

Problems with Appointment of Constitutional Courts Judges: Collegium System

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ABSTRACT

In India we have supreme court, and high courts are consider to be the constitutional courts. The court have power to review the laws made the legislature and took action if any fundamental rights are violated. And also hear the appeals matters from the subordinate courts both civil and criminal matters, and also hear appeals the all tribunals.

Day by day there are lot of cases filled before the supreme court and high courts which are heard by various eminent judges. For subordinate courts judges are appointed by state public service commissions but for the supreme court and high courts judges are appointed by collegium system. This collegium is strongly criticized for lack of transparency, lack of diversity and nepotism In this article we discuss about what is collegium, how it is evolved, composition of collegium, procedure of appointment by collegium and broadly discuss about the defects of the collegium. The articles explain the defects with real time statistical data.

What is Collegium?

Composition of Collegium

- For Supreme court
- For High court

Procedure of appointment in collegium system

- For Supreme court
- For High court

Evolution

Problems with Collegium

- Extra constitutional body
- No seat for non judges
- Lack of transparency
- Nepotism
- Lack of social justice

Conflict between centre vs collegium

Conclusion

Suggestions

References

WHAT IS COLLEGIUM?

The word collegium means a group of person having approximately equal power and authority. Collegium is a system for appointing and transferring judges of supreme court and high court. Chief justice and senior most judges who are the members of the collegium and make recommendations to the president on appointing and transferring of judges. Qualified Advocates of constitutional courts and lower courts judges can be recommended for the appointment by the collegium on its own discretion.

COMPOSITION OF COLLEGIUM FOR HON'BLE SUPREME COURT:

Chief justice of India and four senior most judges of supreme court. Now strength was increased by six because of succeeding CJI not in composition^[1]. if the succeeding CJI is one of the senior most judges the strength is five if not, the strength is six. Currently, collegium consists of

- CJI D.Y Chandrachud
- Justice Sanjay kishan kaul
- Justice sanjiv kanna
- Justice B.R Gavai
- Justice suriya kant^[2]

FOR HON'BLE HIGH COURTS:

The supreme court collegium consists of Chief justice of India and two senior most judges for analysis and filter the recommended names by high court collegium and recommend the filtered names to president for appointment. Which consists of

- CJI D.Y Chandrachud
- Justice Sanjay kishan kaul
- Justice sanjiv kanna

Each high court has separate collegium which comprises of Chief justice of high court and two senior most judge of the high court For recommending eminent persons for the high court.

PROCEDURE OF APPOINTING JUDGES IN CONSTITUTIONAL COURTS: FOR SUPREME COURT

According to Article 124(2) of the Constitution of India, the president shall appoint the judges of the supreme court with the consultation with Chief justice of India and two senior most judges of supreme court.

the collegium make recommendations regarding the appointment prominent advocates of supreme court and elevation of judges from high courts to supreme court, the recommendation send the law ministry, who forward the recommendations to president after clearance^[3].

FOR HIGH COURTS

Art 217 of the Indian constitution is deals with appointment of the high court judges

- For appointment or elevation to the high courts, the HC collegium makes the recommendation to the state government
- The state government sends the names to the centre
- The centre transfer the names to the intelligence bureau (IB) for background checks.

- The IB sends the report to the supreme court collegium consists of Chief justice of India and two senior most judges.
- The collegium Analysis the IB report and recommend the name for appointment to centre.
- The centre can accept or send back the files for reconsideration
- The supreme court collegium have right to reiterate the name sent back by the centre
- If the collegium is reiterate the names, the centre is bound to appoint the recommended names.
- The president of India is final authority of appointment of all high court judges.^[4]

EVOLUTION OF COLLEGIUM SYSTEM.

The collegium system is an extra constitutional body which is evolved by the judicial decisions. This is evolved by three judges cases

First judges case

S P Gupta vs union of India,1982

The concept of collegium is introduced in the case by justice Bhagwati, he suggested that there must be a collegium for recommending the names for appointment of judges in the supreme court and high courts. And the judges emphasized the independent judiciary, which means the appointment of judges should not be done executive alone and there must be a procedure for appointment of judges.

In this case the judges clarify the meaning of the word “consultation” in articles 124 and 217. They said that the consultation means “advice”, the president shall get the advice from the Chief justice of India and two senior most judges, but the president is not bound to follow such advices. The president can make decisions contrary to the advice of Chief justice of India and two senior most judges in case of appointment of judges in supreme court and high courts.^[5]

Second judges case.

Supreme court advocates on record association vs union of India,1993

The first judges case was overruled by constitutional bench of nine judges with the ratio of 7:2. And the judges said that the word consultation mentioned in articles 124 and 217 means “concurrence”. The president bound to follow the recommendation of the chief justice of India and two senior most judges.

The court ensured the primacy of chief justice of India in the matters of appointment of judges to higher judiciary, which means the primacy was transferred from executive to judiciary. And ensure judicial independence. And also said that the appointment and transfer of judges are done by president on the recommendation of chief justice of India with two senior most judges.^[6]

Third judges case

In re: special reference 1of 1998

In this case only the supreme court laid down the strict guidelines for the appointment of judges of higher judiciary which is currently known as collegium system .The court held that the consultation with Chief justice of India expressed in articles 124 and 217 means not only his/her individual and personal opinion, which means the opinion of majority of collective body.^[7]

For supreme court

The court extent the collegium body by five members consist of CJI and four senior most judges.

For high court

For appointment of high court judges there are two collegiums one is high court collegium for recommending the names for appointment, the supreme court collegium for approving the names with alteration .

- Supreme court collegium
collegium consists of Chief justice of India and two senior most judges.
- High court collegium

The collegium consist of chief justice of high court and two senior most judges.

For transfer of high court judges

The collective body consist of CJI and four senior most judges of supreme court along with two judges from the high courts in concern.^[8]

99TH AMENDMENT – NATIONAL JUDICIAL APPOINTMENT COMMISSION

National judicial appointment commission act was passed in 2014 to replace the collegium way of appointment supreme court and high courts judges and transfer of high court judges. this act was passed because the collegium system was strongly criticized for monopoly in appointment of judges of higher judiciary and no place for non judge in the recommending body.

Several provisions were amended and inserted certain provisions in regards of appointment of supreme court and high court judges and transfer of high court judges., moreover, it provides that the president to act on the recommendation of national judicial appointment commission.^[9]

Article regards the national judicial appointment commission

- Article 124A- the article explains the composition of members of the commission and tenure of the members
- Article 124B – the article deal with function of national judicial appointment commission
- Article 124C – it empower the parliament to make law and procedure regarding the appointment of supreme court and high court judges.^[10]

Fourth judges case

Supreme court advocates on record association vs union of India, 2015

This case is considered to be the fourth judges case because it gives an additional assurance to the collegium.

The national judicial appointment commission act was questioned in this case.

The constitutional bench of five judges held that the 99th amendment of constitution and national judicial appointment commission act are invalid. Because there is no adequate representation of judicial persons in composition of national judicial appointment commission which is expressed in article 124A. the judicial independence is a basic structure of constitution, art 124A is violating the basic structure, hence the supreme court held the collegium system to be followed for ensuring the judicial independence.^[11]

PROBLEMS WITH COLLEGIUM SYSTEM

1 EXTRA CONSTITUTIONAL BODY

The collegium system consider to be extra- constitutional body or non constitutional body, because it was created by judges not by the constitution or legislature. The judges they themselves create the way of appointment and transfer. There is no legislative assurance to the Collegium system.^[12]

2 NO SEAT FOR NON JUDGE

When comparing with various countries in world, India is only country which selecting committee appointment of judges of higher judiciary is only consist of judges. Russia also have similar with India, that collegium is consist of judges alone. But in Russia the members of collegium are elected by judicial community whereas in India it is based the seniority. It is only major criticism against the collegium that leads to monopoly of judges in appointment of supreme court and high court judges.

A overview about others countries

In USA – supreme court judges appointment by president with advice and consent of senate.

In Canada – supreme court judges appointment by governor -in -council

In Australia – judges are appointed by governor -in -council As like as Canada

In UK – judges appointment by national judicial commission

In France – the high council of the judiciary appoints the judges. The council consist of judges who are appointed by the head of the state that means the president.^[13]

3. LACK OF TRANSPARENCY

India is a democratic country the government and government authority should accountable to the people of country. When comparing the with executive and legislative the selection process is done by proper bodies like election commission for legislative authority and various public services commissions for executive authority, but in case of judiciary for selection of subordinate courts judges done by public services commissions, for higher judiciary also a collective body is there for selection but that is not recognized by constitution. When comparing with other authority the selection of higher judiciary, there is no proper procedure for selection but that not in case of other authorities.

In collegium system, the judges need not to give any explanation or reason for why the person recommended to become the judge and what are qualification he/she to become a judge except experience. Hence the Collegium was consider to be not transparent and strongly criticized.

4. NEPOTISM

Because of existence of collegium the sons, brothers, relative of sitting or retired judges are given more preference in appointment for high court judges.

Here we can go through some examples.

Present sitting of supreme court;^[14]

- Justice D.Y. Chandrachud – son of Y.V. Chandrachud who was former CJI
- Justice Sanjiv kanna – son of Dev Raj kanna who was a former judge of Delhi high court and nephew of former SC justice Hans Raj Khanna.
- Justice B V Nagarathna – daughter of E.V. Venkatamaih who was former CJI
- Justice Sudhanshu Dhulia – son of Keshav Chandra Dhulia who was former judge of Allahabad high court

- Justice P S Narasimha – son of Kodanda Ramayya who was also a former judge
- Justice Dipankar Dutta – son of Salil Kumar Dutta who was former judge of Calcutta High court
- Justice Pankaj Mithal – son of Narendra nath Mithal who was former judge of Allahabad high court
- Justice P.V Sanjay Kumar – son of Ramachandra Reddy who was former advocate general of Andhra Pradesh
- Justice K.V. Viswanathan – son of K.V. Venkataraman who was former public prosecutor
- Justice Ujjal Bhuyan – son of Suchendra nath Bhuyan who was former advocate general of Assam.
- Justice Bela Trivedi – daughter of former judge of civil court (she and her father presided as judge in same court in same period)^[15]

Justice J..B. Pardiwala, Justice Dinesh Maheshwari, Justice A S.Oka, and justice Vikram nath are the sons of famous advocates.

Some Former CJIs of supreme court

- Justice U U Lalit – son of U R Lalit who was former additional judge of Bombay High court
- Justice S R Bobde – son of AS Bobde who was former advocate general of Maharashtra.
- Justice Dipak Mishra – son of Ranganath Mishra who was 21th CJI of India.
- Justice T.S. Thakur – son of D.D. Thakur who was former judge of high court of J&K^[16]
- Justice Rajendra Mal Lodha – son of justice S K Mal Lodha who was former judge of Rajasthan highcourt

We can see how nepotism plays role in supreme court through the data given above. This is only supreme court. We can't able to collect data about the high courts which is much difficult than the supreme court, these data's are all available in SCC web page. But for high court we doesn't have such kind of source.

Let we see an example for high courts

In 2016, the Allahabad high court collegium recommended 30 name regarding the appointment of high judges. But CJI T S Thakur rejected 11 names because the relatives of sitting and retired judges. Even after that, the Allahabad high court collegium recommended 33 names, the government point out 11 are relatives of sitting and retired judges.^[17]

5. LACK OF SOCIAL JUSTICE.

The recommendation of these collegium we find out there is no proper representation for SCs, STs, minorities and women. From 2015 – 2018, the Allahabad high court collegium recommended 83 names, in that list very few them are SC, ST, minorities and women.

In India we have lot of inequalities based on gender, caste, religion etc. the constitution itself establish the special treatment to socially and educationally backward class by providing reservation in employment and education. We have reservation in legislature, public services, local self government like panchayat raj and municipalities. Even we have reservation for subordinate courts but we doesn't have any reservation for constitutional court judges. It would leads to domination of upper caste over higher judiciary.

We have to go through some recent statistical data

High court appointment

Law minister answered for a question by MP in Rajya sabha, the question is regarding the SC, ST, OBC judges in high courts. The minister Replied,

Total number of judges appointment from 2018 to 2023 July in High courts = 604

- General category – 458
- SC category -18
- ST category – 9
- OBC category – 72
- Minorities – 34
- No information – 13^[18]

Let Come To Supreme Court

Appointment from 2004 -2014

Total number of judges appointment – 52

- General category – 29
- OBC category – 7
- Minorities – 9
- Unknown – 7^[19]

Appointment from 2014 – 2021 may

Total number of judges appointment – 35

- General category - 24
- OBC category-1
- Minorities - 4
- SC category - 1
- Unknown – 5^[20]

Appointment done on August 2021- Total judges appointment – 9

- General category – 7 (including 3 women)
- SC category – 1
- OBC category – 1^[21]

From independence to till now there is no judge from schedule tribe!

We can easily understand how the higher judiciary is dominated by upper caste even the recent one or two judges from schedule caste and other backward caste. More than 75% are appointed from the upper caste only.

CONFLICT BETWEEN CENTRE AND COLLEGIUM

The constant cold war is going between the judiciary and executive regarding the appointment of judges in high courts and supreme court. The parliament passed national judicial appointment commission act in 2014. But that was stuck down by judiciary in fourth judges case because it violating the constitution.

Before we go detailly, we need to know the procedure.

The supreme court collegium recommends the name for appointment of judges in high courts and supreme court. Which the appointment done by president, the collegium send it recommendations not directly to president. It send it's recommendations to the law minister. The have power to approve and send back for reconsideration. The supreme court collegium have power to reiterate the name which was sent back by ministry for recommendation. Once the collegium reiterate, the ministry and centre have obligation to appoint the proposed name, there is no excuse.

In 2022 Nov, the centre send back 20 names for reconsideration. In that 11 are newly recommended and 9 are reiterated by collegium.^[22] centre doesn't follow the procedure properly. The centre won't appoint the person even though they are reiterated by collegium.

And also there is no time limit for appointment of recommended names. In September, the centre only clear 10 names out of 80 names, 70 names are pending for clearance^[23]. It's is one of the best advantage, that makes the centre to make delay of appointment in higher judiciary. Some times the collegium not recommending certain name who are solely against the ruling government, at that time it favours the central government justice Muralidhar issue is one kind of example.^[24]

CONCLUSION

We discussed lot of example for why the collegium system itself is problem. The judges say the collegium ensures the independence of judiciary. I think some what it ensures but not completely. It makes the judiciary to escape from the social reformative program like reservation for SC, ST, OBC, Minorities and women. And it escape from public accountability, which makes the increase of nepotism in judiciary. Over domination of upper caste leads to bias in judgements. One of the best example is EWS case , in this case the judges express the reservation system should abolished as soon as possible. Such over domination of upper caste does not understand the feelings of unprivileged people and they give judgement against the interest of unprivileged sectors. Recently the book “ Unsealed covers” explains the past 10 years judgements which are bias in nature and how the personal ideologies of judges influenced when giving judgement. This book was written a advocate Gautam Bhatia.

SUGGESTIONS

- Collegium is extra constitutional body having lots of problems in regards of transparency, composition, qualification of judges, diversity etc .It is not fit for democratic country, it should be replaced with national judicial appointment commission.
- For appointment of supreme court and high courts judges, Reservation must be followed to ensure the social justice.
- Recommendation given by NJAC is must be transparent and accountable for the people for their recommendations.
- When replacing the NJAC, the national judicial appointment commission act 2015 should be modified in composition of selection committee
- The committee would consist of more than 10 persons which the chairmanship of CJI because of different perspectives.
- Judicial persons is more in number when comparing with other person in the NJAC.
- And proper eligibility criteria must be fixed for elevation of judges from lower and appointment of advocates as judges.

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