

## Ubi Jus Ibi Remedium Falsified

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### I. Introduction

Any student of law would sincerely believe that for every wrong there is a remedy. But when those remedy lies in the hands of the wrong doer itself, the age old adage of ubi jus ibi remedium<sup>1</sup> stands falsified. Another belief ingrained in the mind of a student of law is that the Supreme Court of India is the epitome of justice and can do no wrong. Unfortunately in 2019 that belief too stands challenged. The larger than life convention of restraint and seclusion for the sake of independence of the judiciary met its Waterloo in the battle of assignment of cases to the bench when sitting senior judges of the Supreme Court aired their grievance before the media<sup>2</sup>. These developments were perturbing enough, but the way the allegation of sexual harassment against the present Chief Justice of India has been dealt with is definitely shocking to say the least. Indian justice delivery system is facing a crisis as the sanctity of judicial process is being questioned.

### II. The Genesis of the Case

Facts and time line of the case as gathered from media reporting<sup>3</sup> are as follows:

**April 20, 2019:** What would have been a sleepy Saturday morning turned out to be tumultuous, as few online portals published the contents of an affidavit prepared by the former SC staff, copies of which were sent to all Supreme Court judges?

In her affidavit, she alleged that the Chief Justice of India had made unwelcome sexual advances at her and when she resisted, she was subjected to frequent

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<sup>1</sup> Where there is a wrong there is a remedy

<sup>2</sup> On January 18 2018, Justice Chelameswar, accompanied by Justices Ranjan Gogoi, M B Lokur and Kurian Joseph mounted a virtual revolt against chief justice Dipak Mishra, listing a litany of problems that they said are afflicting the country's highest court and warned they could destroy Indian democracy.

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

<sup>3</sup> <https://thewire.in/women/former-supreme-court-employee-alleges-sexual-harassment-by-chief-justice-gogoi>, <https://caravanmagazine.in/law/former-supreme-court-employee-accuses-cji-ranjan-gogoi-sexual-harassment>; <https://scroll.in/article/920831/what-you-need-to-know-about-the-allegations-against-cji-ranjan-gogoi-and-the-special-hearing>. <https://www.livelaw.in/top-stories/cji-sexual-harassment-case-timeline-144830>

transfers and was eventually dismissed. She further alleged that the CJI was persecuting her family as well, and had caused the suspension of her husband from service of Delhi police. Immediately after the publication of these reports in media, the Supreme Court convened an urgent hearing at Court No.1, with a bench composition of CJI Gogoi, Justice Arun Mishra and Justice Sanjiv Khanna. The notice by registry had stated that the sitting was to deal with a matter of 'great public importance touching upon the independence of the judiciary', which was mentioned by Solicitor General Thushar Mehta. During the session, the CJI denied the allegations and termed them as an attempt to "deactivate the judiciary". The Attorney General and the Solicitor General expressed their solidarity with the CJI. After the session, the Court passed an order (signed only by Justices Mishra and Khanna, with conspicuous omission of CJI Gogoi), advising media to exercise "restraint". On the evening of April 20, Utsav Singh Bains, a Delhi-based lawyer, posted in Facebook that the allegations against CJI were part of a conspiracy. He said that he will file an affidavit in SC with evidence of "conspiracy against the CJI by a lobby of disgruntled judges, SC fixers, corporate scamsters and a few corrupt Politicians - All who have meticulously planned the conspiracy to force the CJI to resign as their 'Corrupt works were not going through in SC'".

**April 22, 2019:** Bains filed an affidavit in the SC stating that he was offered Rs.1.5 Crores by SC fixers to frame allegations against the CJI and that it was plot by a nexus of bench fixers and corporate. Lawyers' bodies, Supreme Court Advocates on Record Association, Supreme Court Bar Association passed resolutions condemning the process adopted by the SC to deal with the matter. They demanded a probe following procedure established by law. The SC Employees Welfare Association passed resolution supporting the CJI, terming the allegations baseless.

**April 23, 2019:** Supreme Court took a suo moto case in respect of the allegations that was considered by a special bench of Justices Arun Mishra, R F Nariman and Deepak Gupta. The bench sought for the appearance of Utsav Bains the next day. CJI constituted an in-house panel of Justices S A Bobde, N V Ramana and Indira Banerjee to probe the allegations against him.

**April 24, 2019:** Wednesday The special bench of Justice Arun Mishra, R F Nariman and Deepak Gupta heard Bains and the Attorney General in the matter. The Attorney General pointed out certain deviations made in the affidavit filed by Bains from his earlier Facebook posts. Bains handed over certain materials to Court in a "sealed cover". The Court summoned the chiefs of CBI, Delhi Police and Intelligence Bureau to chambers for discussion. Sharp exchanges occurred between Bains, the AG and the bench during the hearing, where Justice Nariman chastised Bains for using intemperate language at AG. Bains offered to file an additional affidavit the next day to substantiate his allegations that disgruntled employees, particularly Tapan Kumar Chakraborty and Manav Sharma, who were

dismissed for tampering with the order in Anil Ambani's case, were behind the conspiracy.

Complainant objected to inclusion of Justice Ramana. She addressed a letter to Justice Bobde, expressing concerns about the procedure to be followed by the panel. She said that she had concerns whether the panel will be biased and objected to inclusion of Justice Ramana in it on the ground that he was a close friend of the CJI. She also said that the news reports about the comments made by the judges and top law officers of the government during the special sitting held in suo moto proceedings have left her "frightened and helpless" and that she was worried if her complaint has been "declared to be false by the Hon'ble Judges and senior law officers" without hearing her. The panel issued notice to the complainant asking her to appear on April 26.

**April 25, 2019:** The special 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. Utsav Bains's claim of privilege over information was rejected and he was directed to cooperate with the investigation. Justice Ramana rescued himself following the apprehensions raised by the woman; He informed that he was rescuing himself from the panel saying his decision to rescue is only based on intent to avoid any suspicion that this institution will not conduct itself in keeping with the highest standards of judicial propriety and wisdom. Justice Indu Malhotra was appointed in his place.

**April 26, 2019:** Justice Patnaik informed that he will await the result of in-house probe against CJI Gogoi before starting the investigation of conspiracy allegations.

**April 30, 2019:** Stating that the atmosphere of the in-house committee was "frightening", the woman who alleged sexual harassment by the Chief Justice of India decided not to participate in the proceedings any longer. In a press release, she said that she felt "intimidated and nervous in the presence of three Hon'ble Judges of the Supreme Court and without having a lawyer or support person". She stated the following factors for her decision:

1. She was not been allowed to have the presence of a lawyer/support person despite her impaired hearing, nervousness and fear.
2. There being no video or audio recording of the Committee proceedings. She had not been supplied with even a copy of her statement as recorded on 26th and 29th April 2019.
3. She was not informed about the procedure the committee was following

**May 1, 2019:** Despite the complainant withdrawing from the enquiry, the panel chose to proceed ex-parte, and examined the Chief Justice of India, who denied the allegations.

**May 2, 2019:** Justice Chandrachud wrote to Justice Bobde and met him, stating that the panel should not proceed with the enquiry in the absence of the complainant. Justice Chandrachud also sought inclusion of a retired woman judge as an external member of the panel, and providing legal assistance to the complainant. He said that a senior woman lawyer from the SC bar should be made *amicus curiae* to guide the procedure.

**May 6, 2019:** A press release by the SC Secretary General informed that the in-house panel has given clean chit to CJI Ranjan Gogoi in the matter. The contents of the report will not be made public, stated the press release. In the press release issued by the secretary general of the Supreme Court, the secretary general also cited the 2003 Indira Jaising v, Supreme Court of India<sup>4</sup> case – which involved a sexual harassment complaint against a sitting judge of the Karnataka High Court – as a reason for not furnishing the report for public consumption.

It is to be noted that the Indira Jaising case was rendered before the advent of the Right to Information Act, 2005. Just last month, in the Rafale deal proceedings, the Supreme Court held that the Official Secrets Act has to give way to the Right to Information Act<sup>5</sup>.

The Supreme Court has itself held that the aggrieved party *must* be handed a copy of the in-house committee report, while delivering a judgment in connection with a 2014 case in which a former Additional District and Sessions Judge levelled sexual harassment allegations against a sitting Madhya Pradesh High Court judge<sup>6</sup>. There too an in-house committee of the High Court investigated the allegations.

In that context, the Supreme Court held as follows:

“This Court in Indira Jaising’s [2003] case declined to entertain the writ petition filed at the behest of a third party, seeking details of the proceedings, and the consequential report prepared by the committee of judges. But, that should not be understood to mean, that an individual concerned, who is called upon to subject himself/herself to the contemplated procedure, should be precluded or prevented from seeking judicial redress.

Therefore, a person affected by the outcome of the “in-house procedure”, have the right to seek judicial redressal on account of a perceived irregularity. The irregularity may be on account of the violation of the contemplated procedure, or even because of contemplated bias or prejudice. It may be on account of

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<sup>4</sup> *Indira Jaising vs Supreme Court of India & Anr.* (2003) 5 SCC 494

<sup>5</sup> <https://www.livelaw.in/columns/rafale-official-secret-act-vs-rti-143637>.

<https://www.thehindu.com/news/national/all-you-need-to-know-about-the-official-secrets-act/article26458006.ece>.

<sup>6</sup> Writ Petition (Civil) NO. 792 OF 2014

impropriety. The challenge can extend to all subjects on which judicial review can be sought.

It is not known why an in-house committee was constituted to enquire into the present complaint. Perhaps it was to take advantage of the judicially-laid guidelines found in C Ravichandran Iyer's case of 1995<sup>7</sup>, wherein such a committee has only a limited brief. It was observed in that case:

“The said Committee shall hold an inquiry into the allegations contained in the complaint. The inquiry shall be in the nature of a fact finding inquiry wherein the Judge concerned would be entitled to appear and have his say. But it would not be a formal judicial inquiry involving the examination and cross-examination of witnesses and representation by lawyers. For conducting the inquiry the Committee shall devise its own procedure consistent with the principles of natural justice.”

Can the Supreme Court's three-judge in-house committee, of which two judges were women, be equated to an Internal Complaints Committee as per the 2013 Act? The Vishakha<sup>8</sup> judgment came after C Ravichandran Iyer's case, by all logical reasoning the latter should have had a greater binding force.

When the complainant appeared before this committee, she demanded the assistance of a lawyer to help her in the enquiry and also wanted the proceedings to be video recorded. In order to establish her case, she also wanted the committee to ask telephone service providers for the phone call and WhatsApp records from two phone numbers relevant to her case. To the shock of any judicial-minded person, the committee rejected all fair requests made by the former female employee. Under the law, an Internal Complaints Committee has the power of a civil court to summon any record from anyone. Though, under the Sexual Harassment of Women at Workplace Act, 2013, Parliament obliged an employer to provide all assistance for a complainant to pursue her case, while framing the rules for this law, the government permitted lawyers' assistance in the Internal Complaints Committee hearings. But the three-judge committee of the Supreme Court was not bound by it as this is only a rule framed by the government.

On the day the CJI was given a “clean chit,” Supreme Court advocate ML Sharma filed a petition asking for a Special Investigation Team (SIT) to look into a “planned conspiracy” against the CJI by democratic rights lawyers Prashant Bhushan, Indira Jaisingh and others through “a concocted, false sexual harassment case.” Justice Bobde, who headed the in-house inquiry, agreed to list it. Not surprisingly, the Bar Council of India, which extended unconditional support to the CJI when the news of allegations first broke, has now declared its stand vindicated by the findings in the in-house committee's report (a report which the committee has refused to

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<sup>7</sup> C. Ravichandran Iyer vs Justice A.M. Bhattacharjee & Ors 1995 SCC (5) 457, JT 1995 (6) 339 ...

<sup>8</sup> Vishaka and others V. State of Rajasthan and others. AIR 1997 SUPREME COURT 3011

release, even to the complainant). It has called for protecting the “independence of the judiciary,” warning of a larger conspiracy and deeming the woman’s allegations “fishy.”

Both the Attorney General and Solicitor General, whose role is to appear for the government and who had no locus in the matter, rubbished the allegations and carried out a character assassination of the complainant. Both offices are expected to assist the Supreme Court and the government in fulfilling their constitutional obligations, not participate in proceedings violative of natural justice.

It may not be possible to say that the issue has attained a quietus, as the opaque manner in which the Committee held the proceedings, even after the decision of the woman complainant to refuse participation due to apprehensions of bias, will continue to be debated intensely amongst legal fraternity and general public during the coming days.

### **III. The Protests**

#### **III.I Protest by Women’s Group, Lawyers Activists and Academics**

Women’s groups, lawyers, activists, academics and writers issued a joint statement on 2nd May, 2019 expressing solidarity with the decision of the woman who accused Chief Justice Ranjan Gogoi of sexual harassment to withdraw from the proceedings of the in-house inquiry. They contended that the reasons given by her in the letter justify her decision to abstain, especially in the context of total imbalance of power vis-a-vis her on one side and the members of highest judiciary on the other.

The statement said CJI Gogoi appeared before the in-house committee after the complainant decided to not participate in the process. “By this very conduct the committee has completely de-legitimised itself,” the statement said. “If the committee continues to proceed with the enquiry instead of satisfactorily concluding the matter it will raise many more questions.”

The group reiterated that the constitution of the three-judge panel is “inherently flawed”. They said the chief justice was senior to the three judges hearing the complaint, that the committee did not adhere to Vishaka guidelines and that an external member was not present on the panel as per these guidelines.

“We write again, calling upon the Supreme Court judges to take corrective steps and put a halt to these proceedings,” the statement said. “If they fail to do so, not only the complainant but the citizens of this country, especially women and marginalized sections, will lose faith in the judicial system.”<sup>9</sup>

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<sup>9</sup> <https://scroll.in/latest/922061/full-text-panel-investigating-allegation-against-cji-has-delegitimised-itself-say-lawyers-writers>

This is an extraordinary case that calls for extraordinary measures to be put in place, as this is a matter pertaining to the highest judicial authority under the constitution. However, extraordinary measures cannot and ought not to overlook, fundamental principles of natural justice and fair hearing. The Committee also does not adhere to the spirit of either the 2013 Act or the Vishaka Guidelines, laid down by the Hon'ble Supreme Court itself in 1997. The absence of an external member, whose role is to ensure that there is no undue pressure or influence on either the complainant or the witnesses during the enquiry, casts a shadow on the intent behind and the purpose of setting up this Committee itself. Further, failing to stipulate the procedure to be followed, terming the proceeding as 'informal', and not allowing a lawyer/support person to be present, completely ignores the unequal balance of power not only between the parties but also between the complainant and the Committee itself.

The procedure established by law has not only to be followed by those subordinates to the Hon'ble Supreme Court, but by the Supreme Court itself. Articles 14 and 21 of the Constitution of India would have no meaning otherwise.

The lawyer, academia activist group demanded of the Hon'ble Supreme Court of India:

- a) A Special Enquiry Committee consisting of credible individuals be constituted to conduct a thorough enquiry at the earliest and create an atmosphere of transparency and confidence for the complainant to depose.
- b) The Special Enquiry Committee should follow the norms of the IC and the principles of natural justice and accordingly conduct its enquiry.
- c) The Chief Justice of India should refrain from transacting official duties and responsibilities until the completion of the enquiry.
- d) The complainant must be allowed to be represented by a lawyer/support person of her choice.

### **III. II Protest by National Law School of India University**

Meanwhile, 165 alumni of the National Law School of India University, Bangalore on Thursday backed the two letters written by the Women in Criminal Law Association. The alumni said that the Supreme Court "appears to have fallen well below" what the best practices in sexual harassment cases investigations require.

"It is our view that the court must hold itself to the highest standards in cases involving allegations of sexual harassment," the alumni wrote. "We do not believe that has happened in this case."

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complaint, that the committee did not adhere to Vishaka guidelines and that an external member was not present on the panel as per these guidelines.

“We write again, calling upon the Supreme Court judges to take corrective steps and put a halt to these proceedings,” the statement said. “If they fail to do so, not only the complainant but the citizens of this country, especially women and marginalized sections, will lose faith in the judicial system.”<sup>10</sup>

### **III.III Protest at Connaught Place**

On 8 May 2019, on the second day in succession, people protesting at Connaught Place, against the “clean chit” given to Justice Gogoi by an in-house inquiry that violated established procedures and principles and demanding an independent inquiry, were detained at Mandir Marg police station. The police came in large numbers armed with water cannon. These events are an action replay of 7 May, when a large police force, that was also equipped with water cannons, forcibly picked up and detained about 50 women activists who were protesting on the same issue outside the Supreme Court. One of the issues in the 8 May protest was the crackdown on the 7 May demonstration.

While the police is clamping down on protest demonstrations against the “supreme injustice,” a plethora of cases have been filed against the complainant and those supporting her rights. These pleas and affidavits echo the refrain set up by none other than the accused, Chief Justice India Ranjan Gogoi, himself regarding independence of the judiciary and greater conspiracy deactivate the CJI’s office.

Except for a handful of judges, and advocates of whom a large number are women, the judiciary has chosen not to criticise nor express any disquiet over the CJI’s abuse of authority, and the brazenly flawed inquiry probably because the CJI has a say in their career and continuation in service. The functioning of the inquiry committee, in fact, illustrates why the Supreme Court’s own guidelines emphasise the presence of external members in panels inquiring into sexual harassment at the workplace. The mere presence of two women justices did nothing to ensure a fairer procedure, as the CJI was senior to them, besides of course being the highest judicial authority in the land. The committee continued with its inquiry even after the complainant had walked out, and has not even given her a copy of its report.

Voices from within the legal fraternity, which argued that the principles of natural justice and Vishakha guidelines should be upheld, were at best marginal. There could scarcely be clearer proof that the judiciary itself is far from fair and impartial, and certainly not when it comes to gender-based harassment. The immediate banding together of the judicial and legal fraternity, the executive and the

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<sup>10</sup> <https://scroll.in/latest/922061/full-text-panel-investigating-allegation-against-cji-has-delegitimised-itself-say-lawyers-writers>



administration speaks of immense insecurity regarding sexual harassment at the workplace. The apprehension is that if a complaint can be brought against someone as powerful as the CJI by an ex- junior staffer working directly under him, the dual power of gender and public office is threatened, and hierarchy has to be reinforced in no uncertain terms.

The imbalance of power could not be starker. The judiciary, the legal fraternity, the government, and the police have bonded to protect the CJI in response to a most basic demand: that the minimum guarantees established by the Supreme Court itself should be upheld, most prominently, the Vishakha guidelines, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, and fundamental constitutional principles regarding a fair hearing. It must be noted that under the 2013 sexual harassment law, an appeal against the findings of the internal complaints committee will lie with an appellate authority under Section 18 of the Act. The Government of India has notified the appellate authority as the Chief Labour Commissioner (Central). If the report given against the former woman employee is treated as an Internal Complaints Committee Report, she can move the appellate authority under the 2013 Act challenging the ex parte decision. Otherwise, she also has the option of moving the Delhi High Court under Article 226 of the Constitution, since the in-house committee of the Supreme Court functioned only on the administrative side.<sup>11</sup> But none of these remedies will help her as no one will be willing to displease the Chief Justice of India in whose hands the future of their career is vested.

The “independence of the judiciary” has been given new dangerous meanings. A separation of powers to ensure checks and balances necessary to democratic functioning has morphed into a call for the judiciary, government, and administration to rally together so that they can evade all accountability.

What the women of India are being told is that one judge is synonymous with the judiciary; that gender-just laws brought in after long struggles by women can be shortly dispensed with; that high public office continues to place men above the law; that women employees have no rights and women are not entitled to constitutional freedoms; and that no matter how basic, the principles of the rule of law and natural justice can and will be flouted if we question the powers that be. It is a cause to rage collectively when hard-fought rights can so easily be thrown to the winds by none other than the highest body meant to defend them. Today these are the rights of a working woman, but they set a precedent for the decimation of fundamental rights of all citizens and not just those who are already disadvantaged. We have looming before us a society and polity where individuals

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<sup>11</sup> *K Chandru is a former judge of the Madras High Court.*  
<https://scroll.in/article/922736/supreme-court-should-have-provided-sexual-harassment-complainant-with-all-help-says-former-judge>

become larger than institutions, and where all arms of the state are complicit in silencing all challenges to an arbitrary exercise of power by the authorities<sup>12</sup>.

What did the complainant want? Simply for the judges to take cognisance of her complaint and appoint an independent and impartial inquiry committee comprising retired judges of the Supreme Court examine the allegations.

In a democracy run by constitutional values, this is the least one could have asked for. However, what happened since the receipt of the complaint until the conclusion of the ex parte, in-house inquiry proceedings is simply constitutionally intolerable.

It does not take a constitutional law expert to point out that no man should be a judge in his own case. Or that both sides to a proceeding must be given a fair and equal opportunity of being heard, which includes legal representation. Nor is it unknown to anyone that there is a significant appearance of bias when members of an inquiry committee are subordinate to the person against whom the inquiry is to be conducted.

More than the decision itself, the decision-making process has left such a deep scar on the Supreme Court that it will take years, if not decades, to completely go away.

What does all this say about the country's most powerful court? That it does not care about fundamental rights of citizens, procedural due process or natural justice when it comes to one of its own.

#### **IV. Conclusion**

It is none other than the Supreme Court itself that laid down the Vishaka Guidelines in 1997 on how complaints of sexual harassment must be dealt with. In the past two decades, the court handed down countless judgments acknowledging the care and sensitivity with which the issue of workplace sexual harassment must be viewed in India. One such judgment was authored by the present CJI Ranjan Gogoi himself in 2012 in the case of *Medha Kotwal v. Union of India*<sup>13</sup>. It is a basic principle of rule of law that an inquiry should not and cannot take place under a veil of secrecy with no known procedure to be followed. In cases of sexual harassment, the woman complainant must have legal representation and a clearly spelled-out procedure must be followed. Witnesses must be summoned and an exhaustive fact-finding exercise must be undertaken. Last but not the least, the committee must educate the complainant about what legal options or remedies she has against the respondent and should, in fact, assist her in exploring those options.

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<sup>12</sup> <https://www.epw.in/engage/article/pudr-statement-against-supreme-injustice-cji-gogoi-sexual-harassment>

<sup>13</sup> (2013) 1 SCC 311.

Needless to say, by not making the report public, the Supreme Court has sent a message to the people of this country that judges of India's apex court are beyond public scrutiny and accountability.

Public confidence in constitutional courts is the bedrock of India's democracy. When the Parliament or the executive fails to honour its duties and obligations, we, the people of India, turn to our constitutional courts with a hope to realise our rights and liberties. Taken as a whole, the Supreme Court's handling of the complaint calls for a genuine introspection about the future of the institution as a repository of public trust.

For now, one way for the Supreme Court to prevent any further damage to its reputation is to recall its inquiry report and constitute a fresh inquiry committee headed by a retired woman judge of the Supreme Court, with retired Supreme Court judges and women's rights' activists as members. The complainant must be entitled to legal representation and the committee must proceed in accordance with the Vishaka Guidelines or the Prevention of Sexual Harassment Act, 2015. How can we expect sexual harassment to end if the Supreme Court itself does not take it seriously?<sup>14</sup>

It is a matter of great import that one of India's greatest institutions and also the keeper of constitutional values has failed a test. The main question was whether the Supreme Court of India would live up to the standard of fairness it expects from all other authorities while dealing with cases of sexual harassment and victimisation. The court could not bring itself to maintain semblance of fairness and adopt a formal procedure or allow the complainant to have legal representation. For all its judicial homilies on fairness, when it comes to dealing with its own the Supreme Court has come across as a prisoner of procedure and displayed an alarming propensity to mix up its institutional reputation with an individual's interest. The decision by the 'in-house committee' is an egregious instance of a hallowed institution abusing its own greatness by letting its power speak, and not the compassion for which it is renowned<sup>15</sup>

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<sup>14</sup> <https://www.firstpost.com/india/scs-handling-of-sexual-harassment-charge-against-cji-raises-questions-about-its-future-as-repository-of-public-trust-6595781.html>

<sup>15</sup> <https://www.thehindu.com/opinion/editorial/prisoner-of-rocEDURE/article27061412.ece>  
what-you-need-to-know-about-the-allegations-against-cji-ranjan-gogoi-and-the-special-hearing.

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