

A dangerous incursion

The government's [opposition to the elevation of the Chief Justice of the Uttarakhand High Court](#), Justice K.M. Joseph, to the Supreme Court, as recommended by the Supreme Court collegium as far back as January 10, 2018, is per se unprincipled. Its logic is faulty, both statistically and otherwise.

Justice Joseph pronounced a historic judgment in April 2016 when he struck down the [imposition of President's rule in Uttarakhand](#). Little did he know that his judgment would stand in the way of his elevation. This has created a situation where the very independence of the judiciary is now under attack. We will have to await the response of the collegium. I hope its members stand together and speak in one voice. That is the only way the Supreme Court can reassert its supremacy in the matter of judicial appointments.

Justice Joseph's request to be transferred to the Andhra Pradesh High Court on health grounds since he had undergone a bypass surgery was ignored. In May 2016, the collegium had cleared his transfer to the Andhra Pradesh High Court. For inexplicable reasons, the recommendation was not forwarded for approval to the then President of India, Pranab Mukherjee. In the normal course of events, recommendations for transfers are cleared within 10 days. The attitude of the Union government shows that he was being targeted. The Centre's obduracy by supplying unedifying reasons for rejecting the collegium's recommendation can be clearly attributed to his judgment of April 2016.

Point of seniority

Let us analyse the reasons put forth in Union Law Minister Ravi Shankar Prasad's letter of April 26, 2018 for rejecting the recommendation for Justice Joseph's elevation. The first is that in the All India High Court Judges Seniority List, Justice Joseph is placed at serial number 42 and that 11 Chief Justices of various High Courts in the said list are otherwise senior to him.

Supreme Court at the crossroads

This reasoning is flawed. The first is that Justice Joseph was, obviously, elevated as Chief Justice of the Uttarakhand High Court on account of his qualities as a judge over other judges who might otherwise have been senior. Second, seniority among High Court judges has never been the only benchmark for appointment as Chief Justice of a High Court or elevation to the Supreme Court. Ever since 2014, the government of the day has never considered seniority as the only basis for elevation. When Judges Deepak Gupta and Navin Sinha were appointed in February 2017 to the Supreme Court, there were 40 High Court judges across India senior to them. Similarly, in the case of Justices S. Abdul Nazeer and Mohan M. Shantanagoudar, who were also elevated to the Supreme Court in February 2017, there were 20 High Court judges who were senior to them. When Justice S.K. Kaul was elevated too, there were 14 High Court judges senior to him. In denying Justice Joseph his due, the government has left itself without cover.

Regional representation

Another reason given by the Law Minister is that several High Courts including smaller high courts are not represented in the Supreme Court at present. It is true that High Courts in a few States are not represented. This has happened under the present regime as well as in the past. Justices K.G. Balakrishnan, Cyriac Joseph and K.S.P. Radhakrishnan were all from the Kerala High Court despite the Law Minister calling it a relatively small High Court. This was at a time when the strength in the Kerala High Court was less than 40 judges. Justices K.S. Paripoornan and K.T.

Thomas were also elevated to the Supreme Court from the Kerala High Court when its strength was just 21. So, a small High Court such as Kerala's has had a slew of elevations perhaps because of the outstanding quality of individual judges. The Delhi High Court, with a judge strength of 60, has three judges in the top court. The reason given by the Law Minister that in elevating Justice Joseph there would then be two judges from the Kerala High Court —which he considers inconsistent with the concept of adequate regional representation — is clearly specious.

'Merit trumps seniority in elevation to Supreme Court'

The Law Minister ought to have disclosed that in February 2017, two judges from the Karnataka High Court, Justices Shantanagoudar and Abdul Nazeer, were elevated on the same day. If two judges can be elevated from Karnataka, especially in light of the fact that Justice Kurian Joseph, also from Kerala, is going to retire in the course of this year, the logic of not having two judges from the Kerala High Court is clearly manufactured only to oppose Justice Joseph's appointment.

If one looks at the aspect of regional representation made much of by the Law Minister and analyses the current representation of judges in the Supreme Court, then the Allahabad High Court, which has a sanctioned strength of 160, should have many more than two judges. This logic also applies to the Punjab and Haryana High Court as well as the Bombay High Court. While the Allahabad High Court has two judges in the Supreme Court, the Bombay High Court has three. Therefore, the opposition to Justice Joseph's elevation on the basis of inadequate regional representation is a bogey.

The third reason is that there is an inadequate representation of the Scheduled Castes (SC) and the Scheduled Tribes (ST) in the Supreme Court. First, the total sanctioned strength of the Supreme Court is 31 judges. At the moment, there are 25. Six judges are to retire this year. Consequently, its strength, if no judges are appointed, will be reduced to 19. There will be 12 vacancies. If the government so chooses, it can give representation to the SCs and STs consistent with its logic. But this logic cannot be advanced in opposing Justice Joseph's elevation. Such an argument only betrays the real intent behind the opposition.

Having demonstrated the fragility of the reasoning of the Law Minister, all the points for not elevating Justice Joseph — such as seniority at the level of the High Court, regional representation, representation of SCs and STs — become insignificant when there is an outstanding candidate for elevation. I only wish to reiterate the recommendation made by the collegium on January 10, 2018: "The Collegium considers that at present Mr. Justice K.M. Joseph, who hails from the Kerala High Court and is currently functioning as Chief Justice of 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 Judge of the Supreme Court of India."

It is crystal clear that the opposition to Justice Joseph is mala fide. The executive is seeking to blatantly interfere in the appointment process. If the government's stand is legitimised, such incursions on the independence of the judiciary will become routine. We want our judges to be immune to extra-constitutional pressures. That immunity is the only way to protect our citizens. A judiciary that capitulates is the greatest danger to democracy.

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