Former Delhi High Court judge Kailash Gambhir wrote a letter to President Ram Nath Kovind on Wednesday, [criticising the Supreme Court collegium's](https://www.firstpost.com/india/former-delhi-hc-judge-protests-against-sc-collegium-recommendation-of-elevating-of-2-high-court-judges-ahead-of-32-others-5904571.html) recommendation to elevate justices Dinesh Maheshwari and Sanjiv Khanna to the apex court, ignoring 32 more senior judges.

The SC collegium is often in the news, and in the past, its decisions have been questioned not just by members of the judicial fraternity but also by the government. On 30 April, 2018, the Centre had controversially turned down the collegium's recommendation to consider [Justice KM Joseph for the role of a Supreme Court judge](https://economictimes.indiatimes.com/news/politics-and-nation/justice-km-joseph-and-two-others-appointed-as-supreme-court-justices/articleshow/65267970.cms). Prior to that, on 12 January, 2018, four senior judges (including current CJI Ranjan Gogoi) of the Supreme Court had made public their resentment, stressing on the need to improve the process of judges' appointment.

**So, what is the SC collegium?**

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Thecollegium is a system within to decide on appointments and elevations of Chief Justices and judges of the Supreme Court and high courts of the country. It's a forum headed by the Chief Justice of India and comprises of the four other senior-most judges of the Supreme Court. The collegium takes decisions after voting, with the majority view prevailing in case of difference of opinion, [says *Advocate Khoj*](http://www.advocatekhoj.com/blogs/index.php?bid=597515a97110ac9a612013454&bcmd=VIEW).

**Is the collegium mentioned in the Constitution?**



File image of the Supreme Court of India. PTI

This system of appointment and transfer of judges has [evolved through judgments](https://indianexpress.com/article/explained/collegium-system-supreme-court-how-judges-are-appointed-and-transferred-the-debate-around-it-4375719/) of the Supreme Court, and not by an act of the Parliament or by a provision of the Constitution, says *The Indian Express*. There is no mention of the collegium in the successive amendments of the Constitution either.

If the word of the Constitution is to be followed, then the appointments of judges to the SC and the HCs are made by the President, who is required to meet with sitting judges, or the Chief Justice of India (in case of appointments in the Supreme Court except for the appoint of CJI), and chief justices of high courts (in case of appointments in high courts except for a chief justice of the high court) as per his discretion, before arriving at a decision.

Article 124(2) of the Indian Constitution says: "Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years. Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted."

The other section of the constitution devoted to the appointment of judges is Article 217.  It says: "Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal 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."

**But what actually happens?**

However, judges of the higher judiciary are appointed only through the collegium system with only a ceremonial participation of the President, [says the *Times of India*](https://timesofindia.indiatimes.com/india/What-is-the-collegium-system/articleshow/49404698.cms). Only after the names of the judges have been finalised by the collegium does the government come in.

Here too, the government’s role is limited to asking the Intelligence Bureau to conduct an inquiry into any lawyer who is nominated to be elevated as a judge in a high Court or the Supreme Court. The government can also raise objections regarding the collegium’s choices. However, in such a situation, if the collegium sends back the same names, the government is bound, under Constitution bench judgments, to appoint them as judges.

**How did the collegium gain acceptance, then?**

Three judgments, now merged and called the "Three Judges Cases," led to the legitimacy of the collegium. The First Judges Case of 1980 declared that there was no need for the Chief Justice of India to be granted primacy in recommending a candidate to the President.

In 1993, a nine-judge bench ruled on what is now called the Second Judges Case. This granted primacy to the Chief Justice of India in appointing the key members of the top judicial brass. For the next five years, confusion reigned on how integral a role the Chief Justice of India would play.

This was resolved by the Third Judges Case in 1998, in which, the Supreme Court conclusively asserted the primacy of the Chief Justice of India in the appointments issue. In the same year, then President KR Narayanan issued a presidential reference to the Supreme Court as to what the term "consultation", which the President was required to do with judges before selecting a judge, referred to in the Constitution, [reported *The Quint*](https://www.thequint.com/explainers/explainer-appointment-and-removal-of-supreme-court-judges-controversy)*.*

In reply, the Supreme Court laid down nine guidelines for the functioning of the forum which we now know as the collegium.

**What goes wrong in a collegium?**

The chief problem with the system that critics have pointed out, is that it does not function out of a rulebook. Because deliberations largely happen behind closed doors, little is known about the selection procedure or the criteria considered for the eligibility of the judges. How and when a collegium meets, and how it takes its decisions are secrets that elude even the lawyers or judges whose names are being considered.

**Is everyone okay with the idea of the collegium?**

The NDA government has tried unsuccessfully to replace the system. The Justice MN Venkatachaliah Commission, appointed to recommend on the need for change in the collegium system, said there indeed was. The Commission said a National Judicial Appointments Commission should be formed with the Chief Justice of India, two seniormost judges, the Union law minister, and an eminent person from the public, to be chosen by the President in consultation with the CJI. In 2015, a five-judge Constitution bench declared the move "unconstitutional". However, the 2015 ruling, in the end, also paved the way for a new Memorandum of Procedure to guide the collegium on future appointments.

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 Former Chief Justice of India (CJI) RM Lodha said he was "surprised" after a junior judge was recommended for elevation to the Supreme Court, superseding senior judges. The decision had also upset former Attorney General Soli Sorabjee. Kailash Gambhir, former judge of Delhi High Court, described the choice by the top court panel as "appalling" and "outrageous" in his letter to the President.

"What I always feel is that the Collegium should act in a transparent manner, and people must know why a decision was upturned. The Collegium works as an institution. It is an institutional body; it is not an individual's decision. A junior judge was superseded to the Supreme Court, it surprises me," Justice Lodha said.

If the recommendation for the elevation -- which in one case will supercede more than 30 senior judges -- is accepted, the "[historical blunder](https://www.ndtv.com/india-news/historic-blunder-former-judge-kailash-gambhir-to-president-ram-nath-kovind-on-picks-for-supreme-cour-1978210)" will ruin the credibility of the country's top court, Justice Gambhir said in his letter.

[On January 10](https://www.ndtv.com/india-news/justices-dinesh-maheshwari-sanjiv-khanna-named-for-top-court-elevation-1976577), the Supreme Court Collegium headed by Chief Justice of India Ranjan Gogoi, recommended the elevation of Justice Dinesh Maheshwari, the Chief Justice of the Karnataka High Court, and Justice Sanjiv Khanna of the Delhi High Court. But the names of senior judges Pradeep Nandrajog and Rajendra Menon were being considered in December.

The [elevation of both the judges was confirmed by President Ram Nath Kovind](https://www.ndtv.com/india-news/justice-dinesh-maheshwari-elevated-to-supreme-court-by-president-1978725?pfrom=home-topscroll) today.

Top sources in the judiciary, however, told NDTV that there was no final decision on Justices Pradeep Nandrajog and Rajendra Menon and it was only after the Collegium received some material against one of the judges that the names were changed and Justices Dinesh Maheswari and Sanjeev Khanna were recommended to the centre.

"There are a number of instances where junior judges have been elevated to the top court. Also, the Collegium has on many occasions in the past changed its earlier decision before sending it to the government," sources added.

Supreme Court judge SK Kaul had reportedly written to Chief Justice Ranjan Gogoi against the elevation of Justice Sanjeev Khanna, ignoring the seniority of Justice Pradeep Nandrajog and said that while he had nothing against Justice Khanna, he could have waited for his turn.

"The question is after Justice Pradeep Nandrajog, there are two more judges, Justice Gita Mittal, the Chief Justice of Jammu and Kashmir High Court and Justice S Ravinder Bhatt. The Karnataka High Court Judge, who is from Rajasthan, was superseded six weeks ago, was not found to be, as per reports, deserving for being elevated to the Supreme Court," Justice Lodha told news agency ANI.

The Bar Council of India (BCI) has also termed the elevation as "unjust and improper".

BCI Chairman Manan Kumar Mishra, in a statement, said the supersession of several senior judges and Chief Justices of the country cannot be tolerated by the people and the revocation of the earlier decision recommending the names of Justices Pradeep Nandrajog and Rajendra Menon is being viewed as "whimsical and arbitrary".

Several councils and associations have proposed to organise nationwide protests on this issue, the BCI said.

The dissenting voices also pointed out that last year Justice Gogoi had addressed a press conference along with three other most senior judges of the Supreme Court to flag some of the "pressing problems they faced with the then Chief Justice of India". They had demanded transparency in the functioning of the top court, but now Chief Justice Ranjan Gogoi will have to face some tough questions, they added.

*COMMENT*

The top court is presently functioning with 26 judges as against the sanctioned strength of 31.