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"INDEPENDENCE OF JUDICIARY: A COMPARATIVE ANALYSIS BETWEEN INDIA AND NEW ZEALAND"

AUTHORED BY - SHRISHTI VERMA

Chapter 1

1.1Abstract

India ranked 53 in an independent judiciary ranking by the world economic forum in 2017-18 with a score of 4.3 out of 7 based on how independent the judicial system is from government, individuals and company.[1] From the preceding few years New Zealand has been under the groups of world's highest scoring countries, handing over to this field by scoring 6.7 points and upholding the world's second best level of independence for judicial authorities.[2] If we acquiesce with the trend from past few years of ranking of India in this particular index, formerly we can analyze that it keeps fluctuating from point 3 to point 4 and the highest point secured by India in this index was 5.3 in the year 2007[3] and after that India never achieved that point again and on the separate hand New Zealand is persistent in accomplishing these points and indeed improving itself in this peculiar subject signified by new reformative actions in a measure to attain the full score.

Judicial independence is the most substantial subject for a democratic country as it is instantaneously proportional to the quality of democracy which abounds in any country, so in other words it's the mirror of democracy and other various even if it possesses a written constitution like India or an unwritten constitution like New Zealand. This term "Judicial Independence" was first emphasized by the legal jurist and political philosopher Montesquieu in his book Spirit of laws after expanding the modern concept of doctrine of separation of power.[4] The central point of this comprehensive research study is to examine every element

[1] World Economic Forum Global Competitive Index, WBG Rep. On Judicial Independence 2017-2018, https://tcdata360.worldbank.org/indicators/h5ebaeb47?country=IND&indicator=669&countries=NZL&viz=line_chart&years=2007,2017 (Between New Zealand and India)

[2] WBG Rep., (1.06) Judicial Independence, https://reports.weforum.org/pdf/gci-2017-2018-scorecard/WEF_GCI_2017_2018_Scorecard_EOSQ144.pdf

[3] *Supra* note 1.

[4] MONTESQUIEU, SPIRIT OF LAWS, 152 (Nugent ed. 1823).

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ascribed to judicial independence, its philosophical view, its historical view and constitutional view, modern applicability view of both the respective countries India and New Zealand.

New Zealand is singled out for the comparative evaluation with India as they reside to the same historical colonial domination and both were influenced by it in some aspect but they are divergent from each other at numerous levels. But despite all this, New Zealand has one of the most powerful judiciary systems in the world and India is on the way of getting it with understanding and examining about the new reformative actions which should be drawn for the judiciary so that we can reconstruct a trail contributing to one of the most potent and effective judicial systems.

1.2 Research Methodology

At the preparatory stage of research, the researcher has retained the doctrinal form of Research to compose the primary and secondary sources of data from the library like books, journals, law commission reports, conventions, precedents, articles and research paper, acts, code to formulate an initial base of research. So the researcher can be apprehensive of previously written data on the discussing issues. The reception of research has been based on contemporary principles presented by the judiciary through various case laws, jurisprudential aspects which a researcher uses as the evidence to accentuate her new arguments. Besides, this comparative form of research has been organized to accomplish the focus of this research study that is to discover a trail which could be adhered to reach the goal of establishing Indian judicial system one of the most compelling arrangements in the world by magnifying understanding of the subject matter that is the Judicial independence: a comparative interpretation and analysis between India and New Zealand.

1.3 Research Objective

The basic goal of this research paper is to understand and determine the term judicial independence in various aspects like historical, jurisprudential, constitutional and legislative basis for better interpretation and scrutinizing the significance of the terms linked to the subject matter. Then the onus of objective shift towards narrowing down the issue by examining the consideration of the judicial independence level of both the respective countries and to strike out the reason why they both stand at different levels in the subsequent subject matter. The focused intention of this comparative analysis is to figure out the level of gap in between the

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two respective countries and recognizing the elements contributing towards this gap, Absolute objective is to think markedly about the reformative actions toward filling this gap which will operate as the intensities for India towards constructing strong judicial independence system.

1.4 Research Questions

- What is the expression, scope, types, meaning, various prospects of 'judicial independence' and associated terms? (Historical, jurisprudential, constitutional and legislative prospects)
- Examining the 'judicial influence level' of both the countries and to grasp why there is the level of gaps in between them due to subject matter and what are the different elements hindering 'Indian judiciary' for achieving one of the most powerful judiciary systems in the world?
- What are the reforms which could be chosen for India-based on the comparative analysis which is conducted in between the respective countries?

1.5 Literature Review

The research paper singled out as **"Independence of Judiciary in India[5]"** which accumulates on the historical prospects of judicial independence in India and also tries to explain about all the conditioned research like its varied interpretations, meaning, objective, its importance in India in a hasty manner. It also seeks to feature the elements like the legislative actions and external forces which try to manipulate the Indian judiciary. It was the constructive article for the researcher which tries to express visions and perspectives about the numerous substantial topics referred to this subject matter.

A research editorial titled **"Independence Of The Judiciary: A constitutional Response[6]"** which is the most comprehensive article concentrates about describing the conception of judicial interpretation and specifically researching its inclination toward the constitution of India with the help of various precedents. It likewise likes to convey the view on judicial accountability, which is the complementary term used together with judicial independence. This article allows the researcher to understand the constitutional view of judicial independence

[5] Santosh Kumar Pandey, *Independence of Judiciary in India,* 4 IJl 95, 95-97 (2014).
[6] Dinesh Singh Chauhan, *Independence Of The Judiciary: A constitutional Response,* (2017) https://shodhganga.inflibnet.ac.in/bitstream/10603/128562/17/11_chapter%204.pdf

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and other pertinent concepts with resourceful insights of case law and evolution of the complementary concept in India.

Transparency and Accountability in the Indian Judicial System[7] is the research article which highlights and also makes the researcher aware of the other view of the subject matter that is the exploitation of judicial independence in India by judges in order to escape from their accountability.

The law review titled **The Essence of Judicial Independence**[8] covers the various important aspects like evolution, jurisprudential view considering the subject matter, and was a constructive article for the deep jurisprudential knowledge on the examined subject. **Independence of Judiciary**[9]**,** this research article focuses on the constitutional provision related to the subject matter with the help of the precedents. .

"Judicial Independence: The New Zealand Experience[10]**"** the research article which concentrates on not only to disparate views which are explaining judicial independence but also critically evaluate the legislature which are competent for the higher level of judicial independence in the country. Beside this it also discusses the numerous provision and case laws looking upon the subject matter. This was the most vital article which gives a new outlook to this current research paper and also helps the research to analyze sharply the components which are attending to a moderate level of independence in the judicial system and requires to be administered in a convincing alternative.

"Law Reform in New Zealand[11]**"** This article solely accrues on the law reforms which took place after 1987, which encompasses the historical prospect of the development of the perception of judicial independence in New Zealand. This article is a means to determine the consequential steps which took place for obtaining judicial independence and will cooperate to facilitate and dispose of some reformative processes ascribed to the subject matter at an Indian level of judiciary.

[7] Gayatri Rokade, *Prof Abhijit Vasmatkar & Prof. Richa Dwivedi*, 6 JCR 293, 293-296 (2019).
[8] Irving R. Kaufman, *The Essence of Judicial Independence*,80 COLUMBIA LAW REVIEW ASSOCIATION INC. 671, 671-701 (1980).
[9] Pratik patnaik, *Independence of Judiciary*, SSRN 2, 2-23.
[10] Andrew P. Stockley, *Judicial Independence: The New Zealand Experience*, 3 Austl. J. Legal Hist. 145 (1997).
[11] J. H. Farrar, *Law Reform in New Zealand*, 7 OXFORD JOURNAL OF LEGAL STUDIES 151, 151-154 (1987).

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The Rise of Judicial Activism in New Zealand[12] it discusses about the circumstances where the judicial activism plays a decisive aspect in bringing up the reform in the country and it is recognized as the raising of judicial independence of that country, establishing it stronger by eliminating pollutants like corruptions, etc, on the premise of which the researcher works to set up path free from the hindrance of influence which ultimately result in the development of the judicial system of India

Chapter 2

What is judicial independence ?

This chapter with solely deals with screening the numerous prospects and interpretation of judicial independence and related aspects of the subject matter of both respective countries (India and New Zealand):

2.1) Jurisprudential and Historical Roots Of the Judicial Independence

"The provenance of the dogma of judicial independence is to be encountered in the evolution

[12] James Allan, *The Rise of Judicial Activism in New Zealand*, 4 A JOURNAL OF POLICY ANALYSIS AND REFORM 465, 5-474 (1997).

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of a constitutional democratic state in Europe"[13] Expressed by Joseph Diescho This doctrine is positioning towards the roots in Montesquieu's book, Spirit of the Laws (1748) In which he analysed the conception of separation of powers, that each significant work like legislation, administration, executive and judicial functional should be administered under distinct bodies.[14] Where the independence of the judiciary emerged as the fundamental value of separation of powers.

Independence, in other words, is not an end in itself, but an ―instrumental value, a mechanism of shielding a fundamental value, that of the impartiality of the judge which for centuries has been symbolised by the blindfolded Lady of Justice. The essence of judicial activity endures in the circumstance that it is exerted by an equitable and neutral third party which propel the core purposes of every country and take care of it from any deterioration by modifying the way of it.[15]

The judiciary is a substantial social institution, advances to constructing the life of the community.[16] The appropriate handling of governmental authority is a preconditioned prospect of the rule of law stipulation or limitation on the authority of the government is the soul of constitutional democracy.[1718] The rule of law is particularly ensured for the maintenance of justice between man and man, man and State and the only security for a moderated and ordered liberty.[19] In fulfilling this role, the courts become powerful actors in sustaining the capitulation of the State to law.[20] Until the 18th century, judicial independence was an interpretation unknown to the British legal system. The emergence of judicial independence as a modern concept in the United Kingdom ('UK') can be ascertained to 1701 when the Act of Settlement was drawn up. This is what Shetreet refers to as the first phase of British judicial independence when the proposition was domestically owned.[21] The Act of Settlement among diverse things diminished the Crown's judicial powers and sported as an insured against future monarchs' squandering of power after the 1688 Great Revolution. This was complied to by the second

[13] Mia Swart, *Independence of the Judiciary*, MPECCOL, 2-19 (2019).
[14] MONTESQUIEU, SPIRIT OF THE LAWS (1748)
[15] MARCEL STORME, INDEPENDENCE OF THE JUDICIARY: THE EUROPEAN PERSPECTIVE' IN SHIMON SHETREET AND CHRISTOPHER FORSYTH 85 (Martinus NIJHOFF Publishers 2012)
[16] HAROLD J. LASKI, STUDIES IN LAW AND POLITICS, 163 (New York: George Allen & Unwin Ltd., 1932).
[17] J.J. Spigelman AC, "*The Rule of Law and Enforcement*," 201 UNSW L. J. (2003).
[18] THOMAS C. GREY, "CONSTITUTIONALISM: AN ANALYTIC FRAMEWORK," 218 (New York: New York University Press, 1979).
[19] RAJEEV DHAVAN & THOMAS PAUL, NEHRU AND THE CONSTITUTION, 64 (N. M. Tripathi Pvt. Ltd., 1992).
[20] Christopher M. Larkins, *"Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*," 44 AM. J. COMP. L. 605 (1996).
[21] S SHETREET, JUDGES ON TRIAL: A STUDY OF THE APPOINTMENT AND ACCOUNTABILITY OF THE ENGLISH JUDICIARY (1976).

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state when the British perception of judicial independence happened to be employed internationally.[22] The endorsement of the speculative design of separation of powers doctrine by alternative states and the manual of Article III US Constitution are illustrations of the exportation of judicial independence during the second phase.[23]

The independence of the judiciary is the substance which is likewise emphasized and reinforced at an international level by numerous conventions where it inspires the various countries for completing the independence of the judiciary. As its level of indicator for the world how any country is adequate, assessable and efficient on the basis of parameters of the independent judiciary.

We can say that the level of independent judiciary expresses the substantial constitutional foundation, effective government and prosperity of any country. In other expressions, it can likewise be exhibited as the ability to fight for any country. Judicial Independence can be instantaneously commensurate to the prerogative of any country. Various conventions emphasising on Independence of Judiciary are:

> Article 10 of the Universal Declaration of Human Rights maintains [24]: Independence of the judiciary is the only instrument through which the Human rights can be secured, can evolve, harmful social norms can be blurred. Article 14 (1) of the International Covenant on Civil and Political Rights (1996) states that « (...) everyone shall be empowered to a fair and public hearing by a competent, independent and impartial tribunal established by law.»[25]

Where it marks out the principle of equality of justice to each and everyone and the quality of justice which should be received to everyone that carries impartiality, independency and competency with it. So that that justice could be delivered in the absence of corruption, and any kind of pressure from the judiciary so that the evolution of ideas, interpretation can be supplemented.

> The EU Charter of Fundamental Rights, under Article 47 (2), demonstrates that «everyone is entitled to a fair and public hearing within a reasonable time by an

[22] S Shetreet, *'The Normative Cycle of Shaping Judicial Independence in Domestic andInternational Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges'* 10 CHICAGO J OF INTL LAW 275 (2009).
[23] *Supra note 14.*
[24] United Nations, universal declaration human rights, https://www.un.org/en/universal-declaration-human-rights/ (last visited Oct. 20, 2020).
[25] United Nations Human Rights, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (last visited Oct. 20, 2020).

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independent and impartial tribunal previously established by law».[26]

Further with the same intent but it specially concentrates about the time which likewise depends on the hindrance which is induced because of the dependency of judiciary on alternative factors. It depends on cases to cases, circumstances to circumstances. Even if we delve into the independence of the judiciary and its preconditions, dilemmas, and performance, it modifies from country to country. It likewise depends and manifests the core aspects of the constitution which is outlined.

From the normative elements enunciated, it forthwith reflects that the perception of independence appears usually accompanied with the provision of the fair trial, that it, as a paramount right of the citizens.[27]

Bangalore Principles of Judicial Conduct, which determine independence, primarily, as a value: «judicial independence is a prerequisite to the rule of law and an indispensable guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects»[28]; This convention highlights the form of justice which ought to be delivered in society so that fair can be achieved. Ought means direction towards something - the value being that something and ought being the modus essendi of the value.[29] It also encompasses the other aspect of independence of the judges which are accountable to hold to the two forms of independence that is the independence of the judges and the independence of the institution of judiciary, so that a fair justice can be delivered. The Bangalore Principles point out, in Article 1.1., that «a judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason».[30] It talks about the kinds of requirements needed in order to avail independence of the judiciary in any country, including the sources of dependencies of the judiciary which need to be eradicated or worked upon so that the intensity of effectiveness of these factors can be reduced.

[26] European Union, https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial
[27] ECtHR Baka v. Hungary (2016); Procola v. Luxembourg (1995); McGonnell v. UK (2000); Findlay v. UK (1997); R(Brooke) v. Parole Board (2008).
[28] *Id.* at 31.
[29] JOHANNES HESSEN 87, 86 (1974).
[30] LORENZO DEL RÍO FERNÁNDEZ, 117 (2009)

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Various new amendments, evolution is taking around all over the world in order to secure judicial independence around the country. Various different experiments are being conducted for enhancing judicial independence. Evolution is continuing on around the world which commenced earlier but still shaping judicial independence in various countries.

"Incal v Turkey (Judgment of 9 June 1998) is an influential case on judicial independence. In Incal, the → European Court of Human Rights (ECHR) defined certain yardsticks to be adhered to in evaluating the independence and impartiality of judges within the intent of section 6 (1) of the European Convention for protecting Human Rights and Fundamental Freedoms (1950)—the right to be heard before an independent and impartial tribunal. Various significant provisions were determined and studied like various criteria which to be developed to accomplish the augmented standard of judicial independence such as the appearance of appointment of judges; their term of office; the continuation of safeguards against foreign pressure; and whether they present an appearance of independence. The criteria formulated in Incal has been cited by many international courts. Evolution of these categories also help us analyse the common features and perspective related to judicial independence in any country. [31]"

The African Commission on Human and Peoples' Rights with Media Rights v Nigeria (2000) paragraph 60 referred to Principle 10 of the UN Basic Principles. The case involved the banning of several publications in Nigeria after a modern law was proposed, compelling the registration of newspapers and magazines with retroactive penalties for non-registration. The new law further removed the jurisdiction of the courts, which was reported to imperil the autonomy of the judicial system.[32]It was emphasized in the ground-breaking Pinochet case. This issue revolved around the insisting that one of the Law Lords, Lord Hoffman, had a conflict of benefit and should have recused himself from the case. Here it was observed that the case fell under the category of cases where a judge is to be automatically disqualified if they have an interest in the case.[33] [34] Where another aspect of judicial independence is complied with, which is compromising with the Judge's individual independence, was focussed. Also, the judges contribute towards enhancing judicial independence and if they fail to secure or engage in the practice of corruption, formerly they lack quality as judicial officers which demand to be

[31] Incal v Turkey (1998)
[32] Media Rights v Nigeria (6 November 2000) No 224/98 (Nigeria).
[33] R v Bow Street Metropolitan Stipendiary Magistrate, (No. 1) [1998] UKHL 41 (UK).
[34] R v Bow Street Metropolitan Stipendiary Magistrate, (No. 2) [1999] UKHL 1 (UK).

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succeeded.[35]

"In the Canadian case Valente v The Queen (1985) (Can), the Supreme Court of Canada looked at that the stipulation that judges must be judiciously distinguished as being independent is noteworthy because it is a goal of judicial independence to safeguard public confidence in the justice system. The court articulated that 'Without that assurance the system cannot regulate the respect and affirmation that are preconditioned to its effective operation' This case measured one of the most imperative prospects of judicial independence that is Public faith on the judicial authority which can be gained through an impartial, competent judiciary. Where a public have a belief that if some conflict will happen in any case, or their right is infringed in any manner than justice can be done to them through the judiciary established in their country, heedless of what they are, where they reside, and justice will be turned over even if the exploiter is dominant, reputed or in any cost."[36]

Every democracy in the world had completed their special legal provisions for safeguarding the judicial independence brainstormed by the constitution. Moreover, they are reinforcing their arrangements for further safeguarding nature so that it can not be encroached by any other considerations responsible for influencing the judicial system in political, individual or social processes. These key components are a general and profound stone of judicial independence.

2.1.1) Judicial Selection and Appointment

"It is the introductory and foremost proposition of the foundation of judicial independence as it exhibits the quality of the same. If the judicial selection and appointment is without the prejudice of politics, corruption, formerly the truly determine the management of justice which is moreover reliable for sustaining the public faith in the pedestal of justice. Public confidence in the judiciary primarily depends on the specifications of justice promulgated by judges, but the specifications of justice mostly depend on the aspect of judges. Hence the public quality is decidedly exceptionally reliant on the quality of judges.[37] [38] Conclusively in order to have public confidence, it is eminently significant to have confidence in the appointment of the judicial system.[39] In expansion, the public needs to be assured that judicial functions are

[35] *Id.* at 36.
[36] Valente v The Queen (1985) 2 SCR (Can).
[37] S Shetreet, *'Who will Judge: Reflections on the Process and Standards of Judicial Selection'*, 61 AUSTRALIAN LAW JOURNAL 766 (1987b).
[38] S Shetreet, *Judges on Trial*, North-Holland Pubhshmg Company, (1976).
[39] E Handsley, *'Issues Paper on Judicial Accountability*, 10 JOURNAL OF JUDICIAL ADMINISTRATION 181(2001).

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pardoned in consonance with established precepts and procedures.[40] Loss of public confidence can result in disbelief in the existence of the judiciary. Further it will also destroy the bridge between peace and justice as the people may create violence without following any order, as there is no system to provide them justice, they will be in their self survival mode where they are their individual king and can do whatever they want even can infringe the rights of the people for their own benefit.

Even public confidence is one of the most important criteria on which the judicial independence of the country is judged. Because the confidence of the public on the system of judiciary is the fuel for the judicial system to run. As if they don't entrust the judiciary, then the person whose right is infringed will not get the confidence to fight back for his right. It will be a country without a skeleton where the powerful communities will be worms who eat the whole body of the country as there are no assured rights of the people, if there is the establishment of lawlessness.

An important instrument or the bridge between the public confidence and judicial system is transparency and openness, which is further directly linked to the criteria and mechanisms for judicial appointment.[41]

Generally their two key focus points in this part of section: first the criteria for the appointment of judges and second the mechanism in which they are appointed.

If we first determine the criteria by which the judges should be appointed then it may vary from country to country, but the general rule about this is that it should be transparent and publicly known criteria which will also enhance the judicial accountability toward the public. So these criteria should be discrimination free, merit based and even stretch to publically known but whatever it may should be written and fully expressed so that there can be no grounds of manipulation so that aspiring candidates can assess their suitability and can make his contribution in the life of the people through the judicial system established.

If we talk about the appointments, there are no standardised systems of judicial appointment, but this mechanism has various options available for the appointment where every country can

[40]M Gleeson, *'The Role of the judge and Becoming a Judge'*, National Judicial Orientation Programme, (1998); J Goldring, *'The Accountability of Judges'*, 59 AUSTRALIAN QUARTERLY 145 (1987).
[41] MW Bamett, *'The 1997-98 Florida Constimtion Revision Commission: Judicial Election or Merit Selection'*, 52 FLORIDA LAW REVIEW 411(2000).

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accord to their needs in their country and further based on the transparency.[42] Some famous appointment systems which can be used by many countries are the elective system, and the appointive system.[43]

Switzerland and America If we talk about the elective system, the two types of election processes which are popular election and election by legislature. Under political election the judges are elected by the partisan election or non-partisan election.[44] This election is mainly followed by the United state of America, and even a mixed system of both the types is further followed where both the features of appointment and popular election.[45] If we talk about the election by legislation, then it is also in the same way followed by the few states of the USA, even by the federal judges of Switzerland. But this trend of the elective system reduced after the nineteenth century.[46] Usually in this electorate system the judges are compelled to acknowledge themselves to the electorate and secondly they should be singled out by the people who will be influenced by those laws so that the accountability can be preserved, correspondingly.[47] But indeed this criterion is condemned on the assumption that less experienced people are getting selected through this process, as the voters are not competent enough to guess their suitability for this duty.

Appointment system is widely applied all over the world under this system, mainly the government reimburses a considerable appearance in designating the judge. But various principles state that for continuing judicial independence the whole power of the judge should not be bestowed exclusively in the executive government. Considering this as the executive duty the judicial independence is consistently at compromise that they will receive advantage of their power or moreover it can maintain the condition where the political powers can abrogate the merit qualification of the judges which will infringe the judicial independence of the judges. Solely for the appointment if the power is endowed in the executive, formerly this type of appointment is not rightly comprehended. Further, if we express the appointment system then it is further partitioned into three parts parliamentary recommendation, consultation with Judiciary and Legal Profession and third method is use of independent

[42] E Skordaki, *Judicial Appointments: An International Review of Existing Models*, The Law Society (1991)
[43] *Id.* at 45.
[44] *Supra* note 48.
[45] HJ ABRAHAM, THE JUDICIAL PROCESS, Oxford University Press (1986).
[46] S Shetreet, *'Who will Judge: Reflections on the Process and Standards of Judicial Selection'*, 61 AUSTRALIAN LAW JOURNAL 766.
[47] M COMISKY & PC PATTERSON, THE JUDICIARY - SELECTION, COMPENSATION, ETHICS AND DISCIPLINE, Quorum Books (1987).

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commission. If we talk about the parliamentary approval under these mechanisms initially the government selects the candidates for this judicial qualification, but the eventual call is of the parliament. For case, the United States the President proposes and 'by and with the suggestion and Consent of the Senate' appoints federal judges.[48]

It is understood that this method is better as there is the option of a parliamentary scrutiny but further it was argued that at the initial level of selection of the candidate the parliament does have any role in it. Initial selection is a vital selection process which needs to be checked by someone [49]and it also creates the various possibilities of political bargaining and also the coalition between the judge and the other legislative matters which can be seen as the serious drawback of this type of appointive system.

The second type of appointive system is through Consultation with Judiciary and Legal Profession in which the government may appoint the judge through the consultations of the senior members like senior judges and senior legal professionals. Further consultation can be formal and also can be informal. But here the judges are in the position to influence the lawyers so that is why it is necessary to consult the higher authority in this case the senior most judges. The way through which the independence of the judiciary will be secured.[50] On the other side the consultation of the legal professionals is also important as can guess the lawyer who possesses the characteristics of the judge. However this system also has the limitation that if the executive is not obliged to follow the consultations of the legal professionals and senior most judges. As again then it depends on the discretion of the executive solely to appoint a judge.

It is understood that this approach is better as effectively is the option of a parliamentary scrutiny, but further it was contended that at the introductory stage of selection of the candidate the parliament does have any role in it. Initial selection is a critical selection process which requires to be looked at by character and it likewise establishes the numerous probabilities of political understanding and likewise the coalition between the judge and the alternative legislative matters which can be viewed as the significant shortcoming of this type of appointive system.

[48] Constitution of the United States of America, Art II, s 2.
[49] C BAAR, 'COMPARATIVE PERSPECTIVES ON JUDICIAL SELECTION PROCESSES' , Ontario Law Commission, (1991).
[50] H Gibbs H, *'The Appointment and Removal of Judges'*, 17 FEDERAL LAW REVIEW 141(1987b)

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The second type of appointive system is through Consultation with Judiciary and Legal Profession, in which the government may appoint the judge through the consultations of the senior members like senior judges and senior legal professionals. Further consultation can be formal and also can be informal. But here the judges are in the position to persuade the lawyers, so that is why it is indispensable to consult the higher authority in this case the senior most judges. The procedure through which the independence of the judiciary will be guaranteed. On the diverse side, the deliberation of the legal professionals is also noteworthy, since can guess the lawyer who retains the characteristics of the judge. However, this arrangement likewise considers the limitation that if the executive is not accommodated to follow the consultations of the legal professionals and senior most judges. As again, it depends on the prudence of the executive merely to appoint a judge.

Another important system is use of "independent commission for assigning the judges", this system is particularly popular mechanisms around the contemporary world. This type of system of appointment is predominantly reflected by Canada, the same jurisdiction of the USA and also by South Africa.[51] Such commissions and committees are turned over with the task of either performing the substantial selection of the candidates, or forming 'recommendations only', or requiring 'a shortlist outside of which' appointments should not be conducted by the executive without advocating the figures out for doing so.[52] The impact of the commission depends on the composition of the same. The commission may be empowered with senior judges, senior lawyers, and discriminating legal academics. Community representatives and parliamentary representatives may also be incorporated.[5354] One of the figures out for the popularity of this system is that it provides the special scrutiny of qualification of judicial candidates. Beside this it also furnished the scrutiny which is translucent and publicly accessible to all.

This system is referring to the composition of the commission and the system that may be employed by it, "the South African Model of Judicial Service Commission" is a noteworthy

[51] *Id.* at 43.
[52]M Lavarch, *Judicial Appointments - Procedure and Criteria, Discussion Paper*, Attomey General's Department, Canberra 22 (1993).
[53] M Spry, 'Executive and High Court Appointments', Research Paper, Parliamentary Library, (2000).
[54]K Malleson, The New Judiciary, Ashgate, Aldershot 13, (1999).

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illustration.[55]

The commission system is perhaps considered being the best mechanism for judicial appointment to maintain public confidence in the appointment system, as it will also safeguard the accountability of the future.

2.1.2) "Tenure Security"

After examining the appointment of the judges the text corollary topic is ensuring their years of service as justice for lifetime, As it is the imperative component of judicial independence as when they are free from the pressure that they can be eliminated by everyone then the justice cannot be delivered accurately and will be prejudiced. In other words, if they will be removed in arbitrary manners then they may not be that liberal in delivering justice against anyone as they have to operate in mind, they are under the control of particular authorities. Their tenure should be competently guaranteed.[56]. As the contentment of this condition is a precondition for the personal independence of the judicial officer. This service should be accessible for lifetime or till the age of retirement, but it should be continuous there should be no divergence in the case as this variation can manipulate the judgement expressed by the judge. It is a conditioned process through which the judge is preserved from the disproportionate political influence. Any kind of pressure on the judges will emerge in them acting unnaturally and will eradicate the flow of transparency and public confidence over the whole arrangement of justice delivery. However these tenure should be secured by the lifetime or for a determined period of allegiance but the 'Sheteert' indicated a disadvantage of it as he states: Perhaps the age may be more tolerable than life tenure, as payable to their physical capacity of the judges can be shortened. There are arguments against this witness that there can be some cases where the judges despite their old age factor with the help of their understanding can work for safeguarding justice. In that case, the extension of the service term can be provided. But this power also cannot be given in the hands of the executive as can manipulate the judicial minds for their benefit and the justice can be influenced by it. If they want to work even after the retirement period they can work by being the advisory members of disparate institutions around the province which will stimulate those tribunals to get developed through the experience of the retired judge.

2.1.3) Further in aspect also have to include the **Remuneration and Financial Independence** of the judges where they are secured financially also, as in the sense that their judgement should

[55] *Id.* at 60.
[56] *Id.* at 60.

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not be depending or be influenced by the money factor. If they will be financially dependent on someone, then they can be influenced by the people who want the judgement to be delivered in their favour. Financial independence is one of the crucial factors of judicial independence. That's why the fixed salary amount should be given so that they can be financially adequacy of the judge's coil be assured. The issue of budgetary autonomy is of great importance. The judiciary in Latin America countries had been seen as corrupted for a long time before judicial reforms happened.[57] The Constitution in every single country has the provision regarding the salary of the judges. So that financial autonomy can be provided to the judicial officers and judicial independence with the personal independence of the judge can be maintained. On the contrary, the US Congress has a large control on the judiciary's budget that keeps judges worrying about funds.[58] The power of Congress to inflict de facto pay cuts on judges may arguably threaten the independence of the judiciary.[59]

2.1.4) "Next we talk about the factor **impartiality in the judiciary.** In other words, we can say that judges should follow the rule of law and keep them away from any kind of biased perception. This quality is the major source behind judicial independence, and even the public confidence is based on this concept and is a determining element of judicial independence. The judges can not be biased because of their previously formed perception of an individual. Another significant concept in this section is that they cannot be even impartial on the basis of their relationship or personal interest in the case, and if we extend this thought, then the judge cannot be a judge in his own case. As perfectly captured by maxim ***nemo iudex in re sua."***

2.1.5) Another aspect or the factor responsible for maintaining judicial independence is that the judges should be **free from the extraneous pressure** it can be of any kind so that they can be prepared to maintain their personal independence. External factors pressure in the sense that it should not be prejudiced by any sort of external pressure that can be created by the media, political party, government, executive and indeed occasionally by the public of the country. Only relevant facts and law should be the explanation of the notion to form the judgement in a measure to do the duty which is handled by the constitution in the soul of the judiciary. The prospect of external pressure also encompasses the pressure from the various pressure groups,

[57] L E Nagle, *'the Cinderella of Government: Judicial Reform in Latin America'*, 30 CalWIntlLJ 345 (1999).
[58] J Ferejohn, '*Independent Judges, Dependent Judiciary: Explaining Judicial Independence*' 72 SCalLRev 382 (1998).
[59] *Id.* at 69.

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legislature, executive free from the external pressure.

2.1.6) "German law forbids even indirect mechanisms of altering, such as recommendations, solicitations as well as psychological influence Judges in Germany are further shielded from obstruction from the judiciary itself[60]: a chief judge may not alter the judgement of a judge sitting singly[61] If we spoke about the "**Personal Immunity"** of the judges from the civil suits for financial damages, or wrongful acts or omissions in the exercise of their judicial functions. This rule was developed in the common law tradition according to which 'the king can do no wrong.'[62] This means that a judge has immunity for acts relating to cases before the court, but not for acts pertaining to processes beyond the court's reach."[63]

Further, if we associate to Diversity and representation where slowly unveiling the representation of minority groups to regulate the gender imbalance. No classes should be withdrawn behind the aim of bringing above justice and maintaining and judicial independence and public assurance in every single portrayal of the group.

Now if we talk about the judge's jurisdiction and the judicial independence relation where it is significant to allocate cases in every court neutrally so that the autonomy of the justice for the case can not be concerned by fluctuating the jurisdiction. So it's an obligation that the judges should prescribe or provide the justice after confirming their competence in those cases.

2.1.7) Judicial Discipline It is recognized as an instrument through which judicial accountability is maintained and judges take the responsibility of the legal action they are issuing. Beside this it is a litmus test for checking the corruption and misconduct in the administration of justice. In other words, it is there to emphasize the tremendous quality of justice which desires to be expressed to society. In elementary terms, we can say that it's an advance or strict action taken against the referee so that it could act as a deterrence for other courts to commit something like this. It is used to maintain the quality of the judges. These strict actions can vary from state to state, including censure, reduction to a lower rank and salary, forced transfer, compulsory retirement and removal. The disciplinary actions can

[60] R Wolfrum & E Riedel*, 'Constitutional Guarantees of the Independence of the German'*, 267 Recent Trends in German and European Constitutional Law (2006).
[61] *Id.* at 71.
[62] Barr v Matteo (1959) 360 US 564 (US).
[63] *Id.* at 72.

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directly affect the tenure of the judges, or certain actions can be accepted. Every disciplinary action can be isolated into parts that are the cause of discipline and mechanisms of discipline. If we determine the cause of discipline arises when the legal duties which are enforced as a judge are not performed or performed in a corruptive way. [64] A judge should consistently be accountable for the judicial conducts imposed by them. In Bruce v Cole the Court of Appeal of New South Wales it also defines unreasonable delay in delivering something by the judge can also be considered as an incompetent. Because when the allegations were put on Justice Vince Bruce who was the judge of the supreme court that the extensive delays were made in delivering the judgement, further it is important to the judge to be physically, mentally and intellectually fit or competent enough to discharge the legal duties. But it should be maintained in mind that this incompetency should not be mis-utilized. Further the misconduct can also be a universally accepted ground for removal of the judges.[65]

2.1.7.1) Now, if we focus on mechanisms of judicial Discipline, these mechanisms should be transparent and accessible to the public. This mechanism is also divided into two types: formal and informal. Informal mainly occurs under the jurisdiction of the chief justice. It is to assure the judicial conduct and judicial duties are imposed correctly or not. Here all the jurisdiction is with the chief justice and he can exercise his jurisdiction to maintain judicial discipline by the lower court to sustain the quality or to hurrying up in delivering the judgement.

In reverence of formal judicial discipline, effectively are two prominent functions: institution of disciplinary procedures and its adjudication. In this context, the Montreal Declaration 1983 requires that proceedings for discipline or elimination should be 'held before a court or a board predominantly constituted of members of the judiciary and singled out by the judiciary'[66] In this the parliament retains the power to reprimand the judge because of his undisciplined judicial conduct. Solely the executive should have the power of impeachment against the judges as they can mis-utilize it. But some also believe that even the parliament's impeachment of the judiciary is not free from executive interference therefore it can tamper the judicial independence. If the judiciary is contained in the impeachment process.

[64] K Malleson, *'Judicial Training and Performance Appraisal: The Problem of Judicial independence'*, 60 Modern Law Review 655 (1997).
[65] Bruce v Cole (1998) 45 NSWLR 163, 197.
[66] Montreal Declaration 1983, Art 2.33(a) (N.Z).

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Chapter 3

Judicial system defined in both the countries?

3.1) Judicial System in New Zealand

After realizing what is judicial independence, how it is considered by different legal provisions, after examining why it is so effective, what are the historical and jurisprudentially of judicial independence. Now if we are understanding the conception of judicial independence, then it's the time to analyze the judiciary system inaugurated by the constitution of both the countries after their independence.

Newland is the Parliamentary democratic design of government in the country with no written constitution as it exactly inherits its constitutional culture exactly from the Britain who were their colonial masters at the time. New Zealand constitutions are spread across a wide range of formal documents, decisions and conventions: Acts of parliament. Legal document decision of courts and conventions. Put together defines the separation of power between the three branches of the constitution that is legislative, executive and judiciary.[67] Where everyone has the role to perform beside this check and balance the other branches. For instance, the judiciary examines the actions of the executive through the process of judicial review. Conversely, the executive is notably implicated in the selection of Judges, and both the executive and Parliament would be involved in the dismissal of Judges in the event of misconduct.[68]

New Zealand possesses two types of courts: "the general court" and "the specialist court". Where general courts dealt with cases which have general jurisdiction mainly, the matters pertained to civil and criminal nature whereas the specialist court dealt with the cases ascribed to employment laws, family laws, youth laws cases, the Māori Land matters and environment laws. There are four types of general courts: District courts, High court, Appeal court and Supreme court.[69]

[67] European Union, https://www.newzealandnow.govt.nz/living-in-nz/history-government/our-constitution
[68] Judiciary appointment protocols, (government of new zealand) 2019
[69] Constitution Act 1986 (N.Z).

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"The Supreme Court is the 'court of final appeal'. It hears appeals in both civil and criminal cases, although they must be of universal or legal implication to arrive at this level. The Supreme Court was set up in 2004 to take over the London-based Judicial Committee of the Privy Council and to boost New Zealand's status as an autonomous nation with its own history and traditions.[70] The Supreme Court consists of the Chief Justice and four to five other Judges. Judges of the Supreme Court are also Judges of the High Court. Retired judges of the Court of Appeal and Supreme Court who have not ultimately arrived at the age of 75 years may be appointed as acting judges. Appointments to the Supreme Court are made under the Supreme Court Act 2003.[71] The Appeal Court hears civil and criminal appeals from the High Court, District Courts and the Employment Court. It also influences the law of New Zealand and resolves conflicting court decisions.[72] The Court of Appeal consists of a President and five to nine other Judges. Judges of the Court of Appeal are also Judges of the High Court. Additional High Court Judges may be elevated to sit on divisions of the Court of Appeal. Appointments to the Court of Appeal are made under the Senior Courts Act 2016.[73] The High Court deals with serious crimes and the more substantial civil needs. It also hears appeals from lower courts and specialist tribunals. There are 46 High Court judges, consisting of 7 associate judges and the Chief Judge of the High Court. From their bases in Auckland, Wellington and Christchurch, these judges travel on a circuit to 16 other centres across New Zealand.[74] The High Court consists of the Chief Justice and up to 55 other Judges. The Chief High Court Judge is competent for the conduct of the High Court's business. Former High Court Judges may be appointed as Acting Judges if indispensable to cover vacancies or periods of absence on the part of any Judge. High Court Judges and Associate Judges are assigned under the Senior Courts Act 2016.[75] Most civil and criminal matters start off in a District Court. New Zealand currently has 58 District Courts throughout the country."

3.1.1) numerous other significant components of Judicial Independence in New Zealand

The appointment of judges in Zealand: "The Attorney-General places great importance on maintaining the quality and integrity of the judiciary. Appointments are made based on merit. There is a commitment to actively promoting diversity in the judiciary, taking into account all

[70] https://www.newzealandnow.govt.nz/living-in-nz/history-government/legal-system
[71] The Supreme Court Act 2003 (N.Z).
[72] https://www.newzealandnow.govt.nz/living-in-nz/history-government/legal-system
[73] The Senior Courts Act 2016 (N.Z).
[74] *Supra* notes at 91.
[75] *Supra* notes at 92.

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pertinent attributes. Putting the responsibility for all these appointments in the hands of the Attorney-General should help to ensure a consistent and principled approach to these important decisions. In the case of appointments to the Supreme Court, Court of Appeal and the High Court (Judges and Associate Judges), the administrative process is carried out under the direction of the Solicitor- General. For appointments to the District Court, Family Court, Environment Court and Employment Court, the process is displayed under the direction of the Secretary for Justice."

Every court in New Zealand has their regulations for appointment but mainly the executive retains the power to appoint following the several consultations and procedures. But mainly the criteria revolve around some proficiencies which revolve around various acts. If we talk about some general criteria, then they look upon.

In appointment of high courts Section 94 of the Senior Courts Act 2016 specifies that no person shall be appointed a High Court Judge unless he or she has maintained a practising certificate as a barrister or solicitor for at least seven years.[76]

Main criteria which we require consolidating upon during studying the appointment of the judges in New Zealand are: Legal liability, Quality of characters, personal technical skills, Reflection of society. Legal accountability is the yardstick, where they mainly focus upon a legal knowledge of law and its experience in its application. Legal knowledge, in particular, indicates intellectual efficiency and subtlety. '*Lord Cooke, the former President of the New Zealand Court of Appeal, expressed that our system of government is built upon two complementary and lawfully unalterable principles: the operation of a democratic legislature and the operation of independent courts'.*[77]

The steps for appointment: "Approximately every three years (or more frequently if necessary), expressions of intrigue are called for by public advertisement. Prospective candidates respond to the request for expressions of interest. Alternatively, as a result of the consultation process outlined below, prospective candidates may be nominated, encouraged to express their interest and to enter the process. All prospective candidates are furnished with an Expression of Interest form for completion. The names of those who meet the statutory criteria for appointment are held on a confidential register maintained by the Attorney-General's Appointments Unit (the Appointments Unit). Persons expressing interest are advised when their names have been

[76] Senior Courts Act, 2016 (N.Z).
[77] Cooke, *"Fundamentals"* [1988] NZLU 158-164.

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reflected. The Appointments Unit uses the register to diagnose all those who have expressed an interest in appointment to the High Court. The Solicitor-General examines the names and consults the Attorney-General, the Chief Justice, the President of the Court of Appeal, the Chief High Court Judge and the Secretary for Justice. The purpose of this deliberation is to determine whether additional names should be regarded and combined to the list. The Solicitor-General seeks comments about those on the list from a range of key people and organisations. Those consulted are classified below."

"The Solicitor-General seeks the Chief Justice, the President of the Court of Appeal, and the Chief High Court Judge to give all proposed candidates a rating. The outcome of this handling is an indication of those deemed reasonable for immediate appointment, those possibly suitable in two to three years, and those in neither category (the long list). The Solicitor-General presents the long list to the Attorney-General. The Solicitor- General's advice includes the results of his or her consultation process. In reverence of the long list, the Solicitor-General confers annually with the Chief Justice, Chief High Court Judge, President of the Court of Appeal and Presidents of the Law Society and Bar Association, to safeguard the long list remains current and compatible. In respect of any upcoming vacancy in, or appointment to, the High Court, the Attorney-General, after such consultation as he or she believes necessary, and with the agreement of the Chief Justice (who will consult as appropriate with other judges), will determine a shortlist of possible appointees. The shortlist will accommodate no oftener than three names. The Attorney-General may resolve to seek an interview with, or arrange for an interview by the Solicitor-General of, a person interested in appointment to the High Court. The Solicitor-General undertakes checks on the personal reputation of those on the shortlist. The Solicitor-General also asks shortlisted candidates to complete a declaration intended to confirm there are no matters in their background of a sort that might lead to difficulties after appointment. The response to the declaration is signed, along with an undertaking that, if appointed, the eventual candidate will not resume practice before the courts on retirement or earlier termination of his or her appointment. The Attorney-General will single out from the shortlist the candidate whom he or she wishes to recommend to the Governor-General for appointment. Once the Attorney-General is reassured as to the suitability of the preferred candidate, and his or her willingness to undertake the appointment, the Attorney-General acknowledges the appointment in Cabinet. Finally, the Attorney tenders formal advice to the Governor-General to conduct the appointment. The short-listing process is frequented in

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consideration of each upcoming High Court vacancy or appointment."[78]

The guarantee of tenure of the judges - their immunity from dismissal by the Crown - has long been recognized as a conditioned ingredient of judicial independence. The Act of Settlement 1700 (UK) provided that judges' commissions were henceforth to be detained during good behaviour rather than at the Crown's pleasure.[79] As already noticed, the first Supreme Court judges in New Zealand held office at the Crown's pleasure, The Constitution Act 1986 requires the most recent ratification of the underlying precept: A Judge of the High Court shall not be removed from office except by the Sovereign or the Governor-General, acting upon an address of the House of Representatives, which address may be moved entirely on the grounds of that Judge's misbehaviour or of that Judge's incapacity to discharge the service of that Judge's office.[80]

For the removal of judges In 1978 the Royal Commission on the Courts suggested that judicial independence would be strengthened by elaborating upon the precedents and mechanisms for removing a judge. The Commission endorsed the Judges Act 1971 (Canada) as a model, a statute which sets up a committee of judges to investigate whether (and if necessary recommend that) a judge should be removed from office.[81]

If we say about the financial autonomy of the judges, The Constitution Act 1986 prohibits reducing the salary of a High Court judge while he or she progresses in office. 63 Similar arrangements can be found in the Judicature Act 1908, Supreme Court Act 1882 and Supreme Court Judges Act 1858. The New Zealand Constitution Act 1852 (UK) bound the New Zealand Parliament, in supplement to the Government, to the same effect until the endorsement of the Statute of Westminster in 1947.[82] If we talk about individual independence, which is precisely tied in to the quality of judgement, formerly the conventional prerogative of the judges also broadened to international jurisdiction. It exactly illustrates the independence of the individual judges, and in particular their ability to be free from Government influence when determining cases. Administering the court system, subsidizing and evolving new courtrooms, and engaging and controlling court staff, has traditionally been surrendered to the executive, the judge's role

[78] Judiciary appointment protocols, (government of New Zealand) 2019.
[79] The Colonial Leave of Absence Act 1782, (N.Z).
[80] PALMER, "JUDICIAL SELECTION AND ACCOUNTABILITY: CAN THE NEW ZEALAND SYSTEM SURVIVE?" 28 (Gray & McClintock Courts and Policy: Checking the Balance)
[81] Royal Commission on the Courts, 217 NZLR (1978).
[82] New Zealand Constitution (Amendment) Act 1947 (UK).

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being seen as one of adjudication not administration. They also believe that to achieve the institutional independence we also have to work on adjudicative independence which is generally administering the court system, funding and building new courtrooms, and employing and controlling court staff, has traditionally been left to the executive, the judge's role being seen as one of adjudication not administration.[83]

Immunity of judges from political attack The importance of judicial independence is further embodied in the convention that the executive, both ministers and public servants, should desist from criticising the judiciary. The Cabinet Official Manual enjoins ministers from asserting any views which "could be considered as manifesting skeptically on the probity, personal views or ability of any Judge". Ministers are admonished to "avoid commenting on any sentences within the appeal period". "If a Minister feels he or she has grounds for concern over a sentencing arrangement, the Attorney-General should be cautioned."[84] The Standing Orders of the House of Representatives impose lesser, nevertheless compelling, stipulations on members of Parliament, proscribing "unbecoming words" against members of the judiciary or referring to matters currently before the courts if this might prejudice judicial proceedings. The New Zealand Bill of Rights Act 1990 guarantees every person charged with an offence "the right to a fair and public hearing by an independent and impartial court."[85]

3.2) Judicial System in India

India possesses the written constitutions and is the supreme document which is the foundational source and governor of all the enterprises taking place in the country through the three branches of the constitution, specifically identified Legislature, executive and judiciary. Through the constitutional provisions the explicit demarcation has been indicated toward the separation of power where the legislature is the lawmaking body, executive is administering those laws, and if the dispute ensues between them, or between people, then the role of judiciary comes into picture. Certainly it is acknowledged as the guardian of the constitution. In the same way indian judiciary derives its autonomous and restrictive privileges from the constitution.

3.2.1) Numerous Related Observation regarding Indian Judicial System

[83] Colvin, *"The Executive and the Independence of the Judiciary"* 51 SASK LR 229-230 (1986-87).
[84] Cabinet Office Manual (1991), HI and H2.
[85] *The Speaker ruled in 1951 that suggesting a sentence was inappropriate would be in breach of Standing Orders*: NZ, Parl, Debates 294-329 (1951).

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"The judiciary becomes a simple pyramidal structure with the lower or subordinate courts at the underside, the High Courts in the middle, and the Supreme Court at the top. The High Courts are essentially under the regulative powers of the Union, subject to some responsibility of the States in the appointment of judges and other staff and in the finances. The Supreme Court is completely under the regulative powers of the Union. Subject to territorial limitations, all courts are efficient to cherish and determine disputes both under the Union and the State laws. The unitary character of the judiciary is not a setback but considerably a conscious and deliberate act of the constitution makers for whom a single integrated judiciary and consistency of law were preconditioned for the maintenance of the unity of the country and of uniform specifications of judicial behavior and independence."

Constitutional articles from 124 to 147 certainly talk about the supreme courts and various features related to it on the other hand from 214 to 237 is dedicated to the state judiciary which talks about the high court and subordinate court.

In appointment of judges of supreme and high court changed after the 99th amendment as before this under article 124 (2) the president has the power to appoint judges of the high court and supreme court where in appointment of high court he must take the advice of the chief justice of India. But in the case of a chief justice of India, he may take advice, consultants.

But after 99th amendment act 2014, article 124 (2), 127 and 128. It inserted 124A, 124B, 124C. Under the amendment in 124(2): every judge of the supreme court shall be appointed by the president by warrant under his hand and seal on the recommendation of the national judicial appointments commission referred to article 124 (A). This statutory body will have the power concerning all the subjects of appointment of judges of supreme court, high court, transfer of judges and other related issues to it. It will subsist of various main members The chief justice of India, 2 other senior judges of supreme court, union minister of law and justice, further two eminent members from the committee of prime minister, chief justice and the leader of opposition in the house of the people etc and at last one eminent person from highly backward class.[86]

After this, no consultation is recommended by the president with the judges of the supreme court and the high court. But in the case of Supreme Court Advocates-on-Record Assn. v.

[86] INDIA CONSTI. art 124, *amended by* The constitution (Ninety-Ninth Amendment) Act, 2014.

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Union of India where this amendment was declared unconstitutional. Further, this system was denounced and the 'collegium system' reoccurred which was occurring previous to the constitutional amendment. Beside this they enhanced the working of the collegium system by introduction of the guidelines and numerous important procedural amendments. The NJAC amendment was held unconstitutional because it was not within the hands of the parliament to determine the significance of appointment of judges or any matter connected to it. Also, section 5 of the NJAC act was held unconstitutional as it was held unconstitutional because the position of chief justice of India's position was uncertain where even the criteria of seniority can be ignored. Various sections like 6 (6) related to veto power in the hands of any two members of NJAC which will primarily affect the appointment of judges and their transfer and ultimately will affect the aspect of independence of judiciary.[87]

Further, the guidelines of the collegium system were reformulated to cover its opacity where a committee was formed and various suggestions were invited from private individuals and public suggestions.[88] Where the collegium will be composed of four senior most judges and they shall take these criteria into consideration, that are: Eligibility criteria-where the memorandum of procedure may indicate the minimum age; Transparency in the appointment process- where the eligibility criteria and the procedure as detailed in the memorandum of procedure for the appointment of judges and ought to be published in the court website; Secretariat- for the interest of better management in appointment process, where the memorandum of procedure will establish the position of secretariat for each high court and supreme court, its function, responsibilities will be defined in that; Complaints where the procedures for complaints against anyone who is appointed as judge will be recognized; Miscellaneous- where the diverse means deemed appropriate for providing transparency and liability referred to collegium and its process.[8990]

If we spoke about the qualification for being a supreme court judge is determined under 124 (6) of the Indian constitution which sets forth that he/she must be the citizen of India, the second condition he/she must be the high court judge for at least five years, or be an advocate in high court for 10 years, third in the opinion of president he must be a distinguished jurist. In the case

[87] Advocates-on-Record Assn. v. Union of India 2015 SCC OnLine SC 964.
[88] Second judges case AIr 1994 SC 258.
[89] Judges transfer case III AIR 1999 SC 1
[90] Law commission of India, Report on Reforms of judicial Amendment, Vol 1 pp. 36-37---sec CAD Vol III, p 254

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for being the high court judge he must qualify as: first the citizen of India, then secondly he/she must have held the judicial office for at least 10 years; third condition must have been an advocate of a high court for at least 10 years.[91]

If we move toward the removal of judges, then a judge of the supreme court must hold the office until he reaps the age of 65 years. Judge may resign from his office by writing to the president. The High Court also has a complementary arrangement concerning this, but their retirement age is 62 years.

In the cases when the judge had been pulled out from their office in the case of malpractices or misbehaviour or incapacity of a judge under such circumstances corresponding to Judges inquiry act 1968 a committee will be constituted of three members (one member from super court judges, one member from high court judges and one member shall be the person who in the speaker's opinion or chairman, is a distinguished jurist) and this formed committee shall be ratified by both the houses of parliament. Beside this that committee shall frame definite changes brought forth against the particular judge based on investigation, further where the judge shall be given the feasible convenience of displaying a written statement, hearing and cross-examining witnesses. If the committee found the judge guilty of the fabricated charges, then further proceedings shall be taken corresponding to the legal provisions permitted under clause (4) of article 124 or in consonance with the clause read with article 218 of the constitution. The misbehaviour or incapacity shall be the only ground for removal of the judge by the order of the president. This order can only be passed if it is approved by both the houses of the parliament and passed by a special majority. The security of tenure of the judges has been settled by the Indian constitution, except in the condition of order of the president. Parliament may however determine the procedure for presentation of the address and for investigation and proof of the behaviour and incapacity of a judge. But parliament cannot corrupt this power, because the legal provision must be accompanied.[92]

In regards to financial independence the salary of judges, worked out, not studied to vote of legislature: the salaries of the judges are regulated by the constitution and charged on the centralized fund of India. It is not ruled to the vote of the legislature, and their salaries and allowances cannot be amended except in the case of grave financial emergency.

[91] INDIA CONSTI. art 124.
[92] INDIA CONSTI. art. 124, cl. 6.

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The judiciary is safeguarded from the interference of the executive and legislative interference by numerous articles like Article 50, article 32, article 138 and many more which are embedded in the Indian constitution for ensuring institutional independence.

Indian constitution depended on the thoughts that only an equitable and autonomous judiciary can secure the rights of the individual and understand the substantial essence of implementing justice in an actual sense. Distinct arrangements in the Indian constitution are solely concerned to safeguard the rights of the judicial institution so that it can be in the enhanced place in order to act as the guardian of the Indian constitution. Beside this it protects the constitution from any infringing element and can further as the messenger of peace in the country by resolving disputes and directing the path to the other institution so they can act in an undoubtedly invigorating manner.

But still there are disparate loopholes which can be engraved in between these legal provisions which affect the functionality, objectivity of the institution established by the constitution, which need to be abridged for their magnified efficiency in dealing with the numerous perspectives.

Chapter 4

4.1) Conclusion and suggestions

After the comprehensive study of Judicial Independence of both the countries India and New Zealand which are coming out of the same historical background but diverge in numerous respects, like constitutional point which further drives the division to all the constitutional existing bodies. New Zealand has its own way in dealing with the judiciary, where there is a segregation of the major courts based on the matter they are dealing with. In India there are divisions too but mainly the three hierarchy of courts are established and other tribunals are formulated to compromise with the peculiar matters. Both have the same judicial history where the role of privy council was recognized, though it is still constituted in the New Zealand land. This not only the point of difference recognized but in appointment of judges, there powers, all different in both the countries. The researcher observed that their judicial system is mainly the product of the influence they have on their history, present scenario, mechanism of justice,

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population, Quality and quantity of population they have, their empowering underlying statues are all the main factors which represent their judiciary. Both the countries vary in calls of processes they pursue in requiring to distribute justice. Here we can distinctly appreciate that the product of justice is the same in both the countries but factors influencing it, and the way in which it is expressed differs.

The number of cases, type of cases, number of judges, quantity and quality of problems, economic development, employment among the citizens differs in both the countries. In which New Zealand is a refined and developed country, when compared to India most of the population is educated, have jobs and settled life, there standard of livelihood is considerably much higher. It carries all the contrasts which are perceived between developed and developing countries.

The particular element which require to be concentrated by India after proceeding from the New Zealand experience of judiciary is that the appropriate implementation of laws which are previously determined and also it indicate toward the requiring of appropriate administration of laws in the society through the other remains like legislature and executive, which is designing the society further which is characterized by Judiciary. With the appropriate implementations of the instituted requirements, the unnecessary interruptions initiated by the outlying world will weaken and will stimulate the judiciary to advance at its own arena and be autonomous from any kind of pressure inside and outside the judicial arrangement in India. Furthermore, the researcher analysed that not only Judicial independence is completely encompassed as the responsibility of the judiciary, but altogether it should be examined as every institutional responsibility to restrict themselves to the curb where it does not contravene the independence of judiciary.

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