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JUDICIAL INDEPENDENCE IN USA, INDIA AND GERMANY COMPARATIVE PERSPECTIVE: SAFEGUARDS, CHALLENGES, AND INNOVATIONS

Author

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JUDICIAL INDEPENDENCE IN USA, INDIA AND GERMANY COMPARATIVE PERSPECTIVE: SAFEGUARDS, CHALLENGES, AND INNOVATIONS

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Abstract

This paper will give a comparative study of judicial independence in three different constitutional paradigms among the United States, India and Germany. The study indicates the role of institutional structures in trying to shield the judiciary against political interference by examining their distinctive legal traditions, which include the strict separation of powers as exemplified by the United States and the Indian hybrid federalism to the German Civil law parliamentary system.

*The analysis will start with deconstructing *de jure* protections, i.e. tenure and appointment systems. It compares the American system of life tenure which has been shaped to withstand executive influence with the Indian system of compulsory retirement and the German functional system of non-renewable terms of 12 years. Besides, the paper examines appointment procedures: the judicial primacy of the Indian Collegium, the executive nomination of the American republic, and the legislature election based on consensus in Germany.*

*The undermining of *de-facto* independence amidst strong *de jure* guarantees is at the heart of the investigation. The paper identifies contemporary threat vectors, such as strategic judicial deference in India due to a dominant executive, the crisis of institutional legitimacy due to partisan polarization in the U.S. and structural weaknesses in Germany where the ordinary legislation might in principle be leveraged to control the organization of the courts.*

As a remedy to these weaknesses, the paper will discuss innovations in the future with regard to modernizing administration, financial independence, and the subtle accountability. It contends that the so-called “monolithic fallacy”, which considers the notions of independence and accountability to be mutually exclusive, should be abandoned in favour of the model according to which they work as the two complementary pillars. The German approach to disciplinary review at the peer level is given as the golden mean between an opaque self-governance in India (Collegium) and the American system which is highly politicized. In the end, the paper comes up with the conclusion that judicial resilience does not just rely on constitutional text but is a dynamic interaction between administrative integrity, transparency in appointments and whether the judiciary can manage its own resources to achieve its democratic mandate.

Keywords: *Constitutional Paradigm, Monolithic Fallacy, Separation of Powers, De-Facto Independence, Collegium.*

Introduction

a) Defining the Constitutional Imperative and Scope of Inquiry

The effectiveness of constitutional democracy depends on a constitutional bench of judicial independence, able to maintain the rule of law and uphold basic rights against shifting political trends.¹ The current essay aims at breaking down the particular institutional protection, current issues, and the already suggested innovations in each of the three advanced constitutional paradigms, namely, the United States of America (USA), the Republic of India, and the Federal Republic of Germany. These three countries represent three different legal traditions: the USA, a strict system of separation of powers, which is based on common law, India is an example of a hybrid federal system, which inherited the strong legacy of counter-majoritarian common law, and Germany, a parliamentary federal state which is rooted in civil law. The first is the definition of the Constitutional Imperative and Scope of Inquiry. The intellectual conceit of judicial independence is often brought up as a concept serving as a facilitating tool to the overarching goals of government, i.e., the protection of constitutional freedoms and the maintenance of democratic principles, which is part of the reason why this concept has not been rigorously defined or operationalized to a point practical to sustained scholarly inquiry.

b) Conceptual Framework: Independence, Accountability, and Monolithic Fallacy

A sound conceptualization of judicial independence requires one to refute the commonplace, but unsustainable, assumption that independence and accountability coexist in a state of dichotomy. Nonetheless, a subtle institutional design needs to confront the independence and accountability as complementary partners in sustaining the legitimacy of the judiciary and its constitutional role.² Where independence provides the necessary insulation to permit the adjudicator to exercise power without fear, accountability helps make sure that the judiciary uses the considerable power it has at its disposal in a transparent and morally upright way.

c) Methodology and Structure

The methodology of the comparative approach that is followed in this work follows the general principles of constitutional analysis, extending beyond textual comparison, by assessing the substantive legal information of judicial appointments, judicial tenure, and judicial removal, by contrasting similarities and differences, depending again on the circumstances, underlying meaning, and ultimate practical effect within each particular legal system.³

Institutional Architecture: De Jure Safeguards of Independence

The underlying assurances of judicial independence are contained in constitutional or statutory terms on security of tenure, financial security, and the procedure of appointment. These are institutionalized arrangements that outline the structural relationship between the judiciary and the political establishments. The procedures through which a Court of Appeal judge may be removed have been revised and improved.

a) Tenure and Removal Mechanisms

The procedures by which the judge of a Court of Appeal may be removed have been amended and refined. The security and the length of the judge's office are the main *de jure* protection

¹ Rom Mukhiit & Anar Rentsenkhorloo (eds.), *Implementation of Constitutional Review: Challenges and Development Trends* (Venice Comm'n, Council of Europe, Sept. 2022), <https://www.venice.coe.int/cocentre/MUKHIIT-Rom-ANAR-Rentsenkhorloo-eds-Implementation-of-Constitutional-review.pdf> (last visited Oct. 31, 2025).

² Stephen B. Burbank, *What Do We Mean by "Judicial Independence"?*, 64 Ohio St. L.J. 323 (2003), https://scholarship.law.upenn.edu/faculty_scholarship/948/ (last visited Oct. 31, 2025).

³ Terri Peretti, *Democracy-Assisting Judicial Review and the Challenge of Partisan Polarization*, 2014 Utah L. Rev. 843 (2014), <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1227&context=ulr> (last visited Oct. 31, 2025).

against political revenge. Within the USA, this specific form of judicial independence was deliberately designed by the framers, who gave judges life tenure subject to good behaviour, combined with a constitutional guarantee against the reductions of judicial remuneration.⁴ As put forth in *The Federalist No. 78*, such a constitutional structure guarantees the required strength of the judges to resist legislative and executive encroachment. In India, the higher judiciary judges also have a security of tenure until a constitutional retirement age (65 years in the Supreme Court). The process of removal is extremely strenuous and involves a motion supported by a special majority in both houses of parliament, thereby fortifying the structural insulation of the judicial office.⁵

By contrast, the Federal Constitutional Court (Bundesverfassungsgericht or BVerfG) of Germany follows an enormously narrow and functional model of tenure. Judges have a 12-year tenure, which cannot be renewed, and they must retire at 68, again a strictly institutionalised choice to provide the judiciary with periodic renewal and prevent the ideological stagnation or political complacency that tenure may bring. The term system breeds depoliticization by eliminating the temptation of a lifetime appointment and thus diluting the severity of the appointment incentives.

b) The Appointment Processes and Political Insulation

The process of judicial appointment is the pivotal mechanism of political neutrality of the bench.

- India: The Primacy of the Judiciary Through the Collegium System**

The Indian system experienced a drastic change insofar as executive appointment was concerned, and this was done by an extended number of judicial utterances. Authority over judicial appointments and transfers. Judicial appointments and transfers are vested in the senior judges themselves: the Collegium System, formalized by the Second and Third Judges Cases and reaffirmed in 2015 by the Supreme Court, striking down the National Judicial Appointments Commission (NJAC) Act, places the judiciary in the position of the panoplied lion.⁶ This self-designated process is subject to significant criticism both internally and externally. The Collegium has been characterized as a secretive and hidden structure, and there is a fear that judges will be able to influence their way to the top members of the Collegium in order to earn such a lack of internal accountability, which has caused even retired judges to raise eyebrows.⁷

- USA: Legislative Scrutiny and Executive Nomination**

The system of the United States is based on a structural check: the President appoints federal judges, and they have to win the so-called “*advice and consent*” of the Senate. However, this instrument of the mechanism has been transformed into the main channel of partisan polarization. The life tenure makes presidential nominations ideological investments, thereby making the confirmation process a high-stakes ideological battle.⁸

⁴ American Bar Association, *Threats to Judicial Independence and the Rule of Law*, ABA (last visited Oct. 31, 2025), <https://www.americanbar.org/groups/litigation/about/awards-initiatives/american-judicial-system/threats-to-judicial-independence-and-rule-of-law/> (last visited Oct. 31, 2025).

⁵ W. Elliot Bulmer, *Judicial Tenure, Removal, Immunity and Accountability: Constitution-Building Primer No. 5* (Int'l IDEA, Aug. 5, 2014; rev. ed. Oct. 2017), <https://www.idea.int/sites/default/files/publications/judicial-tenure-removal-immunity-and-accountability-primer.pdf> (last visited Oct. 31, 2025).

⁶ PMF IAS, *Collegium System in India: Evolution, Criticisms & Its Reforms* (last visited Oct. 31, 2025), <https://www.pmfias.com/collegium-system-in-india/>.

⁷ M.S.A. Thomas, *Critical Analysis of the Collegium System for Judicial Appointment in High Courts and Supreme Court* (Inst. of Legal Education, 2023), <https://book.iledu.in/wp-content/uploads/2023/09/47.pdf> (last visited Oct. 31, 2025).

⁸ *Supra* note 3.

- **Germany: Consensus-Based Legislative Election**

The process of appointment of the Bundesverfassungsgericht (BVerfG) is an active way of making a politically pre-determined consensus. The judges are elected by the Bundestag and the Bundesrat; there is a need to ensure the approval of the appointment to the highest court by the entirety of the main political and regional legislative bodies of Germany.

c) Fiscal and Administrative Guarantees

In addition to the tenure of individual members, operational independence requires non-dependence on administrative and financial leverage by the political arms. The three countries, all ensure that judicial salaries are secure, and hence the judges are not coerced by a low salary. The German system offers an advanced system to integrate accountability and still maintain the core independence as stipulated under section 26 of the German Judges Act (DRiG). In this case, supervisory institutions are also allowed to conduct orderliness checks but not to scrutinize the adjudicatory activities. The Court of Public Service, which is largely composed of judges, is the only body that can dismiss the adverse action or penalty and is thereby a strong safeguard against external administration threats.

d) Strong-Form Supremacy: The Authority of Judicial Review

The final form of judicial independence is the authority of judicial review, in which the court acts as the final word in the interpretation of the Constitution. The examples of strong-form review practice are the United States and Germany, though using different mechanistic models. The United States had an outstanding ruling that was *Marbury v. Madison* (1803), and it gave the Supreme Court and the subordinate federal courts the power to render legislative and executive actions invalid that defy the Constitution. This privilege is at the very heart of the idea of the judiciary as an equal arm of government. The Bundesverfassungsgericht in Germany only exists outside the normal appellate process, and is focused solely on constitutional issues. This centralized constitutional power allows the BVerfG to engage in vigorous review, and with this, it also adjudicates referrals to the BVerfG by ordinary courts that consider a law unconstitutional. In addition, its landmark *Luth decision* (1958) permanently solidified the BVerfG as a counter-majoritarian institution since it expanded the application of fundamental rights horizontally to citizens in private, expanding the breadth and width of constitutional protection wherein it had to guarantee protection of constitutional rights through the judiciary. The Indian Supreme Court, which is an “umpire and defender” of the Constitution, also has vigorous strong-form review. It has used its authority to carve out and protect the fundamental framework of the Constitution, and hence make some fundamental principles inalienable in the hands of the parliament.

Structural Feature	USA	India (SC/HC)	Germany (BVerfG)
Term Length	Life Tenure (Good Behavior).	Mandatory Retirement Age (65 SC)	Fixed 12-Year Term (Non-renewable).
Appointment Authority	Executive Nomination; Senate Confirmation.	Judicial Collegium (Judicial Primacy).	Legislative Election (Bundestag & Bundesrat consensus).

Structural Trade-off	Stability at the cost of intense partisan conflict.	Insulation at the cost of transparency and accountability.	Resilience through mandated consensus and fixed tenure.
Supervision Limits	High autonomy, politically volatile.	Secrecy criticized for lack of objective criteria.	Adjudicatory activities absolutely shielded; administrative duties subject to peer review.

Modern Problems and the Wearing away of De Facto Independence

Whereas the *de jure* protections have held firm in all three jurisdictions, the modern political context has identified the gaping weaknesses that have resulted in the slow decline of the *de facto* independence of the judiciary.

a) Executive Encroachment and Strategic Deference in India

What is remarkable about this shift is that the Supreme Court of India (SCI), traditionally characterized as an aggressive and pro-active, counter-majoritarian institution of an “*umpire and defender*” of constitutional morality historically, has experienced extensive criticism as it has undergone a drastic change in its stance to a pro-government one in the years since 2014.⁹ What is interesting is that the SCI has been undergoing this change without any formal takeover of the institution by the other branches of government, which has been a common feature of other illiberal democracies.¹⁰ The judges working in such an atmosphere are the strategic decision-makers who deliberately consider political, social, and executive power in their rulings. The resultant effect is a sort of functional concession, the institutional safeguard provided by the system of Collegium, which ensures judicial dominance in appointments, and unintentionally facilitates concessions *de facto* without any violation. A case study of landmark judgments, e.g., the *Babri Masjid* judgment, may indicate that results are not always well accounted for by law, but may be well explained by a strategic judicial practice that displays the sheer constraints of structural protection in ridding the world of pervasive non-legal factors.

b) Partisan Polarization and Institutional Legitimacy in the USA

The penetration of high partisan polarization into the judiciary core is the central issue in the United States, and thus the aspect that results in the decline of the ability and willingness of the Court to serve as an impartial counter-check to the malfunctions of democracy.¹¹ The high stakes involved in the life tenure mean that the appointment process has increasingly become an ideological battleground, where the political ideology of the Supreme Court itself then influences the propensities of the entire federal legal hierarchy.¹² The politics of the Supreme Court becomes a liability, as its decisions have been increasingly perceived to be.

⁹ Rohit Sarma, *Judicial Powerplay: Independence of Judiciary under the Shadow of Illiberalism*, 2025 Indian L. Rev. ____ (forthcoming), <https://doi.org/10.1080/24730580.2025.2496016> (last visited Oct. 31, 2025).

¹⁰ *Id.*

¹¹ *Supra* note 3.

¹² Suresh Naidu, Samuel Moyn & Eric Posner, *When Common Law Ages: Two Centuries of Growing Inertia in U.S. Judicial Opinions* (Oct. 2024) (unpublished manuscript), <https://arxiv.org/abs/2410.04493v2> (last visited Oct. 31, 2025).

c) Political Opportunity and Structural Vulnerabilities in Germany

Although the independence of the German judiciary is bolstered by the strong tradition of political respect¹³, comparative analysis raises the possibility of weakness. The global threat of political capture of the high courts, such as the BVerfG, is the fact that parliamentary majorities can apply ordinary legislation, which only needs a simple majority (unlike constitutional amendments), to have an impact.¹⁴ The means through which it can be achieved include changing the retirement age so as to displace sitting judges or establishing and filling new judicial positions (*de facto* court-packing).¹⁵ In the absence of this cultural protection, legislative intervention in respect of court structure may be seen as the equivalent of resilience lite, which, in its turn, may result in the subtle, structural degradation of the independence of the judiciary.¹⁶

Jurisdiction	Primary Threat Vector	Nature of Erosion	Mechanism of Influence
India	Internal Judicial Power Dynamics	Strategic Deference/Functional Capitulation	Non-legal influences (political alignment, self-interest) factored into decisions.
USA	Partisan Polarization	Institutional Legitimacy Crisis	Appointment battles transforming the court into a political branch; ideological contagion throughout the federal judiciary.
Germany	Legislative Control via Ordinary Law	Structural Vulnerability	Changes to court organization or procedural rules not requiring constitutional majority.

¹³ Bundesverfassungsgericht, *Provisions Governing the Appointment of Temporary Administrative Court Judges Are Compatible with the Constitution*, Press Release No. 38/2018, 18 May 2018, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-038.html> (last visited Oct. 31, 2025).

¹⁴ Max Planck Institute for Comparative and International Private Law, *Fundamental European Values Under Pressure – Protecting the Judiciary From Partisan Influence*, MPI Priv (Oct. 8, 2025), <https://www.mppriv.de/appointment-of-judges> (last visited Oct. 31, 2025).

¹⁵ *Id.*

¹⁶ Markus Böckenförde, “*Resilience lite*”: Strengthening the Constitutional Protection of the German Federal Constitutional Court, ConstitutionNet (July 29, 2024), <https://constitutionnet.org/news/voices/resilience-lite-german-federal-constitutional-court> (last visited Oct. 31, 2025).

Future Innovations and Direction

The reference to the constitutive documents that are considered foundational is not enough to achieve a strong judicial system; certain reforms should be functional to reinforce the judicial ruling, administration effectiveness, and fiscal independence. These inventions support the pure needs of the law and the general approval of the court.

a) Modernization of Administrations and Boosting Efficiency (India).

In order to make judicial independence credible, the judiciary has to address first the problem of providing timely and fair justice, which requires addressing systemic failures like a huge backlog of cases that may be pending resolution, poor infrastructure, and a sluggish system. The major topical innovations are the E-Courts Project (the information-introduced digitization of the proceedings), the promotion of the Alternative Dispute Resolution (ADR) mechanisms (mediation, arbitration), and the idea of introducing the All India Judicial Service (AIJS) to encourage the development of the moral capital of the judiciary and enable the executive branch to challenge the judicial one based on the substantive constitutional issues.

b) Independence in Budget and Resources Management.

One major weakness of most judiciaries is that they depend on the executive in terms of budgetary allocation and implementation which is also known as dependence on the power of the purse. World trends have indicated that they are moving in a direction of increasing the amount of budgetary autonomy that judicial bodies have, such as allowing judicial bodies to have more control over how their own budget is managed, obtaining goods and services, distributing resources necessary to operate effectively, and through the judicial budget being controlled by the executive itself.

c) Accountability Systems and Judicial Governance.

The institutional design has to be good to accommodate accountability without interference with independence. The powerful accountability framework, based on peer reviews, in Germany, provides a timely example.¹⁷ It is important to note that the Judges Council is very active in personnel work, performance reviews, and adjudication determination, which is a strong law-aid approach that should be considered, as it may be abusive in other transitional democracies. The formation of new governance institutions, which are meant to revolutionize the judiciary, has, paradoxically, occasionally stopped further meaningful reform or solidified existing inefficiencies, an outcome that has prompted some to argue that independence has come too early without having any transparency in it, which is independence that encourages existing biases to be frozen and sheltered behind self-selection.

d) Judicial Self-Governance: Centralization or Peer Review

The form of the role of a single judicial self-governing organ, usually a judicial council, has been a point of relative divergence, frequently informed by underlying constitutional philosophies. Germany avoids the idea of a powerful and centralized model of judicial self-governance, as in Italy or France, as it is considered a threat to democratic legitimacy and the division of powers. Rather, Germany is dependent on a differentiated system that integrates accountability by means of peer review. The councils and judicial bodies are involved in personnel, administrative, and disciplinary issues, thus guaranteeing self-governing without putting all the power in one body and probably an inert body. India Collegium, in sharp contrast, is the other extreme of self-governance, whereby the judicial branch has been able to

¹⁷ Kersi B. Shroff, *Judicial Tenure: The Removal and Discipline of Judges in Selected Countries* (Law Library of Congress, Global Legal Research Directorate, Jan. 1993), <https://tile.loc.gov/storage-services/service/ll/llglrd/2021700499/2021700499.pdf> (last visited Oct. 31, 2025).

take over both basic personnel functions, appointments, and transfers in making certain that independence is maintained by the executive. Nevertheless, this model has received intensified criticisms due to its internal opaqueness and the possibility of reinforcing prejudices, which has shown that self-governance not only maximizes insulation at the cost of internal accountability, but also at the cost of the trust accorded by the population.

Conclusion: Synthesis and Prognosis.

When judicial independence in the USA, India, and Germany is compared, the conclusions that can be made are that none of the institutional arrangements has a full shield to political pressure. This does not mean that the resilience of a judicial system is only based on the constitutional text alone, but rather on the interacting dynamism of a constitutional text, judicial culture, and administrative integrity.

The USA model lays emphasis on the extreme protection of life tenure, which grants the greatest *de jure* stability, but has caused the debilitating partisan conflict that endangers the legitimacy of the institution. Judicial self-selection (the Collegium) has proven to be too vulnerable, as the debate over judicial self-defeat has been confined to the question of *de jure* supremacy, when what might be necessary is *de facto* strategic casing with the presence of a strong executive? The Indian model demonstrates the drawback of judicial self-selection (the Collegium), where, in the context of a powerful executive, the failure of *de jure* supremacy to prevent *de facto* strategic alignment has played out.

The balance offered by the German model, of fixed and non-renewable terms and a consensual approach to appointment, with peer review and special courts supervising the use of administrative discretion, offers an interesting way of putting into practice the idea that independence is not unique.

In the end, the international similarity of the weaknesses of all three systems is that the concept of judicial independence should be treated as an instrument, as supplementing accountability, and that the new measures promoting judicial resilience should go beyond re-protecting judges. This is through improving appointment transparency (as the German consensus system tries to enforce), augmenting judicial command over the resources required (fiscal autonomy), and pursuing administrative effectiveness in order to restore its constitutional mandate and its *de facto* independence to its *de jure* promises.

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