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Perpetuating the Power-Imbalance – Addressing Sexual Harassment at Higher Institutions in India

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This editorial is based on the article [“In his own cause: On complaint against CJI Ranjan Gogoi”](#) which appeared in "The Hindu" on 22nd April, 2019. The article talks about procedural inadequacies in addressing sexual harassment at institutions like the Supreme Court of India.

Quis custodiet ipsos custodes?

This phrase is often quoted and discussed in Socrates’ search for guardians who can hold power to account and prevent its misuse.

- In the Indian context this discussion gets further traction, as the fundamental question being asked contemporarily is, where does the power to prevent misuse lie?
- Bound up with that question are the disputes over the powers of the elected government and the powers of what is being called unelected institutions, particularly the judiciary.

Contextualizing “*who will guard the guardian syndrome*” in Indian Judiciary

Recently after allegation of sexual misconduct against Chief Justice Of India, the CJI constituted a bench comprising of himself along with two other judges in **“In Re: Matter of great public importance touching upon the independence of the judiciary”** which refuted the allegations.

This step was against the established notion of fairness and natural justice.

The premise of natural justice [[Read More](#)]

- ***Nemo debet esse judex in causa propria sua***

Nemo in propria causa judex, esse debet, i.e.; **no one should be made a judge in his own cause.**

- It is popularly known as the **rule against bias.**
- It is the minimal requirement of natural justice that the authority giving decision must be composed of impartial persons acting fairly, without prejudice and bias. [Bias means an operative prejudice, whether conscious or unconscious, as result of some preconceived opinion or predisposition, in relation to a party or an issue].

- **Audi alteram partem**

Audi alteram partem means '**hear the other side**', or '**no man should be condemned unheard**' or '**both the sides must be heard before passing any order**'.

Other Procedural Violations

- **Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal Act) Act, ("POSH Act")**

POSH Act read along with **Supreme Court Sexual Harassment Regulation, 2013** gives the role of deciding the genuineness of the allegations prima facie by the CJI himself. However, no procedure has been laid down if the allegation is against CJI himself.

- **Participation of women in sexual harassment cases**

Even though POSH states that the committee enquiring into sexual harassment must be headed by woman and must comprise of a majority of women, this was not followed in the composition of the Special bench that heard the CJI's case.

- **Role of Attorney General and Solicitor General**

The case was registered via suo-motu writ petition by the Supreme Court, which is procedurally flawed.

Also the unwavering support by the President of Supreme Court Bar association without any enquiry shows that space for women is non-existent even in the Judiciary.

Key Provisions and Documents Related to the Enquiry of Judges

- **Section 77 of the IPC 1860**

Section 77 IPC holds that any act done by a Judge while acting judicially in good faith cannot be considered an offence.

- **The Judges (Inquiry) Act, 1968 and Rules, 1969**

As per the Judges Inquiry Act and Rules framed under Section 124(5) of the Constitution, the expression 'judge' also includes the CJI and no special treatment is given to him.

- **The Judges Protection Act, 1985**

- Section 3 of the Act protects judges from any civil or criminal proceeding in any court for acts done in performing judicial duties.
- However, the **government can initiate criminal proceedings** against a sitting or former judge of a superior court under sub section (2) of Section 3 of Judges (Protection) Act, 1985 if it can produce material evidence to show that a judgment was passed after taking a bribe.

- **Veeraswami Judgment (1991)**

- In Veeraswami case, the Supreme Court held that no criminal case shall be registered under Section 154, Cr.P.C., against a Judge unless the CJI is consulted in the matter and that due regard must be given by the government to the opinion expressed by the CJI.
- However, if the allegation is against the CJI himself, then the Government can consider other judges of the Supreme Court.

- **Vishakha Case (1997)**

In allegations against judges of the Supreme Court, it requires the CJI to constitute a three-member panel of Supreme Court judges to enquire into a complaint of misconduct received by the CJI against a sitting judge. The CJI supervises and enforces the outcome of this inquiry.

- **Prevention of Sexual Harassment at Workplace Act, 2013 along with Gender Sensitisation & Sexual Harassment of Women at the Supreme Court of India (Prevention, Prohibition and Redressal) Regulations, 2013 and 2015**

Under the 2013 Regulations, the CJI has overall supervision and control over the Gender Sensitization Internal Complaints Committee (GSICC) including nomination and appointment of members of the GSICC and the power to accept or reject the recommendation of Internal Complaint Committee post enquiry.

However, with the setting up of a committee under Justice S.A. Bobde rectified the error in "In Re: Matter of great public importance touching upon the independence of the judiciary" to some extent. But even this step and subsequent judgements, were recalcitrant on many accounts, some of which are as follows:

Women were not allowed to be represented by a lawyer or an amicus curiae

According to legal experts, in the absence of any known procedure, the non-observance of the principles of natural justice and the absence of effective representation of the victim, the report, even though not for the public, is non-est and void ab initio ('does not exist'; not legally binding).

- **This ought to have been an external inquiry.** There is no other way to ensure that the judiciary can be viewed as impartial.
- **The woman in the CJI case was told that her own testimony, once she made it, would not be given to her because the inquiry is confidential.**
- **The decision had been given ex-parte** (*def: with respect to or in the interests of one side only or of an interested outside party*)
 - Though legally valid, it erodes the validity of the Supreme Court Judgement. Independence of the judiciary rests on public trust, and public trust is not maintained by one-sided inquiries.
- Moreover, it established the power imbalance by showing that, when it comes to one of its own, imbalances of power don't matter, due process doesn't matter, and basic norms of justice don't matter.

Impact of the Supreme Court Judgement

- **The judgement of the Supreme Court shows “institutional racism”.**

Institutional racism stems from “unwitting prejudice”, “ignorance”, or “thoughtlessness” – almost internalised conditions, acted upon without any conscious desire or motivation to oppress or disadvantage anyone.
- **This judgement points toward “Judicial Oligarchy”.**

The institution of judiciary has a strong counter-majoritarian character. It is considered neutral — free from self-interest. It is supposed to protect individual rights and adjudicate freely and fairly. **Judicial oligarchy reduces the institution to a private club where certain interests are privileged at the cost of judicial integrity.**

For the last 20 years, the law on sexual harassment in India has taken slow, incremental, steps forward. **From the Vishaka Guidelines in 1997 to the POSH Act in 2013, certain basic principles about the imbalance of power, procedural justice, and protecting the rights of survivors, has been fought for, and partially won.** But this judgement, along with defamation suits in #Metoo movement shows that, battle on sexual harassment is far from over.

It's also worth remembering the 2013 complaint against then former Justice AK Ganguly, in which an internal committee of judges gave a hearing to Ganguly and the complainant and ultimately passed an order finding that prima facie sexual harassment had been made out.

Ganguly resigned as Chair of the West Bengal Human Rights Commission (WBHRC), a short time before parliament began a presidential reference procedure to remove him.

Way forward

- Amendment of In-House Procedure or a Dedicated Separate Procedure
 - Such an amendment shall keep in mind principles for departmental inquiries into sexual harassment.
 - **The Full Court should exercise this power and lay down composition of the committee empowered to inquire into the issue.**
 - This committee should have adequate representation and should be constituted as per the laid guideline.
- **Implementation of Veeraswamy Judgment**
 - In Veeraswamy's case, a Constitutional Bench held that if the CJI himself is the person against whom the allegations of criminal misconduct are received the government shall consult any other Judge or Judges of the Supreme Court.**
 - This procedure should be followed.

Drishti Input

“Without addressing the power-imbalance in society, a just society, particularly for women, cannot be envisaged. Discuss the role of the Indian Judiciary in this regard.”