

DOES THE CHIEF JUSTICE HAVE POWER TO ALLOCATE CASES?

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ABSTRACT

The recent controversy involving four senior most judges of the Supreme Court against the Chief Justice of India has created a wave of discussion pertaining to the power held not only by the Chief Justice of India but also the Chief Justices of various high courts. Through a letter of dismail by these four judges to the Chief Justice of India, they have shown how there exists a line of consistent abuse of power and partiality in allotment of cases in the Supreme Court. This has made the whole nation question as to what the restriction can be placed on the 'Master of Roster', a convention followed for the past thirty years. In an attempt to resolve this, we should be aware that there is no short-term solution to this problem. Only a complete overhaul of the approach taken by judicial members can bring back the glory days.

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I. INTRODUCTION

It was Lord Dicey who first coined the term “constitutional conventions”.⁶⁰ According to him, constitutional law comprises of all rules that have some connection to the working of the sovereign power in England. These rules comprise of two distinct categories. The first category, known widely as Common Law, includes “written, unwritten, statutory and customary” laws. The second category are conventions of the constitution. These conventions are practices indoctrinated into bodies of law and the state.⁶¹ The Indian political and civil system has adopted a variety of such conventions. Some conventions, in fact, are as crucial as a functional Constitution.⁶²

Conventions, by virtue of not being codified or stagnant in form, keep changing over time to meet societal needs.⁶³ Their form is not binding on any courts but kept in mind regardless. Although, they arise out of precedence and practice, their creation is mainly dependent on expediency.⁶⁴ The fluid nature of conventions poses difficulty in certain situations that are tied up between politics and the judiciary. Therefore, even conventions must be laid out in a clear and succinct manner.

⁶⁰ A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 19 (8th ed. 1915).

⁶¹ *Id.* at 14.

⁶² IVOR JENNINGS, THE LAW AND THE CONSTITUTION 13 (5th ed. 1959).

⁶³ Ashutosh Salil & Tanmay Amar, *Constitutional Conventions: The Unwritten Maxims of the Constitution*, 3 PRAC. LAW. (2005).

⁶⁴ BRIAN THOMPSON & MICHAEL ALLEN, CASES AND MATERIALS ON CONSTITUTIONAL AND ADMINISTRATIVE LAW 225 (4th ed. 1996).

For the past few decades, the Chief Justices of various courts in the country, primarily the Supreme Court (hereinafter “**SC**”) have been given the complete responsibility of assigning cases to judges of the court. This institutionalized practice has made way for corruption and misuse of statutory power. The outcome of this has not only led to an undemocratic rule in the judiciary but has also led to wrong judgments being delivered. It is time that the judiciary wakes up to rectify its blunders. In an attempt to clear up doubts in relation to the recent stir involving the Chief Justice of India (hereinafter “**CJI**”), the authors will be looking at the controversial convention of the Master of the Roster as practiced in our country.

Part I of this paper gives a brief introduction to constitutional conventions and their importance in the functioning of the country. In Part II the authors will give a historical development of Master of the Rolls in England and how it has been modified into the Indian system. Through Part III the authors will be discussing the pertinent issues related to the convention in light of the recent outburst of the senior judiciary. In Part IV, the readers will get an insight into bench allocation methods used by foreign jurisdictions. Lastly, Part V will list institutional changes to the underlying abuse of power, and Part VI will conclude the essay by summarizing the key points of the discussion.

II. DERIVING THE MASTERY POWER

In order to understand the convention of the Master of the Roster, it is important to look at the history of its development into the

post it is today. This post is a tradition that India has borrowed from the English, albeit giving the convention its own spin. The Master of the Rolls was initially a clerical position arising out of the development of the Chancery Courts of the King.⁶⁵ The Master of the Rolls acted as the King's Secretary and was the guardian of his seal. As the importance of the King's seal grew, distinguished from other smaller seals, the Master of the Rolls found himself heading an entire department. He became responsible for keeping the record of important letters sent for the Chancery and was appointed directly by the King.⁶⁶ When the Chancery Courts were established as courts independent of the King, the Master of the Rolls became the court official who determined the roster. England, early on, realized the problems with giving such immense power to one person and eventually deviated from the system of having one Master of the Rolls. India, on the other hand, adopted and retained this tradition. The importance which the Master of the Rolls acquired in due course of time is something which has not been studied in depth, especially in the context of India and its courts.

In India, the Master of the Rolls is seen as an administrative position held by the Chief Justice of the High Courts in the High Court (hereinafter “**HC**”) and the CJI in the SC. In terms of judicial power, the word of any of the judges of the SC carries the same weight as that of the

⁶⁵ Lord Hanworth, *Some Notes on the Office of Master of the Rolls*, 5 CAMB L.J. 313, 313–331 (1935).

⁶⁶ WILLIAM HENRY STEVENSON & H C MAXWELL LYTE, *CALENDAR OF THE CLOSE ROLLS PRESERVED IN THE PUBLIC RECORD OFFICE 1288-1296*, 454 (2010).

CJI. He is thus merely ‘first among equals.’⁶⁷ In terms of administrative powers however, the CJI is put in a different position. Since the Constitution of India, 1950 (hereinafter “**Indian Constitution**”) is ambiguous in defining the administrative duties of judges, conventions and rules have developed to do so. One such duty is the determination of the bench. In India, the HCs and SC follow the roster system to allot cases.⁶⁸ This system lists out which judges or benches are to hear matters pertaining to a particular subject matter or area of law.⁶⁹ The determination of roster is done by the CJI for the SC. This power of the Chief Justice is derived jointly from the Indian Constitution, Supreme Court Rules and judicial precedents.

The Indian Constitution, under Articles 145(3) and (4) dictates the minimum number of judges required to constitute a bench ruling on an important question of law, generally and for a petition under Article 143.⁷⁰ Further, the Supreme Court Rules state that the Registrar must prepare a roster under the instructions of the CJI.⁷¹ It also provides the mandate to be followed for reference of a case to a higher bench.⁷² It says that

⁶⁷ Campaign for Judicial Accountability and Reforms v. Union of India and Ors., (2018) 1 SCC 589 (India), ¶6.

⁶⁸ State of Rajasthan v. Prakash Chand & Ors, AIR 1998 SC 1344 (India); Campaign for Judicial Accountability and Reforms v. Union of India and Ors., (2018) 1 SCC 589 (India).

⁶⁹ Supreme Court of India, Roster of the work for fresh cases, The Order of Hon’ble Chief Justice of India w.e.f. 05-02-2018, till further orders.

⁷⁰ INDIA CONST. art. 145.

⁷¹ Supreme Court Rules, 2013, Gazette of India, section III(1), Chapter VI (May 29, 2014).

⁷² Supreme Court Rules, 2013, Gazette of India, section III(1), Order 6, Rule 2, (May 29, 2014).

reference of a case by a lower bench to higher bench must be routed through the CJI who will decide whether there is need for the said reference. Neither of these provisions explicitly mention the role of the Chief Justice as sole determinant of the roster.

However, the Court in its jurisprudence has read that meaning into a combined reading of the two provisions. In *State of Rajasthan v. Prakash Chand*,⁷³ a full bench held that the power to constitute Division Benches and decide what cases these Benches will hear is a power that rests solely with the Chief Justice of the High Court. No Single or Division Bench of the High Court can give directions to the Registry which are contradictory to that of the Chief Justice's.⁷⁴ It further said that if a Single Bench or a Division Bench feels that a particular case must be listed before it, it should direct the Registry to obtain relevant orders from the Chief Justice for the same. Puisne judges on the other hand, possess no such authority. A counsel wanting to present his case before a puisne judge must be ordered to make mention before the Chief Justice to secure the necessary orders.⁷⁵ This case relied on Article 225 of the Indian Constitution⁷⁶ to derive constitutional validation for certain powers of the Chief Justice that include deciding benches and preparing cause list.

⁷³ *State of Rajasthan v. Prakash Chand & Ors*, AIR 1998 SC 1344 (India).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ INDIA CONST. art. 145.

Recently, this case⁷⁷ was affirmed by a constitutional bench presided over by the CJI in its order passed in the matter of *Campaign for Judicial Accountability and Reforms v. Union of India*.⁷⁸ It was held in the order that the principle in *Prakash Chand* must apply *proprio vigore* to the Supreme Court. Thus, in light of the Supreme Court Rules⁷⁹ and Article 145(2) and (3) of the Indian Constitution, the Chief Justice of India is the Master of the Roster, and therefore the sole authority on constitution of benches and allocation of cases to the Benches so constituted. The Court further went on to say that no Division Bench or Full Bench could allocate a case to themselves or order the formation of a Bench. Any work done by a judge too has to be screened through the Chief Justice in order to be accepted.⁸⁰ Along the same lines, the judges in *CJAR* observed that even the Chief Justice of India plays the same role as those of the Chief Justices of the High Courts.⁸¹ Additionally, even the SC's Practice and Procedure and Office Procedure⁸² give power to the CJI to direct the Judicial Registrar to prepare a roster of cases.⁸³ It also mentions how the CJI can

⁷⁷ State of Rajasthan v. Prakash Chand & Ors, AIR 1998 SC 1344 (India).

⁷⁸ Campaign for Judicial Accountability and Reforms v. Union of India and Ors., (2018) 1 SCC 589 (India).

⁷⁹ Supreme Court Rules, 2013, Gazette of India, Section III(1), Order 6, Rule 2, (May 29, 2014).

⁸⁰ Amar Singh v. State of Uttar Pradesh, Crim. Appeal No. 4922 of 2006 (Allahabad HC) (India).

⁸¹ Campaign for Judicial Accountability and Reforms v. Union of India and Ors., (2018) 1 SCC 589 (India).

⁸² Supreme Court of India, Handbook on Practice and Procedure and Office Procedure, 2017, <http://supremecourtofindia.nic.in/practice-and-procedure> (last visited Apr 1, 2019).

⁸³ Supreme Court of India, Handbook on Practice and Procedure and Office Procedure, 2017, Chapter 5, <http://supremecourtofindia.nic.in/practice-and-procedure> (last visited Apr 1, 2019).

direct a particular bench to take up the work of another bench due to non-availability.⁸⁴

III. SHORTCOMINGS OF THE EXISTING SYSTEM

The convention of Master of the Roster has been a celebrated practice of the Indian judiciary. It has been adopted by many countries all over the world with certain tweaks of their own.⁸⁵ On paper, the Chief Justice ought to follow the court rules and not exercise her/his power “arbitrarily or in a mala fide manner or for extraneous considerations”.⁸⁶ However, this is not always the case.

In all courts, there are numerous benches listening to various cases of similar and different subject matters. This leads to difference in opinions amongst judges and substantial variations in the jurisprudence so formed, creating conflicting opinions. To solve such complications, the CJI must take the most efficient path and not let personal biases come in the way. In order to maintain normalcy and uniformity, former CJI M. N. Venkatachaliah had started the practice to computerize allotment of cases.⁸⁷ The former CJI Dipak Misra had prepared a roster allocating

⁸⁴ Supreme Court of India, Handbook on Practice and Procedure and Office Procedure, 2017, Chapter 5, <http://supremecourtindia.nic.in/practice-and-procedure> (last visited Apr 1, 2019).

⁸⁵ Gautam Bhatia, *Master and the Roster*, THE INDIAN EXPRESS, <http://indianexpress.com/article/opinion/columns/supreme-court-judiciary-chief-justice-jastichelameswarmaster-and-the-roster-5024588/> (last updated Jan. 15, 2018) [hereinafter Bhatia].

⁸⁶ Justice GC Bhakuria, *Master of Roster – Constitutional Limitation and way forward*, LIVE LAW, (January 15, 2018) http://www.livelaw.in/master-of-roster-constitutional-limitation-way-forward/#_ftn3

⁸⁷ Manoj Mitta, *CJI M.N. Venkatachaliah poised to radically alter the entire judicial system*, INDIA TODAY (Oct. 31, 1993), <https://www.indiatoday.in/magazine/indiascope/story/199310>

matters of particular subject matters to different sitting judges of the court.⁸⁸ The efficacy of system can be questioned only in due time but for now it has been observed that the four most senior most judges have been allotted the most important cases.⁸⁹ This is in line with the convention of the most sensitive cases going to benches presided by senior most judges.⁹⁰

On the face of it, this seems like a well-functioning system. Restricting this intervention to the hands of one human being has ensured smooth functioning but at the same time this unfettered power derived from undefined conventions has created problems. A careful reading of the provisions though, makes it clear that the CJI has unfettered power over the roster. However, the Registrar while preparing the roster, is required to do so on the advice of the CJI.⁹¹ The Chief Justices have, on several instances, misused their power as Master of the Roster to appoint cases to certain judges to get a favourable order for one particular side.

31-cji-m.n.-venkatachaliah-poised-to-radically-alter-entire-judicial-system-811736-1993-10-31 (last updated July 23, 2013).

⁸⁸ Supreme Court of India, Roster of the work for fresh cases, The Order of Hon'ble Chief Justice of India w.e.f 05-02-2018, till further orders, <https://www.thehindu.com/news/national/article22621850.ece/binary/JudgesRoster.pdf>

⁸⁹ FirstPost, *Supreme Court crisis: CJI makes public new roster system for allocation of cases, but is it enough to resolve impasse?*, FIRSTPOST (Feb. 2, 2018), <http://www.firstpost.com/india/cji-dipak-misra-makes-public-new-roster-system-for-allocation-of-sc-cases-four-senior-most-judges-assigned-important-cases-4331895.html>.

⁹⁰ TNN, *How cases are allocated in Supreme Court*, THE TIMES OF INDIA, <https://timesofindia.indiatimes.com/india/how-cases-are-allocated-in-supremecourt/articleshow/62483360.cms> (last updated Jan. 13, 2018).

⁹¹ Supreme Court of India, Handbook on Practice and Procedure and Office Procedure, 2017, Rule 29, <http://supremecourtfindia.nic.in/practice-and-procedure> (last visited Apr 1, 2019).

In the case of *Kishore Samrite v. State of Uttar Pradesh*,⁹² a criminal writ petition in the nature of habeas corpus was filed against, among others, Rahul Gandhi. There was a separate case filed against him accusing him of rape of a young woman in Amethi. The petition was filed to produce the accused to ensure he does not interfere with the investigation. A writ petition of such a nature under Article 226 of the Constitution has to be heard by a Division Bench.⁹³ The Chief Justice of the HC clearly deviated from the rule to place the writ as a private custody habeas corpus in front of a Single Bench which eventually slapped a hefty fine on the Petitioners for ‘political mudslinging’ on a politician of repute.⁹⁴

In a recent order passed in the case of *CJAR v. Union of India*,⁹⁵ the SC relied on *Prakash Chand*⁹⁶ and the aforementioned rules to declare that the CJI had the sole authority to decide the roster for cases in the SC. This order was passed by the CJI to annul a Division Bench order deciding the roster for this case. The matter was taken up and heard by the CJI in spite of the fact that he was amongst the people against whom allegations were levelled in the petition. This was a strong rejection of the principle of *nemo iudex in causa sua*. The CJI was aware of the allegations; in his defence, he claimed that it was improper to accuse the CJI in his own

⁹² *Kishore Samrite v. State of Uttar Pradesh and Ors*, (2013) 2 SCC 398 (India).

⁹³ Allahabad High Court Rules, 1952, Chapter 21, Rule 1.

⁹⁴ KUSH KALRA & LUV KALRA, *BE YOUR OWN LAYER – BOOK FOR LAYMAN* (1st ed. 2013).

⁹⁵ *Campaign for Judicial Accountability and Reforms v. Union of India and Ors.*, (2018) 1 SCC 589 (India).

⁹⁶ *State of Rajasthan v. Prakash Chand & Ors*, AIR 1998 SC 1344 (India).

court and it amounted to contempt. He further went on to say that only the President of India can be approached with a complaint against the CJJ.⁹⁷

Giving absolute power to one individual is highly problematic as it creates possibility of not only mishandling but outright abuse of power. This is especially true when such a power is ex officio vested in someone holding as strong a constitutional post as that of the CJJ. In almost 72 years of independence of the nation, the CJJ has not been impeached even once. Both proceedings initiated for such impeachment have failed. In such a scenario, it would not be wrong to agree with the popular opinion that the Indian Constitutional Courts are amongst the most powerful in the world. As can be made out from recent judicial trends, the CJJ has no incentive to change this system of absolute power conferment. Moreover, a legislative order passed in this regard would be struck down for interfering with the realm of the judiciary and therefore being violative of the basic structure doctrine of judicial independence.⁹⁸

IV. COMPARATIVE ANALYSIS OF ALLOCATION OF CASES IN FOREIGN JURISDICTIONS

The problem of selection of benches for cases exists in certain jurisdictions while it does not in some. In countries such as the United

⁹⁷ Mehal Jain, *Unprecedented Drama At SC: SC Annuls Two Judge Bench's Order On Medical College Scam Matters*, LIVE LAW (Nov. 10, 2017), <http://www.livelaw.in/unprecedented-drama-sc-sc-annuls-two-judge-benches-order-medical-college-scam-matter/>.

⁹⁸ Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr, AIR 1973 SC 1461 (India).

State of America and Canada, all nine judges of the Supreme Court sit for a case at hand.⁹⁹ This is known as an *en banc* session or a plenary seating. Similarly, such a practice takes place in the High Court of Australia with a seating of all seven judges and the Supreme Court of New Zealand with five.¹⁰⁰ Such a practice makes it easier to set the law and does not leave way for contradicting opinions.

Since most judicial conventions and customs followed by India are adopted from the British system, the authors will be looking at the scheme followed by them in terms of bench allocation at the Supreme Court of the United Kingdom (hereinafter “**UKSC**”). In the United Kingdom (hereinafter “**UK**”), much of the changes brought into the judiciary were through the Constitutional Reform Act.¹⁰¹ However, there still exist certain anomalies in the system. The usual practice followed in the UKSC is sitting in panels of odd numbers. However, there is very little insight as to the judge selection for a particular legal matter. There is nothing available on the official website or in its rules.¹⁰² In contrast, our country has explicit mention in SC’s Practice and Procedure and Office

⁹⁹ Bhatia, *supra* note 85.

¹⁰⁰ Hugh Tomlinson, *Selecting the Panel and the Size of the Court*, UKSC BLOG (Oct. 4, 2009), <http://ukscblog.com/selecting-the-panel-and-the-size-of-the-court-updated/>.

¹⁰¹ The Constitutional Reform Act, (2005) (United Kingdom).

¹⁰² Daniel Clarry & Christopher Sargeant, *Judicial Panel Selection in the UK Supreme Court: Bigger Bench, More Authority?*, 7 UK SUP. CT. Y.B. (2016)

Procedure¹⁰³ regarding the vesting of powers in the CJI regarding case allocation.

Regardless of non-availability of official statements, the trends evidenced from UKSC practises include the presence of a Scottish Justice in appeals from Scotland and similarly in matters appealed from Northern Ireland. In addition, justices who have sat through original suits do not seat themselves in the appeals, and cases involving a family member do not have judges from the same family.¹⁰⁴

In a seminar regarding the UKSC, a law lord was interviewed on panel selection. It was shocking to note that according to him very few lords even had vague idea on methods used for panel selection.¹⁰⁵ He discussed one way of selection which is based on “jurisdictional expertise”. The other way according to him probably involved two senior law lords looking through the list and selecting those who deem fit for the case.¹⁰⁶

There are speculations in the UK that benches are allocated by Registrar in consultation with the President and Deputy President of the UKSC, but there is no confirmation regarding the same. Even though the

¹⁰³ Supreme Court of India, Handbook on Practice and Procedure and Office Procedure, 2017, <http://supremecourtofindia.nic.in/practice-and-procedure> (last visited Apr 1, 2019).

¹⁰⁴ Jonathan Crow QC et al., *Commercial Law and Financial Regulation*, 7 UK SUP. CT. Y.B. (2016); Guy Fetherstonhaugh QC, *Land, Housing and Tenancy Law*, 7 UK SUP. CT. Y.B. (2016).

¹⁰⁵ Le Sueur Andrew, *A Report on Six Seminars about the UK Supreme Court*, Queen Mary University of London, School of Law, Legal Studies Research Paper No. 1 of 2008.

¹⁰⁶ *Id.*

panel size is decided by this method, there is still no compulsion that for each case of the similar subject matter there has to be the same panel size.¹⁰⁷ All these instances reveal that even in the UK there are no unambiguous and transparent practices followed for selection of benches. However, due to the appointment of the President and Deputy President in the UKSC, the division of power allows for some checks in the system.¹⁰⁸ On the other hand, the *status quo* in our country wields the entirety of roster making power to the CJI. This system has a major setback in relation to distribution of power even though there is enough legal backing for the same. Thus, the authors have noted that both the systems are equally flawed and therefore there is no benefit of adopting the British practice in its present form.

As mentioned above, the American Supreme Court does not constitute different bench sizes. But this is not the same scenario at the Federal Appeals Courts of America, also known as Circuit Courts. For the longest time, scholars have debated that the three bench panels in all circuit courts are allotted on a random basis. This has been established as a “fact”¹⁰⁹ by many whereas some have even gone to say that it is a “hallmark”¹¹⁰ of the American Appellate Courts. However, over the years

¹⁰⁷ ALAN PATERSON, *FINAL JUDGMENT: THE LAST LAW LORDS AND THE SUPREME COURT* 72, (1st ed. 2013)

¹⁰⁸ Arghya Sengupta, *A question of probity*, THE HINDU, <http://www.thehindu.com/opinion/lead/a-question-of-probity/article20445800.ece> (last updated Nov. 15, 2017).

¹⁰⁹ Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1009 (2005); Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 110 (2011).

¹¹⁰ Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 216 & n.4 (1999).

there has been noticeable patterns followed by various Circuit Courts. Apart from the randomized benches followed in courts, there are some courts who create their oral benches by keeping the number of times each judge sits with another approximately equal.¹¹¹ For example, in the Seventh Circuit, the bench assignment is more or less random except the fact that there exists an electronically generated list that ensures that in a two-year timeframe, each judge sits with another judge approximately the same number of times. This sort of practice is also prevalent in some circuits as a weekly or yearly practice. But all these assumptions are mere speculations by American scholars and not widely available to the public.¹¹² Such a system is not exactly followed in India as the bench size differs with the matters at hand.¹¹³ Although, the Indian system is comparatively different to that of the Federal appellate system, a customized system can be looked at as an alternative to the present model.

We have looked at two bench models followed, and as discussed none of them have a set standard on deciding which judge should sit for a particular case. Our analysis concludes that the Supreme Court of India cannot import the Federal appellate system in its entirety due to the fact that the new system of subject matter allocation in the SC does not mean that the number of cases allotted to each bench is equalized. In addition,

¹¹¹ Adam S. Chilton & Marin Levy, *Challenging the Randomness of Panel Assignments in the Federal Courts of Appeals*, University of Chicago Pub. Law & Legal Theory Working Paper No. 529 (2015).

¹¹² *Id.*

¹¹³ LAURAL L. HOOPER et al., *CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS* 140 (2nd ed., 2011).

the British system of representation also cannot be adopted entirely by us as there is no representation from every community of the country in the SC. Therefore, to have a diverse bench is something we can strive for but in all practicality, promotion to the SC takes place mainly through the convention of seniority.

V. RECOMMENDATIONS

Although, much of the cases heard in the Supreme Court these days are pertaining to public interest litigations, the court still remains subordinate to the Constitution.¹¹⁴ This is line with the established fact of our courts being constitutional courts. Article 145 (1)¹¹⁵ mandates the necessity of explicit rules for a sound judiciary. Clause (4) of Article 145 additionally lays emphasis on transparency.¹¹⁶ This highlights that even though conventions are followed to fast track the process of justice, they should take the position of complementary guidelines to maintain composure of the court. The composition of a bench leads to speculation of the outcome and this needs to be kept at a minimum. The foremost responsibility of a judge is to abide by the Rule of Law and thereby abandon unconstitutional practices.

Much of the abuse by the CJI is due to the absence of clear directives. This, however, in no way allows for the CJI to indulge in

¹¹⁴ Alok Prasanna Kumar, *Crises in the Judiciary: Restoring Order in the Courts*, 53 ECONOMIC & POLITICAL WEEKLY (ISSUE 3) 10 (Jan. 20, 2018) [hereinafter Kumar].

¹¹⁵ INDIA CONST. art. 145.

¹¹⁶ V.N. SHUKLA, CONSTITUTION OF INDIA 568 (12th ed. 2016) [hereinafter Shukla].

arbitrary practices. The leading case of *Maneka Gandhi v. Union of India*,¹¹⁷ held that even constitutional authorities must adhere to non-arbitrary practices as envisaged in Article 14 of the Indian Constitution.¹¹⁸ Further, even Article 145 lays an emphasis on transparency under clause (4).¹¹⁹ However, in reality, the Constitution gives the Chief Justice almost unrestricted power when it comes to allotment of cases. The letter drafted by the four senior most judges of the SC opens a whole new world of public discourse and cannot be done away with. The authors, however, have certain structural reforms in mind which they would like to express. To inculcate these into the system will require resources and time. However, in the long run these will allow the judiciary to keep up with its most important objective, i.e. serving justice in a swift and accurate manner.

First, the formula used to create rosters should be dissipated to the public in order to make it a transparent and informative process. The scheme of enlistment must be either put up on the official SC website or through other widely available media. The present ambiguity as to how a particular subject matter is assigned to a judge has caused a lot of confusion in the country.

¹¹⁷ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (India).

¹¹⁸ Justice GC Bhakuria, *Master of Roster – Constitutional Limitation and Way Forward*, LIVE LAW (Jan. 15, 2019, 12:28 IST), http://www.livelaw.in/master-of-roster-constitutional-limitation-way-forward/#_ftn3.

¹¹⁹ Shukla, *supra* note 116.

Second, assuming that the present allotment is based on the personal choices of the CJI, we would like to present a simple model on creation of a roster with minimal influence and bias. The rosters must not only enlist the names of the presiding judges, but also the entire composition of the bench along with substitute judges in case a particular judge is unavailable at the time due to unforeseen circumstances. To create such a roster will require a team of highly proficient judicial member. The criteria for selection of panels must not only be based on seniority of judges, other attributes such as knowledge of a specific area of law should also be given significant consideration. This roster must be prepared by the CJI and a collegium of four senior most judges through a voting system. The presence of a five-judge panel will lead to engagement and varied opinions which is a better option than a one-man tyranny.

VI. CONCLUSION

The often eulogized ‘Basic Structure’ of the Constitution enlists judicial independence as one of its foremost doctrines. But the judiciary can be independent only if it is truly free of executive and legislative influences including the politicians who exert great power and are determinants of the future of democracy. In the current scenario of increasing bureaucratic interference with the judiciary in underhand ways, the authors observe a judiciary that is highly politicized. The judges are increasingly motivated by their political beliefs and allegiances to the ruling party. This hampers the delivery of justice. When the absolute power of deciding the roster is introduced in such a scenario, it can only ensure further denial of justice. The CJI has full power to pick and choose

judges with convenient political leanings and belief systems to ensure a particular case outcome is favourable to him.

The Master of the Rolls started out as an English convention which was later adopted by India and was moulded into its own judiciary model. The Chief Justices of the High Courts and the CJI were given this ex officio power. Thus, all power was vested in one person. This has so far helped in avoiding ego clashes and ensuring smooth functioning of the Courts. The system has not been without its faults though. Since the CJI has unfettered power over deciding the roster, he is also capable of misusing this power. Regarding the human nature of judges, Justice Felix Frankfurter has famously said that, “Judges are men, not disembodied spirits. Of course, a judge is not free from preferences, or, if you will, biases.”¹²⁰ The current CJI has faced a lot of controversy for his determination of benches for important cases. These controversies are evidence of the need for a new system or one that places checks on the otherwise absolute power of the CJI.

The comparison with foreign models has failed to provide any sustainable solutions and thus the authors have recommended an independent overhaul of the present system to stop misuse. The judiciary should prepare to function as a public institution meeting standards of “fairness, accountability and transparency”. Not only should the SC

¹²⁰ Justice Felix Frankfurter, *Some Observations on the Nature of Judicial Process of Supreme Court Litigation*, 98 PROC. AM. PHIL. SOC'Y. 233 (1954).

judges be a part of reforming the system, but even members of the HCs should hold joint meetings to decide the future of our judiciary.¹²¹

¹²¹ Kumar, *supra* note 114.