

Supreme Court at the crossroads

On April 24, 1973, two events occurred that have united India ever since. Sachin Tendulkar was born in Bombay, and in Delhi the Supreme Court delivered its [verdict in Kesavananda Bharati](#), by a narrow 7-6 majority. Tendulkar would take time to make an impact, but *Kesavananda* had an immediate fallout.

The next day, on April 25, 1973, three of the seven judges who delivered the majority judgment which went against the government's position were superseded for the position of Chief Justice of India. Justices J.M. Shelat, K.S. Hegde and A.N. Grover were superseded by Justice A.N. Ray, who had ruled in the government's favour. Justice Ray took over as Chief Justice on April 26, 1973.

The supersession of 1973 set the stage for the [Emergency of June 1975](#). During the Emergency, the tamed Supreme Court went on to rule that the very right to life, under Article 21 of the Constitution, stood suspended. The court also sought to review its own judgment in *Kesavananda Bharati*. The Emergency era saw a cowering craven court fail to stand up for citizens against the state when it mattered. It failed to act as a brake on despotism.

K.M. Joseph is 'senior-most High Court Chief Justice'

This week, 45 years to the day, on April 25, 2018, the government has chosen to appoint Indu Malhotra to the Supreme Court and has for the moment chosen not to appoint Justice K.M. Joseph. His name had also been recommended along with that of Ms. Malhotra, by the collegium of five senior judges of the Supreme Court. The resolution recorded: "The collegium considers that at present Justice K.M. Joseph, who hails from the Kerala High Court and is currently functioning as Chief Justice of the Uttarakhand High Court, is more deserving and suitable in all respects than other Chief Justices and senior puisne Judges of High Courts for being appointed as Judges of the Supreme Court of India. While recommending the name of Justice K.M. Joseph, the collegium has taken into consideration combined seniority on all-India basis of Chief Justices and senior puisne Judges of High Courts, apart from their merit and integrity."

Justice Joseph's independence and his indifference to political consequences were amply demonstrated when, as Chief Justice of Uttarakhand, he struck down a proclamation of President's rule in the State in 2016. He comes from an illustrious legal family. His father, Justice K.K. Mathew, was a judge of the Supreme Court. He is the senior-most judge from Kerala, which by tradition sends a judge or two to the Supreme Court. The impending retirement of Justice Kurian Joseph later in November this year would have made Justice K.M. Joseph a suitable successor. Despite meeting all the requirements for appointment to the Supreme Court, despite the court through its collegium having recommended his name, he seems to have antagonised the powerful who want to retaliate. In a profession where peer review is a continuous process, there have been no doubts whatsoever expressed about Justice Joseph's integrity or competence.

Having a collegium of SC judges to allocate cases will be a recipe for chaos: Attorney General

Nevertheless the government of the day has now asked for a reconsideration of the recommendation made in this case by the collegium. The government says, "At this stage, elevation of one more judge from Kerala High Court as a Judge of the Supreme Court of India does not appear to be justified as it does not address the legitimate claims of the Chief Justices and Puisne Judges of many other High Courts." Shorn of legalese, the letter primarily makes two points. It says that Justice Joseph is not the senior-most judge in the all-India seniority list. Second, it says that the Kerala High Court already has one Supreme Court Judge and three Chief

Justices of High Courts representing it. Both arguments are fallacious.

Countrywide seniority is taken into account but is not the sole determinative factor. Second, Kerala might currently have four senior judges at an all-India level, but will soon be down to two, with two retirements scheduled this year. In fact the Law Minister's objections are best answered in this case by the Supreme Court judgment in the 1998 presidential reference which has held that "Where, therefore, there is outstanding merit the possessor thereof deserves to be appointed regardless of the fact that he may not stand high in the all India seniority list or in his own High Court. All that then needs to be recorded when recommending him for appointment is that he has outstanding merit. When the contenders for appointment to the Supreme Court do not possess such outstanding merit but have, nevertheless, the required merit in more or less equal degree, there may be reason to recommend one among them because, for example, the particular region of the country in which his parent High Court is situated is not represented on the Supreme Court bench. All that then needs to be recorded when making the recommendation for appointment is this factor."

Unpersuasive: on Centre's arguments against elevating Justice Joseph

The earlier recommendation of the collegium on January 11, 2018, is clear about Justice Joseph's merit and suitability. Nothing has surfaced in the past three months to retract from that position. The government, while setting out its reasons asking for a reconsideration of the collegium's recommendation, has also not made any case on integrity or competence. All that the government points to is a perception of regional imbalance and an overlooking of seniority. It must be pointed out that in the current Supreme Court, at least five judges (including two appointments from the bar) are from the Bombay High Court, at least three are from the Delhi High Court. To say that Kerala can't have two judges on the court is to stretch a point.

Both objections seem to have been taken with a view to somehow stop or delay Justice Joseph's elevation to the Supreme Court. Even if there is some substance in the objections, they can be remedied at a later date. The issue is whether the judiciary can permit any appearance of retaliation upon its brethren by an apparently vengeful executive. The correct course of action now available to the Supreme Court is to reiterate its recommendation after reconsideration of the proposal in the light of the government's latest letter.

In the Third Judges case, it has been held that "if after due consideration of the reasons disclosed to the Chief Justice of India, that recommendation is reiterated by the Chief Justice of India with the unanimous agreement of the Judges of the Supreme Court consulted in the matter, with reasons for not withdrawing the recommendation, then that appointment as a matter of healthy convention ought to be made". The crucial words in this paragraph are "unanimous agreement". Thus if even one of the five has a rethink, the government will have succeeded in its attempt to block Justice Joseph.

A house divided against itself cannot stand. In the Mahabharata, as long as the five Pandavas stood together, they ruled over Indraprastha. Even if Yudhishtira, the eldest Pandava, erred in dicing with fate, it was only by following the path of dispassionate duty that all the Pandavas ended up with the victory at Kurukshetra. The judges may well remember that the Supreme Court's motto itself is *Yatho Dharmastato Jayah*. Victory lies on the side of Dharma.

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