

POLITICS AND IDEOLOGY WITHIN THE PORTALS OF THE JUDICIARY

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'Concern about the ideological/political leanings of judges is perfectly justified' | Photo Credit: Getty Images/iStockphoto

That justice is blind is part of the myth system. "A judge is a lawyer who is a politician who has a friend," Judge Paul Leahy once told his clerk Floyd Abrams. In India, the episode of the collegium's recommendation of Justice L. Victoria Gowri's name and her appointment to the Madras High Court within weeks, has revived the debate on judicial appointments. A two-judge Bench which made a distinction between 'eligibility' and 'suitability', said that the material on her alleged hate speeches was before the collegium.

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The Supreme Court of India is a political court in the sense that it is the final arbiter of political disputes. Accordingly, the political and ideological positions of judges may influence their judgments — at least on contentious political questions. Thus, concern about the ideological/political leanings of judges is perfectly justified. "It is a centre of political power because it can influence the agenda of political action, control over which is what power politics is in reality all about," wrote philosopher-jurist Upendra Baxi. The Court is routinely drawn into the politics of the establishment as well as the politics of the Opposition. In other words, "whether justices of the Court like it or not, understand it or not, care about it or not, the plain fact remains that the court can be used for purely party political ends in certain situations beyond the control of the Court".

Any number of examples can be cited: the Hindutva judgment (1996) was a big boost and legitimised the Bharatiya Janata Party (BJP)'s ideological position. So too ADM Jabalpur (1976) to the Indira Gandhi government. S.R. Bommai (1994) that had upheld the dismissal of the BJP governments in Madhya Pradesh, Rajasthan and Himachal Pradesh after the demolition of the Babri Masjid, on the ground of secularism as the basic structure, was a big victory for the Congress. The Rafale verdict in 2018 which came before the general election in 2019 was a big political boost for the Narendra Modi government. The final judgment in the Ayodhya case (2019) too had huge political significance. Similarly, though there was nothing much in the Pegasus order (2021) of the Chief Justice of India (CJI) N.V. Ramana, on constituting an independent probe, it was still presented as a big setback for the government and a huge

political victory for the Opposition. The upholding of reservation for the economically weaker sections reservation (2022) amendment, and on demonetisation (2023) spelt major political victories for the BJP government. The ongoing Shiv Sena case too has political implications. At the same time, several politically sensitive cases have not yet been heard such as challenges to the electoral bonds scheme, the Citizenship (Amendment) Act, and the dilution of Article 370.

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As a centre of power in national affairs, the Supreme Court is invariably drawn into politics. Some of the instances of Public Interest Litigation, on changing names of over a 1,000 places, a uniform divorce law, anti-conversion laws, love jihad, and women's entry in mosques are examples of the use of the court for political purposes.

Governments do take into account the ideological leanings of judges. On May 12, 1973, in a speech in Parliament, M. Kumaramangalam, Mrs. Gandhi's cabinet colleague, audaciously defended the appointment of the CJI (Justice A.N. Ray who had superseded three seniormost judges) when he said: "We had to take into account what was a judge's basic outlook on life... was it not right to take all these aspects into consideration? Was it not right to think in terms of [a] more suitable relationship between the court and the government?... In appointing a person as Chief Justice, I think we have to take into consideration his basic outlook, his attitude to life and his politics."

There were judges with left, centrist and right ideological leanings. The left-leaning Justice V.R. Krishna Iyer was a Minister in the communist government in Kerala. Justice Baharul Islam was an elected member of the Rajya Sabha representing the Congress. He was first appointed as Guwahati High Court judge and in a rare decision after superannuation, was appointed as Supreme Court judge by the Indira Gandhi government. CJI Subba Rao was the Opposition candidate in a presidential election. Justice Guman Mal Lodha had rightist leanings and subsequently thrice won the Lok Sabha election on the BJP ticket. Justice K.S. Hegde even became Speaker in the Janata government. Justice Vijay Bahuguna was Chief Minister of Uttarakhand.

Every government would want judges who are likely to decide cases in its favour — this was very much the norm even under Congress rule. Justice M.H. Beg, for instance, was appointed on the directions of Prime Minister Indira Gandhi overruling CJI Sikri's opposition. Justice D.G. Palekar was appointed because of his close proximity with then Law Minister H.R. Gokhale. Justice S.N. Dwivedi was related to H.N. Bahuguna. CJI Sikri had serious reservations about Justice Dwivedi's elevation, who told lawyers after his appointment that he was going to the top court to overrule Golaknath (1967).

But fortunately, and strangely, many government-appointed judges were able to assert their independence; barring a few exceptions, they have been quite impressive. Some even struck down major decisions taken by the Jawaharlal Nehru and Indira Gandhi governments. In Champakam Dorairajan (1951), the reservation policy of Madras was struck down by the majority of 7:0. In I.C. Golaknath (1967), the Supreme Court denied Parliament the power to amend the Constitution and held fundamental rights to be the primordial rights necessary for the development of the human personality. In R.C. Cooper (1970), the top court (10:1) struck down the historic bank nationalisation decision; in Maharajahadhiraja Madhav Rao Scindia (1971), abolition of privy purses was also struck down by a 9:2 majority; in Kesavananda Bharati (1973), the basic structure theory was propounded to restrict and limit Parliament's power to amend the Constitution. And who can forget Raj Narain (1975), where Justice Jagmohan Lal Sinha had struck down the Prime Minister's election. Even during the Emergency, as many as nine High

Courts had upheld the right to habeas corpus against illegal detention. Such strong judgments are rarely delivered today.

Even in the pre-collegium days, governments generally used to go by the CJI's recommendations. Of the 547 appointments made between January 1, 1983 and April 10, 1993, the CJI's views were ignored only in seven.

Finally, who can assert that the collegium is entirely independent and always recommends ideologically neutral judges? The collegium system has not drastically improved the situation as the government continues to have the final word in the judicial appointments. Since the government does have a veto power in practice in spite of the Memorandum of Procedure laying down that the government would be bound to appoint a judge if his/her name is reiterated by the collegium, it is better to include the Union Law Minister in the collegium (just as in several other countries) so that his views are heard and his reservations discussed threadbare. Let his views too become a part of the minutes. If the other five judges (CJI plus four judges) are not convinced, decisions can be made by the majority, and the government being party to the deliberations and recommendations would have to accept collegium's recommendations. The goal should be to end the supersession, cherry picking of judges and making process more transparent.

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