**Regulating Judicial Powers**

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The tremendous powers of the Chief Justice of Pakistan to assign cases and form benches have come into the spotlight once again. The bar, civil society, and political parties had been demanding the regulation of the vast discretionary powers of the Chief Justice for long, but now the brother judges have also jumped into the fray and are demanding reform.

A tumultuous history surrounds these administrative powers of the Chief Justice. In 1997, Chief Justice Sajjad Ali Shah’s removal from office resulted from blatant abuse of these powers in his confrontation with the political executive and the Parliament. During his tenure, Justice Sajjad had an autocratic style of constituting benches, which had antagonized the senior judges who were not consulted or even made part of important constitutional cases. Ultimately, it led to the ouster of the Chief Justice by the brother judges. Controversies around the composition of benches and assignment of cases surfaced again during the times of Iftikhar Chaudhry, Saqib Nisar and Gulzar Ahmed. In December 2019, the then CJ Khosa proposed amendments to the Supreme Court Rules, 1980, to regulate the suo motu powers exercised by the Chief Justice. The proposal aimed to establish a system of checks and balances to constrain the wide discretion of the Chief Justice. The proposal failed to reach any consensus among the judges. More recently, there has been mounting criticism from within the judiciary, including by two future Chief Justices, Justice Qazi Faez Isa and Justice Mansoor Ali Shah. They have voiced serious apprehensions regarding the matter.

All judges in the Supreme Court are equal when performing their judicial functions. However, with respect to their administrative role, the chief justice is the “first among equals” and the “master of the roster.” He decides when a case is listed for hearing and which judges will adjudicate it. His authority in this respect is provided for in Part I Order XI of the Supreme Court Rules, 1980. The rules state that every cause, appeal or matter shall be heard and disposed of by a bench nominated by the chief justice. The judgements of the Supreme Court have affirmed the Chief Justice has the “sole prerogative to constitute any Bench with any number of Judges to hear any particular case.”The Chief Justices of the High Courts also hold comparable powers, making it an equally contentious matter.

Assigning cases and constituting benches without clear and objective criteria is inconsistent with international standards of judicial independence, impartiality and the much-revered principle of rule of law.

In comparative jurisdictions, notable jurists and scholars have raised concerns that the discretionary assigning of cases and the constitution of benches by the Chief Justice casts doubts on the integrity and impartiality of the courts.

The Chief Justice in India enjoys similar powers to constitute benches and assign cases. In 2018, a controversy arose when four senior judges of the Indian Supreme Court held a press conference and expressed serious apprehensions about the Chief Justice’s powers to assign cases, which they believed were being misused for political objectives.

In the United States, the Chief Justice of the Supreme Court has the power to assign cases to judges, but this power is constrained by the principle of random assignment, which ensures that cases are assigned to justices on a rotating basis. This way, the likelihood of a single judge or group of judges dominating the court’s docket is reduced.

Assigning cases and constituting benches without clear and objective criteria is inconsistent with international standards of judicial independence and impartiality, and the much-revered principle of rule of law. While international standards do not prescribe a universal system for the allocation of cases to individual judges, they clarify that any system of assignment of cases should not undermine the independence of courts and judges who adjudicate those cases. The UN Special Rapporteur on the Independence of Judges and Lawyers recommends an objective mechanism for case allocation that prevent prevents interference from within the judiciary such that the allocation of certain cases to a specific group of judges is avoided. The Venice Commission also advises that case allocation should be based on transparent criteria established by law or special regulations. Examples of such criteria include drawing dots, assignments according to alphabetical order or predetermined court management plans.

In Germany, for example, the right to a lawful judge under Article 101(1)(2) of the German Constitution is seen as means of preventing external influence on the judiciary. To ensure these rights, a “management group,” comprised of the president of the court as chairperson and other judges, decides how cases are allocated. The management group determines case allocation based on a ‘management plan’ that includes detailed and objective criteria to prevent manipulation and subjective selection of judges. The Federal Constitutional Court of Germany has held that the management plan must exclude arbitrary or subjective factors in the allocation of cases.

The persuasiveness of judicial decisions is based not only on the quality of their reasoning but also on the public’s confidence in the judiciary. The higher the level of trust in the impartiality of judges, the greater the public’s willingness to accept the authority of the courts. Therefore, it is crucial to have safeguards in place against arbitrary case allocations to prevent even the slightest suspicion of illegitimate influence on the functioning of the judiciary.

The current system of case allocation in Pakistan poses significant risks to the right to a fair trial, judicial independence and the rule of law. To address this, a radical restructuring of the administrative powers of the Chief Justice is necessary. In Mustafa Impex’s judgment, the Supreme Court expanded the scope and meaning of the executive branch of the federal government to include the cabinet and not only the prime minister who heads the cabinet. Following similar reasoning, the meaning of the Supreme Court should not be reduced to the office of Chief Justice only when the Constitution includes all the justices of the SC. Hence, the administrative functioning of the Supreme Court should not be managed by the Chief Justice only, on the contrary management of case allocation and forming of benches should be handed to a group of judges like the cabinet manages the federal government,

Since the Supreme Court has failed to regulate itself, it is an opportune time for the Parliament to step in and enact a law under Article 191 of the Constitution to regulate the wide discretion of the Chief Justice in the constitution of benches and fixation of cases. This law should establish clear guidelines for the Chief Justice’s exercise of power and ensure that prominent cases are not allocated to specific judges but are allocated on a rotation basis to all the judges of the Supreme Court.

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