



## Back to the court

The impeachment controversy is now about a presiding officer's power to reject a motion

With the Rajya Sabha Chairman rejecting the notice given by 64 Opposition members for the impeachment of the Chief Justice of India, the focus has shifted to the presiding officer's power to admit or reject a motion. The Congress, spearheading the move, is planning to approach the Supreme Court. Section 3 of the Judges (Inquiry) Act, 1968, says the presiding officer may admit or refuse to admit the motion after holding consultations with such persons as he thinks fit, and considering the material before him. The law is open to interpretation on whether he can reject the motion on merits without sending the charges to a committee for investigation. A common sense view suggests the Chairman has to apply his mind to the nature of the charge. To argue that he should merely satisfy himself on the number of signatures appended to the motion and straightaway constitute a probe committee is unlikely to find judicial favour. However, it needs a court to delineate the contours of such an interpretation. Rajya Sabha Chairman and Vice-President M. Venkaiah Naidu held there is little merit in any of the five charges. He has considered the implications for judicial independence if an investigation were ordered into charges that he says are based on mere suspicion and conjecture. He has picked holes in the motion's wording, saying the signatories themselves are unsure of the veracity of the charges.

As for the legal foundation of his order, Mr. Naidu has cited the Supreme Court ruling in *M. Krishna Swami v. Union of India* (1992), which directed the Speaker (or Chairman) to act with utmost care, circumspection and responsibility and to keep equally in mind "the seriousness of the imputations, nature and quality of the record before him, and the indelible chilling effect on the public administration of justice and the independence of the judiciary in the estimate of the general public". He has also gone by *Mehar Singh Saini* (2010) to elaborate on the phrase "proved misbehaviour or incapacity", used in Article 124(4) of the Constitution, the ground for impeachment of a Supreme Court judge. What is possibly the main charge – that Justice Misra misused his control over the roster to assign cases selectively with a view to influencing their outcome – is indeed a serious one. But the question is whether impeachment is an option in the absence of concrete material to establish this charge. The Opposition is divided on initiating impeachment proceedings and there are two views within the Congress itself. Taking the matter to court may result in a judicial resolution, but it is unlikely to end the controversy over the functioning of the Supreme Court, an issue that has unfortunately assumed a very political and polarised character.

## Nabbing absconders

The ordinance is not enough; the government needs to plug many more legal loopholes

Last Saturday, within hours of Prime Minister Narendra Modi's return to Delhi from an overseas tour, the Union Cabinet approved the promulgation of the Fugitive Economic Offenders Ordinance, 2018. A fugitive is defined as someone who has left India to avoid criminal prosecution or who is already overseas and refuses to return to face the law. In recent weeks, banks have been asked to mandatorily collect passport details of those borrowing above ₹50 crore, and the passports of some wilful defaulters are being impounded too. Given that the proposed legislation was announced well over a year ago, the trigger for this belated haste is easy to see. While presenting Budget 2017-18, the Finance Minister referred to instances of offenders fleeing the country to escape its justice system, and said the government was looking at a law to confiscate the assets of such persons till they return to face the law. By September, the Finance and Law Ministries had agreed on a draft Bill, but it was only introduced in the Lok Sabha this March, in a session that proved to be a washout. The government is no doubt conscious of the clamour for tough action on absconding offenders, particularly those involved in financial misdemeanours and wilful defaulters of bank loans.

There remains great consternation over liquor baron Vijay Mallya's flight from the country, with his now-defunct Kingfisher Airlines having run up outstanding loans of over ₹9,000 crore from Indian banks. Both Mr. Mallya and former Indian Premier League commissioner Lalit Modi, who faces an Enforcement Directorate probe for foreign exchange law violations, are in Britain. They left Indian shores for safer climes under the NDA government's watch, as did diamond merchants Nirav Modi, Mehul Choksi and their associates, whose firms defrauded the country's second largest public sector bank of over ₹12,800 crore. India is no closer to getting Mr. Modi or Mr. Mallya back to face the law, with extradition proceedings against the latter crawling through U.K. courts. No clear indications about whether their return could be expedited emerged during Prime Minister Modi's meeting with his British counterpart Theresa May last week. Meanwhile, though government agencies have attached the diamond merchant duo's assets in India, an American court has disallowed the sale of their assets in other jurisdictions while allowing their U.S.-based entity to offload its assets. The reason: India is yet to pass a model law mooted by the UN for cross-border insolvency cases. It is not clear whether this ordinance can tide over this major handicap. The government may have opted for the ordinance route to deflect the heat from these cases of fraud, but it needs to present a coherent vision about its plans to bring back those fugitives who have already got away and plug the remaining loopholes in the system.

# The dragon beckons again

Prime Minister Narendra Modi's visit to China should be seen in the context of the flux of global geopolitics



P.S. RAGHAVAN

Prime Minister Narendra Modi goes to China on April 27, against the background of turbulence in global geopolitics and some domestic disquiet about "softening" of India's China policy.

The international backdrop is worrying in many respects. The face-off between the U.S. (and its allies) and Russia is arguably worse than during the Cold War. They confront each other, through proxy forces, in three active conflict zones – Ukraine, Syria and Afghanistan. The recent U.S.-French British missile strikes in Syria were a stark reminder. It now emerges that prior communication to the Russians had ensured that equipment, personnel and civilians had been evacuated in advance. However, such deconfliction arrangements seem to be episodic, and there is a lurking danger that miscalculation or brinkmanship might spark off a direct conflict at a local level.

### Edgy confrontation

Sanctions – particularly the new U.S. legislation, CAATSA (Countering America's Adversaries Through Sanctions Act), under which it can impose sanctions on any company which engages with Russia in the defence or energy sector – impart a sharper edge to the confrontation. This weapon

was not wielded in anything like this form in the Cold War; its impact could be far more devastating in today's globalised world. Recent American sanctions on major Russian multinationals, whose stocks are internationally traded, widened the target beyond Russian oligarchs to a larger body of shareholders within and outside Russia.

As the U.S. ratchets up pressure on Russia, it has donned kid gloves in dealing with China, as indicated by U.S. President Donald Trump's tweets. A recent tweet appreciates Chinese President Xi Jinping's "kind words on tariffs and automobile barriers" and "his enlightenment on intellectual property and technology transfers".

### Trade issues

While India is being asked to address its trade surplus of about \$25 billion with the U.S., Mr. Trump asked China (in a tweet last month) to reduce its massive trade surplus of about \$375 billion with the U.S. by just \$1 billion! He probably meant \$100 billion, as has been suggested by his Administration, but it is worth noting that in 2017 alone, the U.S.'s trade imbalance rose by about \$28 billion. America's decision to withdraw from the Trans-Pacific Partnership (TPP), a free trade grouping excluding China, effectively benefited China.

India itself, running a trade deficit of over \$50 billion with China, is in difficult negotiations on the Regional Comprehensive Economic Partnership (RCEP), a free trade grouping that includes China, ASEAN (Association of Southeast Asian Nations), Japan, Korea, Aus-



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### Unpredictable U.S.

The unpredictability of U.S. foreign policy is driving even its closest allies to hedge their options. Japanese Prime Minister Shinzo Abe and Mr. Xi are to exchange visits in the near future – a significant breakthrough in relations between two strategic rivals, who were on the verge of a military confrontation about five years ago. Japan (like India) is concerned about China's assertiveness in its neighbourhood and the geopolitical implications of its Belt and Road Initiative (BRI).

Yet, having failed to persuade Mr. Trump (with whom he claims excellent personal chemistry) to rethink U.S. withdrawal from the TPP and uncertain about the consistency of U.S. policy in the region, Mr. Abe sees benefit in sustaining a dialogue with China, whose positive response reflects its own desire to keep in touch with a U.S. ally, in the face of conflicting U.S. signals on trade and security policies.

The sharpening of U.S.-Russia acrimony has complicated India's relations with both countries. Besides pressure to address the In-

dia-U.S. trade imbalance, India has been warned that its defence and energy links with Russia could attract U.S. sanctions under CAATSA – a development which could have a major impact on our defence preparedness. Russia's intensifying defence cooperation with China and its actions in Afghanistan and with Pakistan are areas on which serious and delicate high-level India-Russia dialogue is being pursued.

### Mutual interest in serenity

This is the backdrop to the current "reset" in India-China relations. With a strengthening Russia-China axis and with the U.S. taking its eye off China to deal with Russia, it is prudent for India to maintain a harmonious dialogue with China, even as we deal with the wrinkles in our relations with the other two great powers. China's motivation in extending the olive branch may be similar: to maintain serenity in relations while it deals with its other challenges.

This is not to say that India should not stand firm on its core interests, political, economic or strategic. We cannot overlook Chinese designs in our neighbourhood – from Doklam to the China-Pakistan Economic Corridor (CPEC), Nepal, Bangladesh, Sri Lanka and the Maldives – or ignore the larger geopolitical threat posed by the land and sea corridors of the BRI. It is just that circumstances may have opened up some space for furthering mutual interests, without compromising on our other interests.

Countries do not publicly admit adverse asymmetries in relations,

but their policymakers have to factor them into their policies and actions. Of course, even countries in adverse asymmetric relationships have levers which can and should be used to further their vital interests. In most cases, this is best done through quiet dialogue instead of public airing of differences, which hardens attitudes.

### Importance of messaging

It is a valid point that the public messaging on this change in tone of the India-China relationship could have been better. The course of India-China relations in the past couple of years had created a public narrative of bilateral frictions over CPEC, Doklam, our Nuclear Suppliers Group membership and other issues, on which India had to take strong public positions. The transformation in the international environment, creating opportunities for non-confrontational dialogue, could perhaps have been better explained. Foreign policy can be pursued far more effectively when it is supported by public perceptions.

The reality is that India has to maintain a pragmatic balance in its relations with the three major powers, remaining conscious of the fact that elements of these relations will be continuously impacted by the dynamic flux of today's global geopolitics.

The Prime Minister's visit to China should be seen in this context.

P.S. Raghavan, a former diplomat, is Convenor of the National Security Advisory Board. The views expressed are personal

# Master of the next steps

With the notice for his impeachment rejected, Chief Justice of India Dipak Misra should proactively initiate reform



FAIZAN MUSTAFA

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.

### On the Bench

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.

"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 Arti-



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cle 12. But in *Narsh 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.

### On 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.

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 confe-

rence 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.

### Amend the Rules

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.

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## LETTERS TO THE EDITOR

Letters emailed to letters@thehindu.co.in must carry the full postal address and the full name or the name with initials.

### CJI's impeachment

The decision by the Rajya Sabha Chairman to reject the impeachment motion against the Chief Justice of India is short sighted ("RS Chairman rejects motion against Chief Justice Misra", April 24). Given the simmering discontent within the judiciary the issue certainly deserved closer scrutiny as it was also a chance for the political class to engage itself in an enlightened debate on the wide range of issues affecting the higher judiciary. An impartial inquiry would have also instilled more confidence in the common man as far as the key watchdog of our democracy is concerned.

C. SURESH,  
Aankur, Thrissur, Kerala

By rejecting the unprecedented, ill-conceived and politically-motivated

step against the Honourable CJI, the Vice-President and Chairman of the Rajya Sabha has stopped a grave assault on the highest judiciary. He has saved the most important pillar of our democracy from falling victim to a vicious campaign launched by those possessed by ulterior motives and having scant respect for the institution.

The common man appeals to the Opposition, especially the Congress, to stop destroying our respected institutions of democracy.

MAHENDRA B. JAIN,  
Belagavi, Karnataka

By pursuing the course of impeachment against the Chief Justice, the Opposition seems to have crossed the threshold limit of exercising its democratic rights. The Opposition needs to realise that we can progress only on the basis of strong

democratic institutions. The case here appears to be one of weakening a pillar of our democracy without a sound basis.

NIRANJAN SAHOO,  
Bhubaneswar, Odisha

The higher judiciary always stands out as a beacon of hope and credibility especially when the other pillars, which include the legislature, the executive and the media, are fast losing their glory. The failed attempt at impeachment should not be considered as the end of the crisis. The CJI must strive to settle the issue with his fellow judges at least for the sake of the credibility of the higher judiciary.

JASKARAN SINGH GILL,  
Phagwara, Punjab

### Dalit unrest

It is a fact that the so-called upper and middle castes

have failed in enabling a safe space for the socially unprivileged. By pretending that caste-based atrocities do not exist and putting forth the argument that the issue is politicised, they have only exposed the bubble of social equality. Data on atrocities against the Scheduled Castes and Scheduled Tribes will give them a reality check. Amidst all this, attempts to dilute the SC/ST Act will only make the situation even worse (Editorial page, "A summer of gathering discontent", April 24).

DISHA GOVAL,  
New Delhi

Increasing violence against the minorities and Dalits can be attributed to a large extent to the regressive values being upheld and promoted by the ruling dispensation. Reason has been the biggest casualty in all this and issues are looked

at from partisan angles. It is next to impossible to have any sort of rational discussion on the issue without you being perceived as being either pro- or anti-somebody or thing. Constitutionally mandated rights for a citizen which should get strengthened as the Republic matures are instead getting overrun by identity politics.

MANOHAR ALEMBAATH,  
Kannur, Kerala

### Serial discontent

One is in agreement with the report, "Regressive Bengali serialsirk Mamata" (April 23). I may add that television serials in Telugu are going from bad to worse. The content is in very bad taste and shows that scriptwriters are unable to think of progressive ideas. The characterisation of women is bad with an emphasis on domestic violence. I am sure

that this is the case in other language serials too. What are the broadcasting regulators doing? Let me list some of the ills: there is an emphasis on novel methods of criminality, orthodox and blind beliefs and villainy by even women.

P. MURALIDHAR RAO,  
Hyderabad

### Handwritten and 75 p

The article, "Last pen standing" (*The Hindu* Magazine, April 15), should silence the doubting Thomases. The fact that the *Musalmán* – with its editorial office in Chennai – which the article claims to be the world's only handwritten newspaper, has a readership of 21,000 people across India is heartening. Who said the reading habit is dead?

JAYANTHI S.,  
Chennai

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