

# Inclusion of Law Ministers in Collegium

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## Abstract

A judge is a lawyer who is a politician who has a friend. Our Supreme Court is also a political court not because judges are politician but because all political disputes are ultimately solved in the court of law. The judiciary should not be solely responsible for the appointment of judges, which is a crucial component of government. The government has made an effort to demonstrate its authority in the process, highlighting the need for a more inclusive framework that includes the executive and legislative branches. To understand the recent debate over our collegium system, it is important to dig deep the constitutionality, history and requirements of the system to be able to answer whether the law minister exclusively be included in the collegium system of India or not. The article aims at elaborating such issues to such context.

**Keywords:** Collegium, judges, appointment, amendment, government, countries, constitution

## Introduction

‘I personally feel no doubt that the Chief Justice is very eminent person. But after all the Chief Justice is a man with all the failings, all the sentiments and prejudices which we as common people have. To allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we not prepared to vest in the President or the government of day. I therefore think, that is also a dangerous proposition.’

– Dr. BR Ambedkar, President, Drafting Committee of Constitution of India

The people's dissatisfaction with the judiciary, which is becoming more obvious on public forums, stems partly from the obscurity of the process by which judges in higher courts are selected. While the framers of the Indian Constitution attempted to keep judicial appointments free of on-the-ground party politics, they also attempted to make judicial appointments reflective of the voice of the people through the elected head of a democratic government, the President of India. To ensure that the President was properly informed by legal minds throughout the process, they preserved the opportunity for consultation with Supreme Court and High Court Judges but left it up to the President's decision. The choice of language made it quite obvious that the Constitution did not oblige the elected president of Democratic India to confer with legal scholars. Any system that contradicts this and the powers of the President of India would be unlawful, no matter what hue we coat it.

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Constitution on Judge's Appointment

There will be a Supreme Court of India composed of a Chief Justice of India and, unless Parliament by legislation specifies a greater number, of not more than seven additional Judges, according to Article 124

of the Indian Constitution. After consulting with any judges of the Supreme Court and High Court in the States the President may deem necessary for the purpose, each judge of the Supreme Court shall be appointed by warrant bearing his or her signature and shall hold office until the age of 65. The Chief Justice of India's opinion must be considered by the President while making judicial appointments. The Government must abide by the Chief Justice of India's judgement. A collegium comprising at least four of the senior-most Supreme Court justices must be consulted in good faith before the Chief Justice of India formulates an opinion. He shouldn't convey the suggestion to the Government even if two judges render a negative judgement. The Central Government will receive the names of the candidates from the Collegium and will then forward those names for consultation. There is no set time restriction for the appointment procedure, thus it takes a long time. The government must approve the names if the Collegium delivers them again with the same name.

Consequently, it is impossible to fully ignore the function of government..

History & Constitutionality Of Collegium –

Judges' political and ideological stances may or may not affect the verdicts they render. There is a psychological component that motivates them to act honourably and faithfully in the performance of their duties, but since the court serves as the last arbiter in political conflicts, every government seeks to nominate judges who will uphold their political views as Chief Justice. Judges who fail to issue rulings, with the result that the government's operations are significantly hampered. It is impossible to say that the government has an illegitimate desire. Even a person of Jawaharlal Nehru's calibre had said in the Constituent Assembly in 1949 that "within bounds, no judge and no Supreme Court may establish itself a third chamber. The sovereign will of Parliament cannot be overruled by the Supreme Court or the judicial system. If we make mistakes here and there, it can highlight them, but no judiciary can get in the way in the end when it comes to the community's future. Additionally, the entire Constitution is a creation of Parliament if it gets in the way. This assertion reflects constitutional history rather than being only a skewed view. Similar to this, Indra Gandhi rejected at least two of our most senior judges when he was nominated to be the Chief Justice of India in another occurrence. The nomination of the Chief Justice of India was deferred as the Supreme Court debated the ruling. On the same day that the historic case's verdict was rendered, the Chief Justice's identity was also made public. One of the biggest disagreements regarding the chief justice's selection included Justice A.N. Ray, who was the junior of the other three judges. Justice K.S. Hegde, Justice J.M. Shelat, and Justice A.N<sup>1</sup>. Grover all previously held top positions on the court. The tragedy also earned the distinction of being our free institution's worst day ever. It was controversial since the Emergency was in place at the time, and it was said that the reason he was elevated to Chief Justice was because, in contrast to the other three contenders, he made rulings that were more in favour of the parliament than the general population. When the junior judge was appointed Chief Justice, the event sparked a number of intellectual controversies. Later, in Parliament, Kumar Mangalam spoke on behalf of the government, asking why it shouldn't be taken into account when choosing a judge to serve as the Chief Justice of India. He also mentioned factors like their outlook on life, relationship with the government, and their participation in politics.

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<sup>1</sup> Kesavnanda Bharti Nanda v State of Kerela [1973] 4SCC 255

### **Other Countries**

There are various countries that simply gives us the wide explanation of how and why the state intervenes in the process of judicial appointment and thus briefly shows the scope of such intervention and role.

*USA –*

President nominates judges after that confirmation hearing is done in Senate when voting has been done. That simply means the exclusive right for nomination of judges is with President or Government. This is why in America we know when Republican party nominates the judge then it will be the conservative judge. On the other hand, when Democrats nominate the judge then it will be a liberal judge.

***England-***

Till 2005, House of Lords (similar to Rajya Sabha) was the highest court, similar to Supreme Court of India. It was presided by law chancellor, a minister, who presided there. Even today, for the appointment of Apex court's judges, the process is initiated by law chancellor or law minister. Firstly, on recommendations of law chancellor, queen/king appoint the judge. Law chancellor basically convened a selection committee in which President of Supreme Court will be present but no other judge of Supreme Court. A non-lawyer person would be in the committee along with representatives of judicial commission of Scotland, Wales, Northern Island and this selection committee will consult with senior politician. After this process, the report will be forwarded to Law minister then even he consult with politicians and judges and he has the power of veto i.e, he may reject or accept or can ask the Selection committee to reconsider and then it will be finally forwarded to President and monarch will appoint the judge.

***Canada-***

Judicial Advisory Committee is established in Canada. The committee is responsible for evaluating the judicial applications. 17 Judicial Advisory Committees are established in every province but government still holds an important role in appointment of judges. Governor General appoint judges acting on the advice of Federal Cabinet on the recommendation of Minister of Justice.

***Germany –***

There is one apex court, German Federal Constitution Court that explicitly deals with constitutional matters. Federal Court of Justice is also established that deals in civil and criminal matters. Along with Federal Administrative Court, Federal Labour Court, Federal Social Court, Federal Physical Court. Federal Constitutional Court has two chambers called senate. Every senate is consisted of 8 judges. Judges are appointed by election process. Half of the judges of Federal Constitutional Court are elected by German Parliament and the other half judges are appointed by the state. That simply shows that even in this country the role of state in the process of judge's appointment cannot be overlooked.

### **Why Law Ministers Should be Included in Collegium?**

The judiciary should not be solely responsible for the controversial part of government known as judge appointment. One of our Prime Minister Indra Gandhi's primary objectives of bank nationalisation was declared unlawful by the Indian Supreme Court in the case of RC Cooper<sup>2</sup> in 1970, with a vote of 10:1. In a different case, the Allahabad High Court ruled in 1975 that Prime Minister Indira Gandhi was guilty of election fraud and barred her from holding public office for six years. The country was placed under a

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<sup>2</sup> Rustom Cavasjee Cooper v. Union of India [1970] AIR 564

two-year state of emergency as a result. Elections by Indra Gandhi were declared invalid by Justice Jagmohan Lal Sinha, an Allahabad High Court judge.

Judges may still be able to make decisions independently even when the government is actively involved. Instead, in my opinion, the MOP court order should have been mentioned when the Supreme Court was rendering its decision about NJC in that particular instance. No one should be in a position of total dominance or have unchecked authority, according to the constitution. We must continue to have checks and balances. It is the public's right to choose judges and to ensure their independence. In the current situation, government engagement in the process is indirect; it should become direct. The five judges must make a decision right away after hearing the government's objections. The majority will make the judgement if the collegium feels it is inappropriate to take into account one law minister's opinion. The constitution expressly stipulates that the President has the authority to select judges, but only after consultation, therefore completely excluding the role of government would not work. Judges of the High Court have no say in the selection of Supreme Court judges who ought to be involved, which is another issue with the collegium.

### Conclusion-

It could therefore be seen appropriate to include law ministers in the collegium; nevertheless, any concerns must be presented to the Chief Justice and five judges; if they are persuaded, the decision will be approved; otherwise, the decision will be taken in support of the majority. The government will abide to act on the decision of the majority in such a case when the decision is taken in line with the majority. Veto authority would be eliminated, making it a necessary part of the procedure. In many nations, the government actively participates in the appointment of judges. In India, the government also actively participates in the appointment of judges, but they now have the right of veto. A compromise must be made in order to improve the situation. The collegium system has several advantageous effects, such as fostering judicial independence. Judges are in a better position to determine which candidates would make the best judges. However, the government has some inputs, and if those inputs were made available to judges, such as meeting minutes, it would increase openness. Transparency and accountability would effectively benefit, and the opaqueness of the collegium system would be gone. Additionally, it would not be fully accurate to believe that judges who are selected by the government lack independence. Government held exclusive rights even before the collegium was established. Judges were consulted and often overruled, although several historic decisions were made against the wishes of the government.

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