

# THE DANGER OF RECIPROCITY: ON THE INDEPENDENCE OF THE SUPREME COURT

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

Independence, impartiality and fearlessness of judges are not private rights of judges but citizen's rights. Ultimately judicial legitimacy/ power rests on people's confidence in courts. We have yet another controversy surrounding the Supreme Court, with the collegium revisiting decisions made at an earlier meeting and recommending the elevation of two junior judges to the Supreme Court. No one has any doubts about the competence or integrity of Justice Sanjiv Khanna and Justice Dinesh Maheshwari, but the manner in which it was carried out puts the spotlight once again on the controversial collegium system of judicial appointments.

This seriously undermines the independence of judges and raises unnecessary doubts about the credibility of the highest court as the government is not only the biggest litigator but also the greatest threat to the abuse of power. Judicial review as a concept is supposed to control the government and keep it in check.

How has this panned out in the past? Let's look back at the Justice K.M. Joseph case. He had struck down the Modi government's imposition of President's rule in Uttarakhand and saw the government returning the recommendation for his elevation to the Supreme Court to the collegium last April — his appointment was cleared in August. This time the government not only did not return the recommendation to the collegium for reconsideration, but approved the appointments instantly.

Take the case of Justice A.N. Ray, who was appointed Chief Justice of India (CJI) in 1973 superseding three senior judges, or Justice M.H. Beg, who was appointed CJI superseding Justice H.R. Khanna in 1977. Both Justice Ray and Justice Beg were excellent judges, but favoured the government. They were considered not forward-looking judges but judges who looked forward to the office of the CJI.

In the bank nationalisation case (1970), while as many as 10 judges went against the government, Justice Ray approved the government's action. Similarly, Justice Beg, in the Indira Gandhi election case, held that while democracy is the basic structure, free and fair election is not.

The National Judicial Appointments Commission (NJAC) was struck down by the Supreme Court because it would have compromised the independence of the CJI and given a role to the government in the appointment of judges. Unlike in the U.S. where judges are appointed by the President and are known to be leaning towards the Democrats or Republicans, Indian judges are not supposed to have any political affiliation. But is it possible to completely insulate judges from governmental influence? The answer is no — as George Orwell pointed out in 1984, the government is everywhere, and judges as fellow human beings do get influenced by it. The judiciary asserts its position only when the government is weak. This collegium system was asserted when we had weak Central governments in the 1990s.

'Power' and 'influence' are fundamental concepts in society. 'Influence' is sometimes considered to be an aspect of 'power'. Indira Gandhi was influential because she was powerful. Prime Minister Narendra Modi is, similarly, not only powerful but hugely influential. According to the American sociologist, Alvin Ward Gouldner, the universal norm in human societies is that

individuals are obligated to reciprocate favours received. Gouldner articulated the “norm of reciprocity” in the following manner: “people should help those who have helped them” and “people should not injure those who have helped them”.

In his NJAC judgment (2015), Justice J.S. Khehar discussed the issue of reciprocity at length in striking down the commission. He referred to Laura E. Little’s work on American judges who felt obliged to the President for nominating them and Senators who helped them in the confirmation process. Justice Khehar therefore preferred exclusion of the political executive from the appointment of judges as a feeling of gratitude towards the government impacts the independence of the judiciary. It was for this very reason that even B.R. Ambedkar wanted to insulate the judiciary from political pressures.

In his autobiography, *Roses in December*, the former Chief Justice of the Bombay High Court, M.C. Chagla, who also served as a Minister in Indira Gandhi’s Cabinet, boldly stated the adverse impact of supersession when he said, “the effect of these supersessions was most deleterious on the judges of the Supreme Court who were in the line of succession to the Chief Justiceship. Each eyed the other with suspicion and tried to outdo him in proclaiming his loyalty to the Government either in their judgments or even on public platforms.” A similar depiction of the apex court was made by Justice H.R. Khanna, who himself was superseded, in his book, *Neither Roses Nor Thorns*, when he recalled, “one of the new trends was the change in the approach of the court with a view to give tilt in favour of upholding the orders of the government. Under the cover of high sounding words like social justice the court passed orders, the effect of which was to unsettle settled principles and dilute or undo the dicta laid down in the earlier cases.”

The Hindu right’s opposition to the Constitution is an open secret. The prospect of a 15-judge bench overturning *Kesavananda Bharati . v. State of Kerala* (1973), which outlined the basic structure doctrine of the Constitution, does not look too remote in the near future if the government continues to exert pressure on the collegium and if the collegium, due to reciprocity, does not effectively assert its power and independence. Most governments prefer pliable judges but many of our judges remain wedded to their oath and decide cases without fear or favour. True reciprocity affects humans but since our judges are addressed as ‘Lords’, let them not have any feeling of gratitude towards anyone.

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Pakistan's identity crisis, going back to the debates since its creation, remains unresolved

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