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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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INDEPENDENT JUDICIARY IN INDIA AND AUSTRALIA: A COMPARATIVE ANALYSIS

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Abstract:

The autonomy of the judiciary stands as an abecedarian pillar in any popular society, assuring the supremacy of law and securing individual rights. This exploration paper presents a side-by-side examination of the independent judicial systems in Australia and India, aiming to bring to light the unique challenges and strengths of each country's judicial outfit. The study investigates the literal development of these judiciatures, their legal foundations, and the mechanisms in place to cover the autonomy of the judiciary. In Australia, this paper scrutinizes the indigenous frame, the process of appointing judges, and the jurisprudential principles that bolster judicial independence. It emphasizes the High Court's part and the principles of separating powers as vital rudiments in upholding the autonomy of the Australian judiciary. Judicial and transfer of judges, which includes the collegium system. The paper analyses the interplay between the superintendent and the judiciary, checking the counteraccusations of the ongoing converse on judicial movables and the eventuality for political hindrance. This relative analysis offers perceptivity into the challenges faced by both countries in conserving an independent judiciary. It also assesses how effective each system is in upholding the rule of law, securing individual rights. The paper concludes by agitating the counter accusations for the future and the part an independent judiciary plays in the wider environment of popular governance. By furnishing a comprehensive analysis of the independent bar in Australia and India, this research contributes to a deeper understanding of the strengths and weakness of each system, promoting meaningful conversations on the improvement of judicial independence in these two distinct popular nations.

KEYWORD: INDEPENDENCE, JUDICIARY, AUSTRALIA, INDIA

1) Introduction

Judicial independence is a major concept that deals with the freedom of judiciary from other parts of government. This idea of independent judiciary is used to prevent the judicial system of a State from any undue influence by any other part of the government. This idea of independent judiciary helps the State to serve the justice in a fair and effective manner. And also helps the judiciary to work freely without feeling any pressure on them. The complete independence of the court of justice is particularly essential in a limited constitution¹. If we see the term Judicial Independence, we easily see that the term has some ambiguity or we can say it fails to explain the idea of that in a proper way. By reading the term 3 major questions arise in the reader's mind the first is what type of independent judiciary? Second is why independent judiciary? third is from whom it should be independent? And answer to this question is the primary objective of this research paper. To get the answer we have to understand the background and origin of this concept.

1.1 Background of the idea of judicial independence

If we see in the background of the concept of judicial independence, we found that it has a very deep historical root. The traces of idea seen in the ancient era of Greece and Rome, where the first time "Magna Carta" charter rule introduced. This charter is a royal charter signed by king John. And it became the 1st charter that talks about the principle of separation of powers along with it this charter also talks about the separation of Justice system from all other. After this period other traces of the idea of independent judiciary seen between 17th to 18th century. In this period of time many great philosophers like Montesquieu played a very important role in making a proper model of separation of power and along with it he talks about the importance of separation of power. there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression². along with-it Montesquieu also helps in to understand how the independent judiciary idea help in to keep a check on the executive and legislative branches of the government. But not all the philosophers are in the favour of independent Judiciary. "Carls Schmitt" a German philosopher

¹ [Alexander Hamilton](#) in *The Federalist No. 78*, published 28 May 1788,

² *The Spirit of the Laws* BY BARON DE MONTESQUIEU, 1689-1755. (1949). The spirit of the laws. New York: Hafner Pub. Co.,

in his books “The concept of political” and “Political theology” he says that the power of decision on laws and constitution were always in the hand of sovereign not in the hand of judiciary. And according to him the guardian of the laws and constitution was a political organ not a judicial organ. These thoughts of “Carls Schmitt” shows his views on the independent judiciary. Other philosopher such as “Jeremy Bentham” who are in the support of Separation of power but not in the favour of Independent Judiciary. According to him the Judiciary is always be subordinate to legislature which prevent the State from the oligarchical rule of judges. After this in late 18th century the United States drafted its Constitution and include the idea of separation of power along with independent judiciary. And this became the first time that any country applying the concept of separation of power in its democratic system. United states also introduced the policy of tenure of judges for lifetime. Which helps in insulate the judges from any pressure and undue influence of other branches of the government. This policy of America becomes an effective and major development in the favour of independent judiciary. After tis another major development held when the United nation organization recognized the independent judiciary as fundamental human rights and most of the countries agrees that an unbiased and fair judiciary is essential part of the rule of law.

1.2 Purpose of the comparative analysis

The aim of this comparative analysis is to understand the strength, weakness and dynamics of independent judiciary. This research paper provides a deep understanding of the legal and judicial system of the to most democratic country. This paper tries to help in to identify the main differences and similarities in both countries. This paper shed a light on the unique challenged faced by both the countries and how much both the countries getting successful in implementing judicial independence and understand the process of how the judges appoint in both the countries and what are the impacts of it on the independence. This research paper brings attention towards the potential threats and area which may reform for establishing judicial independence. In the end this paper concludes by giving a good understanding of all the weakness and strength of judicial system. Along with it this paper gives the suggestion for improvement in both the countries.

2) Historical context

A. Evolution of judicial independence in India

The history of judicial independence in India is very long as we can see that roots of the judicial independence can be seen from the ancient times to the modern times. The justice system of India evolved through different civilization as deep as we dig in the Indian history, we found the early framework that laid the foundation of the independent judiciary in the India sub- continent. And to study about such a vast evolution we have to break the Indian history of judicial independence into 3 parts. Which helps in to better understanding of the evolution. Three parts of evolution are i) Evolution in the ancient period ii) Evolution in the medieval period iii) Evolution in the modern period.

i. Evolution in the ancient period

If we see in the ancient history of India. We found that even at that time idea of justice and judicial system exist and play a major role in the society. One of the oldest languages of world “Sanskrit” which have origin in India have the word “Nyaya”³ mentioned in the Sanskrit dictionary. Which means justice. The mentioning of the concept of justice in earlier times shows that the idea of justice graved in Indian history from that time. In ancient India the king was the fountain of justice but the function of judges was vested in the hand of priest⁴. In that time the priest called as “pradvivaka”. Who is also the head judge and other scholars assisting the king in administration. And for the administration of justice the king appoints the judges on the basis of their caste and capabilities. The judges work under the kingship. And if we talk about the king who is the fountain of justice. According to “Manu smriti” it can be seen that the king can’t self-determine the wrong and right or give biased judgement they are bound by the rule of law. The king and the head judge both are bounded by that law which is called as “Dharmashastra”. The King assisted by priest was bound to impart justice as per the principles of Dharmashastras⁵. Therefore, there has been no doubt that in ancient India there were the existence of rule of law and king have to follow these rules. The separation of power concept also be seen as well in the ancient period. According to “Manu smriti” the king is of divine origin and his

³ Britannica, T. Editors of Encyclopaedia (2017, June 14). Nyaya. Encyclopaedia Britannica. <https://www.britannica.com/topic/Nyaya>

⁴ O.P. Motiwal, Changing Aspects of Law and Justice in India 11 (Chugh Publications 1st edn., 1979).

⁵ Sharma S. D. (1988). Administration of justice in ancient India. Harman.

decision is final no one is allowed to question them. But the book main focus was on the characteristics and qualities a ruler must have rather than western concept that assumes the king as an absolutely of divine nature. According to the “Dharmashastra”. If a ruler not follow the rules of “dharma” he can’t be called as Divine. The “Saptang theory” in the “Manu smriti” is an example of separation of power follows at the ancient period in India. According to this there were 7 elements or parts of the state. If see towards the Hindu Mythologies the Holy book “Bhagwat Geeta” also talks about the qualities a king and judge must have. “Only by selfless action did Janaka and other wise kings govern, and thus assure the well-being of the whole world”⁶. This verse emphasizes the importance of virtues such as courage, charity, patience, truthfulness, and humility in individuals holding positions of authority and judgment. The same relevance of this verse is shown in “Manu smriti” also talks about the appointment of judges. The king who appoints the Brahmins as the chief judge. The reason behind the appointment of them is their knowledge and their learned classes of the society. However, we can’t say that the judicial system of that time is absolutely Independent. The main reason we can say is that the Divine theory and the other is the appointment of judges on the basis of their caste. In “Manu smriti” other caste like Kshatriya or Vaishya were allowed to become judge in exceptional circumstances. But never should Shudra be appointed as Judge⁷. Therefore, the idea of independent judiciary in ancient period can be seen partially similar to the western world. The same concept of divine theory used for the king in ancient India but in a broader sense and due to the rule of law the king is bound by “Dharma” rule .and it will be assumed by the people that king is the ultimate source of justice and the priest appointed by them as head judge were do the justice in fair and equitable manner.

ii. Evolution in the medieval period

The history of medieval period is very different from the ancient history. This period was started around 6th century and ended in 16th century. This period of history was also divided into 2 parts. Which is early medieval period and later medieval period. the early medieval period starts from 6th century and ends in 13th century, whereas the late medieval period starts in 13th century and ends in 16th century. This period is different from the ancient period specially in terms of administration of justice. The reason behind this is the foreign invasion and foreign rulers. The medieval history is the

⁶ Mitchell, S. (2002). The Bhagavad Gita. Crown Publications.

⁷ V. Mehta, Cosmic Vision: - Manu, in Foundations of Indian Political Thought 23-39 (Delhi, 1st edn., 1992).

time where the India is invaded and ruled by Islamic ruler. Due to which whole administration and judicial system get changed. And India is under the rule of Muslim law. If we see in early medieval period there were few Indian empire like Palas, Rasthrakutas. Pratiharas, Cholas in western India. They all ruled India in early medieval period. The justice system in early medieval period is similar to the system used in ancient period. After the early medieval period there is a drastic change in the administration due to the foreign invasion and establishing of Islamic rulers' empire in India. In that period the first Islamic empire was the "Delhi sultane" who was ruled by slave and various other dynasty. In this period the administration of justice was done according to the Islamic law (Shariya). The Islamic laws is used to govern all type of cases of Muslim and the justice is done according to it. It has been seen that the Muslim ruler was very strict about the implementation of Islamic law. And they want to serve justice strictly according to Islamic law. Any law which made against the "Shariyat" law is totally banned. The judicial post to serve justice is hold by learned Muslim person appointed by the ruler and chief judge. The ruler holds the title of "Sultaan" and he himself is bound to obey the decision of the courts. It has been seen that the ruler and the other officers of the court respect the laws. The Muslim were only governed by Islamic laws. The Hindu were not come under these laws. According to Islamic laws the "Zimmis" are the person who are non-Muslims and all such person are governed by there own religion. The sultans were greatly impressed by "Abbasids empire" model which is the third caliphate after prophet Muhammad. The "Qazi" which is a post in the court of justice were taken from that model of "Abbasid". There were other officers like "Mufti's" and "chief Qazi" etc. "Qazi" is the person who is responsible for deciding the cases. It has been seen that there is not any mentioned of the qualification to appoint as an "Qazi". They were appointed by the approval of the ruler. The Qazi's court were called as "Qazi-e-pargana". There were post of "Kotwal" at the lower level. Who are the principal executive officers in the lower level of courts and their jurisdiction is limited to try petty criminal offences at lower level. At supreme level there is a chief justice called as "Sadre Jahan". They were appointed by the Sultan. And chief justice appoints the "Qazi". But sultan have control over "Qazi". It shows that the Idea of independent judiciary were not there but the concept of separation of power were used much. The "Sadre Jahan" appoint the lower-level judge on the basis of their Knowledge about Islamic laws. And due to the strict policy to follow Islamic laws due to this he can't do impartiality in appointment of judges at lower level. After the end sultan dynasty. The Mughal empire comes into existence. This empire ruled the India more than any other empire in medieval period. In the period of Mughal empire there were some changes in the justice

system. There Justice system is based on the merits. It has been seen that the ruler of Mughal empire have strong belief in the idea of Justice. Mughal emperor like Akbar, Shah Jahan, and Jahangir shows a lot concern for appointing quality judges to impart justice⁸. The justice system of Muslim period was divided into three parts which are Siyasat, Muzlim, Qada. The Siyasat deals with military and political offences. Muzlim deals with the disputes of servant and their owner. Qada deals with the ordinary civil and criminal matters. The Muslim court is in the direct control of Mughal ruler. But in matter of giving justice fair manner the judiciary are independent. In Mughal period the judiciary is not separate from executive but it is seen that the judges giving judgment in cases are free to make decision without any influence of executive. Which shows that the independent judiciary idea is not followed absolutely but it is followed partially in the court judgment and serving justice in fair and practical manner which is the main motive of the idea of independent judiciary.

iii. Evolution in the modern period

With the end of “Mughal empire” the medieval period also come to an end. Which led to start a modern period in the mid-18th century. In modern period the rule of India come into the hand of the European country. The East India company established in India who is a British based trading company starts its business in India and gradually take over the rule from Mughal last ruler. And started their own rule in a large part of India. They established their factories in India. The presidency town were established by the East India Company which are name as Madras, Bombay, Calicut. All the presidency town were near the port which is beneficial for the trading purpose to the East India Company. Along with it the East India Company also established courts in presidency town which is called as “Court of agents and council” these courts firstly established in the Madras and after it in other presidency towns. These court have jurisdiction to hear all civil and criminal matters of all English people living in the presidency town. The company servant was appointed as the judges of the courts and they mostly refer all the cases to England because of the unclear procedure and system of the Judiciary. For native people such as Hindu and Muslim there is a separate court for all the native people of India. These courts are called as “Choultry Court” and all the petty offences of civil and criminal nature were tried by this court. The head man of the village was also the judge of these courts. And called as “Adigar”. After 1666 the “Choultry court” system was changed. After the

⁸ J.L. Mehta, History of Medieval India: Mughal Empire 458-73 (Sterling Publishers Pvt. Ltd Delhi 1st edn., 1981); Muhammad Azhar, Social Life of the Mughal Emperors 95-109 (Gitanjali Publishing House New Delhi 1st edn., 1974).

changes “Adigar” was no longer be the judge of these court. The company made the companiesservant as the Judge of these court also. The court were sits 2 days in a week and their jurisdiction were increased to try all the civil cases of amount not more than 50 pagodas (currency at the time of company rule) and other petty criminal offences. There were mainly 3types of judges who hear the cases which are Mini Master, Pay master and Custom Master. If the parties of the case not satisfied with the judgment of the courts, then the first and last appealgoes directly into the court of Governor general and its council. After the introduction of Charter act of 1762, the court of agents and council were abolished and new uniform court were established in presidency town. These court are called “Mayors court” which are consistof 1 Mayor and 9 Alderman. In these 9 Alderman the 7 Alderman’s were British born and other2 were of the princely state of India who have the friendship with the British. The main difference in judicial system before the charter act of 1762 and after it. Is the authority of appointment of judges the judges before 1762 charter were appointed by the company but after it the judge get its authority directly by the crown of the England. And the appointment of mayor is done by the Alderman’s which is done annually. And Alderman’s were holding the post till their life and by the removal of Governor General of India by giving reasonable causefor their removal. The removal of them can be challenged in the court of king of England. Thejurisdiction of the mayor’s court was to try all the civil cases and have a special jurisdiction of“Testamentary jurisdiction” which allow them to the probates the wills and all administration orders. By the beginning of this justice system in India the governor general has not any authority on the mayor’s court due to which governor general of all presidency started to interfere in the court proceedings and want to take away the independence of the judiciary. Which result in starting a tension between executive and justice system. Due to this tension a new charter of 1753 introduced which gives power of appointment of mayor to the governor general and council. The new charter also made the British government supreme and made thecourt subordinate in all three presidencies not only this the alderman was also get appointed bythe governor general according to this charter. Which end the working of independent judiciaryin British India. And the British Government took over the independence of judges by controlling the appointment. After this in 1773 the British Parliament introduced a new regulation act which order to replace the mayor’s court with the supreme court in all the presidencies. And the first supreme court were established in the Calicut in the year 1801 and in other two presidencies after it. The supreme court under this charter has more power than incomparison to mayor’s court. According to charter the supreme court is become court of recordand the court jurisdiction extend to try all civil,

criminal, equity cases. But they are still in the control of British government. The supreme court judge consists of one chief justice and other judges ranked lower seniority than chief justice are the judges. All the judges were appointed by the king. And the tenure of judges was also in the hand of crown of England the judges of supreme court hold his office till the king wants and can remove by him at any time. The Supreme court under this charter have power to make laws to regulate the court procedures but the rules were implemented only after the approval of the king and council. Which shows that the judiciary is still in the control of British government and is in the control of British government for not only administration of justice but also for financial aid. Which shows that the idea of independence of judiciary was only seen in the starting stage of British rule but after that Judiciary goes in the control of British crown in England which ends the independent of judiciary in British rule. In same time the Governor general introduced a judicial system for areas name as "Mofussil" these areas are located outside presidency town and judicial system for Mofussil is known as "Adalat system". Adalat courts were established in three area which are Bihar, Orissa, Bengal. The courts were divided on the basis of there nature of their cases. The civil courts were called as Sadar Diwani Adalat and Mofussil Diwani Adalat and criminal court were called as Mofussil Nizamat Adalat and Sadar Nizamat Adalat. the main difference between the Mofussil and Sadar Adalat were that the Mofussil Adalat were presided over by the collector of Mofussil whereas the Sadar Adalat were presided over by the Governor and its two council. In both the Diwani Adalat it was seen that the independence of judiciary was been neglected in these Adalat the executive plays a dominant role in this Adalat system. The Governor and collector is a part of executive as well as the judges in these courts take away the power of judiciary to work independently. In Nizamat courts the Nawab appoints the Daroga as judge and he get the assistance of Chief Qazi, Mufti and Maulvis. These courts were under the control of Governor and council and all cases were under their observation. Which shows these courts have some independence but keeping an eye on the Courts or supervise them can decrease the independence of judiciary and Judges were not work freely in administrating the justice. After this in 1935 the British government pass the Government of India act. Which is the first act that shows the government take some concern toward the independent judiciary this act takes the power of removal of judges from the British crown and give a specific tenure of 60 years to the judges. Which gives the Judges to free from the pressure of the Executive and work independently. This act also talks about the establishment of the "Federal courts" which are the courts above than High Courts and the tenure of judges in these court were also fixed for 65 years and some qualification and for the appointment

of judges is also introduced but their appointment power was in the hand of the British crown. The removal of judges of federal court were also in the hand of crown but they have to give some ground which are misbehaviour or incapability of the judge and if the judicial committee recommends it. With all these powers given to the judges of Federal courts it is easy to understand that these act shows some concern regarding the independence of federal court judges but the system follows for the removal of judges were tangled up and made complex. It is relevant to mention here that the Federal court that set up by British government become the supreme court of India after the British government rules end.

B. Evolution of judicial independence in Australia

The general history of Australia is not so long as geographically it is an island country which is situated in Australia continent. The discovery of this Island is held in 1606 by a Dutch before it the natives that reside there were the “Aboriginal Australians” and “Torres Strait” Islanders. Aboriginal people inhabit the mainland and many offshore islands, while Torres Strait Islanders come from the islands of the Torres Strait, which is located between the tip of Cape York in Queensland and Papua New Guinea⁹. These native of Australia having their own rich culture. It is necessary to understand that the laws and judicial system of that time was mostly oral and can seen in their traditional practices due to which there were less sources for the study of pre legal history of australia. by this reason the actual legal history we study is from the starting of British colonial rule in australia. In pre-colonial times, the judiciary struggled to be independent, with governors representing the British Crown having considerable influence in legislative affairs. Under the British Crown, a colonial court system was established where governors acted as representatives of the monarch. This centralized control had a significant influence on court cases, including the appointment and dismissal of judges. The lack of a formal and independent judiciary during that period meant that legal authorities often operated within a framework where the executive could disrupt or manipulate their decisions. The absence of a separate judicial office and the dependence on officials appointed by the colonial administration further emphasized the limitations of judicial autonomy. Early colonial judges faced the delicate task of balancing their legal obligations with the political directives of the colonial authorities, which could jeopardize the ideal of impartiality. This period laid the basis for the further development of Australia

⁹ Smith C. & Burke H. (2007). Digging it up down under: a practical guide to doing archaeology in australia. Springer Science+Business Media LLC. January 8 2024

and the legal system and highlighted the need for constitutional guarantees and legal provisions to strengthen the principle of judicial independence. During the colonial period in Australia in the 1850s, the independence of the judiciary had improved, and was somewhat more favourable than in the early days of settlement. In the mid-nineteenth century, efforts to formalize legal structures and establish separate judicial systems intensified. Although the influence of the British Crown and colonial governors continued, some measures were taken to strengthen the separation of powers. The role of the judge became more transparent, and legal professionals such as lawyers and solicitors began to play a greater role in the judicial process. The increasingly autonomous Australian colonies began to establish laws and regulations that led to a more formal legal framework. However, judicial independence appears to be a complex interaction between local colonial powers and the influence of the British legal system. The lack of a unified legal system and the coexistence of colonial powers made it difficult to achieve a standardized approach to legal autonomy throughout the country. As Australia entered the second half of the 19th century, the drive to achieve greater independence and improve legal systems continued, laying the groundwork for further developments in independence and future legislation. In 1851 when Edward Hargraves claimed that gold is present in Ophir a city in Australia which results in the increase in population of the colony, due to which court business increased rapidly. Between 1860 and 1884, Australia experienced significant developments in the status of judicial independence as the various colonies continued to progress towards greater autonomy and self-governance. The legal landscape during this period was characterized by a growing emphasis on establishing more robust and independent judicial institutions. Several colonies, such as Victoria, New South Wales, and Queensland, enacted legislation to enhance the separation of powers and insulate the judiciary from executive interference. The introduction of statutes defining the terms and conditions of judicial appointments marked a crucial step in fortifying the independence of the judiciary. The judiciary also saw an increase in the professionalization of legal practitioners, with the emergence of a distinct legal profession that contributed to a more specialized and impartial legal system. The appointment of legally trained judges became more prevalent, further contributing to the professionalization and independence of the judiciary. However, it is essential to note that challenges persisted, and the colonial legal systems still grappled with influences from the British legal tradition and the limitations posed by the colonial administrative structures. Despite these challenges, the period between 1860 and 1884 laid important foundations for the establishment of a more autonomous and independent judiciary in Australia, paving the way for subsequent constitutional and legal

developments in the nation's history. Even the civilian judges were required to obey the orders of the governors, and for many years they also had to follow the 'rules and discipline of war'¹⁰. In 1901, Australia underwent a major constitutional change when the Commonwealth of Australia was established. The position of judicial independence during that period was shaped by the Australian Constitution, which came into force on 1 January 1901. Section 71 of the Constitution played a decisive role in defining the structure of the judiciary by establishing the structure of the judiciary. The Court of Appeal of Australia as a national and supreme court. This constitutional provision was intended to insulate federal judges from political influence and interference and to strengthen the principle of judicial independence. The creation of the Court of Appeal was a milestone in Australia's legal history, providing a centralized and independent forum for the adjudication of constitutional and federal legal issues. The constitution also outlined the terms of office for federal judges and emphasized security of tenure to protect them from arbitrary removal by the executive branch. That constitutional foundation laid the foundation for the development of an autonomous judiciary, ensuring the separation of powers crucial to the functioning of Australia's democratic system. Challenges and conflicts surrounding the independence of the judiciary continued over the years, but the provisions of the constitution passed in 1901 played an important role in forming a strong and independent judiciary in Australia and the current legal system. By the end of 1995, the Australian judiciary's independence represented a new legal structure with established and mature principles that were deeply ingrained in the domestic and legal system. The legal system has developed considerably since the constitutional establishment of the Commonwealth of Australia in 1901. As the highest court, the Supreme Court of Australia has continued to play a central role in interpreting the constitution and ensuring the separation of powers. Before 1995, the judiciary operated with a high degree of autonomy, isolated from direct political interference. Judicial appointments were usually based on merit, legal knowledge and experience, which further strengthened judicial independence. Statutory safeguards, such as those outlined in the Judiciary Act 1903 and subsequent legislation, provided additional safeguards for the tenure and circumstances of judges. In the legal environment, the recognition of the rights and freedoms of individuals also increased in 1995, which encouraged a justice system actively committed to protecting the rule of law. Although challenges to the independence of the judiciary continued to be discussed, by 1995 the Australian legal system had successfully transitioned from a

¹⁰ KERCHER, B. (2021). AMATEUR LAW AT THE FRONTIER. In *Unruly Child: A history of law in Australia* (p. 45). essay, ROUTLEDGE.

colonial structure to a developed and independent judiciary, which is essential to ensure fair and impartial justice. democratic society. The Australian judiciary faced significant challenges and restrictions during the British colonial era, which was challenging. The judiciary operated within a framework where governors representing the British Crown had considerable influence in legal matters. The lack of a formal and independent judiciary in the early years of colonial rule meant that the judiciary faced potential interference from the executive. The emerging legal system struggled to create clear boundaries between the executive and the judiciary. Despite these limitations, the seeds of judicial independence were sown during that period, which laid the foundation for the development of a more independent and impartial judiciary in the years to come. Britain's colonial legacy set the stage for later legal developments and constitutional guarantees that contributed to strong legal independence in modern Australia.

3) Constitutional framework

A) Indian constitution and judicial independence

India adopted new Constitution in 1950. It is a comprehensive and visionary document that serves as the supreme law of the Republic of India. The Constitution reflects the values and aspirations of a diverse and plural nation. It provides the framework for governing the government, defines the distribution of powers between the central and state governments and describes the rights and duties of the citizens of India. The Indian Constitution is unique in its length, including the preamble and 470 articles, making it one of the longest written laws in the world. The preamble states that India is a sovereign, socialist, democratic and democratic country, and values justice, liberty, equality and fraternity as its core values. The constitution also establishes a parliamentary system of government, with the president as head of government and the prime minister as head of government. It includes provisions for separate judicial administration that ensure the separation of powers. courts of various types have been established to administer justice. At the apex of the legal system, a Supreme Court was established with distinct jurisdictions. The High Courts, established in various states to exercise various powers, are the next in line after the Supreme Court. The lower courts are at the base of the hierarchy. The fundamental rights enshrined in the Constitution are guaranteed to citizens. Guiding principles of national policies guide governments to promote social and economic justice. Constitutional amendments can change the constitution to the different needs of the country. The strength and adaptability of the Constitution of India have played an important role in guiding the

country through social and political changes while upholding the principles of democracy, rule of law and individual rights. According to the constitution the Indian President appoints the chief justice and the other justices of the Supreme Court. It requires specific qualification and experience in order for someone to be appointed as a Supreme Court judge. Any citizen of India is eligible to be appointed as judge subject that he should have been a high court judge for the five years or an advocate of a high court for ten years or he is in the opinion of the President is a 'a distinguished jurist'. The tenure of the judges was fixed till the age of 65 years. The constitution of India gives judiciary the power to resolve conflicts between the central and state governments. It is able to review its own rulings and directives¹¹. Articles 124 to 147 of the Constitution specifically delineate the provisions related to the organization, appointment, and functioning of the judiciary. The President of India appoints judges to the Supreme Court in consultation with the Chief Justice and other judges, ensuring a system of checks and balances. Similarly, the Chief Justice of India and the Chief Justices of High Courts appoint judges to their respective courts. The security of tenure, fixed salaries, and provisions barring judges from practicing in other courts or holding office after retirement are incorporated to insulate judges from external pressures. The independence of the judiciary is further reinforced by the separation of powers, which prevents the executive and legislative branches from unduly influencing the judicial process. The Supreme Court, as the guardian of the Constitution, has played a pivotal role in upholding judicial independence through landmark judgments that reaffirm the principles laid down in the Constitution. This commitment to an independent judiciary is a cornerstone of India's democratic framework, ensuring that the judiciary functions impartially, free from external influences, and acts as a bulwark in safeguarding citizens' rights and liberties. In the Constitution, adequate provisions have been given to ensure judicial independence such as security of tenure to judges, allowances, remuneration to be paid from consolidated fund of India and multi layered procedure to remove judges are some of the safeguards aim to guarantee judicial independence. The Indian Constitution states that the consolidated fund of India will be used to pay judges' salaries. Which gives the judiciary a financial independence and help to work free and without influence from executive. Article 50 of the Constitution explicitly directs the State to separate the judiciary from the executive to ensure independence. However, the practical implementation of this principle has faced challenges over the years. While the Constitution provides for the appointment of judges by the

¹¹ See, The Constitution of India, 1950 article 137

President, the process has often been criticized for lacking transparency. Moreover, the growing backlog of cases and delays in the legal system raise questions about the efficiency of the judiciary. A truly independent judiciary requires not just separation from the executive but also accountability and transparency in the appointment process. Despite these challenges, the judiciary has played a pivotal role in safeguarding democratic principles, intervening in issues related to fundamental rights and ensuring a check on the powers of the other branches of government. Balancing the need for judicial independence with the imperative of accountability remains a critical aspect of the ongoing discourse surrounding the Indian Constitution's commitment to an impartial and effective judiciary.

B) Australian constitution and judicial independence

The Constitution of Australia serves as the foundational legal document that defines the structure and powers of the Australian government. Enacted in 1901, the Constitution came into force upon the federation of the Australian colonies, marking the birth of the Commonwealth of Australia. It comprises a preamble and eight chapters, delineating the powers and responsibilities of the three branches of government: the Legislature, the Executive, and the Judiciary. One of its defining features is the establishment of a federal system, dividing powers between the Commonwealth and the states. The Constitution outlines the composition and functions of the federal Parliament, consisting of the House of Representatives and the Senate, and vests the executive authority in the Monarch, represented by the Governor-General. The judiciary is established by Chapter III, which establishes the High Court of Australia as the nation's highest court. Significantly, the Constitution incorporates democratic principles, enshrining the right to vote for eligible citizens and emphasizing representative government. While the Constitution can be amended through a referendum, the process is deliberately stringent, reflecting the framers' intention to safeguard the core principles while allowing for necessary adaptations. As the bedrock of Australia's legal and political framework, the Constitution plays a pivotal role in shaping the nation's governance and upholding the rule of law. Constitution also plays an important role in the working of independent judiciary in Australia it is the main pillar for the execution of judicial independence in Australia. Chapter III the constitution gives direct protection to the independence of judiciary. The High Court of Australia is designated as the supreme court by Section 71 of the Constitution. It has appellate jurisdiction over a wide range of legal disputes

and original jurisdiction over constitutional disputes¹². This clause protects the court's independence by outlining its jurisdiction and keeping outside influences. In addition, Section 72 describes the nomination and tenure of federal judges, highlighting the security of those appointments, which can only be revoked for demonstrated misconduct or incompetence through a parliamentary removal procedure. The other federal courts are also bound by the constitutional commitment to judicial independence, which upholds the division of powers and forbids the executive or legislative branch from meddling with the judiciary's operations. These constitutional underpinnings have been reinforced over time by legislative measures and customs, resulting in an Australian judiciary that is independent, unbiased, and empowered to protect the rule of law. Furthermore, laws and statutory provisions strengthen Australia's judicial independence even more. The Judiciary Act of 1903, which emphasizes the value of an impartial and independent judiciary, sets forth the processes for the appointment and removal of federal judges. In addition, Australia's dedication to an independent judiciary was reaffirmed by the Australia Act of 1986, which broke all legal ties between the country and the United Kingdom. Together, these legislative actions support the integrity of the Australian legal system and the rule of law by fostering an atmosphere in which judges can decide cases without fear of interference or retaliation. The dedication to judicial independence continues to be a cornerstone, influencing legal policy and building public confidence in the court's capacity to deliver justice in an unbiased manner. The constitutional guarantee of independence stands guardian not only of the fearless judge but also of the judge who cannot or will not properly discharge the functions of his office¹³. The commitment to insulating the judiciary from external pressures, ensuring the separation of powers, and upholding the rule of law is evident throughout Australia's constitutional and legal framework. While ongoing debates and discussions may explore avenues for enhancing and refining judicial independence, the Constitution remains a cornerstone in fostering public trust and confidence in the impartial administration of justice in Australia.

¹² See, Commonwealth of Australia Constitution Act [Australia], 9 July 1900, available at: <https://www.refworld.org/docid/483ea5622.html> [accessed 10 January 2024]

¹³ Kirby, M. D. (Michael D. (1983). The judges. Australian Broadcasting Corporation p. 52.

4) Appointment of judges

A) **Appointment of Judges in India**

A democratic legal system's appointment of judges in the judiciary is essential because it serves as a foundation for the administration of justice. The appointment process for judges in India has been the focus of much examination, discussion, and reform. The appointment process has a significant impact on the independence, efficacy, and capacity of the judiciary to uphold the rule of law. India's constitutional framework vests the power to appoint judges in a complex interplay between the executive, the judiciary, and the legal fraternity. The Collegium system, which evolved through judicial interpretations, has been a predominant feature but has faced criticism for its opacity and lack of accountability. The collegium system came into existence by using Article 124 for the Supreme Court and Article 217 for high courts given in the Constitution of India, which are generally called as "Appointment Clause of Judges" and by various landmark judicial decisions that shaped the country's approach to the appointment of judges. The evolution began with the "Judges' Transfer Case" in 1982 (*Supreme Court Advocates-on-Record Association v. Union of India*), where the Supreme Court asserted its primacy in judicial appointments, arguing that the executive's role should be limited to a consultative process. Subsequent cases, such as the "Second Judges Case" (*S.P. Gupta v. Union of India*, 1981) and the "Third Judges Case" (*Advocates-on-Record Association v. Union of India*, 1993), further clarified and solidified the Collegium system. In these cases, the judiciary interpreted the constitutional provisions related to judges' appointments, emphasizing the Chief Justice of India's pivotal role in recommending candidates. The Collegium system, as it stands today, is a product of these judicial pronouncements that sought to establish an independent and impartial process for selecting judges to ensure the judiciary's autonomy and integrity. Under the Collegium system, the Chief Justice of India and a collegium of four senior-most judges of the Supreme Court recommend appointments and transfers of judges. This process is characterized by internal consultations within the judiciary, and the recommendations are forwarded to the President of India for formal approval. The Collegium system has undergone several changes over the years through judicial pronouncements, and its workings have been a subject of intense public debate and scrutiny. The dynamic nature of this system reflects the ongoing efforts to strike a balance between judicial independence and the need for transparency and accountability in the appointment of judges in India. This system has many advantages that contribute to the work and independence of the judge. One of its greatest strengths is providing some relief to judges from the intervention of managers. The Collegium

system preserves the principle of judicial independence by giving judges an important role in the selection and appointment of judges and ensuring that judges are free from political influence. In addition, the academic system, in which senior judges participate in the decision-making process, is evaluated as a good system for assessing the professional competence and integrity of judicial candidates. This allows people with experience in the judiciary to conduct internal assessments. The system also promotes the continuity and stability of the judiciary by providing a mechanism for judges to participate in the election of their peers, thus promoting a sense of institutional cohesion. Although the Collegium system is not without its flaws, emphasizing judicial competence and independence in the appointment process, it plays an important role in creating a judiciary that is capable, impartial and resistant to external pressure. Recent reforms, including the introduction of the National Judicial Appointments Commission (NJAC), have sought to address perceived shortcomings in the appointment process, but have also sparked constitutional challenges. The introduction of the National Judicial Appointments Commission (NJAC) in India marked a significant attempt to reform the process of appointing judges to the higher judiciary. Envisioned as an alternative to the long-standing Collegium system, the NJAC aimed to introduce a more transparent and diverse mechanism for judicial appointments. However, its implementation faced formidable constitutional challenges. One of the primary objections raised was regarding the perceived encroachment on the principle of judicial independence. Critics argued that the inclusion of the executive and non-judicial members in the appointment process could potentially compromise the autonomy of the judiciary, violating the delicate balance of powers envisaged by the Constitution. The constitutional challenge hinged on the argument that the NJAC, by providing a role for the executive in judicial appointments, might undermine the judiciary's ability to act as an independent arbiter. The Supreme Court of India invalidated the NJAC in 2015 as a result of a protracted legal dispute centred on the executive's participation in the NJAC and the judiciary's claim of independence. This constitutional conflict brought to light the complexities surrounding judicial nominations as well as the continuous conflict between the executive and legislative branches over maintaining the independence of the judiciary and the principles of checks and balances. The Collegium system and its resistance to challenges show its importance in the institution, but also show the need for continuous evaluation and possible changes to better understand and hold the judges of the establishment in India accountable. The constitutional tussle over reforms, exemplified by the National Judicial Appointments Commission (NJAC) episode, underscores the delicate nature of judicial appointments and the need for a nuanced approach. As discussions on

reforms continue, it is imperative to navigate the delicate balance between safeguarding the independence of the judiciary and introducing mechanisms that enhance transparency and accountability in the appointment process, ensuring the public's trust in the impartiality and integrity of the Indian judiciary.

B) Appointment of judges in Australia

In Australia, the appointment of judges is an important part of the judiciary and affects the independence, integrity and efficiency of the legal system. The methods and procedures used in the adjudication process were carefully considered, showing the ease of connection between the principles of legal independence and the need to be responsible in a democratic society. Australia's judicial appointments are guided by constitutional provisions, legislative frameworks, and established practices that have evolved over time. The appointment process involves a dynamic interaction between the executive, represented by the government, and the judiciary. The historical trajectory of judicial appointments in Australia reveals a continuum of reforms and adjustments aimed at balancing the need for an independent judiciary with the imperative of ensuring a transparent and merit-based selection process. The process of appointing judges is complex and important to maintaining an independent judiciary. The adjudication system of Australia is strictly based on legal and regulatory principles aimed at maintaining the principles of fairness, impartiality and transparency. The Australian Constitution gives the Governor-General the power to appoint federal judges, including High Court judges. Article 72 establishes the conditions for their appointment and specifies the need for professional legal experience. But the actual process, however, has evolved over time, and conventions play a significant role. While the Constitution grants the formal power of appointment to the executive, a convention has developed whereby the executive typically acts on the advice of the Attorney-General. The Attorney-General often consults with legal experts and may consider the recommendations of independent bodies such as judicial commissions or legal associations. In recent decades, there has been an increased focus on enhancing transparency and ensuring a merit-based selection process. While Australia does not have a formal judicial appointments commission, various reforms and discussions have sought to refine the process further. The importance of involving legal experts, conducting consultations, and considering recommendations from independent bodies has gained recognition. Notable changes in the appointment process have also been observed at the state level, with variations across jurisdictions. Some states have established judicial commissions to assess

candidates' suitability and provide recommendations, further reinforcing the commitment to a fair and transparent process. The merit-based appointment process aims to select judges based on their legal expertise, integrity, and suitability for the role. This process contributes to maintaining the independence of the judiciary by ensuring that appointments are made on the basis of professional qualifications and experience rather than political considerations. Although Australia does not have a formal judicial appointment commission as seen in some other jurisdictions, the process is characterized by transparency, consultation and adherence to established standards. Emphasizing merit, combined with arrangements to encourage consultation with the legal community, increases public confidence in the appointment process and thus the independence of the judiciary in Australia. However, the ongoing debates and occasional discussions about possible reforms emphasize the need for continuous improvement and refinement of the judicial appointment system to meet the highest standards of judicial independence and competence. One primary advantage is the emphasis on merit and professional qualifications in the selection process. By appointing judges based on their legal expertise, experience, and demonstrated integrity, the system ensures that those elevated to the bench possess the necessary qualifications to interpret and apply the law judiciously. In addition, the appointment system, if implemented transparently, increases public trust in judges. Knowing that judges are chosen based on their merit rather than political considerations increases the perception of fairness and impartiality in the legal system. This trust is crucial to maintain the legitimacy of the judiciary as an institution protecting the rule of law. Another advantage is the isolation of judges from political pressure or outside influences that can arise in an elected or politically controlled appointment system. By making a choice through a process involving legal experts, hearings and adherence to established criteria, the judge can act independently, without favouritism or undue influence. This independence is crucial for judges to make decisions without retaliation, ensuring the impartiality of justice. In addition, the nomination system often involves consultation with lawyers, bar associations and other relevant stakeholders. This collaborative approach not only brings diverse perspectives to the selection process, but also helps identify respected individuals in the legal community. Judges appointed through such an advisory process are likely to be more widely accepted and trusted by their colleagues, thereby strengthening the integrity of the judiciary. but Many critics argue that political ties or ideological considerations can inadvertently influence the selection of judges, undermining the impartiality and independence of judges. The need for transparency in the appointment process is critical to addressing these issues, and a lack of transparency can raise suspicions about the motives

behind certain appointments. Furthermore, if the appointment process is not designed to promote gender, ethnic or background diversity, the bench may not reflect the broader demographics of the society it serves. This lack of diversity can affect the judicial system and the ability to understand and decide on various issues that affect different populations. Addressing these shortcomings also requires careful consideration of the appointment process and, in some cases, reforms that promote transparency, reduce political influence, and ensure a diverse and representative judiciary. Finding the right balance between leadership and role and other stakeholders; To mitigate these challenges and maintain the basic principles of judicial independence, it is necessary to involve legal experts or judicial commissions. The appointment system of judges in Australia reflects a delicate balance between constitutional provisions, legal conventions, and the imperative of maintaining an independent and impartial judiciary. The emphasis on merit-based appointments, often guided by the advice of legal experts and consultations within the legal community, underscores the commitment to selecting judges based on professional qualifications rather than political considerations. While the absence of a formal judicial appointments commission may be notable, the existing system has demonstrated a level of transparency and adherence to established norms, contributing to public confidence in the integrity of the judiciary. Ongoing discussions surrounding potential reforms indicate a commitment to continual improvement in the judge appointment process, ensuring that it evolves to meet the highest standards of accountability, transparency, and the preservation of judicial independence in Australia.

5) Tenure and removal of judges

A) Tenure and removal of judges in India

Any judicial system's foundation is shaped by the tenure and removal procedures of judges, which have an impact on the delicate balance between judicial independence and accountability. It is essential to conduct a thorough analysis of the procedures controlling the appointment and removal of judges in the Indian context, where the judiciary is essential to maintaining the rule of law and protecting fundamental rights. This research paper explores the complex aspects of judges' tenure and the removal processes in India, with the goal of analysing the constitutional foundations, historical development, and current issues surrounding this important facet of the legal system. The Indian judiciary functions on the tenet of judicial independence, as guaranteed by the Constitution, shielding judges from outside pressures and influences. This independence, though, is not unassailable and

needs to be counterbalanced with systems that guarantee responsibility and moral behaviour. the constitutional provisions, legal frameworks, and landmark judicial decisions that shape the tenure and removal of judges. From independence to the present, India's judicial tenure system has undergone a complex evolution driven by judicial rulings, constitutional provisions, and sporadic legislative interventions. The Indian Constitution's founders aimed to create an independent judiciary as a safety net for defending the rule of law and citizens' rights at the time of independence. Adopted in 1950, the Indian Constitution stipulates that judges are appointed and removed in a way that guarantees judicial independence. The idea of "security of tenure" is ingrained in Article 124, which describes the process for selecting justices to the Supreme Court, and Article 217, which deals with the selection and dismissal of justices to the High Court. Judicial decisions over time have shaped how these constitutional provisions have been interpreted, leading to the development of the idea of judicial independence as a fundamental aspect of the Constitution. Judges' tenure security was strengthened by the seminal case of *S.P. Gupta v. Union of India*¹⁴, also referred to as the Judges' Transfer case. This case upheld the judiciary's superiority in matters of appointments and transfers. In this case the petitioner, S.P. Gupta, who was the Chief Justice of the Himachal Pradesh High Court at the time, along with three other judges, filed a writ petition before the Supreme Court challenging the constitutional validity of the executive's authority to transfer judges without their consent. The heart of the matter was the interpretation of Articles 124 and 217 of the Indian Constitution, which detail the procedure for the appointment and transfer of judges. The Supreme Court, in its judgment delivered in 1981, asserted the independence of the judiciary and established crucial principles related to judicial appointments and transfers. The court held that the opinion of the Chief Justice of India, in consultation with his or her colleagues, must be the primary consideration in the appointment and transfer of judges. This judgment solidified the role of the judiciary in matters of its own composition, asserting that the executive could not unilaterally transfer judges without the concurrence of the Chief Justice of India. This case laid the foundation for the principle that the judiciary, through the Chief Justice of India and the Collegium system, has a paramount say in the appointment and transfer of judges. It significantly contributed to the development of the broader concept of judicial independence and set a precedent for future cases and discussions regarding the delicate balance between the executive and the judiciary in matters of judicial appointments and transfers in India. However, the

¹⁴ AIR 1982 SC 149

evolution of the tenure of judges in India has not been without challenges. The Memorandum of Procedure (MoP) between the executive and the judiciary, which outlines the appointment process and terms of service, has been a subject of debate and occasional tension. The National Judicial Appointments Commission (NJAC) Act, passed in 2014, aimed at restructuring the appointment process but was struck down by the Supreme Court in 2015, reaffirming the primacy of the Collegium system. As of now, the tenure of judges in India remains defined by the retirement age specified in the Constitution. According to Article 124 of the Indian Constitution, the Chief Justice of India (CJI) and other judges of the Supreme Court hold office until they attain the age of 65. Similarly, judges in the High Courts, as per Article 217, retire at the age of 62. In India, the removal of judges is a crucial procedure that guarantees the judiciary's careful balance between accountability and independence. A Supreme Court judge may be removed from office by an order of the President on the grounds of proven misconduct or incapacity, as per Article 124(4) of the Indian Constitution. In a similar vein, Article 217(1)(b) describes how a High Court judge can be removed from office. In order to prevent arbitrary actions, the removal process is complex and incorporates multiple constitutional safeguards. A committee is then established to look into the allegations after a motion is made in either the Lok Sabha or the Rajya Sabha, the house of parliament. The Chief Justice of India, a sitting Supreme Court justice, and a renowned jurist usually make up this committee. Although not legally binding, the committee's conclusions are highly influential. The President may issue the removal order if the motion is approved by Parliament by a special majority. The difficulty of this procedure emphasizes how serious it is to remove a judge from the bench. In order to maintain judicial independence and guarantee that judges are held responsible for their actions, a removal mechanism has been implemented. Tight procedural rules and the participation of both chambers of Parliament prevent pointless or politically driven removal attempts. Despite being constitutional, the removal process is rarely used in practice, which reflects the judiciary's dedication to maintaining high standards of integrity and behaviour. This guarantees the judiciary's continued public trust and confidence, which is essential to the efficient operation of India's justice system. The process of removing judges in India is a delicate yet essential aspect of upholding judicial accountability while preserving the cherished principle of judicial independence. The constitutional provisions and mechanisms for the removal of judges, particularly through impeachment, underscore the gravity and rarity of such proceedings. However, the infrequency of impeachment proceedings does not diminish their significance in ensuring that judges are held to the highest ethical standards and that the judiciary remains

accountable to the people. The constitutional safeguards and procedural intricacies in the removal process reflect a careful balance, preventing the arbitrary removal of judges while allowing for accountability in cases of proven misconduct. As India's legal landscape continues to evolve, ongoing discussions and potential reforms in the removal process should be guided by a commitment to both preserving judicial independence and strengthening mechanisms that uphold the integrity and credibility of the judiciary in the eyes of the public and the tenure system needs to be periodically reviewed and changed to address issues with accountability, transparency, and ethical standards—even though it is essential to maintaining judicial independence. It's still difficult to strike a balance between giving judges protection and setting up efficient systems for accountability and oversight.

B) Tenure and removal of judges in Australia

The tenure of judges forms the bedrock of a resilient and independent judiciary, playing a pivotal role in balancing judicial independence with the need for accountability. In the context of Australia's legal system, examining the tenure of judges stands as a critical exploration, delving into the mechanisms that secure the independence of the judiciary while ensuring transparency and trust in the administration of justice. This research paper embarks on an in-depth analysis of judicial tenure in Australia, elucidating the historical evolution, constitutional underpinnings, and contemporary nuances that define this fundamental aspect of the Australian legal framework. Australia's commitment to judicial independence is enshrined within its constitutional framework, where provisions establish safeguards to insulate judges from undue influence and ensure their security of tenure. Section 72 of the Constitution outlines the conditions of appointment and tenure for federal judges, emphasizing the importance of stability and independence in judicial roles. This section states that a federal judge's tenure is secure during good behaviour until the age of 70. This provision reflects a commitment to the principle of judicial independence, ensuring that judges are not subject to arbitrary removal by the executive or legislative branches, thereby promoting the impartial administration of justice. The explicit mention of a federal judge's security of tenure "during good behaviour" underscores the importance of maintaining judicial independence by insulating judges from political pressures or whims. The specified age limit of 70 establishes a clear framework for the end of a judge's term, providing a balance between judicial stability and the need for generational renewal within the judiciary. Section 72 thus serves as a constitutional safeguard, contributing to the integrity and independence of the Australian judiciary by providing clear guidelines for the removal of federal

judges. Section 72 of the Constitution of Australia is also a foundational provision that outlines the conditions and procedures for the removal of federal judges. This section delineates the grounds upon which a federal judge can be removed from office. According to Section 72, a federal judge can only be removed from office on the grounds of proved misbehaviour or incapacity. The process for removal involves a detailed and rigorous parliamentary procedure. The Constitution grants the power of removal to the Governor-General, acting on an address from both Houses of the Parliament in the same session. This constitutional safeguard emphasizes the seriousness and gravity of the decision to remove a federal judge, requiring a consensus from both the House of Representatives and the Senate. The intentional framing of Section 72 reflects the framers' commitment to judicial independence while recognizing the necessity for accountability within the judiciary. The provision ensures that the removal of judges is a rare and well-considered process, providing a crucial balance between maintaining an independent judiciary and holding judges accountable for any proven misbehaviour or incapacity. Section 72 embodies the constitutional principles that underpin the integrity of the Australian legal system and the separation of powers. In Australia, the development of the tenure and removal process of judges has been significantly influenced by landmark cases that have shaped and clarified the principles governing judicial independence and accountability. While the Constitution provides the foundational framework, several crucial case laws have played a pivotal role in elucidating and reinforcing the principles associated with judicial tenure. One such landmark case is the *Boilermakers' Case* (1956), which contributed to the interpretation of the constitutional provisions regarding the security of judicial tenure. The High Court of Australia, in this case, affirmed the principle that judges can only be removed for "proved misbehaviour or incapacity." This decision established a high threshold for the removal of judges, reinforcing the notion that judicial independence requires safeguards against arbitrary executive actions. Another important case was the *Judiciary Act* (1921), in which the supreme court clarified the legal limits on the removal of federal judges. The court emphasized that the power of revocation must be exercised in strict compliance with what is established in the Constitution. These decisions comprehensively describe the judiciary and its role in interpreting and maintaining the principle of legal independence in the legal system. More recently, the case of *Attorney General (Cth) v Alinta Ltd* (2008) contributed to the debate on the legal position. Although unrelated to the impeachment of judges, this case demonstrates the importance of judicial review in ensuring accountability for executive decisions and indirectly influences the broader discourse on accountability mechanisms for judges. These cases, among others, have been

instrumental in defining the contours of judicial tenure and removal in Australia, reinforcing the constitutional safeguards and emphasizing the need for a robust and independent judiciary. They have shaped the jurisprudence surrounding the principles of security of tenure, ensuring that the removal process is a carefully considered and constitutionally compliant mechanism. The development of case law in this realm not only elucidates the legal principles but also contributes to the ongoing refinement and evolution of the judicial tenure and removal process in Australia. Judicial tenure and removal in Australia are a delicate balance between ensuring the independence of the judiciary and creating accountability mechanisms. The constitutional provisions, reinforced by significant case law, emphasize security of tenure for judges and set a high threshold for removal based on "proven misconduct or incapacity." Developing jurisprudence related to the administration of the legal system underscores the commitment to maintaining a strong and impartial judiciary. While the system has shown resilience, continuous evaluation and improvement is necessary to meet current challenges and increase public confidence in the judiciary. Constitutional principles, clarified through case law, guide the ongoing debate on the tenure and removal of judges in Australia, and ensure the harmonious interplay of independence and accountability in the pursuit of justice.

6) Comparative strength and weaknesses

A) Strength and weakness of India in terms of judicial independence

India's constitution upholds the independence of the judiciary, demonstrating a dedication to protecting judges from unwarranted outside pressure. Separating the judiciary from the executive branch is required by Article 50 of the Constitution, which provides the framework for a separate adjudicatory system. Nonetheless, a thorough investigation is required due to the changing nature of the judiciary's relationship with the executive branch, legislative interventions, and societal expectations. Any healthy democracy must have strong judicial independence because it embodies the objectivity and independence necessary to protect the rule of law. Evaluating the degree of judicial independence is critical in the Indian context, where the judiciary is essential to protecting fundamental rights and maintaining checks and balances. Although the Indian constitution has a long history of upholding the principles of an independent judiciary, in recent times there has been a growing examination of the system's shortcomings. A number of issues have been brought up for discussion, including claims of corruption, executive meddling, backlogs in the court system, and opaque judicial appointments. These issues affect public confidence in the administration of justice

as well as the effectiveness of the court. One significant weakness lies in the process of judicial appointments. The current Collegium system, which gives judges a significant role in appointing their peers, has faced criticism for its lack of transparency and accountability. Critics argue that this system may lead to potential biases, favouritism, or an insufficient assessment of merit. Another challenge is the delay and backlog of cases within the Indian judiciary, which compromises the timely dispensation of justice. This backlog not only affects the efficiency of the legal system but also raises questions about the judiciary's capacity to deliver justice in a timely manner, a crucial aspect of judicial independence. Additionally, concerns have been raised about the susceptibility of judges to external influences, including political pressures or corrupt practices, which may compromise their impartiality. Instances of judicial overreach or activism have also been debated, with critics arguing that it might encroach upon the domain of the executive and legislative branches, challenging the separation of powers. Addressing these weaknesses is crucial for fortifying judicial independence in India and ensuring the judiciary's effective role in upholding the rule of law and protecting individual rights. On the other hand, if we see the strength of Judicial independence of India it is rooted in the country's constitutional framework, which establishes a robust and autonomous judiciary as one of its core principles. The Indian Constitution, adopted in 1950, enshrines the concept of an independent judiciary in its fundamental structure. The doctrine of separation of powers, implicitly present in the Constitution, ensures that the judiciary operates independently from the executive and legislative branches. The appointment process of judges, primarily overseen by the Collegium system, emphasizes the judiciary's ability to autonomously appoint and transfer judges without undue influence from the executive. The Constitution also guarantees the security of tenure for judges, protecting them from arbitrary removal and allowing them to adjudicate without fear of reprisal. The Supreme Court of India, as the apex court, serves as the guardian of the Constitution and has consistently asserted its authority to interpret and uphold its provisions, even against the government. Landmark judgments, such as *Kesavananda Bharati v. State of Kerala*¹⁵ (1973), have established the basic structure doctrine, reinforcing the judiciary's role in safeguarding essential constitutional principles. The judiciary's power of judicial review allows it to scrutinize legislative and executive actions, ensuring their conformity with the Constitution and protecting citizens' fundamental rights. One additional significant instrument for advancing judicial activism and guaranteeing

¹⁵ 1973) 4 SCC 225: AIR 1973 SC 1461

underprivileged groups in society access to justice is public interest litigation, or PIL. Through Public Interest Litigations (PILs), the judiciary has supported social justice causes and served as a check on government excesses.

B) Strength and weakness of Australia in terms of judicial independence

Any democratic society must be built on the solid foundation of judicial independence, which represents the judiciary's independence and ability to dispense justice in an unbiased manner. In Australia, a country firmly devoted to democracy and the rule of law, assessing the strength of judicial independence is an important endeavour. Australia's constitutional framework, which guarantees the separation of powers between the executive and legislative branches, upholds the country's commitment to judicial independence. The Constitution emphasizes the vital role of an unbiased judiciary in maintaining the rule of law by outlining measures that protect judicial tenure and shield judges from arbitrary removal. The strength of judicial independence in Australia is deeply entrenched within the nation's legal and constitutional fabric, ensuring the judiciary's autonomy and insulation from external influences. The High Court of Australia, as the apex court, plays a pivotal role in upholding the Constitution and interpreting its provisions, ensuring adherence to the rule of law. Landmark cases such as the *Boilermakers' Case* (1956) have solidified the principle that judges can only be removed for "proved misbehaviour or incapacity," reinforcing the judiciary's autonomy from the executive branch. Additionally, the judiciary's power of judicial review allows it to scrutinize legislative and executive actions, ensuring their alignment with constitutional principles and protecting individual rights. Judges in Australia are appointed largely by the executive branch, but recommendations from legal experts are also taken into account, which helps ensure that judges are chosen on the basis of merit. This procedure encourages the appointment of competent and unbiased judges and emphasizes the judiciary's independence from political meddling. The resilience and strength of judicial independence in Australia are demonstrated by the judiciary's adherence to legal principles, its capacity to serve as a check on governmental actions, and its dedication to upholding the rule of law, even in the face of contentious issues. The strength of the judiciary's independence is demonstrated by its unwavering commitment to interpreting the law without regard to outside influences and by its crucial role in upholding the integrity of Australia's legal system. While Australia takes pride in its strong legal system and commitment to judicial independence, certain weaknesses and challenges have been identified. One major concern is the lack of a formalized and transparent

process for judicial appointments. Unlike some jurisdictions that have established independent judicial commissions or similar bodies to recommend candidates for judicial positions, Australia relies heavily on the Attorney-General's discretion and consultation, which may introduce some subjectivity or political influence. This perceived opacity in the appointment process has sparked calls for greater transparency and standardized criteria to boost public trust in the courts. Another weakness relates to the absence of a clear and codified legal framework explicitly guaranteeing the security of tenure for federal judges. While the Constitution implies security of tenure, the absence of explicit statutory provisions leaves room for potential ambiguity. This issue has been a subject of discussion regarding the need for legislative reforms to explicitly safeguard judges from arbitrary removal or interference. Furthermore, the lack of a comprehensive national framework for judicial conduct and ethics has been considered a weakness. While individual jurisdictions have their codes of conduct, a unified and standardized approach is seen by some as essential to ensuring consistent ethical standards across the judiciary. These identified weaknesses, while nuanced, highlight the ongoing need for review and reform to strengthen judicial independence in Australia. Addressing these concerns through legislative amendments, increased transparency, and a commitment to clearly defined ethical standards would help to strengthen and protect the Australian judiciary. Australia has a strong framework that largely protects judicial independence. However, there is an ongoing need for careful evaluation and reforms to address potential weaknesses. Striking a balance between preserving the judiciary's autonomy and implementing transparency and accountability mechanisms will help to strengthen Australia's judicial system overall. The country's dedication to upholding the rule of law and the integrity of its judiciary remains unwavering, providing a solid foundation for ongoing improvement and adaptation in the area of judicial independence.

7) Conclusion

To sum up, the examination of judicial independence in Australia and India through comparison highlights the complex relationships that influence the resilience and strength of each country's judiciaries. While both countries are dedicated to maintaining the rule of law and guaranteeing an unbiased judiciary, differences in their legal systems and constitutions lead to different ways in which judicial independence is expressed. India, with its elaborate system of judicial review, a complex appointment process driven by the Collegium system, and a rich tradition of public interest litigation, showcases a judiciary that actively asserts its autonomy. The Supreme Court's role in interpreting and

safeguarding the Constitution, often in the face of political and executive challenges, exemplifies the strength of judicial independence. However, the system grapples with challenges such as backlog of cases, delays in justice delivery, and debates over accountability mechanisms. Australia, with its constitutional safeguards, merit-based appointment processes, and a strong tradition of the rule of law, has cultivated a judiciary known for its independence and professionalism. The clarity in the appointment process, guided by constitutional provisions, contributes to a system that prioritizes judicial autonomy. However, Australia's model is not without debates, particularly regarding the transparency of appointments and occasional calls for broader reforms. While both countries prioritize judicial independence, the comparison highlights how historical, cultural, and constitutional factors shape the practical manifestations of this principle. The strengths and challenges in each system offer valuable lessons for the continuous refinement and improvement of judicial independence globally. Both countries showcase a commitment to safeguarding the judiciary's autonomy, but they employ different mechanisms, reflecting their respective legal traditions and socio-political contexts. Ultimately, the comparative study serves as a foundation for informed discussions, reforms, and best practices that can enhance the vitality of judiciaries in diverse legal and cultural contexts.

