

Was the Centre right in resisting Justice Joseph's elevation?

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Justice K.M. Joseph. File

YES

The Centre is reclaiming lost constitutional space from the judiciary



K. Parameshwar

The Union government's request to the collegium to reconsider the latter's recommendation to appoint Justice K.M. Joseph to the Supreme Court has only reaffirmed the belief that the Constitution continues to be a contested space. Granville Austin, a scholar of the Indian Constitution, described the differing views of the judiciary and Parliament on the Constitution's interpretation and scope as a struggle for the custody of the Constitution. It must be recollected that the judiciary, through interpretative gymnastics, hijacked the constitutional space of the executive in the matter of appointment of judges to the constitutional courts.

While doing so, it consistently ignored the fact that the Constituent Assembly had categorically rejected the proposal to vest the Chief Justice with veto power over appointments.

Ceding constitutional space

Successive Central governments have further ceded constitutional space to the judiciary by abdicating their duty to seek clarifications about the nature of appointments recommended by an opaque body. Denying the Centre the right to ask questions furthers an isolationist view of judicial independence, which does not bode well for a constitutional system of checks and balances. The Centre ought not to be accused of incursion into judicial independence since the Supreme Court itself had recognised the government's right to send back recommendations in the Second Judges' Case and Third Judges' Case.

The rule of seniority as a criterion for elevation to the Supreme Court has been recognised by the Supreme Court in the Second Judges' Case and Third Judges' Case. The collegium is duty-bound to justify why it chose to ignore the seniority of not one or two but 11 Chief Justices for elevation to the Supreme Court. The collegium cannot, with respect, simply state that Justice K.M. Joseph is "more deserving and suitable" than other judges. It should also justify why it chose to recommend only two names when there were six vacancies in the Supreme Court on the date of the recommendation. Withholding other names would have a definite impact on the seniority of the remaining judges, when they are appointed. Perhaps the collegium will also have to explain why it chose to delay the recommendation to two vacancies for a considerable period of time, and why it continues to delay recommendations to other vacancies.

The seniority criterion could have been ignored in case the Supreme Court felt that the diversity quotient would increase. When two judges from Karnataka were sworn in in February 2017, there was no representation from the State at that point of time, and the appointments furthered diversity in more than one way.

Similarly, seniority was overlooked to give representation to Himachal Pradesh and Bihar when Justices Navin Sinha and Deepak Gupta were elevated on the same day. The instance of Kerala having three judges during the tenure of Chief Justice of India

Balakrishnan also overlooks the fact that two of them belonged to communities that were not represented in the Court at that time. All the three instances pointed out by Kapil Sibal in his article in The Hindu (Editorial page – “A dangerous incursion”, May 1, 2018) do not substantiate the argument he makes.

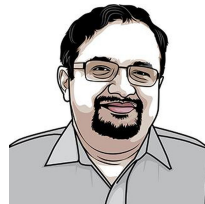
It is time to address the issue of representation of the oppressed communities on the Bench, not just in the Supreme Court but across High Courts. Denying them representation, while repeatedly making appointments of the legal elite, would only turn the court into “a self-perpetuating oligarchy”, as warned by the late Justice Ratnavel Pandian in the Second Judges’ Case.

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NO

This attempt by the government to usurp power undermines the judiciary’s independence

Alok Prasanna Kumar



There is no legal or constitutional basis for the Union government to return for reconsideration to the collegium of the Supreme Court the nomination of Justice K.M. Joseph. The “reasons” offered by the government are completely outside the scope of the limited grounds for such reconsideration recognised by the Supreme Court in the Second and Third Judges’ Cases.

The limited grounds on which a nomination may be returned are: (a) Non-consideration of the opinion of the judges of the Supreme Court in the collegium; (b) non-fulfilment of the constitutional eligibility criteria; (c) any material related to antecedents or health that was not considered by the collegium relating to suitability of the judge that the collegium was not privy to; (d) if the tenure of the judge of the Supreme Court is likely to be extremely short.

Not a recommendatory body

None of these grounds has been mentioned by the Union government in its letter to the Chief Justice of India rejecting the nomination of Justice Joseph. Any contention that the reasons for the return of the nomination is in accordance with the established procedure or the Constitution is utterly specious. It is not for the Union government to decide whether seniority should prevail over ability, and what the diversity of the court should be in terms of

regional and minority representation. These criteria are to be applied only by the Chief Justice of India in consultation with the judges of the Supreme Court who constitute the collegium, based on their best understanding of the needs of the judiciary.

What the Union government has effectively done in the present case is to attempt to exercise a self-given right of “appeal” over the appointment of judges to the Supreme Court — that the Union government, and not the collegium, will decide the suitability of judges to the Supreme Court. This act threatens to reduce the collegium to merely a recommendatory body which has no final say in who gets to be a judge of the Supreme Court. The Union government is, in effect, trying to overturn the dicta of the Supreme Court in the Second Judges’ Case and the Third Judges’ Case in an underhanded manner. This attempt at a naked usurpation of power by the Union government undermines the independence of the judiciary.

The Uttarakhand judgment

This is even more obvious when one sees the track record of the judge in whose case the Union government wishes to exercise this power. It is no secret that Justice Joseph’s judgment as the Chief Justice of Uttarakhand put paid to the Union government’s efforts to impose President’s Rule in Congress-ruled Uttarakhand. Justice Joseph’s judgment stuck to the letter of the law and the Constitution and was upheld eventually by the Supreme Court. This is not even the first time in its tenure that the present government has attempted to do so.

The last two years have not been the best as far as the credibility of the judiciary in general and the Supreme Court in particular is concerned. With the ongoing internal strife, allegations of criminality and opacity in questionable administrative practices, the judiciary’s image has taken a battering. Much of this is self-inflicted — borne out of a refusal to keep up with the times when it came to demands of accountability and transparency. Even so, it is expected that the collegium will reiterate the recommendation to elevate Justice Joseph to the Supreme Court. In times such as these, it is nothing short of its duty to do so.

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IT’S COMPLICATED

The government has so far complied with a minimal threshold of legality

Tarunabh Khaitan



First, in returning the collegium's recommendation to elevate Justice K.M. Joseph to the Supreme Court, the government has so far complied with a minimal threshold of legality, but its failure to accept a reiterated recommendation will be illegal. Second, while segregating a recommended name from an empanelled list is not illegal, it breaches a constitutional convention. Third, the government seems to have acted in bad faith.

On legality

The current law on higher judicial appointments is contained in the Second Judges' Case and the Third Judges' Case. The government's attempt to change this law by a constitutional amendment was rebuffed by the Supreme Court in 2015. The government's understanding of the two 'Judges' Cases' is codified in a Memorandum of Procedure (which itself has no legal authority). Although the 2015 judgment called for incremental reform, any change beyond the parameters fixed by the Judges Cases will either need modification by a larger Supreme Court Bench or a valid constitutional amendment.

The two Judges Cases held that the Constitution requires primacy of the judiciary — represented by a collegium of senior judges — in decisions concerning appointments to the higher judiciary. The government has the power in “exceptional cases alone”, for stated “strong cogent reasons”, to resist a recommendation by the collegium. However, if the collegium reiterates its recommendation, the government must accept. The government's reasons for returning Justice Joseph's file demonstrably fail to satisfy the “strong, cogent and exceptional” standard. As such, should the collegium reiterate its recommendation, the government will no longer have a legal option to continue to resist.

Constitutional governance requires not just formal laws but also a number of constitutional conventions and practices that develop organically around these laws. Conventions acquire precedential authority after consistent compliance over time. Any constitutional actor who breaches them may be legitimately criticised for having acted improperly.

When the collegium recommends multiple nominees in a single list, it has become convention that the government should decide on the list collectively. Segregating a list affects the seniority of the disfavoured nominee vis-à-vis other nominees, and therefore her chances of becoming Chief Justice. Therefore, in 2009, the UPA government waited for the collegium to drop the objectionable nominee (Justice Dinakaran) and reissue another list of four remaining nominees before elevating them. In 2014, the Modi government breached this convention by segregating and returning Gopal Subramaniam's name from a

recommended list of four nominees, while elevating the other three. The then CJI, R.M. Lodha, warned against the repetition of such segregation. By segregating Justice Joseph's name from a list of two nominees, the government has breached the convention again.

In bad faith

Since 2016, the government has ignored a collegium recommendation for Justice Joseph's transfer to the Andhra Pradesh High Court (that he sought on health grounds). Its ostensible reasons to resist his Supreme Court elevation apply equally to several other unresisted elevations. Its hostility appears to stem from Justice Joseph's invalidation of its imposition of President's Rule in Uttarakhand in 2016. Mr. Subramaniam's file was also returned citing flimsy grounds. The real reason, allegedly, was his role in seeking justice in the Sohrabuddin murder case. Circumstantial evidence in both cases points to bad faith and partisan motives.

If pliability to the government/ruling party becomes a precondition for appointments, judicial independence is truly endangered. It is imperative, therefore, that on the matter of Justice Joseph's elevation, the collegium must not blink.

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