Cosmos Multidisciplinary Research E-Journal
Online Available at www.cmrj.in
Recognized International Peer Reviewed Journal
Impact Factor 4.94
ISSN No. 2456-1665

"AN INDEPENDENCE OF JUDICIARY WITH SPECIAL REFERENCE TO THE APPOINTMENT OF JUDGES (COLLEGIUM SYSTEM)"

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Abstract:-

Legislature, Executive and Judiciary are the three pillars on which democratic structure of India rests and the powers and functions of these organs clearly laid down in the constitution. However, the controversy persists, especially in the appointment of judges between the executive and judiciary. After the passing of Constitution, there was a strong executive say in the appointment of judges. Later on judiciary interpreted the Constitutional provisions and developed the collegium system, which minimizes the executive say in the appointment of judges to the higher judiciary. With the elimination of the executive role, the position of the judiciary strengthened. The present research discusses the Constitutional Provision, the role of executive and judicial interpretation in the process of appointment of judges.

Keywords:- *Legislature, Judiciary, Appointment of Judges, Constitutional Provisions etc.*

Introduction:-

An Independence of Judiciary and Appointment of Judges : Brief Overview:-

NO DEMOCRACY CAN flourish without an independence judicial system; a system free from fear and favours, system isolated from the other branches of government. It enhances the prosperity and stability of the social order. Too often, civil society undermines the importance of an independent judiciary while legal professionals overlook it. Today the activist Indian judiciary adjudicates disputes as diverse as river water distribution between states, the legality of governor's proclamation of president rule in state, and even matters involving allegation of corruption by high ranking public officials including the prime minister and members of parliament. In fact in the context of Indian democracy, citizens disillusioned with the political system often resort to the Supreme Court as their last hope. In such circumstances, it is imperative to safeguard the independence of the judiciary so that it continues to play a proactive role in democracy. The constitution includes several mechanisms, such as the following to protect independent of the supreme courts and high courts:

1) Judges can be removed only through a cumbersome impeachment motion in the parliament and only on ground of proven misbehaviour or incapacity.

2) The service continues of judges cannot be altered to their detriment during their terms of office.

3) The parliament is barred from discussing the conduct of judges except in the case of on impeachment motion.

4) The administrative expenses of courts are charged to the consolidated fund of India. However these provisions alone cannot preserve judicial integrity. The powers to appoint or not transfer and promote or not promote.

The courts in India are expected to assume much wider and vast responsibility than traditionally envisaged. For that, the quality of judges is very important as only this can lead to an effective and efficient judiciary. Only the right judge can dispense the right kind of justice. The selection of a competent judge is a difficult task. In case of High Court, Art. 217 provides that judge of a High Court is to be appointed by the President after consultation with the Chief Justice of India, the Governor of the State, and in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court. This procedure had worked fairly satisfactorily till 1993 when the Supreme Court interpreted the words "after Consultation" to mean "with the concurrence" of the Court. After this the role of the executive at the Central and State levels became marginal and the decision on the appointment of judges today rests de facto with the judges themselves. The recent standoff between the judiciary and the executive over the appointment of judges of the Supreme Court had led the President to seek the consultation process for appointment of judges.

The nine judges Bench which heard the President's reference held that recommendations made by the Chief Justice of India without complying with the "norms and requirements of the consultation process" were not binding on the Central Government. Thus, it widened the consultation process among judges while limiting the role of the Chief Justice of India in the selection process. It is necessary to put an end to the controversy over the present mode of selection of the judges. The method is defective as it is not open to public scrutiny, lacks accountability and transparency.

The executive, the legislature, the public and the judiciary should be given an appropriate role. The system of appointment of judges should be made transparent and subject to legal scrutiny.

Objectives of the study:

1) To study the constitutional provisions relating to the independent of judiciary.
2) To analysis collegium system.
3) To analysis whether Indian judiciary is independent in practice or is it so only on paper.
4) To analyses whether judicial accountability bill will have adverse impact on judicial independence.

Researchable questions

1) Is judiciary free from interference?
2) Which criteria are applied for appointment of judges?
3) Whether gender discrimination is done in appointment of judges of H.C. & S.C.?
4) Whether a reservation criterion is applicable in appointment of judges?

Importance of the Study:

This study is an exhaustive compilation of secondary data available on independence of judiciary with special reference to appointment of judges. It shall help the reader to study independence of judiciary with appointment of judges. From different perspectives, procedure of appointment of judges' constitutional provision relating the independence of judiciary, criteria of appoints judges. Judicial interference in other authority.

The primary instrument of justice is the judiciary. It interprets the constitution and acts as it protector & guardian by keeping all authorities whiting its bounds. All these facts highlight importance of the institution of judiciary. The study has tried to answer the most important question from independence of judiciary constitution overview perspective. Limiting

itself to the doctrinal method of research, the study has paved the way for future empirical studies to analyze and criticize the independence of judiciary & appointment of judges.

Statement of Problem of the Study:

Judicial Independence is vital for any democracy to survive. There are several constitutional provisions relating to independence of the judiciary. There is difference in principals and practice.

Scope of the Study:

The scope of the study is limited to independence of higher judiciary. i.e. S.C & H.C. of India.

LITERATURE REVIEW:

Independence of judiciary and appointment of judges not studied through the scope of constitutional law and allied social science. Hence, there is available only a limited understanding of this subject. The data regarding judicial independence and appointment of judges has to be collected by relying on secondary data sources such as news items , internet , News Paper Articles , Journals, textbooks,the theories explored were obtained from academic book s available. Though the data at first glance did not seem adequate, correlating it and applying it to the known independence of judiciary and appointment of judges helped present a reliable analysis of the subject.

Research Methodology Adopted:

The present study, being a purely doctrinal legal research, employs content analysis of secondary sources of data. These sources include textbooks, news reports and web content. Scholarly journal articles. Statistics etc. as per the recognized rules of explanatory research, this study provide definite answers to the questions that have been raised. It merely explains the subject matter in depth to provide future researches with reliable data to conduct their own research on.

Discussion:-

Independence of judiciary is the cornerstone of our Constitution. It has been held to be a basic feature of our Constitution. For ensuring judicial independence, our Constitution has made a deliberate and conscious departure from other constitutions of the world – indeed, even from the Government of India Act, 1935. The appointment, transfer, discipline and all other service conditions of the subordinate judiciary was placed entirely in the hands of the judiciary; the executive was expected to make or issue formal orders only. So far as superior judiciary is concerned, the power of appointment was vested in the President but it was conditioned by the requirement of consultation with judiciary. A convention was developed according to which the recommendation always and invariably emanated from the Chief Justice of the High Court (in the case of appointment to High Court) and from the Chief Justice of India (in the case of the Supreme Court of India). While preparing this Consultation paper, we have kept in mind the necessity of preserving and promoting the concept of judicial independence and the all-pervading fact that independence of judiciary is a basic feature of our Constitution. We have also dealt with the oft-debated concept of a National Judicial Commission and the parameters within which such a commission, if one is thought advisable, should be constituted and composed.

Our concern has been that while in the matter of appointment, one can countenance a role for the executive; no such role can be countenanced in the matter of removal, transfer or in

case of remedies for deviant behaviour not amounting to "misbehavior". In all such matters it is the judgment of the peers that is given due recognition.

Our concern has been to effectively deal with and rectify instances of deviant behaviour among members of the superior judiciary to safeguard the fair name of judiciary, its independence and its image. A few unworthy elements here and there are sullying the image of the judiciary. It has to be checked. For judiciary, its image and its reputation is all important; if that is tarnished, nothing remains. It is equally necessary to create mechanisms which serve to enhance the image and effectiveness of Superior Judiciary.

Conclusions:-

This Research Paper is intended to promote a debate within the aforesaid parameters and to introduce measures to enhance the public confidence in the Judicial Administration, so essential for promoting public good. Appointment of judges by judges themselves poses challenges to the democratic system. This may lead to the appointment of judges who hold similar ideological or philosophical positions.

The executive, the legislature, the public and the judiciary should be given an appropriate role. The system of appointment of judges should be made transparent and subject to legal scrutiny. It would not be out of place to refer to a judgment of the Supreme Court in State of A.P. v. K. Mohanlal (1998 (5) SCC). The decision was rendered in an appeal against a judgment and order of the Andhra Pradesh High Court. The matter related to the appointment of judicial and revenue members to the Special Court constituted under section 7 of the A.P. Land-grabbing (Prohibition) Act, 1982. The State enactment provided that the chairman of the Special Court shall be appointed "after consultation with the chief justice of the High Court concerned" (in case of a retired judge of the High Court) and "after nomination by the chief justice of the High Court concerned, after the concurrence of the Chief Justice of India" (in case of the sitting judge of the High Court). However, no such consultation was provided in the matter of appointment of the judicial members and revenue members. Even if a retired district judge was to be appointed as a member of the special court, no such consultation was required. A contention was urged before the court that appointment of members of the tribunal without consulting the chief justice of the High Court concerned, renders the Act unconstitutional. The Supreme Court rejected the contention. Reversing the view taken by the A.P. High Court, the Supreme Court held that absence of consultation with the Chief Justice of the High Court in the matter of appointment of judicial and a revenue member does not affect the validity of the Act. They held further that even where a retired district judge is sought to be appointed as a member of the tribunal, no such consultation is necessary. They, no doubt, clarified that a sitting district judge can be appointed as a member of the Tribunal only with the concurrence of the High Court as provided in Article 235.

In spite of the said opinion of the Law Commission, the Government of India evolved a general policy of transfer of High Court Judges contained in the Press Note issued on January 28, 1983. Several transfers were effected thereafter which have been criticized by the Satish Chandra Committee as not in keeping with the principles enunciated in the said Press Note. Furthermore, experience shows that barring some exceptions, the transferred Judges, even the efficient among them, have lost interest in judicial work. Many of them felt that they have been unjustly and arbitrarily picked out for transfer. They point out that the transfers have not been affected with an even hand. Self discipline has indeed suffered on account of these

transfers. As a matter of fact, no consistent policy was followed in this matter. Judges appointed during a particular period were, as a rule, transferred, while Judges appointed later were not. In short, the transfer policy as a whole has produced its own defects and anomalies.

But who will select the judges, and ascertain their qualifications and class character? Unless there is a clear statement of the principles of selection, the required character and conduct of judges in a democracy may fail since they will often belong to a class of the proprietariat, and the proletariat will have no voice in the governance: the proprietariat will remain the ruling class.

Winston Churchill made this position clear with respect to Britain thus: "The courts hold justly a high, and I think, unequalled pre-eminence in the respect of the world in criminal cases, and in civil cases between man and man, no doubt, they deserve and command the respect and admiration of all classes of the community, but where class issues are involved, it is impossible to pretend that the courts command the same degree of general confidence. On the contrary, they do not, and a very large number of our populations have been led to the opinion that they are, unconsciously, no doubt, biased."

Thus, today we have a curious creation with no backing under the Constitution, except a ruling of the Supreme Court, and that too based on a very thin majority in a single ruling. Today, the collegium on its own makes the selection. There is no structure to hear the public in the process of selection. No principle is laid down, no investigation is made, and a sort of anarchy prevails.

In a minimal sense, the selection of judges of the highest court is done in an unprincipled manner, without investigation or study of the class character by the members of the collegium. There has been criticism of the judges so selected, but the collegium is not answerable to anyone. In these circumstances, the Union Law Minister has stated that the government proposes to change the collegium system and substitute it with a commission. But, how should the commission is constituted? To whom will it be answerable? What are the guiding principles to be followed by the Commission? These issues remain to be publicly discussed. A constitutional amendment, with a special chapter of the judiciary, is needed. Such an amendment can come about only through parliamentary action.

Surely a commission to select judges for the Supreme Court has to be of high standing. It must be of the highest order, of a status equal to that of the Prime Minister or a Supreme Court judge. The commission's chairman should be the Chief Justice of India. In the process of selection, an investigation into the character, class bias, communal leanings and any other imputations that members of the public may make, may have to be investigated. This has to be done not by the police, which function under the government, but by an independent secret investigation agency functioning under the commission's control. These and other views expressed by outstanding critics may have to be considered.

The commission has to be totally independent and its ideology should be broadly in accord with the values of the Constitution. It should naturally uphold the sovereignty of the Constitution beyond pressures from political parties and powerful corporations, and be prepared to act without fear or favour, affection or ill-will. It should act independently — such should be its composition and operation. The commission should be immune to legal proceedings, civil and criminal. It should be removed only by a high tribunal consisting of the Chief Justice of India and the Chief Justice of all the High Court's sitting together and deciding

on any charges publicly made. We, the people of India, should have a free expression in the commission's process.

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