

ISAS Brief

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The Chief Justice of India: Make the Impeachment Process Apolitical

Indian citizens recently witnessed a futile attempt to impeach the Chief Justice of the Supreme Court. The news surprised many as it was the first-ever attempt to impeach a Chief Justice. The notice for impeachment was moved by a clutch of opposition party members of the Rajya Sabha (Upper House). Whilst the notice was rejected by the Rajya Sabha Chairman, its rejection was sought to be contested in the Supreme Court. The notice was ultimately withdrawn, leaving behind very grave concerns whether a Chief Justice of the apex court in the country should be the subject matter of such political machinations. It is widely believed that the credibility of such high accountability institutions should never be made a part of political upmanship.

Vinod Rai¹

The Indian political and judicial space received a rude jolt on 14 April 2018 when 64 members of parliament and seven recently-retired members, owing allegiance to seven opposition parties, moved a notice for the impeachment of the Chief Justice of India (CJI), Justice Dipak Mishra. The signatories to the notice accused Justice Mishra of ‘misbehaviour’ and ‘misuse of authority’. The notice levelled five charges of misbehaviour and was moved a

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day after the Supreme Court rejected a number of petitions seeking an independent investigation into the death of judge B H Loya, who was hearing the Sohrabuddin Sheikh² encounter case. While five impeachment motions had earlier been moved against judges, this was the first attempt in India to impeach a CJI. The notice for impeachment was moved before the Chairman of the Rajya Sabha (Upper House) as it was signed by its members meeting the requirement to have a minimum of 50 signatures. Article 124(4) of the Constitution mandates that in case the notice is accepted by the Chairman, a three-member panel, comprising a chief justice of a high court, a supreme court judge and an eminent jurist, should be constituted to investigate the charges. Following investigations, if the panel finds the judge guilty, the House can take it up for discussion. The House is required to pass the motion by a 'special majority'. A special majority is one which comprises half the total members of the House and a majority of not less than two thirds present and voting. After its passing, the motion goes to the second House which is also required to pass it by a special majority before it is presented to the President, who can pass an order for the removal of the judge.

The five charges levelled against the CJI were the following:

1. Pertaining to the Prasad Education Trust (PET), in which there is reference in certain telephone conversations about the highest judicial luminaries being involved in the granting of permission to the PET to set up a medical college. Whilst there is no reference to any judge by name, by innuendo, it has been surmised that the telephone conversations may be referring to the CJI.
2. That the CJI overruled Justice Jasti Chelameswar's³ bench adjudicating that the PET case be heard by a constitution bench of five senior-most judges other than the CJI. (A

² Sohrabuddin Sheikh was a dreaded gangster of Gujarat who was wanted in extortion, kidnapping and such other crimes. He had 40 cases against him registered in five states. It was reported that he had planned to create chaos by eliminating an "important political leader of Gujarat". He was taken into custody by the Gujarat police and was later allegedly killed in a 'staged encounter'. His brother filed a case in the Supreme Court which ordered an investigation by the Criminal Investigation Department into the circumstances of his death. This investigation found the 'encounter' to be faked and there were evidences of political interference, implicating Amit Shah, then-Home Minister of Gujarat (present president of the ruling Bharatiya Janata Party).

³ Justice Chelameswar was the second senior-most judge of the Supreme Court who ordered that the PET case be heard by a constitution bench. It was his order that the Chief Justice be overruled.

five judges bench later ruled that the CJI is the master of the roster and thus has the discretion in deciding the constitution of any bench).

3. When Justice Chelameswar was hearing this case, it is alleged that the Supreme Court registry placed a note before him stating that such matters should be decided by a CJI-led bench. The charge is that the CJI got this note prepared by ante dating it.
4. Abuse of power by the CJI by sending sensitive cases to chosen judges by misusing his powers as the master of the roster.
5. That the CJI acquired land in Odisha when he was an advocate by filing a false affidavit.

The Chairman of the Rajya Sabha rejected the notice after consulting legal and constitutional experts. However, this decision of the Rajya Sabha Chairman was not accepted by the opposition parties and they decided to make an appeal in the Supreme Court to review his decision. It was also represented before the Supreme Court that the review should not be placed before the CJI. Instead, it should be placed before a bench presided over by the second senior-most judge in the Supreme Court. The Supreme Court, however, decided to list it before a bench of five judges, which did not include the second senior-most judge (or the CJI). The order constituting this five-judge bench aggrieved the signatories who sought a copy of the 'administrative order', claiming that, if it had been a judicial order, it would have been pronounced in an open court. Not being able to procure a copy of the said 'administrative order', the signatories decided to withdraw the notice under protest. They contended that they merely wanted to draw attention to certain issues in the highest Court which was causing them concern and that they were aware that they did not have the numbers in the Upper House to get the resolution passed.

The entire episode has caused an animated discussion in the country on whether the decision to issue the notice was politically motivated, since *ab initio*, it was known that the opposition did not have the numbers to have it passed. The constitution makers have provided for a process of impeachment to ensure the accountability of the judiciary and yet made the process stringent so that mere political considerations do not attempt to erode the credibility of the judiciary. In fact, in January 2010, the then-minister in the United Progressive Alliance

government, Kapil Sibal, addressed the issue in an interview to NDTV, when he said that he did not accept the impeachment process if political parties in the opposition had to vote based on a Whip issued by their party. He was indicating that the members of parliament should be allowed to vote as per their individual conscience. Strangely, this is the very path the opposition parties adopted in the current episode.

Without going into the merits of the allegations levelled against the CJI or the grounds for rejection of the notice by the Rajya Sabha Chairman, it is important to analyse whether any of the three pillars of the Indian democracy, which have been the bedrock of India's development in the last 70 years, should ever be weakened at the behest of a handful of politically-motivated objectives. It is natural, as has happened, that if the opposition targets a particular institution, the government will rally around that institution. However, in the process, especially so in the case of the judiciary, which, quite often, has had to take strong positions against the executive, the independence of the institution gets impaired. A corollary of the process would imply that if the executive were to be unhappy with any decision of the judiciary, and since it has the numbers in parliament, they could initiate a process for impeachment of the judge who passed that verdict on the grounds of 'misbehaviour'.

It is widely believed that the entire episode has debilitated the independence of the CJI. The government rushing to the aid of the judiciary is, in itself, unhealthy for the judiciary's independence. Going forward, will it be possible for the CJI to take strong positions against the government in litigations before the supreme court? Considering the fact that the government is a litigant in about one-fourth of the cases before the Court, it would become relatively impossible for the CJI or the Court to sit in arbitrations where the government could be in the wrong. On the other hand, the government will be emboldened to bring, or at least threaten, impeachment motions against strong and independent judges.

Since the impeachment process is tedious, no judge has ever been impeached though five attempts have been made in the past. Hypothetically, it can be argued that there is no fear in the judiciary of any judicial accountability. There is a good deal of debate about 'activism', 'over stepping' mandate and 'excesses' against the judiciary. Each time that such situations arise, a debate on judicial reform gets credence. Hence, there is a need to set in motion a credible accountability mechanism. The Judges (Inquiry) Bill 2006, based on a Law Commission report, seeks to create a judicial forum (National Judicial Council) to deal with

complaints against judges. Four senior-most judges are expected to be members of this council. The council may not warrant an impeachment but warnings, advisories and voluntary resignations can be the provisions to enforce accountability. There is need to evolve a consensus on this or similar provisions.

In any parliamentary democracy, the different pillars act as checks and balances to ensure that everything works in cohesion and no arm of the functioning democracy wades into space rightfully belonging to the other. At the same time, each institution must be vigilant of its own mandate and ensure that the welfare of the citizen remains paramount and that the rule of law prevails.

The Indian democracy has been a shining example of enabling rapid economic development and keeping the welfare of citizens at its core. Its institutions have stood the test of some very testing times. There is a need to strengthen these institutions to ensure a bright future for India's citizens by rising above political and other narrow confines. The citizens have displayed the will to do so, and, in going forward, the country needs to reinforce that commitment in them.

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