

ROLE OF CHIEF JUSTICE AS MASTER OF ROSTER – TIME TO REVISIT

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INTRODUCTION

It is the spirit and not the form of law that keeps justice alive

- *Earl Warren*

Hours after being sworn in as the 46th Chief Justice of India (CJI) Mr. Justice Ranjan Gogoi, issued a new roster, in which he distributed the hearing of Public Interest Litigations between himself and the second senior most judge Mr. Justice Madan B Lokur. He also hinted at working out along with his colleagues; new parameters. His words are encouraging and show a commitment to set things right and also to bring in a sense of inclusiveness amongst Judges. It seems to be the right time to revisit the role of the CJI as the 'Master of Roster' from the administrative point of view.

The administration in the present day deals with rulemaking, quasi-judicial and purely administrative functions. Thus, principles envisaged in our Constitution and the principles of natural justice need to be applied as a balance between the interests of the individuals and the authorities. It has to be applied with maximum possible care and caution when the highest office of Justice in the country discharges administrative functions.

The expression Natural Justice refers to two distinct presumptions of interpretation, *the audi alteram partem rule* and the rules against the *appearance of bias*. Bias is an operative prejudice, whether conscious or unconscious, as a result of some preconceived opinion or predisposition, in relation to a party or an issue.

The dictum "*Nemo judex in sua causa*" broadly governs the rule against such bias which translates as "no person shall be a judge in his/her own case", is widely considered a pre-requisite to a reliable, trustworthy, upright and unbiased judicial system. This principle constituting one of the main pillars of our justice system dates all the way back to Roman Law which not only intends to prevent a potential wrong-doer from condoning his errors by judging the validity of his own actions but also, and more importantly, to preserve public confidence in the sanctity and independence of the judiciary itself. The object behind this very principle is that the justice should not only be done, but should also seem to be done.

This has been often upheld and applied by the Supreme Court and the lower Judiciary in a multitude of cases. However there have been several instances which have led to the suspicion of potential departures from this principle. Such departures have been in the form of pecuniary, personal, departmental bias, etc., leaving the very foundation of our judicial system in tatters. For instance, Justice CS Karnan, a sitting High Court Judge, had put allegations of the caste based bias on the Apex Court. To canvass some of these biases, at the heart of the dispute is the recent case of *Kamini Jaiswal v. Union of India*¹, where the role of the CJI as the 'Master of Roster', with a prerogative to constitute benches of the apex court and allocate cases has raised a lot of questions and at multiple levels on the institution itself. In this case, though there were doubts about the possible involvement of the CJI himself in a case, the matter was assigned to a Bench by the CJI overruling the decision of allotment of the case, taken by another Bench. This gave the impression that the principle of *nemo judex in causa sua* (no one shall be a judge in one's own cause) did not apply to the highest Court of the land.

To add on, the controversial press conference by the four senior most judges of the Supreme Court questioned the manner in which power has been concentrated in the office of the Chief Justice which raises some serious challenges for constitutionalism and the rule of law. Since the issue has been brought to the notice of the public at large which affects the credibility of the most honored and trustable institution of the country, it is very important to examine the fault lines.

¹ W.P. (CrI.) No. 176/2017, Criminal Original Jurisdiction in the Supreme Court of India.

This paper examines the 'Rule against Bias' in the context of the administrative power of the CJI as the 'Master of Roster' in the light of the orders passed by the CJI in the cases of *CJAR v. Union of India*² and *Kamini Jaiswal v. Union of India*³.

BACKGROUND OF THE CONTROVERSY

To critically examine the role of the Chief Justice of India as Master of Roster, it is important to discuss the background of facts with regard to the recent orders passed by the CJI.

It all started with the Central Bureau of Investigation (CBI) filing an FIR in September and subsequently arresting a former High Court judge, Justice I. M. Qudusi, who was reported to be involved in a racket involving the opening of medical colleges in Uttar Pradesh. A medical college set up by the Prasad Education Trust in Lucknow was granted permission on August 20, 2016, stated to be by the oversight Committee of the Medical Council of India. But it was debarred from admitting students for two academic sessions, 2017-18 and 2018-19, as its infrastructure and other facilities were found to be deficient. The college was among 46 medical institutes barred by the government from admitting new students because of shortcomings in infrastructure. As a result, few petitions were filed in quick succession before the Supreme Court and Allahabad High Court.⁴ It appears from the FIR lodged by the CBI that an attempt was being made to unduly influence the outcome of the petition which was pending before the Supreme Court. It was alleged that the former judge of the High Court was apparently negotiating through a middle man to get a favorable order in the petition pending in Supreme Court. The said petition was being heard by a bench headed by the then Chief Justice, Dipak Misra.

Following this, Advocate Kamini Jaiswal along with the Campaign for Judicial Accountability and Reforms filed two writ petitions in the matter, praying for setting up an impartial Special Investigation Team headed by a retired Chief Justice of India to investigate the above case in

² W.P. (CrI.) No. 169/2017, Criminal Original Jurisdiction in the Supreme Court of India.

³ Supra Note 1.

⁴ W.P. (C) No. 442/2017 and W.P. (C) No. 411/2017 in the Supreme Court of India.

order to ensure that the investigation was not left to an agency (CBI); which is controlled by the Government.

One of those petitions had been “listed” before the Court of Mr. Justice Sikri and Mr. Justice Bhushan. The second petition was “mentioned” on Thursday, the 9th November before Mr. Justice Chalmeswar, who was second in seniority and listed for immediate hearing on the same day. During the course of the hearing, Mr. Justice Chalmeswar noted that the allegations were serious, and referred the matter to be heard by the five senior-most judges of the Supreme Court on Monday, the 13th November. It was this referral that Mr. Sikri and Mr. Bhushan; JJ took note of when the other (first) Petition came up for hearing before them on the 10th November. On the morning of 10th November, the Chief Justice constituted a bench consisting of himself and four other judges to hear it t on the same day afternoon. . In a short order, that constitution of this bench has effectively annulled the order of reference passed by Mr. Justice Chelameswar the day before.

The justification given by the bench was as follows: every Court has two “sides”, the judicial side (that is, hearing and deciding cases) and the administrative side (taking administrative decisions such as listing cases). On the judicial side, the Chief Justice is only “first among equals.” However, on the administrative side, he is the “Master of the Roster”; that is, “he alone has the prerogative to constitute benches of the Court and allocate cases to the benches so constituted.” Consequently:

“Needless to say, neither a two-Judge Bench nor a three-Judge Bench can allocate the matter to themselves or direct the composition for constitution of a Bench. To elaborate, there cannot be any direction to the Chief Justice of India as to who shall be sitting on the Bench or who shall take up the matter as that touches the composition of the Bench. We reiterate such an order cannot be passed. It is not countenanced in law and not permissible.”

Though the Constitution Bench justified its order in the interest of smooth functioning of the court and avoiding chaos in the administration of the justice dispensation system, it is highly irregular that the Constitution Bench of the Supreme Court overruled a previous order, without even mentioning it specifically as in this case, as every order of the court is

binding on all benches of the Supreme Court, including those led by the CJI, unless specifically overruled. Despite this, the Constitution Bench held: “..any order passed which is contrary to this order be treated as ineffective in law, and not binding on the CJI.”

Having impliedly annulled the order of Justices Chelameswar and S. Abdul Nazeer, the 10th November Constitution Bench wanted to appear as if it was not opposed to hearing Kamini Jaiswal’s petition on merits. Thus, it posted it before the appropriate bench, again “to be allocated by the CJI”, without explaining why it did not agree with the petitioners that the CJI must recuse himself from choosing the judges who would hear this case.

On 13th November, when the three-judge bench comprising Mr. Agrawal, Mr. Mishra and Mr. Khanwilkar JJ heard the case, the petitioner’s counsel, Mr. Shanti Bhushan questioned the Bench to hear the matter because the CJI constituted it despite their plea that the CJI ought to have recused himself both judicially and administratively. The bench, on 14th November, refused the recusal plea and instead relied on the controversial decision of 10th November Constitution Bench to hold that the CJI was the master of the roster and that if he had constituted the bench, there could be no grievance against it.

The three-judge bench also averred that even when there is an allegation against the CJI, it is he who has to assign the case to a bench as considered appropriate by him. This has not only been settled by the Constitution Bench on 10th November but also in the matter of *Dr D.C.Saxena v CJI*⁵ in which the bench held that “It is contempt to imply that the Chief Justice would assign it to a bench which would not pass an order adverse to him.”

Undoubtedly in this case, the principle of *nemo judex in causa sua* is held to be overruled by the other principle of the Chief Justice being the ‘Master of the Roster’. Sadly, such interpretation of the “Master of the Roster” by Constitutional Bench raises the office of the Chief Justice above the institution of the Supreme Court. It places the institutional integrity in the hands of one person failing to ring-fence a vitally important public institution against the possibility of an impulsion.

⁵ (1996) SCC (7) 216.

But, this fierce criticism of the Supreme Court does not end here. To bring this issue into a National debate, the four senior most judge of the Supreme Court came forward to hold a press conference to discuss certain grievances related to the current state of affairs in the administration of the Apex Court. The Judges objected to the manner of framing of roster and allocation of cases by the CJI saying this power was meant for efficient functioning of court and not to exercise any superior authority over judges. Certainly, the judges coming out to public and speaking about this has shaken public confidence in the Indian judicial system, in which the Indian public has put enormous faith, and which many Indians consider their last resort.

THE PRINCIPLE OF MASTER OF THE ROSTER

The ‘Master of the Roster’ denotes the privilege of the Chief Justice of India to constitute Benches to hear cases as well as when the cases would be listed for hearing; assuming that the incumbent Chief Justice will always be entirely honest and maintain the highest standards of integrity. Theoretically, this privilege only extends to administrative functioning of the court and for adjudicatory issues, the CJI is only the “first among equals”, which means that he has no superior claim over his fellow judges. However, practically, the implications of this in the Indian context are greater.

In India, given the scale of cases, the principle of *en banc* or the entire court hearing everything does not apply. The Indian Supreme Court is a poly vocal court consisting of 26 Judges in 13 Courtrooms, speaking in different and sometimes contradictory voices unlike in the US, where all the nine judges sit together to hear cases. This Therefore, power of the Chief Justice of India as head of Court administration and thereby listing cases for hearing assumes importance in India. ,

Sources of Power of CJI to act as the Master of the Roster

In India, the CJI’s position is such that it projects strong ‘centralized tendencies’ with no concurrent accountability mechanism in sight. Though the Constitution of India mentions about

the rules for regulating the practice and procedure of the court⁶ and empowers the Parliament to make law in respect of the Constitution, organisation, jurisdiction and powers of the Supreme Court⁷, the Parliament has not made any law so far with regard to formation of benches or laying down the principles for distribution of judicial functions, the CJI and other judges exercise the same powers.

The CJI is always the senior-most judge of the court, except with an isolated instance. It has, therefore, been said that on the judicial side, the CJI is only first among equals.⁸ But following the judgment of the three bench in *Prakash Chand*,⁹ it has further been held that as far as the roster is concerned, which is an administrative function, the Chief Justice is the ‘Master of the Roster’ and he alone has the prerogative to constitute the benches of the court and allocate cases to the benches so constituted. It has been clarified by the Constitution Bench that this has also been the convention of the Supreme Court and as such is the law. It has been clarified that the convention is followed because of judicial discipline and decorum. It has been emphatically clarified that “*Once the Chief Justice is stated to be the Master of the Roster, he alone has the prerogative to constitute Benches*”

Exercise of power to act as the Master of Roster

On a plain reading of the law declared by the apex court in relation to the concept of “master of roster”, it looks as if he has absolute discretion in the matter of distribution of judicial work among the judges of his court. Without going into the controversy as to the source of this power, that is, whether it is derived from certain conventions or can be said to be inherent in the office of the chief justices or are based on statutory provisions, one thing is certain that such power can be exercised only subject to the constitutional limitations, particularly, Article 14 of the Constitution.

It is well settled that “Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding

⁶ Article 145(1) of the Constitution of India, 1950.

⁷ Article 246 read with Entry 77 of the Union List in the Constitution of India, 1950.

⁸ Campaign for Judicial Accountability and Reforms v. Union of India, (2018) 1 SCC 196 para 6

⁹ State of Rajasthan v. Prakash Chand and Ors., (1998) 1 SCC 1.

omnipresence”.¹⁰ This principle equally applies to all the constitutional authorities. In the case of *Maru Ram v Union of India*¹¹, the Constitution Bench has held that where a power is vested in a very high authority, it must be presumed that the said authority would act properly and carefully after an objective consideration of all the aspects of the matter, and further, the higher the power, the more cautious would be its exercise.

Mr. Justice .Patanjali Sastri in *State of Madras vs V.G.Row, Union of India, and others*¹² observed that "Supreme Court has the role of a sentinel on the qui vive" which has been perversely perceived by the present generation of judges. The lordship meant that the court should eternally be on guard to protect citizens' rights but it seems from the ongoing controversies that CJI Justice Dipak Mishra have mistaken it to mean that the court ought to jealously protect the interests of the judges. There were also grievances in the Press Conference by the Judges that though there are well settled conventions for guidance for the discharge of the said function, of late, such conventions have not been strictly adhered to. According to the said judges, “ *There have been instances where cases having far reaching consequences for the nation and the institution had been assigned by the Chief Justice of this Court selectively to the benches ‘of preference’ without any rational basis for such assignment.*”

Unfortunately, the order passed by the then Chief Justice, Mr. Deepak Mishra and the subsequent press conference by the senior most judges of the Apex Court clearly demonstrated that the power of ‘Master of the Roster’ is being misused which somehow elevates an administrative rule above one of the most basic and fundamental principles of justice. Though there may not be any wrongdoing here by the CJI, but the manner in which the matter was heard and disposed of was profoundly disappointing and has cast a genuine doubt in the minds of the people at large.

These issues and the latest statement by the new Chief Justice raise key constitutional questions that go beyond the individual and the answer certainly lies in the rule of Seniority. Succession to the Office of the Chief Justice is by virtue of seniority, and the presiding judge in Courtroom No. 2 is the next in line after the Chief Justice. Consequently, when there are allegations against

¹⁰ Article 14 was explored and brought to light in Royappa case, (1975) 1 SCC 485, and it was reaffirmed and elaborately by the Supreme Court in maneka Gandhi v. Union of India, (1980) 4 SCC 95, pp/ 283-84. Para 7.

¹¹ [(1981) 1 SCC 107]

¹² 1952 AIR 196, 1952 SCR 597

the CJI or the Chief Justice himself precludes from acting as the “master of the roster”, that responsibility, both judicial and administrative, must devolve on his successor, i.e the second most senior judge. Therefore, by virtue of this rule, Mr. Justice Chelameswar’s order on the 9th November was not procedurally irregular. The Chief Justice having been disqualified by the principle of *nemo iudex*, it was Courtroom No. 2 that, temporarily for the practical purpose, became Courtroom No. 1, and the administrative powers of the Chief Justice vested in his successor. Had Mr. Justice Chelameswar’s order been passed by the Chief Justice, it would have been entirely regular; because the Chief Justice was disqualified from dealing with the matter at all, the order in question would have to be treated as an order of an (acting) Chief Justice, and deemed to be regular.

CONCLUSION

Today, the country is faced with a situation involving the administrative functioning of the Chief Justice and it appears that the Supreme Court could not locate any constitutional remedy except to approach the people through the medium of press. As a result, outsiders, the common men and women, who hope to depend on this institution to get justice, are helplessly looking at the whole episode in bewilderment. There are already many questions asked about the transparency, accountability, and corruption in the judicial system and now this has further aggravated the matter.. The change of guard from one individual to another may sometimes improve the position temporarily. But the questions those loom around us has nothing to do with any particular individual. It goes to the root of the Institution and is related to its best practices. Under such circumstances, it is a right time to revisit the rule against bias and reinstate the personal and institutional probity in the governance of the judiciary.

The CJI’s power on the administrative side, especially one that determines how the CJI functions as the Master of the Roster s is a question of constitutional law concerning the office of the Chief Justice itself. So far, there have been only Conventions to regulate the number of administrative roles played by the Judges. In such circumstances where the reputation of the whole institution is at stake, it is highly demanding that before any further damage is caused to the great constitutional institution, the Supreme Court as collegiums takes a strong stand on the

issue and pursuant to its powers under Article 145(1) of the Constitution, clearly lays down the exhaustive guidelines for exercising the powers of formation of Benches and allocation of cases keeping in view the conventions of the Court in this regard. In the fast changing situations, it may also be found advisable to confer the functions of ‘Master of Roster’ on a committee comprised of Chief Justice and two senior-most judges. If the new Chief Justice Mr. Ranjan Gogoi could bring in this change; it would be no doubt be a landmark in the history of the Supreme Court.

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