CHAPTER II

THE SUPREME COURT OF INDIA
GENESIS, STRUCTURE AND ORGANIZATION

Genesis:

India is one of the few old civilisations which has the oldest system of law, courts, and justice\(^1\). Great jurists like Manu and Yajnavalkya among other ancient Indian jurists deal at some length with courts of justice and legal procedure. The system of law, courts, justice and legal procedure laid down and described by these ancient sages continued to govern the life of the Indian community from ancient times to the close of the medieval period.

In ancient India the King had the responsibility for the administration of justice. He was considered the fountain of justice\(^2\), as it is the case in all monarchical regimes\(^3\). At the

1. Mayne in his preface to the first edition of his book 'Treatise on Hindu Law and Usages' (1878) testifies that "Hindu Law has the oldest pedigree of any known system of jurisprudence."

2. Manu VIII 1-3; Yajnavalkya 1, 360 II-1.

3. Speaking of ancient India, Lee Guy Carleton observes in his book 'Historical Jurisprudence' (1911) that "The Royal system did not harmonise with the spirit of the day. The villagers had a judicial system of their own at once familiar to and respected by them; the various trades and guilds had a similar system. The presiding officer of the Popular Courts or the Guild Courts held office either by election or inheritance according to local custom. With him were associated three or five men. In these apparently private courts were settled the affairs of every day life. In cases of grave crimes or when the condemned party refused to obey the judgment of the local court, the court of the King was concerned with litigation." (p. 141).

This description of the position of the King has been refuted by the Indian jurists. See S. Varadachariar, Radha Kumud Mukerjee, Endowment Lectures, 1945, on the Hindu Judicial System, (1946) p. 63.
same time, it was an accepted principle of ancient Indian jurisprudence that justice shall not be administered by a single person. 'No decision shall be given by a person singly' (न एककी निर्णयं कुर्यात्) was the oft repeated principle in the various texts. Manu says, "When desirous of dealing with Vyavahara, the King shall in humility enter the Sabha with Brahmins and with Ministers who are skilled in Counsel."

Yajnavalkya also makes a similar provision in his code: "The King, divested of anger and avrice, should administer justice along with learned Brahmins, in conformity with the principles of legal science."²

In the absence of the King, the Chief Justice, known as Pradvivaka (a learned Brahmin who had the knowledge of eighteen titles of law) used to preside over the Sabha. The other members of the Sabha were equally required to be well versed in law. Most of the Smrtis require Brahmins to be appointed to the Sabha, since Brahmins were known to possess deep knowledge of the sacred laws, which was the most essential qualification for a person to


2. Yajnavalkya, Verse I.
Aristotle also advocated the above principle and he justified the Greek system of Heliasts on the ground that as the supremely wise man is difficult to discover, several ordinary heads are better than one and that a multitude of men are less liable to corruption than a single individual (See Coleman Phillipson, The Trial of Socrates, p. 237).
be a judge at that time. The Marchchkati says: "A judge should be learned, sagacious, eloquent, dispassionate, impartial, he should pronounce judgment only after due deliberation and enquiry, he should be a guardian to the weak, a terror to the wicked, his heart should covet nothing and his mind should be intent on nothing but equity and truth."²

Besides the King's Court, there were 'popular courts' as well, the hierarchy of which was first set by Yajnavalkya. According to Yajnavalkya the gradation is in the following manner: The King's Court, Puga, Sreni and Kula. In the matter of deciding disputes "each one is superior to the succeeding."

The hierarchy of courts as laid down by Brihaspati is the same as that of Yajnavalkya. There is much evidence provided by

1. It will be interesting to note here that fifty per cent of the Hindu judges who have served on the Supreme Court of India during 1950-59, are identified as Brahmins though Brahmins constitute only one fifteenth of Hindu population. See George H. Gadbois, Indian Supreme Court Judges A Portrait, Law and Society Review, Vol. III, No. 2, 1969, p. 317(325).


4. Brihaspati says "First come the family arbitrators; the judges are superior to the family judges; the Chief Justice is superior to the judges; the King is superior to all of them and his decision becomes the law." Brihaspati, 1-94. "They - that is the hierarchy of Courts investigate respectively suits of major, minor, and medium character and their capacity is in that order: above all is the intelligence of the King." Brihaspati, 1-96.
their functioning that they were an important institution in ancient India. For example 'Sreni' (Court of Guilds) became a prominent feature of commercial life in ancient India from c.500 B.C. and that these courts continued to function down to the 18th century in Maharashtra, probably same was the case in the rest of the country. Again the Puga court had its prototype - Sabha or the village assembly in the Vedic period to settle village disputes. The Gramavridha Court of the Arthashastra was also a forerunner of the Puga Court. In Maharashtra these courts later came to be known as Gota Courts. In Karnataka, these courts were familiar even during the 17th century A.D., as Darmasasana.

There are two differing views about these courts. Henry Maine thinks that the reason for the existence of these courts was the prevalent anarchy in the country which was a hindrance in the establishment of regular courts. But according to Altekar "it was considered and long established policy of the governments in Ancient India to encourage these popular courts and to enforce their decisions."

2. Ibid.
3. Henry Maine, Village Communities in the West, p. 68.
Again there is controversy as to when exactly the relation between the popular tribunals and the King's Court as postulated by Yajnavalkya came about and also as to the character of these courts. For example, Jolly considers these courts as "stages of private arbitration." But others do not think that this view is tenable for if it were, then an individual could go to the King direct to seek justice. But that was not the position. Visvarupa clearly says: "It is to be noted that in respect of disputes, the King can be approached only in the order of Kula, etc."

"कुलादिक्रमेन जैव अन्वेषकर्ण राजाभास्मिता दृष्टिव्यः।" 2

Altekar's view seems to be more appropriate that "though these courts were essentially non-official and popular, they had the royal authority behind them."

Further it may be pointed out that the ancient Indian judicial system not only maintained the hierarchy of courts but was also based on recognised principles of administration of justice. The judiciary was separate from the executive. Manu enjoins the executive not to interfere with the functioning of the judiciary. On the other hand the judges were required to point out even to the King if he committed any wrong and a duty

2. See Jolly's Translation of Narada, Sacred Books of the East, XXXIII, p. 6.
3. Dharma Kosa 1, 41.
5. Manu VIII 43.
was cast upon them to prevent the King from doing so. Those who failed to do so incurred a sin.\(^1\)

The independence of the judges was unquestioned but at the same time they were charged with the duty to act in an impartial manner, without any motive of personal gain, bias or prejudice.

It can not however, be said that the ancient Indian judicial system was without defects. It had certain inherent defects, especially the position accorded to the Brahmins, which was a negation of the principle of 'rule of law'.\(^2\) It evoked strong criticism especially from the English jurists. Consequently, with the advent of the British, Indian jurisprudence received a setback. Macaulay considered ancient Indian ideas on law and justice merely as "dotages of Brahmanical superstition" and Mayne described the judicial system "as an immense apparatus of cruel absurdities." Be that as it may, the British gave India a new concept of justice and judicial system which were different from

1. Yajnavalkya who makes the distinction between 'Niyuktas' and 'Aniyuktas', casts this special responsibility on 'Niyuktas'. See Yag. II.2, Katyana also emphasizes in the same manner. The Sabhasads shall not have alone a King who begins to act unjustly. Those who follow the King who proceeds in an unjust manner also become participators therein, therefore, the King should be awakened by them (to the right course). Katyana,\(^7\), 75. In another verse Katyana says when the King imposes on the litigants an illegal or unjust order, the judge should notify the King of his error and have it reversed. Katyana, 78.


those that obtained in India before they established their rule in this country. They adopted the policy of establishing the courts as soon as a territory came under their rule. Thus a system and a hierarchy of courts came to be established first in the three Presidencies and then in the Provinces. Warren Hastings, Lord Cornwallis and Lord Bentinck introduced at once important, and far reaching reforms in the field of administration of justice. As a result the Privy Council in England became the highest court of appeal.

But there were certain evils inherent in the British system of administration of justice also, as is evident from the concern which was expressed by many eminent Indian jurists. Jinnah pleaded in the Central Legislative Assembly "............... I have no hesitation in saying that the Privy Council has on several occasions absolutely murdered Hindu Law and slaughtered Muhamdan Law."¹ Hindu law and Muhamdan law were foreign to English judges and they could not interpret them properly. Consequently, people lost their confidence in the courts. With the struggle for freedom the demand for judicial reforms became a plank in the national programme.

In the absence of a single body to interpret the law for the whole country the need for a supreme court was badly felt which could ensure the uniform application of law. The two most eminent Indian jurists who put forth this problem in bold relief were Sir P.S.Aiyer and Sir Tej Bahadur Sapru. Sir Aiyer pointed out

¹. Legislative Assembly Debates, 1925, Vol. V., p. 1175.
that "in any country in which there are a number of High Courts in existence for different provinces, a central Supreme Court would be necessary for the purpose of settling conflicts between the decisions of the Courts and securing uniformity of laws."  

Sir Tej Bahadur Sapru, wrote in the same strain that a Supreme Court was "needed for getting the differences of judicial opinions among the various High Courts authoritatively settled." Indian jurists were not alone in advocating the establishment of a single superior court. English jurists were also seized of this idea. For example, Lord Haldane suggested in 1916, the establishment of a Privy Council in India, as it was too expensive for Indians to get cases decided by the Privy Council in London.

But it was Sir Hari Singh Gour who first initiated efforts for the establishment of a "court of ultimate appeal for the whole of India." He moved a resolution to that effect in the Central Assembly in 1921, but the decision in the matter was postponed to elicit public opinion. Again in 1925, he moved the matter in the Assembly. Sir Malcolm Hailey, the then Home Member, pleaded the inability of the Government of India to set up such a court due to lack of finance and the absence of qualified Indians to man such a tribunal. The leader of the Swaraj Party, Pandit Moti Lal Nehru also opposed this move and characterised it as 'premature'. But

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3. Lord Haldane was the then Lord Chancellor of England.
Jinnah, however, strongly supported it. Sir Hari Singh Gour observed in the Assembly that "Self-respect of India demands the establishment of such a Court. With the establishment of the Supreme Court, Swaraj would become nearer, without it Swaraj would be an illusion."¹

The idea of the need for the Supreme Court was also supported by the Indian National Congress. Mahatma Gandhi in his Presidential address to the 39th Session of the Congress, remarked that "final court of appeal should not be in London, but in Delhi."²

The demand was again made at the Round Table Conference in 1930, but it was rejected on the plea of lack of finance. In 1931, at the second session of the Round Table Conference, when the question of setting up a federation in India came up for discussion, the demand for the establishment of a Supreme Court was also discussed. The two questions became lumped together and this completely changed the aspect of the demand for a superior court since with the acceptance of the principle of the establishment of a federation in India, the establishment of a Supreme Court became a necessity. Consequently, the Chairman Lord Sankey circulated a memorandum which said: "In a Constitution created by a Federation of a number of separate political units and providing for the distribution of powers between a Central Legislature and Executive on the one hand and the Legislatures and Executives of the Federal Units on the other, a Federal Court appears to be an essential element. Such a Court is needed to interpret Federal

¹ Legislative Assembly Debates (1921), Vol. V., p. 1176.
² Congress Presidential Address, Madras (1934), p. 743.
Laws and compel obedience to them and more particularly to interpret the Federal Constitution itself....

At the Conference also Lord Sankey maintained that the necessity of the Federal Court was beyond controversy. There in fact was no controversy at the Conference over the establishment of a Judicial Tribunal with an all India jurisdiction, but the controversy arose over the point, whether to have a Federal Court or a Supreme Court. Delegates from British India wanted to empower the Federal Court with wider jurisdiction, while the delegates of the Indian States were opposed to this suggestion. The idea of having a separate Supreme Court was considered undesirable. Sir Akbar Hydari, who represented the Government of the Nizam of Hyderabad, stated: "A Federal Court was a constitutional necessity, a Supreme Court was not a matter of immediate importance....."

Advocates of the idea of a separate Supreme Court, according to Sir Shafat Ahmad Khan did not have a "clear-cut, decisive and workable proposal." However, the controversy continued till the publication of the White Paper of March 1933, which provided besides a Federal Court, for a Supreme Court of Appeal for British India, in civil and criminal cases in which sentence of death had been passed by a lower court and the White Paper proposed to empower the Federal Legislature of India to establish the Supreme Court if it deemed necessary. But this

3. Indian Round Table Conference (Third Session) Proceedings, 4238 (1933), p. 73.
4. Sir Shafat Ahmad Khan, Indian Federation, p. 234.
proposal for the establishment of two distinct all India courts with overlapping jurisdiction was rejected by the Joint Select Committee of the Parliament.

The Committee recommended the setting up of a Federal Court of India and observed in its Report that "a Federal Court is an essential element in a federal Constitution." ¹

In view of the recommendations of the Committee, the Draft Government of India Bill contained a provision for a Federal Court which was passed by the British Parliament and became the Government of India Act 1935. Consequently, Orders-in-Council for the establishment of the Federal Court were issued by the Crown on December 18, 1936 and the Court began to function from October 1, 1937, with Sir Maurice Gwyer as its first Chief Justice and two other judges. ²

The establishment of the Court was hailed by Indians as a very significant step in the history of the administration of justice in India. It was hailed as an "inheritor of a precious heritage." ³ Sir Brojendra Lall Mitter the then Advocate General of India, speaking at the inauguration told the Judges: "Your function in the Federal Court will be to expound and define the provisions of the Constitution Act and as guardian of the Constitution it will be for you to declare the validity of the statutes passed by the Legislatures in India on the one hand, and, on the other to define true limits of the power of the Executive.

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2. The other two judges were Sir Shah Sulaiman and Mr. M. R. Jayakar.
The manner in which you interpret the Constitution will largely determine the constitutional development of the country. ¹

Sir Maurice Gwyer, the first Chief Justice of the Federal Court, assured the people on behalf of the Court that "its primary duty is to interpret the Constitution" and that "the Federal Court will declare and interpret the law in no spirit of formal or barren legalism........ This Court can and I hope will, secure those political forces and currents, which alone can give vitality to a Constitution, have free play within the limits of the law; but it can not under the colour of interpretation, alter or amend the law........ An all India Court which stands firm and aloof amid the ebb and flow of politics and political theories, the victory and defeat of parties, the restless and eager questioning and the intellectual ferment of each successive generation, a court sympathetic to all but allied to none may play in the building up of a nation, by proclaiming and cherishing those things which lie at the root of all civilisation........" ²

After Independence the Constituent Assembly debated, drafted and passed the Indian Constitution which embodied the provisions under which the Supreme Court of India was set up in 1950³.

**Structure and Organisation** :

Article 124(1) of the Constitution requires that a Supreme

2. Ibid pp.9-11.
3. Articles 124-151 of the Constitution deal with the Union Judiciary, The Supreme Court of India.
Court be set up. Consequently, when the Constitution became operative the Supreme Court of India was set up on January 26, 1950, which began to function from that date.

Originally the Supreme Court was constituted by the appointment of a Chief Justice and seven other judges. The Parliament is authorised under the provisions of the Constitution to increase the number of judges if necessitated by the exigencies of work. The Parliament has increased the number of judges twice since the Supreme Court came into existence. In 1956, Parliament by passing legislation to that effect increased the number of judges to ten and again in 1960 to thirteen including the Chief Justice.

The power of the Indian Parliament to increase the number of judges has a parallel in the United States Congress which also

1. Article 124(1) of the Constitution of India reads: "There shall be a Supreme Court of India consisting of a Chief Justice of India and, until the Parliament by law prescribes a large number, of not more than seven other judges." The Supreme Court of India is the only federal judicial court. There are no other federal courts in the country, though there are different High Courts in the States (constituent units). The judicial structure in India is like a pyramid, at the apex of which stands the Supreme Court. This makes the Indian federal system different from other countries with federal Constitutions, which have dual system of courts. The adoption of a single judicial system by India was explained by Dr. B.R. Ambedkar in the Constituent Assembly in the following words: "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 under the constitutional law, the civil law or the criminal law. This is done to eliminate all diversities in a remedial procedure. Canada is the only country which furnishes a close parallel. The Australian system is only an approximation." Constituent Assembly Debates Vol. VII, p. 36.

2. The seat of the Supreme Court of India is at New Delhi. It may however, be changed by the Chief Justice with the prior approval of the President (Article 130).

enjoys this power. But the power of the Congress to increase the number of judges may give it control over the Court, this is not so in the case of the Indian Parliament. Because the quorum for the Constitution Bench is fixed - five, and the Chief Justice who has the power to assign judges to this bench, may not assign the new judges to the Constitution Bench.

The framers of the Indian Constitution were very particular about securing the independence of the Court. Consequently, the Indian Constituent Assembly which was fully alive to the importance of the independence of the judiciary embodied provisions in the Constitution providing for an independent Supreme Court for the Union of India.

The procedure for the appointment of judges of the Supreme Court is laid down in clause (2) of Article 124, of the Constitution. It provides that "Every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of the Supreme Court.......Provided that in the case of the appointment of a judge other than the Chief Justice, the Chief Justice shall also be consulted."

This procedure is similar to the one laid down for the appointment of the judges of the Federal Court, in the Government of India Act 1935, with the difference that whereas the Constitution makes provision for 'consultations' the Government of India Act 1935\(^1\), did not provide for it.

1. Section 200(2) of the Government of India Act 1935, reads: "Every Judge of the Federal Court shall be appointed by the order of the Governor General....."
It may be observed here that when Article 103 of the Draft Constitution which became Article 124 of the Constitution was being discussed some important amendments to Article 103, were moved in the Constituent Assembly. For example, Sibban Lal Saksena moved that the appointment of the Chief Justice of the Supreme Court by the President of India be made subject to the confirmation by the two-thirds majority of the total number of members of Parliament assembled in a joint session of both the Houses of Parliament. He contended that if the appointment was to be left to the President, it will be really the Prime Minister or the Executive who will appoint him, in which case "his independence is compromised." This amendment was lost. It may however, be pointed out that Saksena did not foresee that his amendment in the mode of appointment of the judges did not exclude the influence of executive. If the appointment of the Chief Justice were to be confirmed by a special majority of the two houses, there again the Prime Minister and the Executive have their say, as the party in power is the party in majority in the Parliament.

K.T. Shah another active member of the Constituent Assembly also expressed similar doubts. He observed: "The Constitution concentrates so much power and influence in the hands of the Prime Minister, in regard to the appointment of Judges, Ambassadors or Governors to such an extent, that there is every danger to apprehend that Prime Minister may become a dictator if he so choses.

2. Ibid p. 231.
to do so." In order to mitigate the gravity of the situation, Shah suggested that the judges of the Supreme Court be appointed as in the United States, by the President of India after consultations with the Council of States. This suggestion was also rejected by the Assembly.

It is relevant here to discuss the procedure of appointment of judges in England and in some of the important federal countries viz., Canada, Australia, Germany, Switzerland, U.S.S.R. and the United States of America.

In England the appointments are made by the Crown without any limitation on its power whatsoever, which means they are made by the government of the day.

In Canada the judges are appointed by the Governor-General, whereas in Australia judges of the "High Court of Australia, are appointed by the Governor General-in-Council."

In Germany the appointment of the judges of the Federal Supreme Court is made jointly by the Federal Minister of Justice and a Committee for the selection of the judges consisting of the Land Ministers of Justice and an equal number of members elected by the Bundestag.

In Switzerland however, the judges of the Federal Court are

2. Ibid.
3. Article 96 of the Constitution of Canada.
4. Article 72(1) of the Constitution of Australia.
5. Article 95(3) of the Basic Law of the Federal Republic of Germany.
appointed by the Federal Assembly. In Russia also the judges of the Supreme Court are elected for five years by the Supreme Soviet of the U.S.S.R. In both these countries the judiciary is thus dependent upon the legislature.

In the United States the judges of the Supreme Court are appointed by the President but his appointments are subject to confirmation by the Senate. It is on rare occasions that a nomination by the President is rejected by the Senate. However, these appointments to the bench of the Supreme Court in the United States are not free of political and party considerations since the President himself is a partyman. The percentage of lawyers appointed as judges of the Supreme Court of the U.S.A. during 1789-1958, who were primarily politicians, is fifty three. In the nature of things the President of the U.S.A., can hardly be expected to appoint men, however, outstanding, whose views on matters of public policy are known to be radically different from

1. Senate has however, set a record by rejecting recently two nominations of President Nixon, one after the other. The first nomination was of Judge Clement Haynsworth a known conservative from the South. After his rejection the President's choice again was a conservative from South, Judge Harrold Carswell. His nomination was also rejected by the Senate. Much of the Senate opposition to these nominations centred on their alleged lukewarm attitude to the civil rights of Negroes and other minority groups. Now the President has nominated Judge Harry Blackmun from Minnesota (Mid-West of America). See The Tribune, April 16, 1970, 5 : 1.

2. Glendon A. Schubert, Constitutional Politics, (1964), Table 2, p. 29.
his own. He has personal and political obligations to fulfil. It is well known, that most of the appointments to the Supreme Court are rewards for political service. This can be seen from President Theodore Roosevelt's letter to Senator Cabot Lodge, considering the nomination of Justice Holmes to the Supreme Court Bench: "I should like to know that Judge Holmes was in entire sympathy with our views....before I would feel justified in appointing him."^3

The President of India does not have as much freedom in the appointment of the judges of the Supreme Court as his American counterpart enjoys. Dr. Ambedkar in this context observed in the Constituent Assembly that "......It seems to me, in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent to which we find it 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. Apart from its being cumbersome, it also involves the possibility of the appointment being influenced by political pressure and political consideration. The draft article, therefore, steers a middle

course. It does not make the President, the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultation of persons who are ex hypothesi well qualified to give proper advice in matters of this sort...."  

It may however, be pointed out that the President of India is the constitutional head and he is to act on the advice of the Council of Ministers headed by the Prime Minister. It is true that the letter of the Constitution does not bind the President to the advice of the Council of Ministers, but the parliamentary system requires that he should act on the advice of the executive. Consequently, as in Britain, the choice is more or less of the Prime Minister. The consultation of the Chief Justice, though constitutionally obligatory is a mere formality, because he can not veto any appointment.

There are however, certain qualifications laid down in the Constitution, which a person must possess to qualify himself to be appointed a judge of the Supreme Court. Article 124(3) provides that: "A person shall not be qualified for an appointment as the Judge of the Supreme Court unless he is a citizen of India and:

(a) has been for at least five years a judge of a High Court or of two or more such Courts in succession; or

(b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or

(c) is, in the opinion of the President, a distinguished jurist."

The Constitution provides for the appointment of an acting

Chief Justice as well. When the office of the Chief Justice falls vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the President is to appoint, one of the other judges of the Court for the purpose.

There is a provision for the appointment of ad hoc judges also in the Constitution. Article 127(1) provides that whenever there is a want of quorum to hold or to continue the session, the Chief Justice of India may with the previous consent of the President and after consultations with the Chief Justice of the High Court concerned, request in writing the attendance of a judge at the sittings of the Court, as an ad hoc judge for the necessary period. The only limitation is that the High Court judge must be duly qualified for an appointment as a judge of the Supreme Court. The judge so appointed enjoys all the powers and privileges of a judge of the Supreme Court. He has, in priority to other duties of his office, to attend the sittings of the Supreme Court at the time and for the period for which his attendance is required. Article 127, indicates that the appointment of ad hoc judges is to provide for emergency, which may arise due to illness, absence or to other reasons, resulting in the lack of quorum. Again Article 128, provides that in case there is much pressure of work, instead of appointing temporary judges, retired

1. See Article 126 of the Constitution of India. In 1969 when Chief Justice M. Hidayatullah was called upon to act as the President of India, in his absence Justice J.C. Shah of the Supreme Court acted as Chief Justice of India.
2. Article 127 of the Constitution of India.
3. Article 127(2).
judges of the Supreme Court may be requested to attend the sittings of the Court by the Chief Justice with the previous consent of the President. Such judges are accordingly entitled to such allowances as the President may by order determine. They have all the powers and privileges of a judge of Supreme Court but are not to be deemed to be the judges of this Court. Both the Articles 127, 128 provide for contingencies.

In regard to tenure, both in the United States of America and Ireland, the judges hold office during good behaviour and no age limit is prescribed. The Government of India Act, 1935, provided for the retirement of the judges at the age of sixty-five years. The report of the Ad Hoc Committee of the Constituent Assembly also suggested the same age for the retirement of the judges of the Supreme Court. The matter was thoroughly debated in the Constituent Assembly. The prescription of age limit was considered essential. Many members suggested the fixing of the retirement age below sixty-five years arguing that sixty-five is an age when the mind becomes feeble. Mr. Nehru who was opposed to this suggestion strongly criticised and rejected this suggestion. He argued that we should not discard men when they are at their peak and get untrained persons to start afresh. He compared the position of the judges to that of the scientists and said that "we can not tell them that because you are sixty, we can not use you, you make your experiments privately." 1

The age limit suggested by the Committee was ultimately accepted and it was provided in the Constitution that every judge

shall hold office until he attains the age of sixty-five years. 

Today opinion is gaining ground that the present age limit of sixty-five for the judges of the Supreme Court be increased. This opinion has found a strong advocate in B.P. Sinha, retired Chief Justice of India, who is of the opinion that the provisions fixing the age limit should not have found place in the Constitution itself; thus making it rigid and not amenable to alteration in changed circumstances. The result is that the judges retire when they are in full possession of their faculties and good for judicial work for years to come. He suggests that the retirement age be fixed at seventy, but the Chief Justice of India, must enjoy the office, at least for five years, so as to ensure the continuity of policy and that the judges on retirement should not have to look to other sources of supplementing their income. The arguments put forth in their views by those who are well qualified to speak have great strength in them and do not require any further support from any other source because of their soundness. Even in England until recently there was no age limit. Recently the age limit for the judges was fixed at seventy-five. In the United States, there is no age limit and the judges hold office for life or till good behaviour. But it can not be denied that there are many disadvantages in not fixing the age limit. In this context the proposition of B.P. Sinha the retired Chief Justice, is more appropriate that the age limit must be raised and that the Chief

1. Article 124(2).


3. Since 1950 there have been sixteen Chief Justices of India.
Justice must enjoy the office at least for five years irrespective of his age. If politicians can work without any age limit, why can not the judges? But to say that judges be appointed for life is wrong, because "senility has not infrequently affected individual justices, either by rendering them physically incapable of carrying out their duties, or by putting them in their dotage."¹

Another problem closely linked with that of tenure is that of the removal of judges. The doctrine of pleasure in service hampers the principle of independence, for "one who holds his office only during the pleasure of another can not be depended upon to maintain an attitude of independence against the latter's will."² To avoid this, the doctrine of pleasure was not made applicable to the office of a judge of Supreme Court of India. The Indian Constitution, on the other hand provides that the office of a judge may terminate in three ways:

1. Until they reach the age of 65 years.
2. Or may resign by writing in their hand addressed to the President.
3. On removal by the President upon an address by each house of the Parliament.³

The address may be presented on the ground of "proved misbehaviour" or "incapacity."⁴

¹ Glendon A. Schubert, Constitutional Politics, (1964), p. 63. Justice Hunt of the United States Supreme Court was stricken speechless with paralysis, but remained on the bench till death. Similarly Justice Brown continued in office even when he was totally blind till he became eligible for pension. Examples are many and these prevented the framers of the Indian Constitution from not fixing the age limit.

² Humphery's Executor v U.S. 295 U.S. 602

³ Article 12A(4).

⁴ Both the expressions "proved misbehaviour" and "incapacity" have been borrowed from the Australian Constitution (See Section 72).
Article 124(4) requires that the address must be supported by a majority of the total membership of the House and by a majority of not less than two-thirds of the members of that House present and voting. The procedure for the investigation of the two grounds for removal is left to the legislature and if the address is presented to the President after the Parliament has duly passed it as required by the Constitution, then the President has no choice in the matter and the judge in question has to be removed from office. In the United States, however, the judges hold office during good behaviour and are removable by the process of impeachment, which is a very cumbersome procedure and is rarely resorted to.

In Canada also judges are removable. The Canadian Constitution vests the power of removal in the Governor-General on an address presented to him on this behalf by the Canadian Parliament. But this address must originate in the lower house of the Canadian Parliament. In England also the requirement is a joint address by both the Houses of Parliament which must be presented to the Crown. However, it must originate in the Lower House and the judge concerned is entitled to be heard. Erskine May observes that such a motion is an extreme step and taken only in the event of 'impropriety' of the gravest kind. In India the judges are not entitled to be heard. So far there has been no case of a removal of a judge of the Supreme Court in India.

Another cardinal feature for maintaining the independence of the judiciary, is that the judges must be handsomely

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1. Only one Judge, Samuel Chase, was impeached in 1804, but he was acquitted.
remunerated. In India the Chief Justice of the Supreme Court is paid Rs. 5,000/- per mensum and other Judges Rs. 4,000/- per mensum. A free official residence is placed at the disposal of each judge of the Supreme Court. Article 125(2) lays down that their privileges, allowances, and other rights in respect of leave of absence and pension are to be fixed by Parliament by an Act and can not be changed to their disadvantage after their appointment. Their salaries are charged on the consolidated fund of India and can not be voted upon by Parliament, which may however, discuss them.

The emoluments of the judges remain the same what they were before independence while judicial work has increased manifold. It is often noticed that many able members of the bar refuse appointment to the bench because of financial loss and inadequacy of emoluments. It is being felt that the emoluments of the Judges are not adequate to permit them to keep them to a standard commensurate with their high office. It is true that India is a poor country and can ill afford such high salaries as are paid to judges in countries which are richer than India\(^1\), even so, to keep the integrity and independence of judges there is some strength in the argument that the emoluments should be such as to enable them to maintain the dignity of their high office.

\(^1\) In the U.K. during the period 1954-65, salaries of the judges of the High Court have been increased from £5,000/- to £8,000/-. In the U.S.A. the salary of the judges in the course of twenty years has been raised from $20,000 to $25,000 and then again to $39,000
It is clear thus that the independence of judiciary which is an essential requirement of a good government depends upon factors like personnel, mode of appointment of judges, their tenure, salaries and other conditions of service. If the persons appointed fail to inspire respect and faith in their integrity and honesty among the people, a feeling of distrust and disrespect in the decisions of these judges is bound to rise among the people which may lead to far reaching consequences. Unless those who occupy the bench are men of high integrity, competent and highly spiritual, not to be influenced by any considerations of fear or favour, judicial system is bound to prove a disappointment to the people for whom it is meant and this defeats the very purpose for which it is set up. To secure such men on the bench it is essential that they are handsomely paid, their tenure is secure and other conditions of service are congenial to the maintenance of the dignity of their office.

The framers of the Indian Constitution were undoubtedly mindful of the need of an independent judiciary in which people could repose confidence. They realised that an independent judiciary is more likely to give security and justice to people than a mere declaration of rights in the Constitution; that it is at once the guardian of the Constitution and of the conscience

1. Haynes a well known jurist of the view that one factor most likely to provoke revolution is a feeling of injustice in the mass of the people. The kind of men who are on the bench must necessarily have much to do with the presence or absence of that feeling. See Introduction to Haynes, The Selection and Tenure of Judges, p. 3.
of the people. Accordingly, they directed their efforts to secure maximum possible independence to the Supreme Court, the highest judicial body in India.