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Scandalizing the Judiciary: An Analysis of the Uneven Response of the Supreme Court of India to Sexual Harassment Allegations Against Judges

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The Supreme Court of India (SC) pronounced a momentous judgment in Vishaka v. State of Rajasthan *in 1997, categorically recognizing the menace of sexual harassment (SH) at workplace and constitutionally rendering it as being in violation of fundamental rights guaranteed by Articles 15, 19, and 21 of the Constitution of India 1950. The Court also provided a mechanism for redressal against SH, which was ultimately reinforced by Parliament with the enactment of Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act 2013 (POSH Act). However, when it comes to allegations of SH against judges in the SC and High Courts by its employees, interns, or lower court judges, the response of the SC has been abysmal to say the least. There is a systematic pattern to suggest foul play and conspiracy in each such allegation, and judges, including even the Chief Justice of India (CJI), have not hesitated to openly indulge in victim-shaming and-blaming. In other words, the court has not been able to uphold its own jurisprudence on sexual harassment, which it expects to be scrupulously adhered to by other organs of the state. It is submitted that in not supporting the cause of victims alleging SH against judges, the other organs of the state are also party to this constitutional decay and serious infraction of fundamental rights. It leads us to ask the question, how can we guard against the guardians?*

> The Chief Justice's conduct has sent a signal that he is above all principles of natural justice, above all due process, above all law and entitled to be a judge in his own cause.[1]
>
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1 https://indianexpress.com/article/opinion/columns/chi-ranjan-gogoi-supreme-court-sexual-harassment-metoo-5691237/.

1. Introduction

The Record of the Supreme Court of India (SC) in holding other branches of the government to maintain the value of good governance is almost impeccable.

> Good governance in a civil society is inextricably woven with the fabric of ordered liberty. Enforcement of law, the investigation of crimes and the prosecution of offenders constitute important components of a system which is guided by the ideals of the Rule of Law. Ideals in the distant horizon they seem to be when the conscience of a society is aroused by wrongdoing which is of a systemic nature.[2]

Whether the said jurisprudence has been absorbed by the judiciary in its internal affairs, in general and with reference to allegations of sexual harassment (SH) against the Chief Justice of India (CJI) and other SC and High Court puisne judges, is a question worth pondering and reflecting. With great reluctance, but with highest conviction, we establish that the SC has failed to uphold the jurisprudence it advocates. In fact, certain former judges, the supposed guardians of the Constitution, have let themselves down by indulging in infliction of grave injuries on the reputation of the SC. The meek responses by the judiciary in the context of allegations of SH, is a constitutional anathema. Although, superficially its looks episodic, it is symptomatic of a pattern borne out by events over the last fifteen to sixteen years. In this paper, we demonstrate that the certain former judges of the SC of India, including the former Chief Justice of India, have been unevenly absolved from the constitutional obligation to undergo due process of law when facing serious allegations of SH, to the detriment of the victims.

For systematic discussion, the paper is divided into three sections. In Section 2, we briefly deal with SH jurisprudence as developed by the SC. Section 3 laments the unresponsive and blunt attitude of the SC to the *Vishaka* judgment. Section 4 extends the analysis to a dissection of the extraordinary procedure adopted by the former CJI for probing allegations of SH against himself. In summary, we argue that the stance of the SC on allegations of SH against its judges and judges of the High Courts appears as a textbook case of policy paralysis and display of patriarchal attitude by fostering the assumption that an allegation of SH by a victim against the public office of judge is either inconceivable or falsely motivated. We conclude the paper by suggesting an alternative roadmap.

2. SH jurisprudence of the Supreme Court: A bird's eye view

Combining international human rights law standards, constitutional law, and ethics, the Indian SC has grounded the SH of female employees in workplaces as a dignity harm.[3]

[2] State of Tamil Nadu v. Elephant G. Rajendran, 2019 SCC OnLine SC 527, Civil Appeal Nos. 3918–3919 of 2019, para. 49.

[3] Nisha Priya Bhatia v. Union of India, 2020 SCC OnLine SC 394.

2.1. *Vishaka mechanism:* Vishaka v. State of Rajasthan

Vishaka arose as a consequence of public interest litigation filed by NGOs engaged in the sphere of gender equality and women's empowerment. Taking judicial notice of the violation of the right to gender equality and the dignity of working women, the Court assumed the existence of SH at a workplace.[4] Both the litigants and the Court perceived this class action as an appropriate opportunity to fill the legislative[5] vacuum, obtain justice for SH victims, and engender gender equality. Invoking the framing of public law, the Court ironed out the interstices by characterizing SH as being in violation of the fundamental right to carry on profession, to gender equality, to the liberty of life, and to dignity.[6]

> The obligation of this Court under Art. 32 of the Constitution, for the enforcement of these fundamental rights in the absence of specific legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region (1995).[7]

Besides its institutional commitment, the Court also took cognizance of the involvement of the Government of India in the 4th World Conference on Women in Beijing, the Platform for Action for formulation and operation of a national policy on women, setting up a Commission for Women to act as a public defender of women's human rights, and institutionalization of a national-level mechanism to monitor its implementation as driving factors.[8]

The most creative aspect of this judgment lies in its rationale for judicial intervention, with the invocation of certain unenforceable directive principles and fundamental duties, enshrined in Arts 42 and 51A(e) of the Constitution of India 1950. In a way, the Court assumed the mantle of quasi-legislature by accepting its duty under Article 37 to take cognizance of Directive Principles of State Policy while enacting laws.

The whole mark of judgment is its discourse on 'Constitutional Feminism'. It is one of the rarest cases where the horizontal dimension of gender equality is implicated in Public Law. The court used its Article 32 jurisdiction to completely transform the adversarial argumentation into a collaborative interaction between itself, the Bar, the executive, and nongovernmental organizations (NGOs), incorporating the mandate of international conventions (the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) treaty) and instituting the rights of women against SH as human rights.

The actual outcome of the Constitutional discourse of the SC of India surfaced with the issuance of the seminal directions known as the *Vishaka* mechanism. [9] This obligated the employers in both the public and private sectors interalia to take appropriate steps to prevent SH; to launch criminal prosecutions against SH perpetrators; to

4 Vishaka v. State of Rajasthan (1997) 6 SCC 241.
5 *Id.*, at 246.
6 Articles 14, 15, 19, and 21 of the Constitution of India.
7 *Supra* note 4, at 249.
8 *Supra* note 4, at 246.
9 *Id.* at 250.

guard against victimization and discrimination of victims and witnesses while dealing with complaints of SH; to create an effective complaint mechanism (i.e. the Complaints Committee) to be headed by a woman, with no less than half of its members also being women; to make provision for a special counselor; and to cast a duty to maintain confidentiality. By characterizing these guidelines as law under Art. 141 of the Constitution, the Court paved the way for SH victims to redresss their grievances as a violation of fundamental rights under Arts 32 and 226 of the Constitution of India. There is nothing in the judgment, even faintly indicating any exception in favour of judicial branch.

3. Judges failing the litmus test

Ironically, judges have failed the *Vishaka* litmus test every time an allegation of SH against them has surfaced. In 2003, the SC delivered a feeble judgment in *Indira Jaising v. Registrar General of Supreme Court of India*[10] in respect of publication of report of the committee of judges, established by the Chief Justice of the High Court, to inquire into the SH charges leveled against certain judges of that HC. The said committee had been constituted by then Chief Justice of India, invoking the In-House Procedure for Remedial Action against Judges.[11]

> Leading newspapers published reports about how three Judges of the Karnataka High Court had been found indulging in immoral behaviour at a private resort in Mysore. The High Court responded by issuing to the editors and publishers notice for contempt of court. The Court's demand to know the journalists' sources of information was staunchly resisted by the press on the grounds of journalistic privilege. … In the meantime, a committee comprising of senior Judges appointed by the Chief Justice of India carried out an "in-house investigation" and absolved the judges concerned who have since continued in judicial office.[12]

A writ petition was filed by Senior Advocate Ms Indira Jaising in

> public interest primarily for the publication of the inquiry report made by a Committee consisting of two Chief Justices and a Judge of different High Courts in respect of certain allegations of alleged involvement of sitting Judges of the High Court of Karnataka in certain incidents and also for a direction to any professional and independent investigating agency having expertise to conduct a thorough investigation into the said incident …[13]

The Court demonstrated the immunity granted by the Constitution against the disciplinary inquiry of the judges other than by the process of impeachment.[14] Additionally, it held that the mechanism of an in-house procedure for remedial action against judges of the SC and the High Court facing allegations of misconduct and SH was strictly an internal device evolved by the judiciary to elicit the truth. A report would be submitted, being ad hoc in nature for the information and satisfaction of the Chief Justice alone. Such a report, "if given publicity will only lead to more harm than good to the institution as Judges would prefer to face inquiry leading to

[10] Indira Jaising v. Registrar General of Supreme Court of India, 2003 (5) SCC 494.
[11] The procedure was adopted at the Chief Justices' Conference in December 1999.
[12] M. Divan, *From Secrecy to the Freedom of Information—A Reluctant Transition*, (2003) 8 SCC J-60.
[13] *Supra* note 10, at 496.
[14] Articles 124 and 217, Constitution of India.

impeachment."[15] The procedure leaves the outcome of allegations of SH at the exclusive discretion of then CJI, as he may either close the proceedings if the report is not damning or do "as he deems fit."[16] However, the Court characterized this discretion as moral and ethical rather than constitutional, and dismissed the petition seeking disclosure of the report. It is not clear from the observations why the authority of the CJI, while invoking the in-house procedure, is merely moral in nature.

3.1. In-house procedure, open to Judicial Review

This position of law has been rightly overruled by the SC itself in the *Addl. District & Sessions Judge 'X' v. High Court of M.P.*[17] This case arose out of allegations of SH leveled by a female Additional District and Sessions Judge against the sitting Judge of the High of Court of Madhya Pradesh. She made a representation to the President of India and the CJI for bringing the culprit judge guilty of her SH to justice. Although the Chief Justice of the Madhya Pradesh High Court constituted the committee in line with the in-house procedure, she refused to submit to the jurisdiction because of lacunaes in the establishment of the committee and, having failed to persuade the Chief Justice of the Madhya Pradesh High Court, she moved the SC. For our purposes, the assertions made by the court to clarify the dicta in *Indira Jaising* are crucial. Constitutionalizing the in-house procedure, the SC observed "those who are liable to be affected by the outcome of the 'In-House Procedure,' have the right to seek judicial redressal, on account of a perceived irregularity."[18] From the perspective of inclusive legal positivism, morality stands as one of the criteria of validity along with constitutional provisions and legislation regulating the conduct of judges.[19] The requisite jurisdiction may be contested if the victim submitting before such a committee finds any irregularities in the procedure of the committee. The bench was also categorical in holding that for judicial redressal against the decision of the committee, the victim must be entitled to have all resources and, by implication, a copy of the report of the committee.

The bench, though purporting to be sensitive in this case, could not resist taking a sarcastic dig at the victim by observing:

> Whether the perception of the harassed individual was conveyed to the person accused, would be very material in a case falling in the realm of oversensitivity. In that, it would not be open to him thereafter, to defend himself by projecting that he had not sexually harassed the person concerned, because in his understanding the alleged action was unoffending.[20]

However, it is noteworthy that, despite the above categorical judgment, the result was no different in terms of outcome: the so-called committee constituted by the CJI

[15] *Supra* Note 10, at 496.
[16] *Id.*
[17] (2015) 4 SCC 91.
[18] Addl. District & Sessions Judge 'X' v. High Court of M.P., (2015) 4 SCC 91: 2014 SCC OnLine SC 1025 at 123.
[19] Kenneth Einar Himma, 'Morality and Nature of law' OUP 2019.
[20] *Supra* note 18, at 111.

mirrored the ultimate conclusion reached by the Chief Justice of the Madhya Pradesh High Court and exonerated the judge concerned. Although the matter reached the doorstep of Parliament with the initiation of impeachment proceedings against the culprit judge, the whole exercise proved to be in vain because the proceedings did not reach the logical conclusion.[21] At any rate, it is virtually impossible to impeach judges of the SC or High Court, because of an extremely rigid and blunt procedure which is aligned completely in favour of the judges.[22]

3.2. Retired SC judge prima facie guilty of SH (Justice A.K. Ganguly's case)

At this juncture, it is important to further unfold the turn of events pertaining to SH charges against judges by briefly discussing the *AK Ganguly* case, wherein a young intern from a law school leveled a charge of SH against a retired judge of the SC. Taking cognizance of a newspaper report, and because the allegations of SH against a SC judge were mentioned by the Attorney General to the Court, then CJI, brought together a three-judge committee to probe the claims. According to the then CJI, such allegations would seriously jeopardize the judiciary's reputation and credibility.[23] The committee consisted of three sitting judges of the SC (two men and one woman). The Committee gave an extremely damning report, finding the behavior of Justice Ganguly to be inappropriate, and making out the prima facie case of SH. However, the Committee closed the investigation by observing:

> Considering the fact that the said intern was not an intern on the roll of the Supreme Court and that the concerned Judge had already demitted office on account of superannuation on the date of incident, no further follow up action is required by this Court. … As decided by the Full Court in its Meeting dated 5th December 2013, it is made clear that the representations made against former Judges of this Court are not entertainable by the administration of the SC.[24]

A careful look at the aforementioned extract of the report and statement of then CJI displays a glaring example of misogyny. His reluctance to take cognizance of the whole issue on the ground of Justice A. K. Ganguly being retired and the victim not being on the roll of the SC is a classic case of hiding behind technicalities. This is an attempt on the part of the CJI to downsize the whole controversy into a petty private encounter between two individuals, thereby providing an excuse for the Court to maintain neutrality. It is inconceivable that the judges of the SC in a Full Court Meeting should resolve against entertaining representations/complaints against retired judges in respect of serious allegations of SH. Often, the victim would find it difficult to speak out against a sitting judge and would choose her

[21] https://www.livelaw.in/rajya-sabha-chairman-admits-impeachment-motion-against-mp-hc-judge-2/.

[22] https://www.thehindu.com/news/national/bill-on-removal-of-judges-to-be-introduced/article3743953.ece.

[23] https://www.livelaw.in/inquiry-panel-finds-merit-in-charges-against-justice-ganguly/.

[24] It was also noted that the Committee was constituted by the Chief Justice of India based on the media referring to the culprit as "Supreme Court judge."

time of disclosure. However, it appears that the court has no sensitivity to the context.

Only after enormous public pressure was the Presidential reference explored to remove Justice Ganguly from the office of Chairman of the West Bengal Human Rights Commission and, succumbing to the public outcry, he forcibly resigned.[25]

3.3. Old Boys' Club and SH (Justice Swatanter Kumar's case)

The saga of SH by the SC judges was not over, and soon very serious allegations surfaced against Justice Swatanter Kumar, the then sitting judge of the SC, by a young student intern. However, allegations came to light after his retirement, when he was Chairperson of National Green Tribunal, Principal Bench, New Delhi. As published on a noted website, the intern alleged that between May 16, 2011 and May 29, 2011 Justice Kumar had made "unwelcome physical contact" with her, during her internship with him in 2011, and made suggestions of a "quid-pro-quo" arrangement. This had made her vulnerable to "hostile and intimidating" work environment, and feel "fear, anxiety and alarm".[26] (at that time, Justice Kumar was a sitting SC judge). In particular, on 28 May, he allegedly asked X "to come to his side of the desk, placed his arm around her and kissed her shoulder."[27] Reportedly, the intern abruptly ended her internship, fearful of her personal safety. Since there was no formal recourse available to her, she did not file an official complaint about the alleged harassment at the time. However, after the turn of events unfolded in Justice Ganguly's case, she revived her allegations in order to bring the culprit to justice by filing a public interest litigation (PIL).[28] She pleaded before the SC to institute a committee to inquire into her complaint against Justice Kumar, and urged for the setting up of a permanent mechanism "to enquire into the complaints of SH against all judicial officers, sitting or retired judges, whether while holding office or not."[29]

[25] https://www.legallyindia.com/the-bench-and-the-bar/read-intern-x-pil-as-swatanter-kumar-submits-affidavit-20140213-4347 (last). A day after the Centre decided to seek the SC's opinion on whether Justice Ganguly's alleged misconduct warranted his removal from the West Bengal State Human Rights Commission, a public interest litigation (PIL) was filed seeking the judge's protection from arrest and quashing any proceedings against him. The petitioner, the daughter of a former judge, alleged that the sexual harassment complaint was a conspiracy hatched by football club Mohun Bagan in collusion with the intern. The petition was subsequently rejected.
See https://www.livelaw.in/columns/courting-metoo-conspiracies-and-conundrums-144532; *see also* https://www.livelaw.in/cabinet-note-accuses-ganguly-accepting-foreign-hospitality-and-paid-employment-while-in-chair-of-wbhrc-chief-pil-in-supreme-court-seeking-stay-against-removal-proc/

[26] https://www.legallyindia.com/the-bench-and-the-bar/swatanter-kumar-adjourned-malicious-conspiracy-20140214-4349.

[27] *Id.*

[28] The law intern filed the petition after the administrative side of the SC refused to entertain her complaint against Justice Kumar, citing its full court resolution passed on December 5, 2013. *See* https://www.deccanherald.com/content/380640/sc-agrees-hear-plea-law.html. The matter is recorded as W.P. (Crl) No. 000015/2014 and allotted Diary No. 1504/2014.

[29] *Id.*

A three-judge bench of the SC presided over by then CJI, admitted this petition for hearing[30] and issued notices to Justice Kumar, Secretary General, SC and Ministry of Environment and Forest and Climate Change. The bench appointed Senior Advocates as amicus curiae in the case, and directed Attorney General to assist the Court in the matter. During the hearing of this petition the then CJI followed the set pattern of expressing fear about abuse of process by the women and painted judges as victims of an indiscriminate onslaught of allegations of SH. He further expressed his anguish[31] at the absence of any legal norm laying down a period of limitation for levelling SH charges/allegations. In response, Senior Advocate (arguing for the intern) very effectively retorted by stating that "once a mechanism is set up to deal with such cases, then people will come within reasonable time to file the complaint."[32] He conceded, however, that a time frame should be observed for the redress of such complaints.[33] The next hearing of the case was abruptly adjourned as the two-judge bench, comprising then CJI, decided to convene a three-judge bench to hear the matter.[34]

The petitioner's advocate, confirmed to the website *Legally India* that at the hearing in the PIL dated March 26, 2014, amicus curiae and senior advocates had submitted their written notes to the SC.[35] A journalist was said to have tweeted excerpts from the aforementioned written notes furnished by the amicus curiae to the SC, entailing a legal framework for the prosecution of Judges of Higher Courts and Subordinate Courts and Retired Judges.[36]

Before adverting to the blunt, brutal, and excessively adversarial stance of Justice Kumar and the battery of lawyers engaged by him, it is imperative to point out that the SC website does not show any record of the impugned proceedings. The same is apparent from the screenshot of the website shown in Figure 1. Even the major law reporters have not been able to provide the full and complete trail of this seminal encounter.

In his counter-affidavit, Justice Kumar strongly refuted the charge of SH as being "malicious", and sounded predictably like any accused person smelling a controversy and detecting a plan to malign his reputation. In addition, he invoked the plea of sub judice, by referring to the defamation suit worth 50 million INR which he had

[30] X v. Secretary General, Supreme Court of India & Others, (2014) 3 SCC 158. *See also* https://www.deccanherald.com/content/380640/sc-agrees-hear-plea-law.html.

[31] The then learned CJI was probably unaware of the elementary and basic principle of criminal law that in order to file criminal complaints or level allegations involving crimes, the law of limitation is inapplicable.

[32] https://www.deccanherald.com/content/380640/sc-agrees-hear-plea-law.html .

[33] We submit that this was the most uncalled for and preposterous concession to have been made by a Senior Counsel, ignoring the fundamental canons of jurisprudence of sexual harassment law around the world, including that of the United States of America.

[34] https://www.outlookindia.com/newswire/story/larger-sc-bench-to-hear-plea-against-swatanter-kumar/828908.

[35] https://www.legallyindia.com/the-bench-and-the-bar/internjudge-amicus-fali-recommends-sex-harassment-investigation-procedure-for-current-and-ex-judges-via-spread-law-20140326-4515.

[36] https://www.legallyindia.com/the-bench-and-the-bar/internjudge-amicus-fali-recommends-sex-harassment-investigation-procedure-for-current-and-ex-judges-via-spread-law-20140326-4515.

Figure 1. Screenshot from the website Supreme Court of India

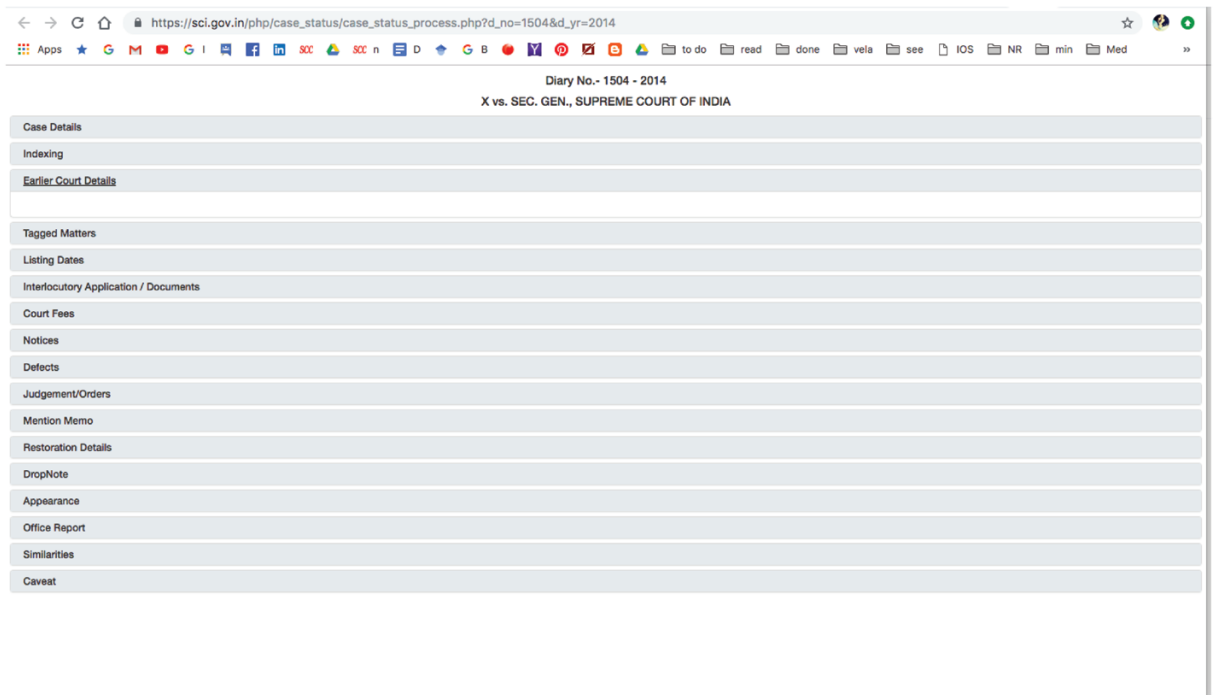


Figure 1. Continued

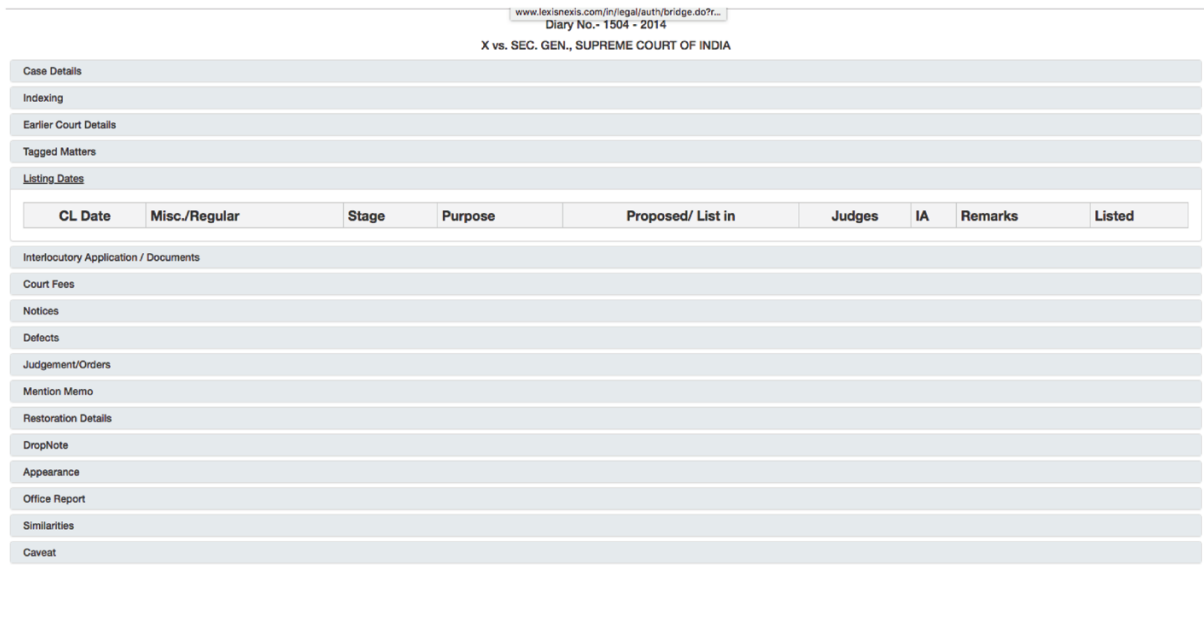


Figure 1. Continued

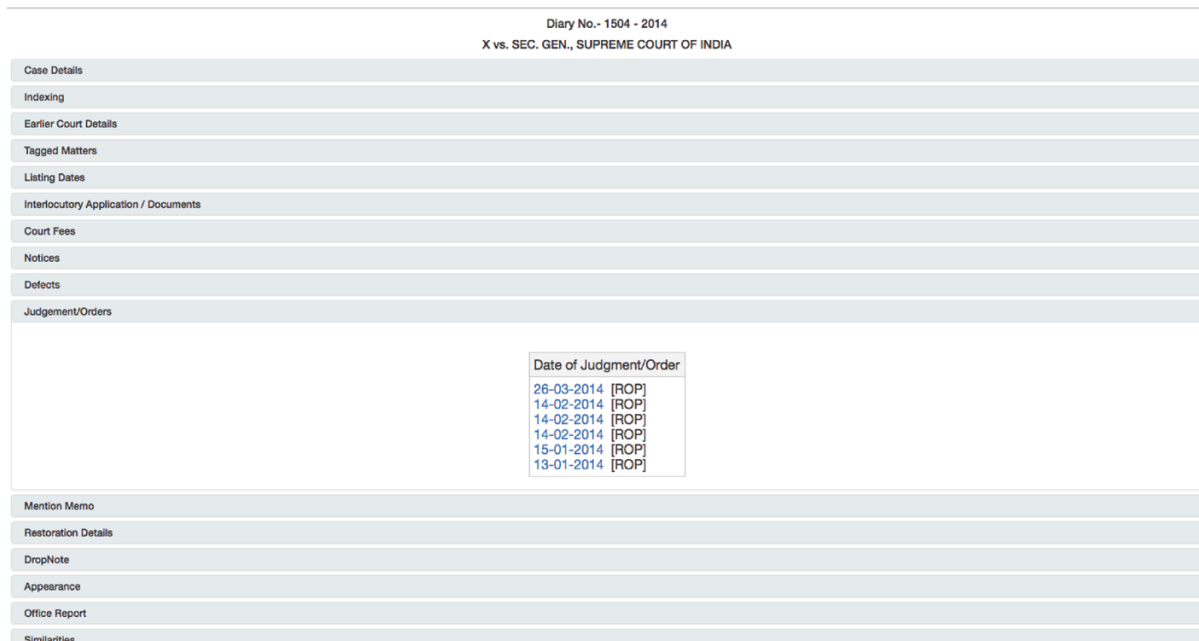
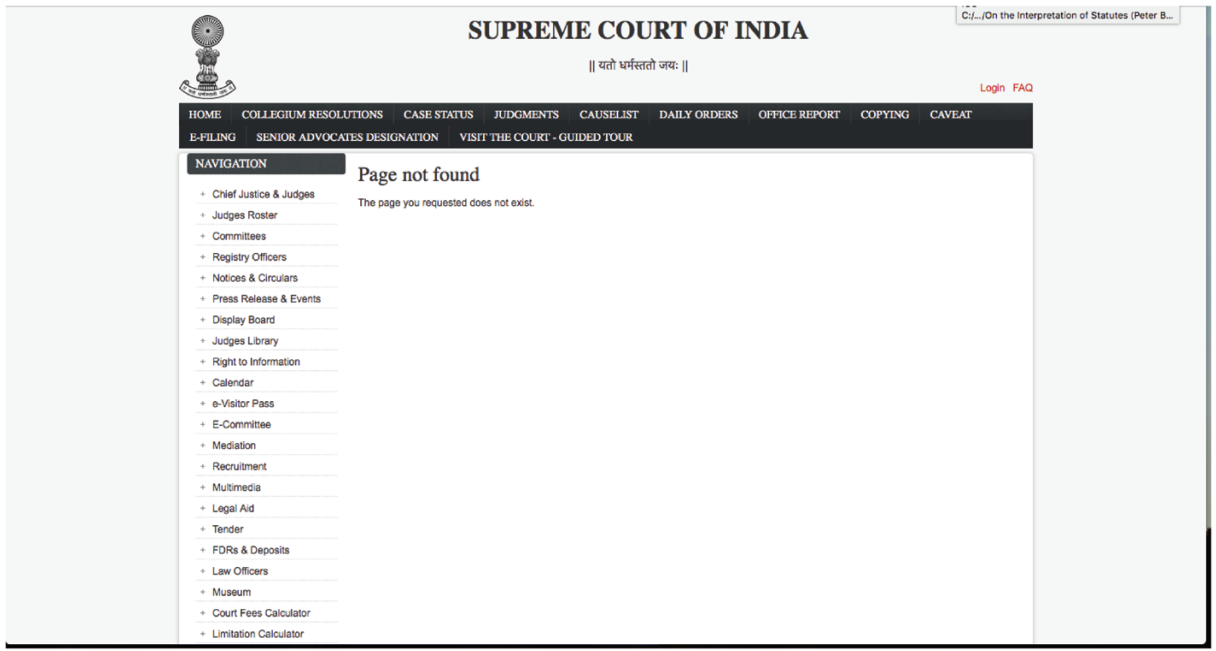


Figure 1. Continued



mercilessly slapped on the vulnerable victim and the innocent messenger media outlets. After this, the intern applied to the SC to transfer the defamation case to Bangalore, since she feared she had "absolutely no chance of equal or near equal legal representation in Delhi."[37] In fact, a "grand total of 19 non-hearings and adjournments have happened to decide on that transfer petition in the Delhi High Court since 15 May 2014"[38] (Figure 2). This demonstrates the attitude of the SC towards some of the most important fundamental rights: i.e. non-discrimination on the grounds of sex, due process of law, and access to justice.[39]

Justice Kumar did not forget to remind the court that as per the resolution of the full court meeting dated December 5, 2013, it was not permissible for the bench to have entertained a complaint against him, since he had retired when the petition was filed. The then Solicitor General, also defended Justice Kumar by opining, "since the allegations levelled by the intern pertained to when Justice Kumar was a sitting judge of the apex court, the provisions of the National Green Tribunal Act would not be applicable to him."[40] The phraseology of the Section 10(1)(e) of the National Green Tribunal Act "has so abused his position as to render his continuance in office prejudicial to the public interest," has a specific temporal dimension and cannot be expanded to cover his tenure as a sitting judge of the SC.

If this was not enough, Justice Kumar also silenced the media, the defendants, and the intern with an elaborate forty-two-page interim injunction order from the Delhi High Court. Both print and electronic media were restrained from further publishing/telecasting the write-ups of the documents file or any article or headline highlighting the allegations against the plaintiff, without disclosing that they are mere allegations. The media were also restrained from publishing photographs that hinted at a connection between the plaintiff and the allegations. In addition, they were directed to remove his photographs, other implicating material and uploaded defamatory articles from the Internet.[41]

These interim directions seem to have continued, as is made clear by the screenshot in Figure 3.

[37] https://www.legallyindia.com/201405144712/Bar-Bench-Litigation/internjudge-transfer-petition-swatanter-kumar (last).

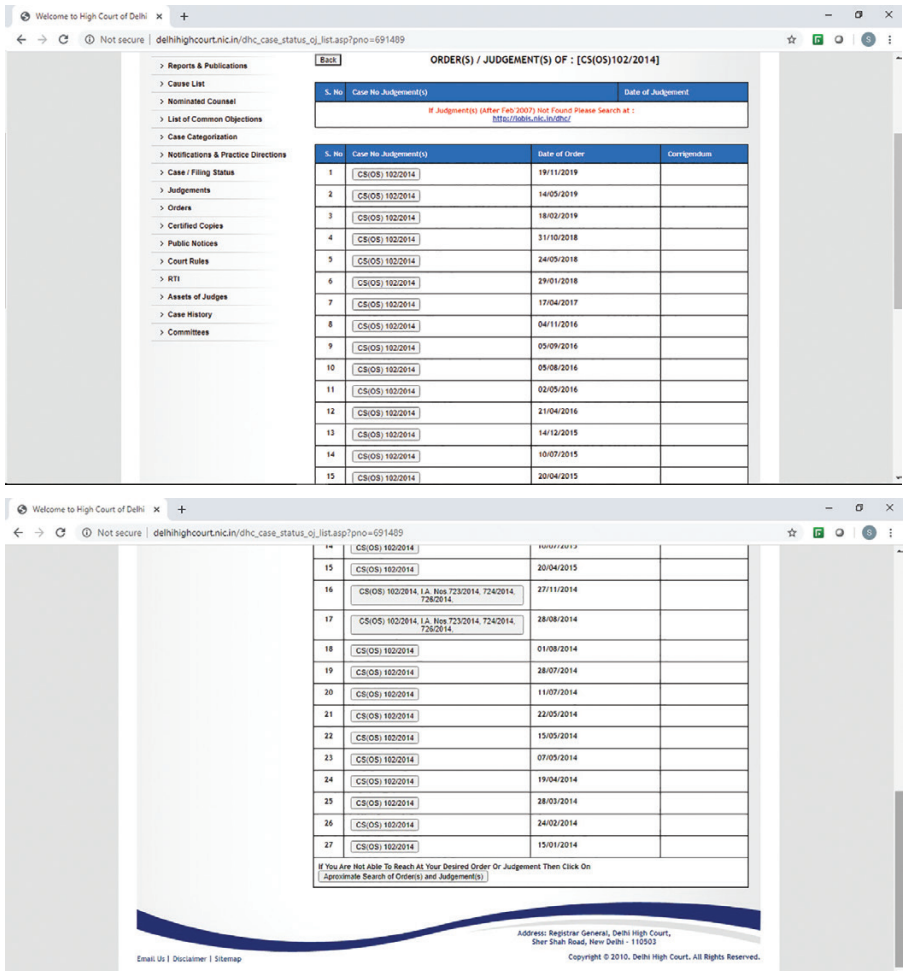
[38] https://www.legallyindia.com/the-bar-and-bench/how-the-sc-turned-back-the-clock-discovered-yet-another-worst-possible-way-to-deal-with-a-sex-harass-complaint-against-the-cji-20190420-10020; *see also* https://www.legallyindia.com/content/swatanter-kumar-gag-strategic-genius-20140207-4326.

[39] *See also* https://www.legallyindia.com/the-bar-and-bench/how-the-sc-turned-back-the-clock-discovered-yet-another-worst-possible-way-to-deal-with-a-sex-harass-complaint-against-the-cji-20190420-10020.

[40] https://www.thehindu.com/news/national/sg-swatanter-cant-be-removed-as-ngt-chief/article56.

[41] Swatanter Kumar v. Indian Express Ltd., (2014) 1 HCC (Del) 572: 2014 SCC OnLine Del 210 at 598. As recently as 2017, the Orissa High Court did not hesitate to copy the order of the Delhi High Court by issuing a gagging order which restrained the media from reporting updates in respect of an allegation of SH (though the term SH was not as such used) made by a woman police official against certain lawyers while she was on duty within the premises of the Orissa High Court. See High Court Bar Association, Odisha v. State of Odisha, 2017 SCC OnLine Ori 126: AIR 2017 Ori 62. We submit that such orders unabashedly reinforce masculinity in the relationships between male judges and male lawyers, justifying the expression "old boys' club."

Figure 2. Screenshot of the High Court of Delhi website

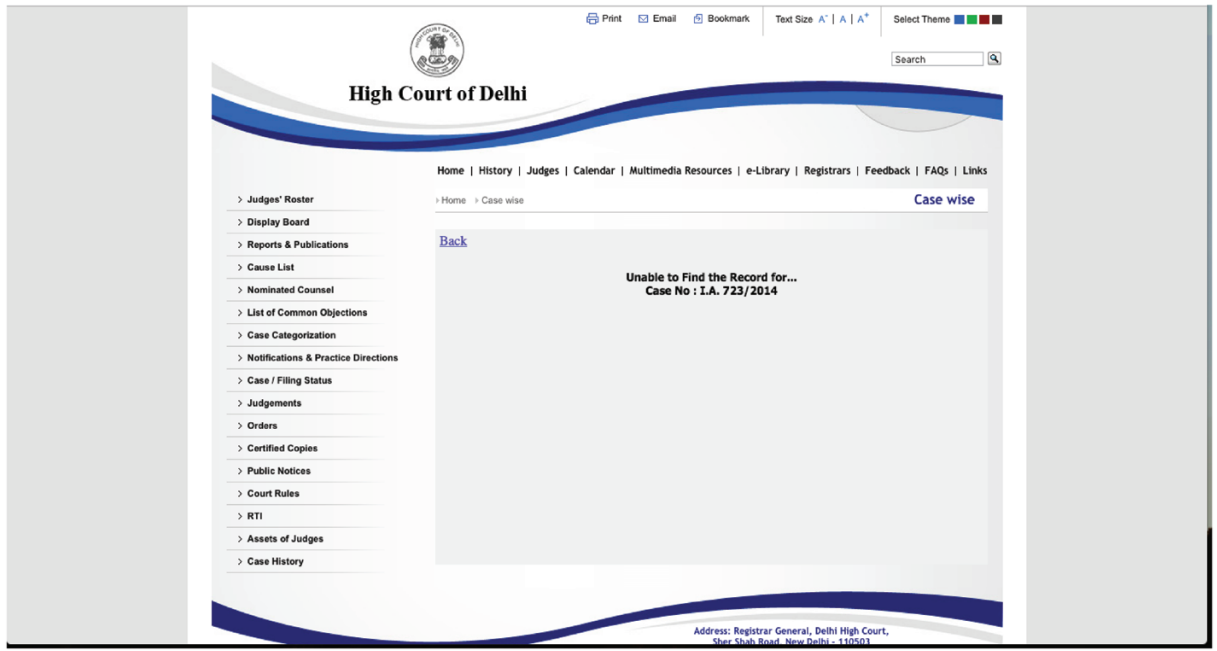


Since the issuance of this order, there is almost total TV, radio, and newspaper silence on this matter.[42]

We submit that the Ganguly and Kumar episodes present a perennial and heart-wrenching pattern as well as an ironic situation. Drawing a distinction between retired and sitting judges of the SC with great eloquence and stoicity, the SC (through then CJI) maintained neutrality in the case of retired judges. Invoking the same distinction, the

[42] Except for an editorial in the *Hindu* by Chinmayi Arun, from NLU Delhi's Centre for Communication Governance, who condemned the order (mirroring the Editors, Guild 20 January assessment of the order as a "mockery of the rule of law"). Admittedly, *Legally India* has not written much about Kumar lately either. For one, we have been busy, after what we thought was a fight about whether we could stand up for our legal right to publish Kumar's photo. https://www.legallyindia.com/content/swatanter-kumar-gag-strategic-genius-20140207-4326; *see also* https://www.thehindu.com/opinion/op-ed/making-the-powerful-accountable/article5627494.ece and https://timesofindia.indiatimes.com/india/Gag-order-in-Swatanter-case-mockery-of-the-rule-of-law-Editors-Guild/articleshow/28977317.cms?referral=PM.

Figure 3. Screenshot from the High Court of Delhi website



Solicitor General pleaded helplessness with diffidence before the Apex Court (through then CJI) and in his advice to the government, by citing the letter of the law echoed in Section 10(1)(e) of the National Green Tribunal Act, 2010; but what about the reverberations and resonance arising out of the spirit of the law?

A careful analysis of the above controversy and the judicial response clearly shows that, at least theoretically, the court had second thoughts about having a mechanism to look into misconduct, including allegations of SH leveled against sitting and retired judges of the SC. Normatively and personally, Gogoi (who went on to become CJI) must be taken to have endorsed this idea, as he was part of the landmark bench dealing with Justice Kumar's case. However, since then, the so-called report and public written notes filed by the amicus curiae in Justice Kumar's case are gathering dust. In the meantime, the elephant of SH has grown bigger and fatter in the corridors and courtrooms of the SC, and ultimately has been found knocking on the office door of none other than the CJI himself, Ranjan Gogoi.

Is it not ironic that a man who preached transparency, fairplay, and justice in an historical press conference,[43] pointing more than one finger at his predecessor, should be asked to take a taste of his own medicine? It is scandalous on the part of then CJI Gogai to have taken refuge behind self-invented technicalities, thereby degenerating his own investigation into a sham inquiry.

3.4. The blunt attitude of the Supreme Court towards the elephant of SH

The most recent controversy involving allegations of SH against former CJI by one of the female staff of the SC surfaced shortly after four digital media platforms published the victim account on April 20, 2019. The victim also sent sworn affidavits to the residences of twenty-two SC judges accusing then CJI of SH and intimidation on April 19, 2019, describing "two incidents of molestation by Gogoi in her affidavit, both of which allegedly took place in October 2018, only days after he was appointed to India's highest judicial office …"[44] A noted website quotes her affidavit. "I say that the CJI has misused his position, office and authority and abused his clout and power to influence the police," she writes. "I have been victimised for resisting and refusing the unwanted sexual advances of the CJI and my entire family has also been victimised and harassed due to that."[45]

Prima facie, the allegations look very serious and would demand an exemplary and fitting response from Justice Gogoi in his twin capacities: as a chief guardian of the SC, and as a man who stands firm on observance of the foundational values of justice, equity, and fair play underlying the Constitution of India. We wish that then CJI had met at least this bare minimum expectation. But, alas, Justice Gogoi followed

[43] https://www.thehindubusinessline.com/news/supreme-court-crisis-all-not-okay-democracy-at-stake-say-four-seniormost-judges/article10028921.ece.

[44] https://caravanmagazine.in/law/former-supreme-court-employee-accuses-cji-ranjan-gogoi-sexual-harassment.

[45] *Id.*

his predecessor Justice Kumar, and indeed surpassed him, in a slide of morality by resorting to a process which is inconceivable, both in terms of law and ethics. Let us now consider this process.

a) Constitutionally suspect process

We demonstrate in this section that the process resorted to by then CJI is constitutionally and jurisprudentially indefensible and has pushed the constitutionalism of our great country to the wrong side of justice, i.e. to injustice.

It is difficult, if not impossible, to speculate what criteria the court had in mind forming a bench consisting of then CJI himself (in de-facto presence) and two other fellow puisne judges of the SC, who sat on this so-called Special Bench on a public holiday, i.e. April 20, 2019 (a Saturday). Those two puisne judges, were neither very senior nor affiliated with the SH Committee of the Apex Court.[46] Very predictably, the then CJI Gogoi began the proceedings with screaming and shouting and suggesting there was foul play. According to him, because "allegations of financial impropriety could not be raised in his spotless career as evidenced by his bank records, he was being targeted by such 'claims' of SH."[47] He insisted that the allegation of SH was part of a "bigger plot" to make his office "defunct." Unsurprisingly, the "old boys' club" of the "Attorney General, the Solicitor General, senior officers of the Court acted as cheerleaders" for the Chief Justice by extoling his honesty and integrity.[48]

A senior jurist and, at the time, the then Finance Minister of India, wrote a defensive blog in praise of justice Gogoi.[49]

The matter was taken up by this bench at the behest of Solicitor General. Curiously, although then CJI was very much a part of the bench, both physically and through his actions, his name does not appear in the record of the proceedings, and nor is he the part of the coram passing the so-called order. This is despite him being seen actively taking part in the shouting match and with a brazen and blunt attitude openly questioning the motives and credentials of the victim. "I should not stoop low even to deny this [allegation]," he added. "There are two first information reports against her. How did she enter Supreme Court service when there was criminal case pending? I inquired with Delhi Police," he roared. He said that the woman was employed for a month and a half and that he did not deem it appropriate to reply to the allegations when they first surfaced.[50]

The bench wound up the theatrics by passing what it called an order, which was obviously not signed by then CJI:

[46] https://www.livelaw.in/columns/courting-metoo-conspiracies-and-conundrums-144532.
[47] *Id.*
[48] *Id.*
[49] https://www.arunjaitley.com/its-time-to-stand-up-with-the-judiciary/.
[50] https://www.businesstoday.in/current/economy-politics/cji-ranjan-gogoi-accused-sexual-harassment-denies-charges-hearing/story/338781.html.

> Having considered the matter, we refrain from passing any judicial order at this moment leaving it to the wisdom of the media to show restraint, act responsibly as is expected from them … as wild and scandalous allegations undermine and irreparably damage reputation and negate independence of judiciary. We would therefore at this juncture leave it to the media to take off such material which is undesirable.[51]

One of the eminent colleagues of then CJI Gogoi, a former SC Judge, characterized the whole process as colored by institutional bias. He very aptly cited Eleanor Roosevelt, "Justice cannot be for one side alone, but must be for both,"[52] thus questioning the wisdom of then CJI Gogoi and the Secretary General of the SC for embroiling the institutional integrity of the SC in the matter. He perceived the mail sent by the Secretary General to the *Wire* denying the allegations of SH against CJI to be in bad taste. He wondered how, despite the presence of then CJI on the bench, his name was found to be missing from the record. The former colleague of then CJI satirically observed, "either the news reporters were seeing and hearing the equivalent of Banquo's ghost in Court No 1 or the record of proceedings was incorrect—tampering with the record may be too strong a word."[53] He reminded the SC of the serious consequences of misrecord by citing the dismissal of two employees, earlier in the year, in Ambani's case.[54] According to him, the rubbishing of allegations of SH against the CJI by the SC Employees Welfare Association further aggravated the institutional bias in favour of the CJI and against the victim of SH.[55]

The whole exercise was probably designed to pass an order to restrain media implicitly from doing any fair reporting let alone arousing further discussion of the matter.

Similar to the pattern of the Justice Ganguly case, wherein his daughter suddenly emerged as a public interest litigant to vindicate against foul play, in this case too, soon after the conclusion of the hearing of the special bench, a young lawyer, incidentally the grandson of a judge, emerged on the scene with a sensational claim that "three disgruntled employees of the Supreme Court conspired with corporate lobbyists to frame SH allegations against the Chief Justice."[56]

This young lawyer took to Facebook to allege that "an anonymous person, possibly a 'fixer', had offered him Rs 1.5 crores to represent the SH complainant against Chief Justice of India (CJI) Ranjan Gogoi, in order to force him to resign."[57] He also filed a sworn affidavit before the SC testifying the same.[58] Promptly, the three-judge bench of

[51] https://www.livelaw.in/top-stories/sexual-harassment-allegations-sc-order-144405.

[52] https://indianexpress.com/article/opinion/columns/justice-ranjan-gogoi-sexual-harrassment-caseclean-chit-supreme-court-5741244.

[53] *Id.*

[54] https://thewire.in/law/two-supreme-court-employees-sacked-for-tampering-with-order-in-anil-ambani-case-report.

[55] https://indianexpress.com/article/opinion/columns/justice-ranjan-gogoi-sexual-harrassment-case-clean-chit-supreme-court-5741244/.

[56] https://www.livelaw.in/columns/courting-metoo-conspiracies-and-conundrums-144532.

[57] https://www.legallyindia.com/the-bar-and-bench/young-advocate-utsav-bains-shares-story-of-bribes-conspiracy-to-help-bury-cji-with-complaint-makes-case-for-due-process-even-stronger-20190422-10022.

[58] https://www.livelaw.in/top-stories/sc-to-consider-today-claim-of-lawyer-that-he-was-offered-rs-15-crores-by-fixers-to-frame-allegations-against-cji-144456.

the SC issued him a notice dated April 23, 2019 to "produce evidence in support of the averments" in the said affidavit.[59]

On April 25, 2019, the same bench Appointed Justice A K Patnaik to probe the conspiracy angle in the allegations against CJI, after a dramatic hearing session. The court directed the CBI, Delhi Police and Intelligence Bureau to give necessary assistance to Justice Patnaik. The Young Lawyer's claim of privilege over information was rejected and he was directed to cooperate with the investigation.[60]

Justice Patnaik decided to defer the investigation until the "in-house inquiry is over … to avoid any clash."[61]

On the other hand, in light of the allegations of SH, the response of the SC went from ridiculous to absurd. On April 20, 2019, the bench had virtually dismissed as rubbish the allegations and then CJI was categorical on his position, not even taking cognizance of the matter. In all probability, the bench was determined to stop the media from reporting the matter, while at the same time feeling pressure from resolutions passed by the SC Advocates on Record Association (SCAORA) as well as the SC Bar Association (SCBA) on April 23, 2019. Then CJI, who was the accused, brazenly appointed his own jury under the so-called "in-house panel" to probe the allegations against him."[62]

With the panel issuing a notice to the complainant to appear before it on April 26, 2019, the drama continued to unfold with her letter to the in-house panel raising objection to the inclusion of one of the members on the panel, as he was a known close ally of then CJI. In the letter, the complainant expressed apprehension regarding the comments made by the judges and top law officers of the government during the special sitting held in suo moto proceedings. She stated that the proceedings had left her frightened, helpless, and worried whether her complaint would be declared false by the judges and senior law officers without giving her any hearing.[63] She also sought clarification on the procedure to be followed by the panel.

In response to this letter, that member promptly recused himself from the panel, observing, "My decision to recuse is only based on an intent to avoid any suspicion …"[64] He was replaced by another sitting female judge. On April 26 and April 29, the next layer of the story unravelled, with the appearance of the victim before the in-house panel. On April 30, the controversy took a sensational twist, with the victim unilaterally deciding to withdraw herself from the proceedings. She justified her action by contending in a press release that she was not allowed to be represented by a lawyer during the proceedings; that her hearing impairment was not accommodated; that no video/audio recording was being made of proceedings; that a copy of statement had not been supplied to her; and that she had not been informed about the procedure to be followed by the Committee.[65]

[59] https://www.livelaw.in/top-stories/sc-issues-notice-to-lawyer-who-claimed-that-he-was-offered-rs-15-crores-to-frame-allegations-against-cji-144458.
[60] https://www.livelaw.in/top-stories/cji-sexual-harassment-case-timeline-144830.
[61] https://www.livelaw.in/top-stories/cji-sexual-harassment-case-timeline-144830.
[62] https://www.livelaw.in/top-stories/cji-sexual-harassment-case-timeline-144830.
[63] https://www.livelaw.in/top-stories/cji-sexual-harassment-case-timeline-144830.
[64] https://www.livelaw.in/top-stories/cji-sexual-harassment-case-timeline-144830.
[65] https://www.livelaw.in/top-stories/cji-sexual-harassment-case-timeline-144830.

In complete disregard of her perception, the panel continued the probe ex parte and examined the deposition of then CJI, who categorically denied the allegations of SH. In the meantime, voices of wisdom whispered from the corridors of the SC through some of his senior colleagues, who urged the court not to continue the inquiry in the absence of the complainant. Reportedly, they sought the inclusion of a retired woman judge as an external member of the panel, emphasizing that her role would be to provide legal assistance to the complainant, and the nomination of a senior woman lawyer from the SC bar as amicus curiae to assist the panel.[66] However, these pearls of wisdom meant precious little for then CJI. Ultimately the panel rang its death knell by giving a clean verdict to then CJI on May 6, 2019. The contents of the press release on the website of the SC are worth reproducing here:

> The In-House Committee has found no substance in the allegations contained in the Complaint dated 19.4.2019 of a former employee of the Supreme Court of India. Please take note that in case of Indira Jaising v. Supreme Court of India & Anr. (2003) 5 SCC 494, it has been held that the Report of a Committee constituted as a part of the In-House Procedure is not liable to be made public.[67]

Since then the story has unraveled further with the nomination of the former CJI Ranjan Gogoi by the ruling party as a member of the Upper House of Parliament, post his retirement,[68] and the reinstatement of the complainant female staff member and her family members who had been suspended from their jobs when the allegation of SH against the CJI surfaced.[69]

The Patnaik committee, has also submitted its report to the SC in September 2019.[70]

Both the complainant and the accused having been engaged by the Government nominating the former as member of Parliament and restoring jobs to the latter and her family and exonerating them of criminal charges shows that the issue of sexual harassment has been given short shrift, and the question thus remains whether the CJI's account shaded the truth or the complainant played fair.[71]

4. Dissection of the curial approach

It is important to assume that judicial minds deserve the highest degree of deference. While carrying out our analysis of the approach of the Gogoi Bench and the in-house panel, we would mindfully labor under this assumption. Going by the chronology of events, it is incomprehensible as to why then CJI consciously embroiled the highest institution of justice delivery, the Apex Court of India, in the controversy. In our view, it was wholly inappropriate and needless on his part to have dragged the institution

66 https://www.livelaw.in/top-stories/cji-sexual-harassment-case-timeline-144830.

67 https://sci.gov.in/pdf/LU/notice_06052019.pdf.

68 https://www.thestatesman.com/india/ex-cji-ranjan-gogoi-takes-oath-rajya-sabha-mp.

69 https://thewire.in/rights/cji-ranjan-gogoi-delhi-police-supreme-court-sexual-harassment.

70 https://www.thehindu.com/news/national/patnaik-report-on-conspiracy-against-judiciary-submitted/article29745815.ece.

71 https://theprint.in/judiciary/woman-who-accused-cji-gogoi-of-sexual-harassment-goes-on-leave-after-getting-back-sc-job/352924/. *See* Gautam Bhatia, *The Sexual Harassment Case: Five Questions, available at* https://indconlawphil.wordpress.com/2020/01/23/the-sexual-harassment-complaint-five-questions/.

of the SC and its judges in the controversy. Since the allegations were leveled by the victim against then CJI, it would have been fitting had he given deep and careful introspection to the matter rather than a knee-jerk reaction. It is our considered opinion that then CJI was totally swayed by uncontrolled emotions during his outcry and his comments during the so-called suo moto hearing of what was a matter of public importance and did not appear to be observing even a semblance of due process of law. Why, according to then CJI, the matter in hand involved public interest and what public interest was served by the bench while conducting the hearing on the matter of allegations of SH are the questions that require categorical answers from him. What kind of example has been set by then CJI indulging in open victim-shaming while he himself is accused of a very sensitive allegation of SH is an issue which should be seriously debated by the intelligentsia. What kind of process of law would support unabashed camouflaging of a plain allegation of SH into a bigger plot/conspiracy? These and many other allied questions have gone unanswered.

In terms of the handling of the complaint by the in-house panel, several seminal questions have to be raised. Was then CJI authorized to appoint an in-house panel to probe allegations against himself? Does it not amount to a serious infraction of the basic axiom of natural justice, i.e. no-one is judge in his own cause. Even if it is assumed that judges of the SC are the epitome of highest propriety and integrity, they are still prone to human follies and it would be naive to be unmindful of the public perception that they would be hesitant to engage with the highest authority, in the instant case then CJI. However, we do not take judgment call on the basis of the public perception. In fact, the manner in which the allegations of SH against the High Court and SC judges have been dealt with in the past reflects a very sad commentary on gender justice and stands testimony to the aforementioned public suspicion. It is a very strange paradox that the judiciary in India is keen to chastise and pinpoint unconstitutional deviations by other organs but in terms of setting its own house in order, it has looked the other way and not taken robust, innovative, and exemplary measures. Looking at the latest controversy, what prevented then CJI from recusing himself from the process of his own probe? Why did he not explore the opportunity to establish an impartial probe by setting up a committee of retired judges and women activists? What prevented the court from adhering to the dicta in *Vishaka* mandating that the majority of female members along with external members be part of the in-house panel? Did then CJI not know that the in-house panel must withstand the scrutiny of the principle of due process of law, thereby requiring scrupulous adherence to principles of natural justice? Why did the in-house panel not lay down a proper procedure to deal with sensitive charges such as the allegation of SH? What prevented the panel from following the earlier precedent in Ganguly's case wherein the bench appointed amicus curiae? Even if it is accepted that in an in-house inquiry the assistance of a lawyer is not a prerequisite and the principles of natural justice do not come fully into play, would not the current controversy, being on a very different level—pitting a dwarf against a giant—[72] deserved some reasonable accommodation to

[72] We draw from the views of noted jurist and Retd. HC Judge K. Chandru, *available at* https://scroll.in/article/922736/supreme-court-should-have-provided-sexual-harassment-complainant-with-all-help-says-former-judge.

the complainant? In particular, if the victim has a hearing impairment, then would the provisions of the Rights of Persons with Disability Act, 2016 (RPD ACT) not mandate providing appropriate accommodation to her? Moreover, is it not ludicrous to expect that a junior staff member would feel confident to put her case when faced by a battery of legal giants? Would their presence not overwhelm her? But most important of all is the following million-dollar question: what is the point of setting up an in-house panel to investigate an allegation of SH if the allegations have all been disparaged not only by the accused but also by the entire governmental machinery?

By setting up a commission to investigate the allegation of fixing and conspiracy, has the SC not belittled the stance of the victim? The former judge of the SC aptly observed:

> according to a website, the CJI appointed Justice S. A. Bobde on April 23 to conduct an in-house inquiry into the allegations of sexual harassment levelled against him and Justice Bobde confirmed the development. From the confirmation, it appears that the decision to set up a committee was a decision taken by the CJI and not the Full Court. That apart, the so-called in-house inquiry is a complete misnomer. With respect to the alleged misconduct by the CJI, there is no in-house inquiry procedure or any other remedial procedure laid down at all. So, the decision by the CJI can only be understood as a decision to set up some kind of an ad hoc committee, which I would prefer to call an internal committee of sorts. Please note, the internal committee was set up by a person charged of unwanted physical contact with a lady staffer and that person chose the judge to inquire into the allegation. Equally significantly, the mandate given to the internal committee was limited to the allegation of unwanted physical contact, itself difficult to prove. The mandate did not include the allegation of victimisation. Why was the mandate limited? If there was to be an inquiry by an internal committee, then it should have been in respect of both the allegations, particularly since the affidavit of the staffer does contain verifiable documentary evidence which could lead (if proved) to a conclusion of victimisation.[73]

Although we have fully empathized with the victim, we are constrained to question her modus operandi of going to the press against the panel. Once she had submitted herself to the jurisdiction of the panel, it would have been advisable had she stuck to the rules of the game. It was open for her to file an appeal by way of a writ petition in the SC under Article 32 or in the Delhi HC under Article 226, praying for appropriate reliefs including the directions to provide her adequate legal help and necessary accommodation under the RPD Act. She could have sought the dissolution of the panel and urged the court to have an appropriate mechanism along the lines suggested by amicus curiae in Ganguly's case.

Last but not least, constitutional morality and propriety are the real casualties in this episode, as then CJI has proceeded with a clean chit in an ex-parte proceeding.

At this point, it is also necessary to examine very carefully the stand of then CJI in particular and the judiciary in general, on the grounds of transparency, accountability, and judicial integrity.

[73] https://indianexpress.com/article/opinion/columns/justice-ranjan-gogoi-sexual-harrassment-case-clean-chit-supreme-court-5741244/.

No amount of rhetoric would absolve the bench of its onus to justify the efficacy and utility of the urgent hearing it conducted on a public holiday. The plain message which the bench conveyed is that they would work on a public holiday to shame victims and to inhibit innocent messengers like the media. Then CJI cannot justify using the highest institution of the SC as a personal pulpit for forwarding and endorsing his private agenda and problems, lest it is assumed that the Constitution of India provides him that pedestal. Although the expectation that one should practice what one preaches is a tough one to fulfill, judges have to act this way in order to bear out the oath they swore when entering that Office.[74]

At the Chief Justices' Conference of 1999, a sixteen-clause Code of Conduct, along with a declaration of assets and in-house procedure in the event of a complaint against the judge, was adopted as a guiding instrument. However, the Code has been met with little or no enthusiasm. Even in the famous Supreme Court Advocates-on-Record Association v. Union of India, NJAC case,[75] barring the candid opinion of the contrarian, Justice Chelameshwar, nothing has been said about the in-house problems of the judiciary, particularly in the context of allegations of SH against judges by outsiders or its own female staff. Even in respect of allegations of SH against a sitting HC judge by a woman judge, the SC has demonstrated a lack of craftsmanship and brinkmanship. If the SC can develop a mechanism of a basic structure to create a safety wall to regulate the amending power of Parliament, what prevents it from instituting some mechanism to discipline itself and its judges and to be accountable to the Constitution? This is a question which requires an urgent and earnest response.

Consider the inquiry which the in-house panel conducted. The inquiry commenced on April 26 and concluded on May 5 with a clean verdict for then CJI, in ex parte proceedings, in the absence of the victim. Does this even fulfill the requirements of the so-called discrete inquiry, which is integral to the compliance of an in-house procedure? Recall Kasab's case[76] which took more than a year to conclude. In this connection, we would like to refresh the memory of then CJI with the wise observations of the Delhi High Court in the case of *Barkha Gupta v. High Court of Delhi*: "discreet inquiries should be made over a suitable period of time. An inquiry into matters pertaining to the integrity of a judicial officer, which may have the effect of permanently damaging her career and reputation, must not be a one-off affair."[77]

In the case under consideration in this article, the blunt approach of then CJI of the SC and the government,[78] disparaging the allegation of SH, exemplifies the symptoms of anarchy, impropriety, and unruliness. Victim-shaming and playing down such allegations as a bigger conspiracy are the marks of a predictable pattern

[74] http://www.nja.nic.in/Jounals_Publications_Newsletters/NJA%20Ocacasional%20Paper%20Series%20No.1.pdf.

[75] (2016) 4 SCC 1.

[76] Mohd. Ajmal Amir Kasab v. State of Maharashtra (Ajmal Kasab Case), (2012) 9 SCC 1. Kasab was found guilty in the horrific 26/11 Mumbai terrorist attack and was sentenced to death by the SC of India.

[77] Barkha Gupta v. High Court of Delhi through Registrar General Anr, 2006 SCC OnLine Del 1427: (2007) 93 DRJ 586 (DB), Writ Petition (Civil) No. 11017 of 2006, Decided on November 20, 2006. *See* paras 60 and 61.

[78] https://www.arunjaitley.com/its-time-to-stand-up-with-the-judiciary/.

followed by the judges while negotiating allegations of SH. Such a pattern is extremely damaging and in the long term will contribute to the destruction of public image of judiciary. One of the canons of judicial accountability is the observance of transparency, implying that every judgment must be backed by rock solid, cohesive, and logical reasoning. The same appears to be a casualty in the present controversy.

In connection to this, the observations of Professor Cappelleti are seminal:

> In our societies, judges are non-accountable only in the sense that they are not and shall not be held responsible to the other branches or to the people for their individual decisions and philosophies. Their non-accountability, however, holds only in [the] short and medium term. There are many ties which, in the long term at least, connect them with their time and society. … When we speak of separation of powers today … we mean … reciprocal connections and mutual controls. The judicial accountability is a political and a legal non-accountability—and even that with important limitations in cases of serious abuses; it is not, however, a societal non-accountability."[79]

So far as upholding the integrity of the judiciary is concerned, there cannot be any qualms about restraining freedom of speech and expression or any other rights, as long as the objective is to secure and protect the judiciary and judges from indiscriminate and arbitrary attacks and allegations. If women activists surround the SC to protest against its lack of empathy towards victims of SH, should the court handle the upsurge with the imposition of curfew under Section 144 of Criminal Procedure code 1973, or come out of its cocoon and conduct a dialogue with them. This is a matter connected with and integral to judicial accountability and integrity.

In *Vishaka*, the court eloquently cited CEDAW and the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region.[80] Clause 2 of the latter, under the heading Independence of Judiciary, reads:

> 2. The Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Rights (Art. 14(1)) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent judiciary is indispensable to the implementation of this right.

The in house panel appears to have lost sight of the aforementioned clause by continuing the inquiry ex-parte. Undeniably, there is no advantage in the fact that the independence of the judiciary is one of the features of the basic structure of the Constitution, but it should not be pitted against another important value of judicial accountability, equally one of the features of its basic structure. Instead of perceiving the two as antithetical, an attempt must be made to strike a delicate balance between the two. Moreover, freedom of speech and expression is an important means to ensure the accountability of judges, and that cannot be curtailed by indiscriminately issuing gagging orders.

[79] M. Cappelletti, *Repudiating Montesquieu. The Expansion and Legitimacy of "Constitutional Justice"* Cath. U. L. Rev. 35 (1985) *available* at https://scholarship.law.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2020&context=lawreview.

[80] Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995, *available at* https://www.hurights.or.jp/archives/other_documents/section1/1995/08/beijing-statement-of-principles-of-the-independence-of-the-judiciary-in-the-lawasia-region-beijing-1.html.

To quote a former CJI and chairperson of the National Human Rights Commission of India, "the quality of independence allowed to the judicial branch is also posited on the premise that the person in whom it is vested will behave in an ethical manner in his judicial and personal life."[81]

The SC has also disregarded the canon of governance of being bound by the same standards set by it for the other branches of government. In this context, consider the case of compliance with the *Vishaka* mechanism. But ironically, it took the next seven years for the SC to set up the Gender Sensitisation and Internal Complaints Committee (GSICC). The website of the SC has a link with the acronym GSICC languishing literally at the absolute bottom of the home page, demonstrating the level of attention it commands. However, the story does not end here: when we opened the link, we found that of the ten further links given,[82] only one talks about a report, which to our dismay is a short four-paragraph piece about a conference conducted by the GSICC, that too in 2014. There is no link providing annual reports or any audits done on behalf of this committee, which is a mandatory requirement as per the POSH Act (at the time of writing this article).

No wonder, therefore that, petitions are continuously filed for compliance with *Vishaka*, in essence, incorporated in the POSH Act. Had the in house panel relied upon the Gender Sensitization and SH of Women at the Supreme Court (Prevention, Prohibition and Redressal) Guidelines, 2015[83] and the Gender Sensitisation and SH of Women at the Supreme Court of India (Prevention, Prohibition and Redressal) Regulations, 2013[84] in their true spirit, it would not have constrained itself with the archaic judgment of *Indira Jaising*, discussed in Section 3. It would not have been difficult for the proceedings to be videotaped and for a bare minimum ethos of natural justice to be observed. We submit that the opportunity has not been lost completely. The victim should move to the SC with a curative petition and the court can invoke its extraordinary jurisdiction under Art. 142(1) of the Constitution of India and do some damage control. Obviously in light of judgments like *Antulay*[85] and *Ashok Hurra*,[86] it is the settled position of law to rectify errors in judgments pronounced by SC through 'curative jurisdiction', Similarly, in a plethora of cases[87] it has been established that, on its administrative side, the court is covered by Art. 12 of Part III of the Indian Constitution, being part of the "state."

From the perspective of public policy, we are bound to ask the court why it is reluctant to be transparent in tackling the complaints of SH against its judges, while it insists through its guidelines and regulations on the use of videotaping of inquiries and observance of the principles of natural justice in redressal of complaints of the

[81] http://www.nja.nic.in/Jounals_Publications_Newsletters/NJA%20Ocacasional%20Paper%20Series%20No.1.pdf.

[82] http://www.sci.gov.in/gsicc.

[83] https://www.sci.gov.in/pdf/GSICC/GSICC%20Guidelines%202015-SC.pdf.

[84] https://www.sci.gov.in/pdf/GSICC/gazette_final.pdf.

[85] R.S Nayak v. A.R Antulay (1984) 2 SCC 183.

[86] Rupa Ashok Hurra v. Ashok Hurra & Anr (2002) 4 SCC 388.

[87] Riju Prasad Sarma v. State of Assam (2015) 9 SCC 461 and Harjinder Singh v. Punjab State Warehousing Corpn. (2010) 3 SCC 192.

SH made by women against persons except judges in the SC. It is also not clear why the judges of the SC and the High Courts should have immunity from the *Vishaka* mechanism with its incorporation in the POSH Act.

Finally, we argue that while demanding scrupulous adherence to the rule of law, the SC has presented itself as an exemplary institution, even outside India, but when it comes to containing the onslaught of SH by its own judges, the institution has not acted with gusto, it does not have an answer to the question "How to guard against the guardian?"

5. Conclusion

We assume that justice is an indivisible concept and, in saying so, we endorse the opinion of the noted scholar Gautam Bhatia that we have to highlight the Court's failure—at an institutional level—to do justice in a case involving SH allegations against the Chief Justice.[88] The institutional failure of the SC in perpetuating injustice towards victims alleging SH is diabolical and a sad commentary on a clear violation of fundamental rights guaranteed by Arts 14, 15, 16, 19, and 21 of the Constitution of India. The court has also been found wanting in upholding the principles underlying Arts 38, 39, and 42, the Directive Principles of State Policy, as judiciary being the part of the state under Articles 12 and 36 is duty bound under Article 37 to take cognizance of the same in evolving public policy.

Moreover, judges are citizens of India and, by indulging in alleged SH, are seen to be in violation of vital fundamental duties guaranteed by Arts 51-A(a)[89] and 51-A(e).[90] SH, being a social menace and instrument of oppression in the hands of men to perpetrate violence and prejudice against women, as has been put forward in this article, is spreading like cancer and causing constitutional decay. We have demonstrated that the knee-jerk reaction of then CJI and his predictable outcry in victim-shaming and -blaming has only exacerbated the downfall of the mighty institution of the Indian judiciary. By becoming the judge in his own case, he has seriously jeopardized the constitutionally entrenched doctrine of due process of law, so eloquently and vigorously advocated by his predecessors in the *Maneka Gandhi*[91] case. Similar cases in the future must result in curial admonition of the erring judges, including CJIs. The Judges including CJI may also write to the President of India to initiate investigation against the particular judge facing the allegations of SH. Alternatively, they could assume special jurisdiction under Art. 142(1) and seek recusal of the erring judges including CJIs facing charges of SH from the performance of all administrative functions and judicial duties until the victims' grievances are addressed appropriately. In our submission, at the time of the Gogoi SH controversy, most of the judges retreated into the twilight

[88] https://indconlawphil.wordpress.com/ (last).

[89] "Article 51A. Fundamental duties: It shall be the duty of every citizen of India (a) to abide by the Constitution and respect its ideals and institutions …"

[90] "(e) … to renounce practices derogatory to the dignity of women;"

[91] (1964) 1 S.C.R. 332.

between constitutionality and unconstitutionality by maintaining a stoic silence.[92] We have also established that the conduct of the victim in the case discussed was not free from criticism, as she chose to play to the gallery rather than resort to the process of law, thereby creating doubt in the minds of the public about her credibility. It was not open for her to unilaterally withdraw from the inquiry and begin a trial in the press and media. We have shown how the in house panel appears to have overlooked the guidelines and regulations set by the SC itself. Then CJI would have met the ends of Justice, had he stepped aside from the administrative duties of his office and enabled the next senior-most judge to fill the administrative void and to constitute a seemingly impartial committee with retired judges and external women members. By no stretch of the imagination, our views should not be read to demean or defame in any way the office of the CJI and other judges of the SC and HCs, nor we want to take a judgment call on the guilt or innocence of the judges having faced allegations. However, we are candid in our assertion that justice should not merely be done but should seem to be done, and when it comes to the office of CJI one cannot ever forget the axiom that Caesar's wife must be above suspicion. However, in the present case, not only Caesar's wife but even Caesar himself is perceived to be under suspicion because of the unconstitutional path then CJI has resorted to. We hope that the report submitted by the Patnaik panel will not only be made public by the court but will also be acted upon critically by it. But what would happen to the vulnerability of the victim is a question which will remain unanswered.

Although the judiciary is not directly accountable to the electorate, the institution cannot survive if it does not command the confidence of the public. Looking at the present controversy, it is not difficult to see visible cracks in the relationship between the judiciary and the public. Judges in India, instead of presenting themselves as the avatars of infallibility, must learn to own up to wrongdoing and to cultivate a habit of being self-critical and vigilant about the pitfalls of their fellow judges.

The sooner judges realize that it is no longer blasphemy to question their character if there is a genuine complaint, the better it will be. The judiciary is indeed justified to raise questions against crusaders trying to undermine its integrity, but equally it should jettison the tendency to read every criticism as contempt.

By now, it must be accepted that even judges are human and prone to errors. This fact must not be forgotten while framing public policy by the Supreme Court of India.

[92] *See* opinion of Jackson J in Youngstown Sheet & Tube Co. v. 343 US 579 (1952) https://www.justsecurity.org/63380/what-to-do-with-vetoed-bills/ (last). We submit that, in the Indian setting too, in light of its role as guardian of the Indian Constitution, the Supreme Court does not necessarily only rely on powers enshrined in the provisions of the Constitution. At times, the court is required to go beyond the provisions of the Constitution to give meaning to certain provisions, or it has to look beyond the language of the Constitution to capture the underlying spirit rather than adhering to the actual letter of the law. The present controversy was a lost opportunity by the judges of the SC to exercise their guardian power against the CJI. At the present time, due to their silence, they are in the twilight zone, i.e. their actions are neither completely constitutional nor totally unconstitutional. However, if they continue this silence, their actions would degenerate into unconstitutionality as the behavior would not be justified, either under the text of the Constitution or its spirit.

To allude to the views of Dr Arghya Sengupta, during the performance of judicial functions on the sidelines of mainstream public discourse, mainly confined to private disputes, the assumption of judicial integrity would work; but with the courts taking up issues of national governance or matters raised through PILs, the said assumption and the righteous colonial mindset are unworkable.[93]

With the tremendous rise of judicial power, walling oneself off from scrutiny and transparency is never going to be sustainable. It is this unravelling that we are witnessing today. Disillusioning as it may be, this is a churn that is necessary so that the SC can truly find itself at home in the transformed twenty-first-century India that we inhabit.[94] Time is ripe for the SC to look beyond itself for ideas.

To allude to Prof. Nilanjana S. Roy, "If the courts offer uneven justice, or abandon due process entirely to protect one of their own ...,"[95] then it is a deathknell for the Constitution.

[93] https://www.financialexpress.com/opinion/judges-must-be-independent-but-must-also-be-accountable/1572768/.

[94] https://economictimes.indiatimes.com/articleshow/69286276.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.
See generally A. Senguta, Independence and Accountability of the Higher Indian Judiciary (2019).

[95] Prof. Nilanjana Roy, *The Hgh Barriers to Justice for Women*, The Wire, May 10, 2019, https://thewire.in/law/the-high-barriers-to-justice-for-women.