

## Judicial quicksand

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The Indian judiciary now is stuck in an institutional quicksand, where every attempt to set things right seems only to deepen its crisis. Chief Justice Dipak Misra has, to put it mildly, made some questionable judgment calls that have led to concerns over the propriety of his conduct. Four of his colleagues went to the unprecedented step of calling a press conference, where the gravity of the implied accusation was combined with the kind of vagueness that made any follow-up difficult. A three-judge bench, including the Chief Justice, delivers a judgement on petitions regarding the death of Judge BH Loya. The judgement, not for the first time in the history of the Supreme Court, puts procedural decorum aside, to deliver a final closure in a case fraught with political implications.

The Congress party decides to file an impeachment motion that, above all else, lacks the courage of its convictions. For one thing, the party itself seemed divided on the motion. Without former Prime Minister [Manmohan Singh](#) and some senior leaders signing the petition, it lacked gravitas or credibility; it had the hallmarks of a Kapil Sibal too-clever-by-half manoeuvre. For another thing, the main premise of the petition rests not just on accusing the Chief Justice, but also by implication, at least four other judges of being accomplices in a game of bench-fixing. In effect, not just the Chief Justice, but a significant chunk of the Court was being implicitly accused without serious evidence. The timing of the motion seemed so overtly political, rather than principled, that it was easy to portray the impeachment motion as an intimidatory tactic to forestall judgements the Congress might not like.

Yes, it could be argued that the motion was to trigger an inquiry. But the threshold under which such an impeachment motion should be admitted is, rightly, for the sake of the independence of the judiciary, very high.

Meanwhile, Vice President [Venkaiah Naidu](#)'s decision not to admit the impeachment motion again foregrounded our institutional quagmire. He has the statutory authority to reject the motion. He gave reasons for doing so. On balance, he arguably made the right judgment call. For, one important element of the case against Dipak Misra rests on the presumption that all those he is handpicking for particular benches are doing his bidding. This is what makes the charge against him more than merely one of exercising poor judgement. But this also means that it is not a charge that can be admitted lightly.

But Naidu's reasons will not convince the sceptics, in part because of his continual partisanship. They will argue that it was not his mandate to ascertain whether misconduct had been proved beyond reasonable doubt; it was merely to ascertain whether there were sufficient grounds for proceeding with a further inquiry. He should not have acted as an inquiry commission itself. This is exactly the same mistake, they will argue, the Supreme Court made in the Loya case; it acted as if it were the final commission of inquiry. So one side seeks vindication of suspicion, the other side requires certainty to proceed further.

A low threshold for the vindication of suspicion threatens judicial independence; total certainty before we can proceed gives no means for redressing legitimate concerns about the conduct of the Chief Justice.

Now we wait for a petition to be filed before the very Supreme Court whose credibility is being impugned. We are in a peculiar situation where every actor's credibility is so much in question that justice will not be seen to be done, even if the actors in this drama actually do the right thing. Each has now contributed to the decimation of the institution. The Chief Justice by always appearing to

be a judge in his own cause, the rest of the Court by being a divided house without the minimal ability to exercise principled leadership, the BJP for so plainly intimidating the judiciary over appointments, and now the Congress party for creating a precedent where impeachment motions are used all too lightly. The Congress forgot that if you target the king, you should better hit bull's eye, or all you leave behind is more collateral damage.

Meanwhile, there is a larger game going on. The Chairman rejects the motion in order to protect judicial independence. But the government has done its level best to break judicial independence. It is sitting on the recommendations for appointment to the Supreme Court and High Courts of the collegium led by the same Dipak Misra who is supposedly acting at the behest of government. So, appointments to the courts are stuck and have a cloud over them. The BJP's conduct gives more ammunition to those who believe that the government is trying to intimidate the judiciary.

Meanwhile high-profile cases of political violence, from Mecca Masjid to Naroda Patiya, seem to fall apart. Like so many other cases in the past involving riots and violence, the Supreme Court's ability to oversee justice goes for a toss. The Chief Justice continues unfazed in his bench constitution, oblivious to an elementary fact that credibility is not just a matter of claiming formal legal powers, but about exercising discretion with fairness. The Bar seems as politically divided as ever, and except for one or two honourable exceptions, no major lawyers can help overcome this crisis of credibility or partisanship; they are part of the problem rather than the solution. So the net result is this: The final arbiter of our constitution is now mired in ineffectiveness and partisanship. Who do you believe? We are in an institutional quicksand when we know that who you believe seems to depend on your political loyalties. The Court, instead of being a mediating institution, is now a divided and dividing institution.

Getting out of this quagmire will not be easy for the Supreme Court. The current Chief Justice may not have committed impeachable offenses, but has certainly exercised questionable judgment. Maybe we can hold our noses sufficiently long enough for the controversial Chief Justice to retire, and for the next one to initiate reforms and restore credibility. Whatever the rightness of rejecting the impeachment motion, the government could show some prudence by not stalling good appointments in the blatant manner it has done so far. It needs to show it is not out to control the judiciary. The Congress would do better to concentrate on how to politically defeat the BJP than create dangerous precedents based on half convictions. But we are in a quicksand. We can endure neither the Court's loss of legitimacy nor all the attempts being made to overcome it.

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