The Independence of the Judiciary: Separation from the Executive

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I. Introduction

The independence of the judiciary is primarily, though not exclusively, assured by the separation of the judiciary from the executive irrespective of the form of government a system establishes.¹ Although separation of the judiciary from the legislature is no less important as its separation from the executive, we are presently concerned with the latter. In this paper I will, therefore, confine to the examination of the separation of the judiciary from the executive, i.e., how and to what extent such separation has been attained and what steps are still on in that direction. The context in which such separation has been attained and is being pursued is, however, relevant and needs to be mentioned.

II. Historical Context

At the time of gaining Independence in 1947, while, broadly speaking, separation of the judiciary from the executive was ensured in the appellate courts and also in the courts of first instance in the civil matters, separation in criminal administration of justice in the courts of first instance was absent. Although Lord Cornwallis had introduced separation of the executive and judiciary at all levels as early as in 1793, Lord Hastings reversed it in 1821 by restoring magisterial functions in criminal matters to the collector — the chief ex-

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ecutive at the district level. Thus the collector was also designated as district magistrate.\textsuperscript{2} The weaknesses of this arrangement were noticed and pointed out on several occasions but no serious efforts were ever made to change the situation. This arrangement was also incorporated in the Criminal Procedure Code of 1898, which continued unchanged until Independence.

After Independence, the national leaders and the Constitution makers gave due attention to this anomaly.\textsuperscript{3} They spared no efforts to make the judiciary at every level as independent of the executive as could be humanly conceived of. They also gave as much space to the judiciary in the Constitution as no other constitution may have given.\textsuperscript{4} Being aware of the lack of separation between the executive and the judiciary on the criminal side at the level of magistrates, they specifically commanded the state “to separate the judiciary from the executive.”\textsuperscript{5} They even proposed a time limit of three years for achieving this goal, which was dropped in the hope that the goal should not be delayed that long or perhaps also because it might not be achieved within that time. Though, as we will note below, the achievement of the goal took much longer, it has finally been achieved. The constitutional provisions have played an important role in the achievement of that goal whether by legislation or executive orders or judicial decisions. No doubt being not only the fundamental law of the land but also the symbol of its foundations, the Constitution sets the tone for the separation of the judiciary from the executive and of the independence of the former from the latter. Let us, therefore, first look at the Constitution.

III. FOUNDATIONS OF THE SEPARATION

A. Constitutional Provisions

The Constitution of India provides for the parliamentary form of government, which lacks strict separation between the executive and the legislature but maintains clear separation between these branches and the judiciary. As noted above, it specifically directs the state “to separate the judiciary from the executive”. The Supreme Court has applied this direction to support separation between the

\textsuperscript{2} See M.P. Jain, OUTLINES OF INDIAN LEGAL HISTORY, 140, 145, 193, 268-269 (5th ed. 1997).

\textsuperscript{3} For a brief history see id. at 270-71; 2 Law Comm’n of India, FOURTEENTH REPORT, REFORM OF JUDICIAL ADMINISTRATION 850 (1958), available at http://lawcommissionofindia.nic.in/1-50/Report14Vol2.pdf.


\textsuperscript{5} INDIA CONST. art. 50.
judiciary and the other two branches of the state at all levels from the lowest court to the Supreme Court.6

The Constitution provides for a federal structure of the government consisting of the Union and the states. While they have separate legislatures and executives, they do not have separate judiciaries. The judiciary has a single pyramidal structure with the lower or subordinate courts at the bottom, the high courts in the middle, and the Supreme Court at the top. For funding and some administrative purposes, the subordinate courts are subject to regulation by the respective States, but they are basically under the supervision of the high courts.7 The high courts are basically under the regulative powers of the Union subject to some involvement of the states in the appointment of judges and other staff and in the finances.8 The Supreme Court is exclusively under the regulative powers of the Union.9 Subject to territorial limitations, all courts are competent to entertain and decide disputes both under the Union and the state laws.

The unitary character of the judiciary is not an accident but rather a conscious and deliberate act of the Constitution makers for whom one single integrated judiciary and uniformity of law were essential for the maintenance of the unity of the country and uniformity of standards of judicial behaviour and independence.10

6 Supreme Court Advocates-on-Record Ass'n v. Union of India, A.I.R. 1994 S.C. 268. Serrvai takes objection to the application of Article 50 to higher judiciary among others on the ground that the judges of the Supreme Court and high courts are not members of public services. H.M. Sekhrai, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY 2900-31 (3d ed. 1983). While the objection may not appear to be baseless, the liberal interpretation for a laudable purpose taken by the Court is justified because in England, from where we derive much of the understanding of our law, the judiciary at all levels is treated part of public service. See R. STEVENS, THE INDEPENDENCE OF THE JUDICIARY, 179, 183, 184 (1993). Even if Article 50 is confined to the lower or subordinate judiciary, provisions are made in the Constitution to insulate the higher judiciary from the legislature and the executive. Articles 102 and 191 specifically disqualify members of Parliament and state legislatures, respectively, from holding any office of profit under the Government of India or government of any state, which will definitely include the office of a judge of the Supreme Court or of any high court. Further, under Articles 75 and 164 members of the Union and the state executive respectively have to be members of Parliament or state legislature. Therefore, they cannot be judges. Again, perhaps with the sole exception of Justice Krishna Iyer, who was a legislator in a state from 1952-56 and also a legislator and minister in another state from 1957-59 before he was appointed a judge of the Kerala High Court in 1968 and later of the Supreme Court in 1973, no other legislator or minister has ever been appointed a judge of a high court or of the Supreme Court.

7 See INDIA CONST. arts. 233-235.

8 See id. art. 229 & sch. VII.

9 See id. art. 146 & sch. VII.

10 See AUSTIN, supra note 4, at 184-85.
1. The Supreme Court

The Supreme Court of India consists of the Chief Justice of India and thirty other judges. The judges are appointed by the President of India "after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary." For "the appointment of a Judge other than the Chief Justice, the Chief Justice of India [must] always be consulted." A judge of the Supreme Court, including the Chief Justice, holds her or his office until the age of sixty-five years. She or he may resign or be removed from his office earlier. Removal can take place only on the ground of proved misbehaviour or incapacity of the judge and that too by an order of the President passed after a majority of the total membership and a majority of not less than two-thirds of the members present and voting in each House of Parliament present an address to the President in the same session for such removal. So far no judge has ever been removed. The only attempt to remove a judge in early 1990s failed in Parliament. Before entering his office a judge takes an oath, among others, to perform her or his duties without fear or favour, affection, or ill will and to uphold the Constitution and the laws.

Only a citizen of India who has been a judge of one or more high courts for at least five years, or has been an advocate of one or more high courts for at least ten years, or is a distinguished jurist in the opinion of the President, can be a judge of the Supreme Court. A judge of the Supreme Court is prohibited from pleading or acting in any court or before any authority in India after her or his retire-

11 INDIA CONST. art. 124(1); The Supreme Court (Number of Judges) Act, 1956, No. 55 of 1956, amended by Act No. 22 of 1986, INDIA CODE, available at http://indiacoode.nic.in/full act1.asp?fnum=198655. Initially, the Constitution had fixed the strength of puisne judges at seven. The increase in the number to Supreme Court judges from twenty-five to thirty, in addition to the Chief Justice, is in pursuance to the Supreme Court (Number of Judges) Amendment Bill, 2008, Bill No. 41 of 2008, available at http://www.prsindia.org/uploads/media/1209532839/1209532839_The_Supreme_Court_Number_of_Judges_Amendment_Bill_2008.pdf.

12 INDIA CONST. art. 124(2).

13 Id. art. 124(2) proviso.

14 Id.

15 INDIA CONST. art. 124(4)-(5).

16 This attempt took place in the Case of Justice V. Ramaswami in 1993. For details, see M.P. Singh, V.N. Shukla's CONSTITUTION OF INDIA 476 (11th ed. 2008). An earlier attempt to remove Justice J.C. Shah did not reach Parliament and could not even become public.

17 INDIA CONST. art. 124(6) & sched. III.

18 Id. art. 124(3).
ment. Every judge is entitled to salary and other allowances and
privileges specified in the Constitution, subject to upward, but not
downward, revision by Parliament. Provision for the appointment
of an acting Chief Justice of India, ad hoc judges, and attendance of
retired judges at the sittings of the Supreme Court is also made.

The Supreme Court is a court of record having, among others,
the power to punish for its contempt. It sits in Delhi though it may
hold its sittings at other places also. It has incomparable wide original,
appellate, and advisory jurisdictions. It also has the power to
review its decisions; to make such order as is necessary for doing
complete justice in any cause or matter; to enforce its decrees and
orders; to order attendance, investigation, and discovery; to transfer
cases to itself or from one high court to another; and to regulate its
practice and procedure. Parliament may further enlarge the jurisdic-
tion of the Court and may confer ancillary powers on it for more
effective exercise of its jurisdiction. The law declared by the Court
is binding on all courts in India. All civil and judicial authorities are
required to act in its aid.

The judgments and opinions of the Court are given in the open
and with the approval of the majority of judges. The differing judges
may write dissenting or separate opinions. The Chief Justice of
India appoints officers and servants of the Court and, subject to any law
made by the Parliament; she or he also regulates their service condi-
tions. All administrative expenses of the Court including the salar-
ies, allowances and pensions of the judges and other staff are
charged on the Consolidated Fund of India free from variation or al-

19 Id. art. 124(7).
20 Id. art. 125 & sched. II; The Supreme Court Judges (Conditions of Service) Act, 1958.
Article 125 had to be amended by the Constitutional (Fifty-Fourth Amendment) Act, 1966
because the original Article 125 did not provide for upward revision of salary. During a
financial emergency the salaries of the judges may, however, be reduced. INDIA CONST. art.
360(4)(b).
21 INDIA CONST. arts. 126 & 128.
22 Id. art. 129.
23 Id. art. 130. All proposals from the government to create benches of the Court at
Mumbai, Chennai, and Kolkata have also been negated by the Court.
24 Id. arts. 32, 131-136 & 143.
25 Id. arts. 137, 139A, 142 & 145.
26 Id. arts. 138, 139 & 140.
27 Id. art. 141.
28 Id. art. 144.
29 Id. art. 145(4)-(5).
30 Id. art. 146(1)-(2).
teration by Parliament. The Parliament and state legislatures are prohibited from any discussion with respect to the conduct of any judge of the Supreme Court or of a high court in the discharge of her or his duties.

2. The High Courts

The Constitution provides for a high court for each state, though the Parliament is also authorized to establish a common high court for two or more states or for two or more states and a union territory. Every high court is a court of record with power to punish for its contempt. It consists of a chief justice and such other judges as the President may from time to time deem it necessary to appoint. High court judges are appointed by the President after consultation with the Chief Justice of India, the governor of the state, and the chief justice of the high court. Unless a judge resigns or is removed or appointed to the Supreme Court, she or he holds her or his office until the age of sixty-two years. She or he holds her or his office during good behaviour and can be removed only in the same manner as a judge of the Supreme Court. Only a citizen of India who has held a judicial office for at least ten years or who has been an advocate for ten years can be appointed a judge. Every judge of a high court takes similar oath as a judge of the Supreme Court. High court judges are prohibited from pleading or acting in any court or before any authority except the Supreme Court or a high court in which they have not served. The salaries, allowances, and other rights and privileges of the high court judges are also specified in the Constitution and are subject to only upward and not downward varia-

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31 Id. arts. 112(3)(d)(i) & 146(3).
32 Id. art. 121.
33 Id. arts. 214 & 231.
34 Id. art. 215.
35 Id. art. 216.
36 Id. art. 217(1).
37 Id. art. 217(1) & proviso. The age of retirement was raised from sixty to sixty-two years by the Constitutional (Fifteenth Amendment) Act, 1963, available at http://india.gov.in/govt/documents/amendment/amend15.htm.
38 India Const. arts. 217(1) proviso & 218.
39 Id. art. 217(2).
40 Id. art. 219.
41 Id. art. 220.
tion by Parliament.\textsuperscript{42} The Constitution also provides for the appointment of an acting chief justice, additional and acting judges, and retired judges at sittings of high courts.\textsuperscript{43} High court judges may be transferred from one high court to another.\textsuperscript{44} The high courts have wide original and appellate jurisdiction including the jurisdiction to issue writs for the enforcement of the Fundamental Rights and for any other purpose.\textsuperscript{45} Every high court has power of superintendence over all courts and tribunals within its territorial jurisdiction\textsuperscript{46} and of withdrawal of cases involving substantial questions of law relating to the interpretation of the Constitution.\textsuperscript{47} The Chief Justice of a high court appoints officers and servants of the high court and regulates their services.\textsuperscript{48} The administrative expenses of a high court including the salaries and other allowances of the judges and other staff are charged on the consolidated fund of that state.\textsuperscript{49}

3. The Subordinate Courts

The apex subordinate court is the court of the district judge. The governor of a state, in consultation with the high court of that state, appoints the district judges.\textsuperscript{50} Only a person who is either already in the legal service of the Union or of the state or has been an advocate for at least seven years and is recommended by the high court can be appointed a district judge.\textsuperscript{51} Appointments to judicial service of the state below the rank of district judge are made by the governor in accordance with the rules made after consultation with the state public service commission and the high court.\textsuperscript{52} The control of district courts and courts below them, including the posting and promotion and grant of leave to members of judicial service, vests in the high

\textsuperscript{42} Id. art. 221, amended by The Constitutional (Fifty-Fourth Amendment) Act, 1986, available at http://india.gov.in/govt/documents/amendment/amend54.htm (providing for upward revision).


\textsuperscript{44} INDIA CONST. art. 222; see id. app. I.

\textsuperscript{45} Id. arts. 225 & 226; see app. id. I.

\textsuperscript{46} Id. art. 227; see app. id. I.

\textsuperscript{47} Id. art. 228; see app. id. I.

\textsuperscript{48} Id. art. 229; see app. id. I.

\textsuperscript{49} Id. arts. 202(3)(d) & 229(3); see id. app. I.

\textsuperscript{50} Id. art. 233(1); see id. app. I.

\textsuperscript{51} Id. art. 233(2); see id. app. I.

\textsuperscript{52} Id. art. 234; see id. app. I.
court. The governor of a state may apply these provisions even to the magistrates in that state.\textsuperscript{53}

B. Constitutional Practice

The foregoing summary of the constitutional provisions and the structuring of the judiciary fully uphold the belief of the Constitution makers that they had done everything to secure the independence of the judiciary and hoped that those who had to work with the Constitution will make its operation successful.\textsuperscript{54} The constitutional scheme has stood the test of time and survived without any significant changes.\textsuperscript{55}

The Constitution assumes judicial review of legislative and executive acts and, therefore, from the very initial litigation soon after the commencement of the Constitution, the courts started exercising it without anybody entertaining any doubts in this regard.\textsuperscript{56} In the exercise of this power the Court has also acquired and exercised the power to review the validity even of the amendments of the Constitution if they violate its basic structure.\textsuperscript{57} The independence and effi-

\textsuperscript{53} Id. art. 237; see id. app. I. Then there are some supplemental provisions such as Article 39A, which requires the State to "secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and . . . to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities"; Article 312, which provides for an All India Judicial Service; Articles 323A and 323B, which provide for certain tribunals, and which to some extent derogate with the powers of the ordinary courts (the Supreme Court has recently held that the amendment is unconstitutional to the extent it excludes the jurisdiction of the high court under Article 226); and provisions in the Second Schedule regarding the salaries allowances and other privileges of the Supreme Court and high court judges.

\textsuperscript{54} See Rajendra Prasad, President of the Constituent Assembly, Speech Given Before Putting the Motion for Adoption of the Constitution (Nov. 26, 1949), in 4 THE FRAMING OF INDIA'S CONSTITUTION 946 (B. Shiva Rao ed., 1968).

\textsuperscript{55} The only aberrations in this scheme brought by the controversial Constitution, Forty-Second Amendment during the emergency in 1976 curtailing powers of the Supreme Court and the high courts were quickly removed by the Constitution Forty-Third and Forty-Fourth Amendments in 1978. The other amendments in these provisions have rectified the situations not envisaged by the Constitution makers such as the conferment of power on Parliament for upward revision of the salaries of the Supreme Court and high court judges, some restrictions on as a matter of right appeals to the Supreme Court, provision for the appointment of additional and acting judges in the high court and raising of the age of retirement in high courts from sixty to sixty-two years, provision for compensatory allowance to high court judges on transfer from one high court to another, etc., which in a way further strengthened the position of the judiciary to face the workload as well as to facilitate appointment of competent persons. Some incidental amendments were made on the reorganisation of the states in 1956.


\textsuperscript{57} Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461; see D. Conrad, Basic Structure of the Constitution and Constitutional Principles, 3 LAW & JUST. 99 (1996), re-
ciency of the judiciary and judicial review have been, among others, held part of the basic structure of the Constitution and, therefore, the Court invalidated amendments that directly or even indirectly curtailed them.\textsuperscript{58} It has also invalidated a constitutional amendment, which subjected the decision of a tribunal, which was not a court in the strict sense, to the confirmation or rejection by the government.\textsuperscript{59} Similarly, laws merely abrogating a judicial decision without retrospectively changing the legal basis of that decision have also been invalidated.\textsuperscript{60} The courts have also expanded the scope of judicial review by liberalising the requirement of locus standi and developing the concept of public interest litigation and by rejecting the concept of political questions.\textsuperscript{61}

Judicial tenure stands on sound footing, and as noted above the only attempt to remove a Supreme Court judge also failed.\textsuperscript{62} Low salary and allowances of judges have been an issue because of which sometimes the best persons have not been available for the office of judge and sometimes even those who were appointed later resigned from it. From time to time, they have, however, been revised and even the Constitution has been amended once to improve the situation.\textsuperscript{63} Now they are considered to be at the satisfactory level with every possibility of upward revision.\textsuperscript{64} Parliament and state legisla-

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\textsuperscript{60} See, e.g., In the Matter of Cauvery Water Disputes Tribunal, A.I.R. 1992 S.C. 522.


\textsuperscript{62} For details, see SINGH, supra note 16, at 476. An effort seems to have been made earlier to impeach Justice J.S. Shah, which never reached Parliament. See N.K. Falkhivala, Judiciary in Turmoil: Public Confidence Rudely Shaken, 26 CIV. & MILITARY L.J. 176, 178 (1988).


\textsuperscript{64} See the Supreme Court Judges (Conditions of Service) Act, 1958, No. 41 of 58; INDIA CODE, available at http://indiacode.nic.in/fullact1.asp?fnum=195841. Until recently the current base salaries of the Chief Justice of India and other judges of the Supreme Court were Rs. 32,000 and Rs. 30,000, respectively, and of the Chief Justice and a judge of a High Court were Rs. 30,000 and Rs. 26,000, respectively, plus free residence to every one of them. On February 24, 2006, the High Court and Supreme Court Judges (Salaries and Conditions of Service) Amendment Bill, 2005, was passed by Rajya Sabha and approved by the Lok Sabha. The bill was preceded by an ordinance that increased the salary of the Chief
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tures abstain from discussing the judicial behaviour, though sometimes it is doubted whether the courts also show similar deference to the legislatures in the exercise of their functions.  

The most remarkable development through judicial interpretation of the Constitution has been in regard to the separation of the judiciary from the executive at the Supreme Court and the high courts levels. Until the decision in the *Supreme Court Advocates-on-Record Association v. Union of India* the constitutional position was taken to be that in the matter of the appointment of judges to the Supreme Court and the high courts, and in the matter of the transfer of the latter from one high court to another, the final decision rested with the executive. But that decision, which the Court has confirmed in a unanimous larger bench decision, has established, among other things, on the constitutional requirement of the separation of the executive from the judiciary that the final decision in this regard rests with the judiciary and not with the executive.

From the very beginning governments have also shown due concern for the judiciary. As early as 1955, the Union Government constituted the Law Commission to review the system of judicial administration in all its aspects and to suggest ways and means for improving it and making it speedy and less expensive. In 1958, the Commission produced its famous *Fourteenth Report* with comprehensive study of all courts, from the lowest to the Supreme Court, and with wide ranging recommendations for ensuring the independence, efficiency, and efficacy of the judiciary at all levels. Since then, the exercise has been repeated several times concerning different aspects of administration of justice, including in particular appointment of

Justice of India from Rs 33,000 to Rs 1,00,000 per month and that of other apex court judges from Rs 30,000 to Rs 90,000 per month, plus D.A. It also increased the salary of chief justices of high courts from Rs 30,000 to Rs 90,000 per month and that of high court judges from Rs 26,000 to Rs 80,000 per month, plus D.A. The increase became effective from January 1, 2006. Effective from September 1, 2008 sumptuary and furnishing allowances for the Supreme Court and high court judges have also been doubled.


69 LAW COMM’N OF INDIA, supra note 3.
judges, arrears in courts, and separation of the lower judiciary from the executive.\textsuperscript{70}

The independence of the lower judiciary or subordinate courts has also been honoured and strengthened. The lower judiciary has been separated from the executive almost all over the country and operates under administrative supervision of the high court to which it is subordinate. Its supervision and control by the high court vis-à-vis the executive has been expanded by holding that the district judges shall be appointed by the governor of a state only from amongst the members of the judiciary and not from amongst the judicial officers who are part of the executive and that they shall always be appointed only in consultation with the high court and with no other body or authority.\textsuperscript{71} Similarly, disciplinary action against the members of the lower judiciary such as suspension and removal from


job and matters such as inter se seniority are determined and decided by the high court. Through a notable ruling followed by subsequent clarifications and expansion, the independence of the lower judiciary has been substantially secured and enhanced by the Supreme Court. It has held that for purposes of their service conditions the members of the judiciary even at the lowest level are comparable to the members of the other two branches of the government, namely, the legislative and the executive, and not to the civil servants or administrative staff of the government. Emphasising the importance of the independence of the judiciary and its uniform service conditions, it directed the Union of India and the states to take steps for the creation of an All India Judicial Service, prescribe minimum qualifications for recruitment to the lower judiciary, effective involvement of the high courts in the recruitment, fixing uniform age of retirement at sixty, payment of library allowance, provision for conveyance or conveyance allowance, provision for suitable residential accommodation, uniform and better service conditions, and provision for training of judges.72 In any case, the salaries and allowances of the members of the judiciary are increased from time to time with the increase of salaries and allowances of other civil servants. To protect the honour of the lower courts, the Supreme Court has also extended its contempt power to cover the contempt of the lowest courts.73

IV. SEPARATION FROM EXECUTIVE AND LOWER JUDICIARY

We noted in the very beginning that broadly speaking separation of the higher judiciary — high courts and above — from the executive was ensured well before Independence and the commencement of the Constitution. Even at the level of the lower judiciary — district courts and below — so far as the civil side of the judiciary was concerned it had been separated from the executive almost from the time of Lord Cornwallis in 1793. The district judge in pre-independence India held higher status and commanded greater respect than the highest executive, i.e., the collector at the district level.74 Whatever little chances of the executive influencing the civil judiciary at the lower level existed were plugged by the Constitution as discussed above. Except in the matter of some budgetary allocations, which the-

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74 See E. Stokes, The English Utilitarians and India 7 (1959); see also All India Judges' Ass'n., A.I.R. 1992 S.C. 165, 167.
oretically are within the domain of legislature and not of the executive, the lower civil judiciary stands completely separated and independent from the executive. The lowest court in the hierarchy of civil courts and the pettiest matter of civil nature lies exclusively within the domain of the judiciary under the administrative control of the respective high courts.\textsuperscript{75} The high courts, as we have noted above, are in some respects — especially in matters of appointment and transfer of high court judges — under the supervision of the Supreme Court. The Supreme Court, as we have noted above, has completely insulated itself and all the high courts from the executive even in matters of appointment and transfer. Even the determination of service conditions, age of retirement, salaries, allowances, and other facilities for the members of the lower judiciary is now in the hands of the judiciary.\textsuperscript{76} Although some of the states are facing some budgetary difficulties in enforcing uniform standards in this regard, no difference of opinion exists on the desirability of the independence of the judiciary and its separation from the executive.

The position of the lower judiciary on the criminal side has, however, not been so clear. We have already noted that the separation of the judiciary on the criminal side from the executive introduced by Lord Cornwallis was soon reversed by his successors and the magisterial powers were vested in the executive officers with the collector as district magistrate heading all the district magistracy. This arrangement was later incorporated in the Criminal Procedure Code, 1898, which applied to the whole of British India. The magistrates were divided into several classes as class I, class II, class III, special magistrates, honorary magistrates, etc., having power to try and punish people for different offences except the serious offences, which they had to commit to the sessions courts after holding enquiry into the charges. The sessions courts were also the civil courts. Therefore, they were as much insulated from the executive in the criminal matters as in the civil. Thus separation of the judiciary at the level of sessions courts existed even before Independence and the commencement of the Constitution. It was absent only at the level of magistrates. The national leaders and the Constitution makers were, as we have already noted, primarily concerned about this absence. Accordingly the command to separate the executive from the judiciary was incorporated in the Constitution.\textsuperscript{77}

\textsuperscript{75} The revenue matters relating to agricultural land are still in the hands of the executive. But title suits can be brought in the courts. Revenue matters in general are in the hands of the administrative and quasi-judicial bodies even in other matters subject to the supervision of the high courts.

\textsuperscript{76} See \textit{All India Judges' Ass'n.}, A.I.R. 1992 S.C. 165.

\textsuperscript{77} See \textit{India Const.} art. 50.
The states of Madras and Bombay led the implementation of the constitutional command. The former appointed a committee even before the Independence in 1946 to suggest separation of the judiciary at the magisterial level from the executive. Following the committee’s recommendations, which classified the various functions assigned to the magistrates under the Criminal Procedure Code and other laws into police, administrative, and judicial functions, the State of Madras shifted the judicial functions to magistrates who were removed from the control of the collector or the executive. The State performed this task by a Government Order in September 1949 instead of doing it by legislation. The State of Bombay achieved the same goal by legislation in 1951. Different states and union territories in the country adopted these two models at different times in pursuance of the constitutional command. However, several states had not taken adequate measures in this direction until the Law Commission examined the matter in its Fourteenth Report in 1958. The Commission expressed its dissatisfaction with the then existing position and emphasised the importance and urgency of the matter and recommended that out of the two available models the Bombay model should be implemented all over the country. The Commission continued to pursue this matter in its subsequent reports until its Forty-First Report, which led to the revision and replacement of the Criminal Procedure Code of 1898 by the Criminal Procedure Code of 1973 by Parliament of India. The new Code provides for the uniform separation of the judicial magistrates from the executive throughout the country.

Under the Code subordinate criminal courts throughout the country are courts of session, judicial magistrates of the first class or metropolitan magistrates in the metropolitan areas, judicial magistrates of the second class, and executive magistrates. Bombay, Calcutta, Madras, and Ahmedabad are designated as metropolitan areas in the Code. The concerned state government may by notification designate any other town, whose population exceeds one million, as a

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79 See JAIN, supra note 2.
80 For the adoption of this model see, for example, The Punjab Separation of Judicial and Executive Functions Act, 1964; The West Bengal Separation of Judicial and Executive Functions Act, 1968; and The Union Territory (Separation of Judicial and Executive Functions) Act, 1969.
82 INDIA CODE CRIM. PROC. § 6.
metropolitan area. The judges of the courts of session, judicial magistrates of the first and second classes, and the metropolitan magistrates are appointed by the respective high courts. The high courts also appoint from amongst the magistrates of the first class a chief judicial magistrate and an additional chief judicial magistrate and in metropolitan areas a chief metropolitan magistrate and an additional chief metropolitan magistrate. The high courts may also appoint special magistrates on the request of the central or state governments. The executive magistrates, including the district magistrate, additional district magistrates, and special magistrates, are appointed by the concerned state governments. All the offences under the Indian Penal Code are tried only by a judicial magistrate of the first or second class or by a metropolitan magistrate. An executive magistrate tries no offence. They perform only non-judicial functions such as arrest of criminals, security for keeping peace and good behaviour, removal of public nuisances, dealing with urgent cases of nuisance or apprehended danger, etc. Thus the judiciary in criminal matters has been completely and uniformly separated from the executive throughout the country.

V. Separation with Independence and Dignity

The separation of the judiciary from the executive does not mean that it has been left to fend itself without support from the other two branches of the state. When it appeared that the lower judiciary was not being given its due, an informal organisation of the judges — The All India Judges’ Association — filed a petition in the Supreme Court for directing the Union of India and the states to ensure the independence of the judiciary which is part of the basic structure of the Constitution. In its judgment, the Supreme Court directed that the

83 Id. § 8.
84 Id. §§ 11 & 16.
85 Id. §§ 12 & 17.
86 Id. §§ 13 & 18.
87 Id.
88 Id. § 26 & fist sched.
89 Id. § 44.
90 Id. §§ 106-110.
91 Id. § 133.
92 Id. § 144.
93 The State of Jammu and Kashmir has been excluded from the application of the Code. Some parts of the Code also do not apply to the State of Nagaland and tribal areas. See id. § 1(2).
94 All India Judges’ Ass’n v. Union of India, (1992) 1 S.C.C. 119.
Union of India should set up an All India Judicial Service, uniformity in the designation of the judicial officers must be brought about, their retirement age must be raised to sixty years of age, the question of appropriate pay scales of judicial officers must be specifically referred to and considered by the pay commissions appointed by the Union and the states, a working library at the residence of every judge and sumptuary allowance must be provided, residential accommodation with provision for office room must be provided for every judicial officer, every district judge and chief judicial magistrate should have a state vehicle and other judicial officers should have a pool vehicle and facility for loans for acquiring a vehicle, and service institutes should be set up at the central, state, and union territory levels.\textsuperscript{95} Half of these directions had a time limit set by the Court, which was in no case longer than one year. On a review petition by the Union of India, upholding its main judgment and rejecting the argument of the Union that it was interference in the powers of the legislature or executive and that it would involve unbearable financial burden, the Supreme Court clarified and modified some of these directions.\textsuperscript{96} It directed that the service conditions of the judicial officers should be laid down and reviewed from time to time by an independent commission reflecting adequate representation of the judiciary exclusively constituted for this purpose, three years legal practice must be an essential qualification for recruitment to a judicial post and in the recruitment even at the lowest position a representative of the high court must be associated, incompetent and unsuitable judicial officers could be compulsorily retired at the age of fifty-eight, sumptuary allowance to district judges and chief judicial magistrates was withdrawn, library allowance should stand withdrawn after establishment of court libraries, provision for free petrol need not exceed one hundred litres per month for vehicles used by judges, state judicial academies were optional in view of the establishment of National Judicial Academy, and extended time for compliance with the directions in the original judgment was permitted in view of the time taken in the disposal of the review petition. It reiterated the need of higher salary and improved service conditions for the judicial officers.

Pursuant to the directions of the Court, the Government of India appointed the First National Judicial Pay Commission with Justice Shetty as Chairman on March 21, 1996. The Commission submitted its final report on November 11, 1999. On December 14, 1999, the Supreme Court directed the states and the union territories to send their responses to the Union of India so that it could correlate the

\textsuperscript{95} Id. at 140-41.

\textsuperscript{96} All India Judges' Ass'n v. Union of India, (1993) 4 S.C.C. 288.
responses and indicate its own stand on the recommendations of the Commission. The main recommendations of the Commission included: framing of the rules by the high courts for the retirement of judges specifying a particular age, appropriate nomenclature for the judicial officers, providing for the chief judicial magistrate to have the same position as district judge, recruitment and promotion norms for different cadres of judicial officers, and steps for judicial education and training. Following the principles laid down by the Supreme Court in the All India Judges’ Association case that the judges should be at par with the political executive and legislature and not with the administrators, the Commission recommended the following pay scales for the judicial officers:

(i) Civil Judges (Jr. Divn.) Rs. 9000-14,550  
(ii) Civil Judges (Jr. Divn., I Stage) Rs. 10,750-14,900  
(iii) Civil Judges (Sr. Divn. II Stage) Rs. 12,850-17,550  
(iv) Civil Judges (Sr. Divn. I Stage) Rs. 14,200-18,350  
(v) District Judges (entry level) & Civil Judges (Sr. Divn., II Stage) Rs. 16,750-20,500  
(vi) District Judges (selection grade) Rs. 18,750-22,850  
(vii) District Judges (super time scale) Rs. 22,850-24,850

The Commission could not recommend salaries higher than the above because it had to keep in mind that the salary of a high court judge is fixed at Rs. 26,000. These salaries were given effect from January 1, 1996 and their burden had to be shared by the Centre and states. It also recommended several allowances and facilities. The recommendations also included raising of the age of retirement from sixty to sixty-two years of age, domestic help allowance for retired judicial officers, and creation of an All India Judicial Service. As the salaries of the Supreme Court and high court judges have increased and the Rs. 26,000 limit has gone up to Rs. 80,000, the Chief Justice of India appointed a commission under Justice Padmanabhan to look into the matter of increase of the salaries of the judges of subordinate courts. No further information is, however, yet available in this regard.

Pursuant to the Court orders, several states expressed to the Union their willingness to immediately implement the recommendations subject to the condition that the Union shared fifty percent of the financial burden and the Union of India implemented them with some modification in the union territories. The Supreme Court rejected the modification in the scales of salary even though in some

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98 See supra note 64.
respects they were higher than of the IAS officers on the ground that they were just, fair, and reasonable.\textsuperscript{99} It directed the respective governments to implement the new scales with effect from July 1, 1996 and their payment from July 1, 2002. But it refused to uphold the recommendation that the Union must share the financial burden. The lower judiciary was a state subject and they should generate the necessary resources for the purpose. The Court also directed the raising of strength of judges from 10.5 to 50 per ten lakh people within a period of five years. But it rejected the recommendation for raising of the age of retirement from sixty to sixty-two on the ground that sixty-two was the age of retirement for the judges of the high courts and the judges of the lower courts should retire earlier than the high court judges. It also rejected the requirement of three years of legal practice for new entrants into the lower judiciary on the ground that bright candidates would be discouraged from entering the judiciary. But it upheld the distinction between the higher judicial service and judicial service in the lower judiciary and held that while in the former seventy-five percent of posts should be filled by promotion, twenty-five percent should be filled by direct recruitment from amongst practicing lawyers. The Court also left the question of uniformity of nomenclature open but directed that the nomenclature for each scale must be different.

Most of the states and union territories including the National Capital Territory of Delhi have implemented the recommendations of the Shetty Commission as modified by the Supreme Court. Those, which have failed to do so until now, are in the process of implementing them. Thus not only the separation of the judiciary from the executive but also its independence, efficiency, and dignity have also been ensured.

VI. CONCLUSION

To conclude, the foregoing brief description of the judiciary from the top to the bottom establishes that the concern of the Constitution makers of India for an independent and competent judiciary is fully expressed in the Constitution and has been constantly pursued by the state since its making. Maybe it has not yet been fully realised in terms of ground realities, but legal formalities have been completed in almost all respects. The judiciary stands as much an independent and separate branch of the state as the legislature and the executive. It has all that is needed for performing its job effectively and for invoking the confidence of the people in it.