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“JUDICIAL INDEPENDENCE AND INDIAN JUDICIARY”

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ABSTRACT

The History of mankind is full of struggle between the most privileged and most disadvantage the later always fighting to get justice in all times.

The Independence of the judiciary which to use the language of Supreme Court. The constitution ‘Copiously’ protect autonomy (primary from Executive) guaranteed under the constitution. It is a facet of the separate of powers which underlies the constitution and is a part of its basic structure. It has been said of Britain by Judge that “the reputation of the judiciary for independence and impartiality is a national assets of such richness that one government after another tries to plunder” 1. The same should be said of Indian Judiciary.

In 1975, Emergency was declared when the powers of judiciary review severely curtailed. In 1976, 16 High Court Judges were transferred to other High Court by the executive ostensibly with view to strengthening the National Integration. The reason was rejected by the Supreme Court remarked that “It is indeed strange that the Government of India should selected for transferred by and large those High Court Judges who has decided case against the Government during the Emergency” 2.

1)Union of India V/s. Sankal Chand Seth, 1977, 4 SCC, 19*3, p.213.

2)The Indian Advocate Journal of the Bar Association of India, New Delhi – Sept. 2010–p.18.

The Independence of the Judiciary and of the judicial system of course ultimately depends on the personal integrity of each judges.

KEYWORDS:History of mankind ,National Integration, Judicial Independence.

INTRODUCTION:

The Concept of Judicial Independence and it is old as the Independence of Judiciary. In India independence and impartiality have

always been considered to be the essential qualities of a judge from the earliest time. During the modern period the Independence of judiciary has been accepted as cardinal principle world wide and has found place in their constitution. The frame work of the main legal system has other facets, which bring in to the other two pillars like the judiciary and executives.

THE JUDICIARY :

Judiciary as an Independent specialized legal system of interpretation and enforcement of laws and regulations is absolutely unavoidable in any healthy democratic system. I am referring to the evolution of one laws and that arises from interpretation of the rules and laws and regulations laid down by the legislation of course



consistent with basic structure of the constitution. In a mature democracy it is important that judges are independent both of Parliament and Government.

THE EXECUTIVE :

The Third pillar, namely the executive is also expected to be as independent as possible and free of intrusions from the other two. All along it has been that Executive is the third pillar of democracy, which is independent of the other two, that the independent power enjoyed by the Legislative and judiciary and a large number of regulation exist to constant by keep the actions of the executive under the watchful glare of the legislature and the judiciary and that unquestionable takes away the much bandied about independent of the Executive, control and provisions for interpretations and answerability are also applicable to the legislature and the judiciary.

APPOINTMENT OF JUDGES :

Changing Collegiums tough task for Government and tussle between executive and judiciary. The Governments move to bring about changes in the process judges in High Courts and Supreme Court are appointed could prove to be an onerous task. Despite the proposition seemingly gaining some momentum with jurist agreeing to it.

A high level meeting was held attended by the Law Minister, the Finance Minister, Former Chief Justice of India and other Legal Luminaries, on the view that the existing Collegiums system must undergo some change. 3 Those from the Judiciary were not ready to give primacy to the executive as was the situation before 1993, when the Supreme Court Constitution passed verdict change the ground rule. But another view saw no harm in letting the government have the final, the government wanted to push for the judicial appointment commission Bill, which would replace the system of judges appointing themselves.

THE NATIONAL JUDICIAL APPOINTMENT COMMISSION ACT ; 2014 :

The National Judicial appointment Act 2014 that replace the present collegiums system of judges choosing judges, was passed by the Lok Sabha August 13, 2014 and by the Rajya Sabha on August 14 (both houses) and received the assent of the President on the 31st December 2014 and notified in Official Gazette on April 2015. The NJAC Act was introduced conjunction with the Constitutional Amendment Act 2014, which gives constitutional status to the NJAC. The Commission is the body responsible for the appointment and transfer of judges of the higher judiciary Supreme Court and High Courts in India. 4

Article 124(2) of the Constitution as amended by the Constitution (99th Amendment) Act 2014 states that every Judge of the Supreme Court shall be appointed by President by warrant under his hand seal on the recommendation of the National Judicial

3)Deccan Herald, published News paper on Changing Collegiums tough task for Government date : July 30, Wed. 2014 P. No.12

4)Anita Devi, Editor Chief, Faculty of Arts Banaras Hindu University, Varanasi Journal of Humanities and Culture An International Research referred Journal to High Education (ISSN ; 2393 – 8285) Vol No.I, 2015 p.39.

Commission. A new Article 124 A has been inserted in the constitution which provides for the composition of the Commission. Commission consisting as following namely

- a)The Chief Justice, Chair person Ex-Officio.
- b) Two other senior Judges of the Supreme Court next to the Chief Justice of India Members Ex-Officio.
- c) The Union Minister incharge of Law and Justice – Member Ex-Officio
- d) Two eminent person to be nominated by the committee consisting of the Prime Minister, Chief Justice of India and leader of the opposition in the house of the people and provided that one of the eminent person shall be nominated from among the member belonging to SC, ST and OBC and Women etc for the period of three years and but its implementation is yet to be tested.

Denies of Reports of Karnataka High Courts Elevation The Supreme Court on August Monday 2014 deprecates attempts to defame the judiciary by launching campaign against the collegiums system of appointment of judges. The Apex Courts expression of disapproval coincided with the Government introducing the judicial appointment commission bill in Parliament.

A three judges bench preside over by the Chief Justice R.M.Lodhi spoke against lowering the image of judiciary in the eyes of the general public, saying that many judges have been appointed since the introduction of collegiums system. Further Bench said “For God Sake, Do n’t shake confidence of the people” every one say that the collegiums system is failed.

APEX REJECT PLEAS AGAINST JUDICIAL APPOINTMENT PANEL :

The Supreme Court on Monday August 25th 2014 dismissed several petitions including one filed by noted jurist Foli S. Nariman, which challenged the 121st constitutional amendment bill and the setting up of a National Judicial Appointment Commission (NJAC). The petitioner contended that the bills passed by the Parliament earlier to set up a judicial appointment Commission and scrap the collegiums system of appointing Judges were unconstitutional with the independence of the judiciary.⁵

5)Ashishg Tiwari ; written article Deccan Herald News – National column on Sunday August 26, 2014 Page No.8.

The Apex court concurred with attorney General, Mukul Rohatgi who argued that the bill did not warrant any action as yet since they still need the assent of the president and notification from more than 50 percent of the State Assembly to become reality. Senior Nariman appealing for the Supreme Court Advocate Association, argued that it was absolutely essential to examine the matter as the appointment of Judges was being affected. The NJAC Bill has been passed. How does the Chief Justice of India sit in the collegiums ? there is a hiatus how will judge get appointed.

F.S. Nariman buttressed his argument with a petition contended that Parliament could not pass the bills in question without amending Articles 124 and 217 of the constitution, which related to the appointment of Supreme Court and High Courts Judges “Parliament is not empowered to pass the law without amending both the Articles it is totally illegal”. Further that F.S. Nariman cited Article 368 which empowers Parliament to amend the constitution and contended that legal action affecting the independence of the judiciary could not be passed. The top jurists also urged the Supreme Court to refer the question of whether the bills could be put to judicial review to a five judge Constitution bench, disagreeing with Nariman, the apex court rejected the Shama’s petition as well as those filled by former Additional solicitor general and others too.

ORIGIN OF THE COLLEGIUM SYSTEM AND HOW TO CHOOSE JUDGE ?

Appointments the selection of Supreme Court judges and High Courts back that Gopal Subramaniam could not be appointed to the Supreme Court despite being one of India’s foremost lawyers. The controversy over this non-appointment is a useful backdrop to examine the working of the current system of judicial appointment. A collegium of senior Judges recommends candidates per appointment and the Government appoints them on such recommendations. If the Government does not like the recommendations it can seek reconsideration, but it is bound by the result after such recommendation, the collegium, with its never changing membership has for the past two decades conceived every appointment of a Judge of the High Court and the Supreme Court.

The Executive that makes the appointment on the recommendation of the Court is an equal participant in delivering to the Nation a new judge of the High Court or Supreme Court. The Judiciary is not an autoregenerative organ existing outside the body of the Government, it is a vital organ within that body.

At present the elected Government of the day is not minded to accept the recommendation for a particular person, there is no realistic chance that he will become a Judge in the face of such disapproval by the Government as the biggest litigant has as much such a right to impartial treatment as any other user of the system, and all disguised as an intelligence report, making a disfavored candidate unsuitable.

1) Can such reports render unacceptable to recommendation made by the five of the Countries Senior Most Judges ? Can agencies in effect have veto over judicial appointment and is such a practice desirable ? one way around this word be for the court to seek a willing by the agencies prior to even before considering candidate for recommendation

2) If the consultative process was based including Executive participation at the Ministry level and before the recommendation was arrived at by the Judiciary; question of who would have primarily would be avoided.

The Chief Justice of India has rightly taken exception to the government reframing the Judiciary's recommendation for the appointment of a high constitutionally functionary is not be summarily discarded. Reservation to the proposal, if any are to be conveyed respectfully with a request to review the entire recommendation as whole. The Judiciary is then free to reiterate its recommendation modify it. The recommendation job belong to the Judiciary alone and none else can perform that function.

Origin of Collegium system with cases are the Supreme Court of India's Collegiums system which appoints Judges to the National Constitutional Courts has its genesis in and continued basis resting on three of its own Judgements which are collectively known as the Three judges cases :

1) The cases are : S.P. Gupta's V/s. Union of India, 1981 also known as the Judges Transfer case, Supreme Court Advocates on record Association V/s. Union of India – 1993 and special reference of I of 1998.

2) Over the three cases the court evolved the principles of Judicial Independence to mean that no other branches of the State including the Legislative and the Executive would have any say in the appointment of Judges. The Court than created the collegiums system, which has been in use since 1993, there is no mention of the collegiums either in the original constitution of India or in successive amendments.

3) The case of Judges of 1998 is not a case but an opinion delivered by the Supreme Court of India responding to a question of law regarding the collegiums system raised by the then President of India K.R. Narayan, in July 1998 under his constitutional powers.

4) Further in January 2013 the Court dismissed as locus standi a public interest litigation filed by NGO Suraz India Trust that sought to challenge the collegiums system of appointment.

5) On the Septebmer 5, 2013. The Rajya Sabha Passed the Constitution 120th Amendment Bill, 2013 that the amends Articles 124 (2) and 217(1) of the Constitution of India 1950, which seeks establish the judicial appointment Commission on whose recommendation the President would appoint judges to the High Judiciary⁶.

CURRENT SYSTEM AND WITH DEMOCRATIC CULTURE :

The Text of the constitution that provide for appointment judges of the Supreme Court (Article 124) and High Court (Article 217) is deceptively simple. They provide for the the power to appoint such judges vested ultimately in the executive, it is now with the Chief Justice and the Senior Judges of the Court in the last famous trinity of the judges

6) – Ibid – P.8

cases. The Supreme Court changed the character of "Consultation" to "Concurrence". Our current appointment system is out of step with democratic culture. Primarily because it lacks of transparency provides for over sight. The way in which judges are appointed embodies set of values about democracy choosing Judges based on undisclosed and in largely unknown from system of democracy deficit. It is here that we can learn from system else where, which have managed to provide for a transparent process of appointment while maintaining Judiciary through an independent Commission.

1) For the example of U.K. may be taken the constitutional Reform Act 2005 has established a Judicial Appointment Commission (JAC) with one Chairperson and 14 other Commissioner including five judicial members one barrister one Solicitor and five by lay judges the Act explicitly states that the selection be formed only one merits.

2) Similarly, in South Africa the establishment of the Judicial Service Commission (JSC) and it made the appointments process more Independent its 23 members are drawn from the Judiciary two branches of the Legal Profession, National and regional legislature, the Executive Civil/ Society and Academic.

The Judges are not representatives of any group or constituencies their duty is to do justice to all according to the law without fear or favour, affection, ill-will, equally the Judiciary as whole does not need to be representative of any group or constituency.⁷

JUDGES CHOOSING JUDGES :

Another Model is termed as Independence “Model” where judiciary itself appoints judges and its frees them from political goals and aspirations of other branches of Government. Such system has been followed in Japan. And it is said that collegiums system has put question mark on true federalism which has been the hall mark of Indian judiciary. Since the appointment are in the hands of Five senior Most judges of the Apex Court, the incentive for dissent in the high has been lost.

7) Justice Shah Former Chief Justice Delhi High Court and Chairman Law Commission published in Deccan Herald on Sunday Spot light August 20, 2014 P.8

In France, the Judicial appointment are controlled by self government body. *Council superieur de La Magistrature (CSM)* it comprises of 12 members of which give are elected Judges, a public prosecutor, a counselor of a state, and three individual (nominated) by the President. Senate and National Assembly (respectively) Judicial appointment Commission have been adopted in many Jurisdictions including in some of US, in Canada, at the Federal Provincial level. IN Scotland and Ireland, South Africa, Isreal and various European countries.

Judges of the British Supreme Court are appointed on the recommendation of special selection commission is made up of the President and Deputy President of the court and member of each from the Judicial appointment Commission the Judicial Board for Scotland and Netherland Judicial Appointment Commission.⁸

HOW OTHER DEMOCRACIES CHOOSE THEIR JUDGES :

Generally comprising of academic by people representatives of their Government. The Bard and also the Judiciary thus going primacy to no one institution, it is high time learn from various countries and other mature democracies and various European Countries.

France : Judicial appointments controlled by a self governing body *council Superieur de La Magistrature (CSM)* it comprises of 12 members of which five are elected judges a public prosecutor, counselor of state and three individuals.

Britain : Judges of the Britain Supreme Court are appointed on the recommendation of special selection commission.

South Africa : Judicial Service Commission selects Judges.

Russia Brazil : Judges of Constitutional Court nominated by President and approved by legislatively a Majority of votes.

8) Vice-Chancellor, NALSAR, University of Law Hyderabad, published in Deccan Herald 20-07-2014 – Ibid- 8.

United States : All Federal Judges appointed by President with the advice and consent of the Senate, Judicial nominations are referred to the senate judiciary Committee by the Senior.

Japan and India : Independence Model where Judiciary itself appoints Judges.

South Korea : One third appointment each one made by Executive Parliament and Judiciary.

Judicial commissions are prevalent in some states of the US in Canada at the Federal and provisional levels, in Scotland, Ireland, South Africa, Isreal and various European countries.⁹

CONCLUSION :

What is the solution ? The Power of appointment vested in the Executive cannot be transferred to the judiciary, except by constitutional Amendment under Article 368 of the Constitution. However, that the restoration of the power to appoint judges to the executive is not the solution, either there should be broad based National Judicial Commission consisting 9 eminent persons viz, the Chief Justice of India, 2 eminent jurists nominated by the President, the Law Minister, the Leader of the Opposition in Lok Sabha, the Chairman of the Law Commission, A Bar leader to be nominated by the Chief Justice of India, a Law Professor and an eminent journalist to be nominated by the President in consultation with the Law minister and leader of the opposition and why not lawyers to be elevated as Judge.¹⁰

Another solution is that also have to increase the age of retirement of High Court Judges from 62 to 65 years and keep Supreme Court Judge retirement Age at 65 years. This should also restore the degree the dignity of the High Courts since it was never the intendment of our constitution, the collegiums system created by the Supreme Court has reduced the High Court into a mere Sub-ordinate Court.

9) Deccan Herald published Article How their Democracies choose their Judges, on 20-07-2014, Ibid p.8.

10) (2003) & SCC (Journal) 32 Article by Vinod Bobde.

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