jurisdiction and powers of the courts, confining his letter entirely to the independence of the judiciary. He suggested that the Draft Constitution should cover the relationship of the Executive with the judiciary so that the courts would be free from suspicion of Executive control. Kania particularly stressed that, when recommending, to the President a person for the judgeship on a High Court, the Governor and the High Court Chief Justice should be in direct contact so that the provincial Home Ministry would not be an intermediary in the proceedings. Otherwise, Kania said, local politics might affect the selection of judges.\textsuperscript{129}

Another matter which evoked divergent comment was the right of retired High Court judges to engage in practice at the Bar; The \textit{Government of India Act}, 1935 did not contain any provision in this matter; but the practice was uniform that all persons appointed permanently to a High Court required to give an undertaking that after retirement they would not practice before any court within the jurisdiction of that High Court. Persons appointed as acting or additional judges were, however, free to engage in private practice.\textsuperscript{130} The Drafting Committee included an article imposing an absolute ban

\textsuperscript{126} \textit{Ibid}, p.497.
\textsuperscript{127} \textit{Ibid}, p.640.
\textsuperscript{128} \textit{C.A.D.}, Vol. IV, p.710.
\textsuperscript{130} B. Shiva Rao, \textit{supra} note 110, p.205.
on practice on every one who had held office as a judge of a High Court, and also on every one who, having been recruited from the bar, was appointed as an acting or additional judge:¹³¹ and this ban extended to pleading or acting in any court or before any authority in India. This provision evoked adverse comment. The memorandum sent by the judges made three points. In the case of judges already in service and those who had retired before the commencement of the Constitution, they were at the time of their appointment free to practice in courts outside the jurisdiction of the High Court in which they served; and if the ban on private practice was extended to them, it would be a sudden deprivation of a right enjoyed by them. The memorandum therefore recommended that no such ‘enlarged disability’ should be imposed on such judges. The second point was that ‘the enforcement of the ban in the case of additional or temporary judges would lead to the not very satisfactory result of preventing recruitment from the Bar to these posts.’ Finally, the judges expressed the opinion that the scope of the ‘existing disability’ should not be enlarged without a compensatory increase in the scale of pension and a higher age-limit for superannuation.¹³²

Former judges were not to be allowed to return to the Bar, a provision that had the strong support of both Sir Tej Bahadur Sapru and B.N.Rau.¹³³ Tej Bahadur Sapru, was of the definite opinion that once a man had accepted a judicial position, he should on no account revert to the Bar. He referred to the English practice appreciatively, never to allow a man to go back to the Bar once he had accepted a judicial appointment. He said:

“I think the rule in future should be that any Barrister or Advocate, who accepts a seat on the Bench, shall be prohibited from resuming practice anywhere on retirement… I am also of the opinion that temporary or acting judges do greater harm than permanent judges, when after their term on the Bench for a short period they revert to the Bar. A seat on the Bench gives them a pre-eminence over their colleagues and embarrasses the subordinate judges who were at one time under their control and thus instead of their helping justice they act as a hindrance to free justice… It is however said that the true remedy lies in increasing the pension of the judges and allowing the judges to secure some pension after short periods of office.”¹³⁴

¹³² B. Shiva Rao, supra note 110, pp.197-199.
¹³³ Granville Austin, supra note 129, p.179.
¹³⁴ B. Shiva Rao, supra note 110, p.193.
The question of the salaries and allowances and other conditions of service of High Court judges also evoked much interest. Finally the salaries would be fixed in the Constitution and that other allowances and leave and pension rights would be determined by Parliament by law. The salaries of judges already in service were also protected.\(^{135}\)

### 6.5.3 The Subordinate Courts

The organization of the judicial system in India at the time of the transfer of power presented certain anomalies. Both the Indian Statutory (Simon) Commission in 1930 and the Joint Select Committee on Indian Constitutional Reform in 1934 had emphasized the paramount importance of an independent and fair-minded judiciary enjoying the confidence of the people. Special stress was laid on the need for a competent subordinate judiciary, as the Joint Committee observed:

> “It is the subordinate judiciary in India who are brought most, closely into contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question than in the case of the superior judges.”\(^{136}\)

Under the *Government of India Act*, 1935, the civil judiciary was controlled under the respective High Courts.\(^{137}\) The position was, however, somewhat different in the case of the magistracy on the criminal side. District and subordinate magistrates were appointed by the Provincial Governments under the provisions of the *Criminal Procedure Code*, there being no obligation to consult the High Courts. It was a common practice for revenue officers to be invested with powers to try criminal cases as well as to supervise the work of the lower magistracy.\(^{138}\)

In the earlier stages of Constitution-making, no specific attention was paid to the subordinate judiciary. The intention at this time was that detailed provisions with regard to the recruitment and conditions of service of persons in the Defence Services or serving

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\(^{135}\) C.A.D., Vol. IX, p.64.


\(^{137}\) The district and sessions judges who exercised both civil and criminal jurisdiction were appointed by the Governor of the Province, exercising his individual judgment, and the High court had to be consulted on each such appointment. *Government of India Act*, 1935, section 254. In the case of civil judges below the rank of a district and sessions judge, it was provided that the Governor of each Province should make rules, in consultation with the Public Service Commission and the High Court, defining the standards of qualifications required; the recruitment was to be made as a result of examinations held by the Commission. Postings and promotions were in the hands of the High Court.

\(^{138}\) B. Shiva Rao, *supra* note 79, p.505.
the Union or a State in a civil capacity should not be included in the Constitution but should be regulated by Acts of the appropriate Legislature. The omission to provide specifically for the subordinate judiciary in the Constitution was prominently mentioned by the Conference of the Judges of the Federal Court and the Chief Justices of High Courts held in March 1948. Their memorandum observed:

“So long as the subordinate judiciary, including the district judges, has to depend on the provincial executive for their appointment, posting, promotion and leave, they cannot remain entirely free from the influence of members of the party in power and cannot be expected to act impartially and independently in the discharge of their duties. It is therefore recommended that provision be made placing exclusively in the hands of the High Courts the power of appointment and dismissal, posting, promotion and grant of leave in respect of the entire subordinate judiciary including the district judges.”

The Drafting Committee accepted these recommendations. Accordingly, under its directions new provisions were drafted, the principal feature of which was that all appointments of district judges would be made by the Governor in consultation with the Chief Justice of the High Court. In order to be qualified for appointment as a district judge a person who was not already in the service of the Union or of a State had to be an advocate or a pleader of five years’ standing and had to be recommended by the High Court for such an appointment. Control over district courts and courts subordinate thereto, including postings, promotions and the grant of leave to district judges and all persons belonging to the subordinate judicial service, was to vest in the High Court.

The committee also proposed an Article for inclusion among the directive principles that the State should take steps to secure, within a period of three years from the commencement of the Constitution, complete separation of the judiciary from the executive in the public services in the State.

There is no doubt that there was considerable anxiety about the independence of the judiciary from politics in the Constituent Assembly. Professor K.T. Shah moved that Article 102-A be added to the Draft Constitution. Article 102-A, as proposed, read:

139 B. Shiva Rao, supra note 110, p.186.
140 B. Shiva Rao, supra note 79, p.505.
141 Draft Article 39-A.
142 B. Shiva Rao, supra note 110, p.187.
“Subject to this Constitution the judiciary in India shall be completely separate from and wholly independent of the Executive and the Legislature.”

There was rich contribution to the debate—some members felt that this point was already covered in the Directive Principles. Many members accepted the amendments in principle. Alladi Krishnaswami Ayyar felt that the emphasis on a wholly independent judiciary would create complications. At the end of the debate the amendment was negatived.

Assembly members then wished to give their work some permanence. There would, of course, be in the Constitution a mechanism for amending it. How, then, could the sanctity of the courts be protected? The Assembly solved the problem by including among the entrenched provisions of the Constitution all the Articles dealing with the Union judiciary, the High Courts in the States, and the Legislative Lists—on which appeared the authority for the several legislatures to act on matters concerning the judiciary. Although much of the Constitution can be changed by Parliament itself, the entrenched provisions require additionally the approval of not less than one-half of the legislatures of the States. Only certain provisions pertaining to the Executive and to the federal structure were also included in this special category.

All discussions on the draft Constitution ended on 17 October 1949. Notably absent in the debates was any substantial or significant discussion on other criteria that could be employed to appoint judges to the court—on whether regional representation could be followed while appointing judges to the court; whether gender, religion or caste were to have a role to play in judicial appointments; whether educational or professional qualifications were important. The Constitution did not say anything—and neither did those who drafted it—about what kind of judges were supposed to be appointed to the court, except for the fact that they had to be ‘first-rate’ and of the ‘highest integrity.’

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147 Ibid, p.221.
149 Article 368, the Constitution of India.
150 Granville Austin, supra note 129, p.184.
151 Abhinav Chandrachud, supra note 60, p.66.
152 Article 124(3), the Constitution of India.
Interestingly, in a speech made in London in 1944, Sir John Beaumont had criticized the Privy Council for being unrepresentative of the different regions of India. However, the Constituent Assembly of India did not seem to seriously apply itself to the question of the geographical representation or otherwise of the Supreme Court it was setting up. Beaumont had said:

“There are so many races in India with so many habits and customs and ways of thought, that local knowledge in a Court of Appeal is desirable, and there cannot be much local knowledge in the Privy Council. For example, a Board of the Privy Council without any representative of Bombay might not appreciate the difference in mentality and habits between Gujerat and Kanara.”

The draft Constitution, as revised by the Drafting Committee based on discussion in the Assembly on 3rd November 1949, was submitted to the President of the Assembly. It was enacted on 26th November 1949, but most of its provisions would come into force on 26 January 1950.

6.6 Conclusion

Justice is fundamental for the prevalence of the social order in society. Our rich culture, heritage and traditions have evolved from time immemorial and have centered on ‘justice.’ Before the British period there were the Hindu and the Muslim periods, and each of these early periods had a distinctive judicial system of their own.

Discussion of the British period reveals that efforts were made to establish a new pattern of judicial administration. Many measures were taken to improve the judiciary though the steps taken were not free from defects. In fact, the executive government always tried to control the judiciary.

The Constituent Assembly was well aware of the misuse and abuse of power by the executive, having fought for our freedom and knew and understood the value of an independent judiciary. The Constituent Assembly attached a great deal of importance to

153 Cited in Abhinav Chandrachud, supra note 60, p.66.
154 B. Shiva Rao, supra note 110, pp.745.
155 Article 394, the Constitution of India.
the provisions relating to the judiciary. The members of the Constituent Assembly brought to the framing of the judicial provisions of the Constitution, idealism equal only to that shown towards the fundamental rights. Indeed, the judiciary was seen as an extension of the rights, for it was the courts that would give the rights necessary force. The Assembly members had established a judiciary both independent and powerful.