**Allocation of cases**

B Y R E E M A O M E R 2021-03-06

IN recent years, jurists and other commentators have raised concerns about the chief justice`s powers of constituting benches and allocating cases to judges in several jurisdictions, including Pakistan.  
  
In Pakistan, all Supreme Court judges are equal when carrying out 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 the judges who will adjudicate it.  
  
His authority in this respect is provided for in Order XI of the Supreme Court Rules, 1980. The court has clarified in judgements that the chief justice has the `sole prerogative to constitute any Bench with any number of Judges to hear any particular case`. Chief justices of high courts have a similar role.  
  
The prerogative of the chief justice to constitute benches and allocate cases can be traced back to colonial times. Article 214(3) of the Government of India Act, 1935, provided that `the Chief Justice of India shall determine what judges are to constitute any division of the court and what judges are to sit for any purpose`.  
  
Chief justices in India enjoy similar powers, which in recent years have attracted controversy. For example, in 2018, four of the senior-most judges of the supreme court held a press conference and expressed concern about the manner in which the chief justice of India was allocating cases to certain benches.  
  
The discretionary power to constitute benches and allocate cases without necessarily applying any objective and predetermined criteria is inconsistent with international standards on the independence and impartiality of the judiciary as well as general principles of the rule of law.  
  
While international standards do not prescribe a universal system for 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 has argued for a mechanism of objective allocation of cases that `protects judges from interference from within the judiciary`.  
  
Otherwise, allocation `at the discretion of the court chairperson may lead to a system where more sensitive cases are allocated to specific judges to the exclusion of others`.  
  
The Venice Commission has also recommended `the allocation of cases to individual judges should be based to the maximum extent possible on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law`.  
  
Such mechanisms could take a number of forms such as the drawing of lots; automaticdistribution according to alphabetic order; or predetermined court management plans that incorporate objective criteria governing how cases are to be allocated.  
  
Take, for example, Article 101(1)(2) of the German constitution that says `no one shall be deprived of his/her lawful Judge`.  
  
The right to a lawful judge was historically seen as a means of preventing any external influence on the judiciary, especially from the executive. In recent times, however, it is also seen as a safeguard against deprivation of the lawful judge through measures within the court administration.  
  
Pursuant to the right to a lawful judge, a `management group` comprising the president of the court as chairperson and a certain number of judges, decides how cases are allocated. The management group has the task of developing a `management plan` for the court for the financial year ahead.  
  
This plan states the criteria according to which cases are allocated to judges. The Federal Constitutional Court of Germany has held that the management group`splans have to be detailed enough to eliminate the possibility of manipulating the allocation of cases, and that they should exclude the possibility that judges are chosen according to arbi-trary or subjectivefactors.  
  
The persuasive power of judicial decisions rests not only upon the quality of their reasoning, it also depends on public confidence in the judiciary. The higher the degree of confidence in the impartiality of judges, the greater the public willingness to accept the courts` authority.  
  
It is then essential that safeguards are provided against arbitrary allocations of cases in order to prevent even the slightest suspicion of illegitimate influences on the judiciary`s functioning.  
  
The current system of allocation of cases in Pakistan has grave implications for the right to a fair trial, judicial independence and the rule of law. It is imperative that courts adopt a clear, transparent, credible system of case allocation in line with international standards to uphold the independence of judges deciding individual cases as well as the judiciary as a whole. The writer is a legal adviser for the International Commission of Jurists.  
  
reema.omer@icj.org Twitter: @reema\_omer