

Master of the next steps

In an unprecedented move, seven [Opposition parties finally initiated the process to impeach the Chief Justice of India](#) (CJI), Dipak Misra. Vice-President, and Rajya Sabha Chairman, Venkaiah Naidu has rejected the motion. Whether the Vice-President can himself examine the merits of the impeachment motion in itself is debatable as this is the job reserved for the inquiry committee under the Judges (Inquiry) Act, 1968. The matter may soon be in the Supreme Court. And if it is, the CJI should not constitute a Bench to hear this petition if the credibility of our judiciary is to be preserved.

One charge against Justice Mishra pertained to the arbitrary use of his powers as 'master of the roster'. On April 11, a three-judge Bench headed by the CJI had given a judgment upholding absolute power of CJI in the constitution of benches. A similar order was passed by a five-judge Bench again headed by the CJI in November 2017, when for the first time in the Supreme Court's history, administrative powers were used within 24 hours to overrule a judicial order of a Bench, in this case headed by Justice J. Chelameswar. Another two-judge Bench of Justices A.K. Sikri and Ashok Bhushan is scheduled to hear Shanti Bhushan's petition later this week. Thus, Bench constitution is at the core of current crises and something must be done about it without attributing motives to the CJI.

Back to the court: on the impeachment controversy

"As a repository of constitutional trust, the Chief Justice is an institution in himself," said Justice D.Y. Chandrachud, who authored the 16-page April 11 order. Thus we are told not to question the CJI's decisions. But then by the same logic, is Rashtrapati Bhavan not an institution? Is the Prime Minister's Office not an important institution of our democracy? Is Parliament not the most important institution? If the answer to these questions is in the positive, then how come decisions by these high constitutional functionaries are routinely struck down by the judges of High Courts and Supreme Court?

In fact if men were angels, there would be no need to limit the powers of public officials through constitutional means. Judges too are humans like us and thus are fallible. Judges are our last resort against governmental authoritarianism and that's why they must be insulated from the governmental control. But similar protection at times may be needed against at least the 'administrative actions' of Chief Justices. Thus if civil liberties are seen to be under threat due to potential abuse of powers by Chief Justices, a review of earlier judgments like *Prakash Chand* (1998) that held the Chief Justice as an 'absolute' master of the roster should be urgently taken up.

Constitutionally speaking, the judiciary is not 'state' under Article 12. But in *Naresh S. Mirajkar* (1967), the apex court itself made a distinction between 'judicial' and 'administrative' powers of the court. Thus when the CJI acts in his 'administrative' capacity, his actions are certainly subject to fundamental rights, including the right to equality.

Right to equality includes right against arbitrariness. In *E.P. Royappa* (1973), the Supreme Court itself expanded the protection of equality when it observed that "From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch." In *Tulsiram Patel* (1985), the Supreme Court itself held that non-observance of the principles of natural justice too violates right to equality. Thus the CJI's participation in cases about his own powers has not gone well with those who believe in the fundamental rule of natural justice that 'no one shall be a judge in his own case'. His recusal could have enhanced his own credibility

and saved the judiciary from the crises.

Speaker must act as 'reasonable man'

The Supreme Court Rules, 2013, framed under Article 145 of the Constitution, do state that CJI is master of rolls. But since constitution of Benches is an 'administrative' function, this function cannot be exercised at the CJI's whims and wishes. Thus the cherry-picking in Bench constitution may not be violative of 'the rule by law' but is definitely contrary to the ideals of 'the rule of law'. Spirit of law at times is more important than letter of law.

An interpretation accepting no limitations on the exercise of the powers of the CJI and justifying even power to act in an arbitrary manner means a re-writing of the entire jurisprudence developed by the Supreme Court on the exercise of 'administrative discretion'. Isolated cases of even improper use of power should never be criticised, and the Vice President rejected the motion because of this. But if there is pattern in which Benches are being constituted, it is to be more closely examined.

In *Prem Chand Garg* (1962), the apex court held that rules made by the court violative of fundamental rights may be struck down as *ultra vires* of the Constitution. Thus if the rule of the CJI being master of rolls is used in an arbitrary manner, such a rule should either be read down or there should be safeguards built into it.

Certainly, all judges are equal and seniority has no bearing on the constitution of Benches. But then equality also means that senior judges be treated equally with junior judges. Their exclusion from all constitutional Benches has certainly sent the wrong signals. Since in the roster prepared by the CJI after the press conference by four senior-most judges, some subjects have been assigned to more than one judge, the CJI again decides on his own who gets which matters and thus has not in any way improved the situation in reducing his discretion. Moreover, all important matters have been reserved for the CJI.

The CJI yet again has this opportunity today which he should proactively use to bring in real reforms by amending the Supreme Court Rules on constitution of Benches. Any CJI would have a fairly good idea about the ideological positions of all the brother judges and therefore even if there is no malice on his part, he can always constitute a Bench with judges who are likely to go this way or that. This power therefore has a huge impact on the justice delivery system. In the wake of the current crises, some mechanism can be evolved to ensure that one individual does not have absolute power to make or unmake Benches. We may disagree with a number of judicial and administrative decisions of the CJI. But none of his actions can really amount to 'incapacity or proved misbehaviour', i.e. grounds of impeachment, and thus the rejection of the notice by the Vice-President.

Let the CJI himself come forward in leading the process of developing the mechanism that will exclude the remotest possibility of arbitrariness by future CJIs.

Faizan Mustafa is Vice-Chancellor, NALSAR University of Law, Hyderabad. The views expressed are personal

Receive the best of The Hindu delivered to your inbox everyday!

Please enter a valid email address.

YES | Syed Ata Hasnain India risks its national security with low allocations to defence spending
Syed Ata Hasnain For a developing country that is

END

Downloaded from **crackIAS.com**

© **Zuccess App** by crackIAS.com

crackIAS.com