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## THE FALLACY OF FAIR TRIAL: SEXUAL HARASSMENT IN THE INDIAN LEGAL PROFESSION

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### Abstract

This article is a comparative analysis of the legal handling of two cases of sexual harassment against former judges by their court staff — a 2016 case against a then sitting Additional District Judge (ADJ) of a Delhi district court and a 2019 case against the then Chief Justice of India. Beginning with the registration of the complaint the article follows the legal trajectory in the two cases to bring forth the argument of contradictory application of legal remedies on the agents of the Indian Legal System. The article begins by establishing that the Indian legal profession is not immune to sexism, and proceeds to argue that incidents of sexual harassment in the Indian juridical field are not uncommon. The article focuses beyond the application of the sexual harassment law in these cases and contrasts the exercise of power by the apex court of the country in the name of maintaining the sanctity and independence of the Indian judicial system against the gradual unfolding of the “due process of law” in the ADJ case. For textual analysis of these sexual harassment cases, data has been gathered through court orders and legal reporting of the two cases in print and electronic media.

**Keywords:** Indian Judicial System, Fair Trial, Sexual Harassment, Legal Remedy, Indian Legal System, Sexism, POSH Act 2013, Legal Profession.

### 1. Introduction

The Indian judicial system has undergone a series of amendments in relation to its response to cases of sexual violence against women in the last decade. However, despite the introduction of fast-track courts, POCSO courts and mahila courts around the country for faster disposal of cases of rape and sexual harassment to the setting up of Vulnerable Witness Deposition Complexes for protection of vulnerable victims and child witnesses in such cases, there exists a tradition of deeply gendered laws. Decades of feminist engagements and interventions with laws have had an impact on the ILS and the Indian judicial system but the process is far from over (Guinea 2015). The regressive statements of lawyers<sup>1</sup> and judges in rape and sexual harassment cases highlight the paradox in the application of the Indian rape laws that have been a site of theoretical and empirical enquiry. This article builds on the sufficiently rich feminist literature on the impact of sexual harassment laws on victim-survivors and analyses two cases of sexual harassment within the Indian judiciary.

To understand the concepts of ‘fair trial’ and ‘equality before law’, the article compares and contrasts the two cases of sexual harassment by the court staff against then sitting judges. The two cases find similarity in the fact that both cases were filed by members of the court staff of the judge while the accused judges held office. Apart from this, there is no similarity between the two cases from the stage of filing of the complaint till the final verdict. By critically analysing the legal trajectory followed by the two cases, the article attempts to showcase that there is no simplified definition of a ‘fair trial’ in the Indian context, especially when sexual violence is reported by women within the legal profession against the members of the Indian judiciary. Another point of contestation in the article is the establishment of the fact that the flow of authority and power emanates from the Supreme Court of India and merely trickles down to other agents and representatives of the judicial system. Through the example of the legal handling of the two cases, the article argues that the apex court of the country enjoys supreme power (even over the law in this case) while the officers of the subordinate courts in the country may be tried on the general parameters set by the rule of law.

### 2. Sexism in the legal profession: a tool of ‘gendered othering’

Sexism in male-dominated professions, much like the legal profession in India, has been understood as a form of gender-based discrimination and an exclusionary tool (Powell and Sang 2015). This stands in opposition to the guarantee of ‘equality before law’ that emanates from the Indian constitution, the protector and champion of which is the Indian Supreme Court. In contrast to the constitutional rights and a strong-arm of the law in favour of affirmative action for women, there exists a contradictory reality of prevalence of sexism within the legal profession (Jaising 2019) that either go unnoticed in the courts or are dismissed as ‘harmless’ banter, or are only seldom questioned after they attract media attention.

<sup>1</sup> Upon receiving formal, a complaint in 2015 by the Supreme Court Women Lawyers Association against the public statements of two defence lawyers in a BBC Documentary ‘India’s Daughter’ based on the 2012 Nirbhaya gang-rape incident, the Bar Council of India issued a show-cause notice to the accused lawyers to explain their “anti-women” remarks.



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Adjudication of cases of rape and sexual harassment in India is publicly analysed. Statements of lawyers outside the courtrooms, language used in court orders and remarks of the judges are scrutinised not only by the media, but also by academicians, women’s rights’ activists, feminists and scholars alike. The presence of sexism in the Indian legal profession is not uncommon, but is certainly underreported. In a few cases wherein the victim does manage to file a formal complaint against the member of the Bar or the Bench, the struggle to take the case forward is immensely challenged at each legal proceeding. To establish this, two cases of sexual harassment against members of the Indian judiciary have been discussed and contrasted in detail to enable the reader to see through the legal proceedings in each case.

### 3. Debunking the myth of fair trials: supreme court vs. district court

Article 21 of the Indian Constitution provides all Indian citizens the right to impartial and law-based trial. The law of the land directs, at least theoretically, the procedure to be followed during the trial of an accused. Coupled with Article 14 that guarantees right to equality before law, the right to a fair trial enables an accused to claim impartial legal proceedings despite the nature of crime. During the textual analysis of the factual details and legal proceedings of four major cases of sexual harassment by members of the Indian judiciary in the last decade, two cases stood out.

#### 3.1 Case of the Additional District Judge, Delhi

In 2016, a Delhi district court judge (ADJ) was charged with allegations of sexual harassment<sup>2</sup> by a judicial officer who was recently transferred to another court. On suspecting misappropriation or misplacement of certain court documents, the ADJ directed the former court assistant to explain the matter in person. Upon exiting the court of the ADJ, the court assistant filed a complaint to Internal Complaints Committee of the court alleging that while she was in the chamber of the ADJ, he spiked her drink and sexually harassed her.

After the receipt of the complaint on the ADJ was suspended within a week and was notified that he will be put on disciplinary proceedings without being issued a copy of the complaint. An Internal Complaints Committee was constituted in the next eight days. While the proceedings continued, the ADJ along with his two family members, were admitted to a hospital for attempted suicide and the Shahadra Bar Association came in support of the ADJ refuting the allegations of rape on him as ‘false’.

The ICC issued its report on the matter in 2016 and the ADJ submitted that he received no copy of the report. The ICC conducted an enquiry between September 2017 and February 2018. In May 2018, the ADJ was asked to present his written submission on the report of the ICC. The former ADJ filed a petition in the Supreme Court seeking redressal in the case and demanded fair trial. The Supreme Court dismissed the petition in September 2019 stating that the investigation report was submitted in accordance with law. On approval of the Delhi government, in an order dated 17. April.20, the Delhi High Court formally dismissed the suspended ADJ from the Delhi Higher Judicial Services. The former ADJ filed petitions after petitions stating that the inquiry against him has not been conducted fairly, he was not given copies of the ICC reports, and that the High Court did not have the authority to discharge him of his duties and only the Governor could do so upon the report of an ICC stating that the offence has been proved. In January 2021, the division bench of the Delhi High Court culminated the case with a lengthy order dismissing all petitions by the former ADJ and maintained orders of his dismissal from Delhi Higher Judicial Services.

The former ADJ appealed to the Supreme Court in January 2021, March 2021, May 2021 and the allotted Benches adjourned the matter on account of recusal of a judge, or non-availability of a lawyer in the case.

#### 3.2 Case of the Chief Justice of India, Supreme Court

In 2019, sexual harassment allegations were levelled against the then Chief Justice of India by a junior court assistant<sup>3</sup>. On April 19, 2019 she forwarded her complaint to 22 sitting judges of the Supreme Court and narrated the details of sexual harassment at hands of the CJJ.

<sup>2</sup> See “Dwarka court judge, accused of molestation, consumes excessive sleeping pills” accessed on <https://www.indiatoday.in/india/story/dwarka-court-judge-accused-of-molestation-consumes-excessive-sleeping-pills-330782-2016-07-22> on 21.01.21. Also see ‘Suspended additional district judge, family attempt suicide ’accessed on <https://www.dnaindia.com/india/report-suspended-additional-district-judge-family-attempt-suicide-2237185> on 21.01.21.

<sup>3</sup> Read a detailed account of allegations on ‘Former Supreme Court Employee Alleges Sexual Harassment by Chief Justice Gogoi ’accessed on <https://thewire.in/women/former-supreme-court-employee-alleges-sexual-harassment-by-chief-justice-gogoi> on 02.01.2021.



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The allegations were not limited to sexual harassment, but extended to professional intimidation and threats of harassment to her family members. The woman had alleged that she was immediately transferred from CJI’s office and eventually terminated from service when she refused his advances, and that her husband and brother-in-law were also suspended from Delhi Police. The CJI refuted all allegations and subsequently no judicial order was passed in the case. While the allegations were dismissed by the members of the Bar as “attacks on judiciary”, the Supreme Court took suo moto cognisance of the matter and a three-judge Special Bench was constituted to look into the matter<sup>4</sup>. What led to another controversy was the fact that the CJI appointed himself as the head of this committee<sup>5</sup> and declared himself innocent in the case while calling the sexual harassment allegation a ‘matter of great public importance touching upon judiciary’s independence’<sup>6</sup>.

Following an RTI filed by women activists<sup>7</sup> on November 20, 2019 to make the report of the in-house committee formed in the sexual harassment case against the then CJI public, the additional registrar of the Supreme Court rejected the request stating that the “independence of the judiciary, proportionality test, fiduciary relationship, invasion to the right to privacy and breach of duty of confidentiality are applicable to the matter” and hence the report cannot be made public. The committee found “no substance in the allegation” and rejected all allegations made against the CJI as false. Senior advocate Indira Jaising raised voice and questioned the handling of such serious allegations against the CJI, but to no avail.

The article does not allege that law failed the victims of sexual violence in these cases. The article, through comparative analysis, argumentatively proves that the way the inquiry has been held in the above cases concerning allegations of sexual harassment on the CJI failed the Indian legal system. The incapacity of the Indian judiciary to reinstate people’s faith in its independence and fair trial deepened with the way the then CJI disposed his own case and retired only to be appointed to a member of the Indian Parliament.

### 3.3 Comparative analysis of the two cases

When we look at the legal proceedings of the ADJ case by the Delhi High Court and the Supreme Court in relation to the handling of the case of sexual harassment against then Chief Justice of India, we see glaring differences.

In the CJI case, the victim sent her complaint to 22 sitting judges of the Supreme Court against a sitting CJI and the accused headed the committee he constituted to preside over a hearing against himself and declared it an attack on the Indian judiciary. Legal response to the CJI sexual harassment complaint seemingly establishes that (i) there was strict media gag at an appropriate time to keep the facts of the case “internal” and the dignity of the Supreme Court intact, (ii) the victim of sexual harassment was made party in the case proceedings in a way that her statements, petitions, and family details were made public, (iii) inquiry into the case did not impact the occupancy of the office by the then CJI. In contrast to this, the case of the ADJ was differently handled in the sense that (i) there was no media gag, (ii) the victim of the sexual harassment in this case has not been represented by any senior lawyer and her side has not been disclosed to the media in any manner, (iii) within a week of the victim’s complaint the accused was suspended from office, despite his claims of an unfair trial at hands of the judiciary.

### 4. Conclusion

A comparative analysis of the two cases enables the critical sociological eye to peek into the already established Foucauldian visual (Foucault, 1975): the ‘watchmen’ of the panopticon Supreme Court exercising their force over the watchman of the capillary district court. Such inquiry further complicates the position of law and pulls it closer to the proposition of justice as law in the binary of justice as law and law as a means to justice. Extending the allegory, a two-way glass into the panopticon serves as a shield for those inside the disciplining tower. Extracting law from the constitution, the ‘watchmen’ of the supreme court extend it onto the masses while remaining immune to the penalties that a crime would otherwise invite.

<sup>4</sup> See full first day reporting of the Supreme Court in the said case at <https://www.scobserver.in/court-case/sexual-harassment-allegations-against-cji/sexual-harassment-day-1-arguments> accessed on 02.01.2021.

<sup>5</sup> See ‘Sexual Harassment Allegation: CJI Ranjan Gogoi’s presence on Bench Raises Eyebrows ’accessed on <https://www.thehindu.com/news/national/sexual-harassment-allegation-cji-ranjan-gogois-presence-on-bench-raises-eyebrows/article26900497.ece>

<sup>6</sup> See ‘Gogoi as MP: ‘A Matter of Great Public Importance Touching Upon Judiciary’s Independence ’accessed on <https://thewire.in/law/ranjan-gogoi-cji-rajya-sabha-supreme-court> accessed on 02.01.2021.

<sup>7</sup> See ‘Indira Jaising Questions Court’s Handling of Allegations Against Chief Justice ’accessed on <https://www.bloombergquint.com/law-and-policy/indira-jaising-questions-courts-handling-of-allegations-against-chief-justice>; also see ‘Indira Jaising questions Attorney General’s appearance in hearing on sexual harassment charges against CJI ’accessed on <https://www.firstpost.com/india/indira-jaising-questions-attorney-generals-appearance-in-hearing-on-sexual-harassment-charges-against-cji-6486711.html>



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While law was evoked in both scenarios - the Supreme Court case and the ADJ case, we have seen differences in the application of law right from the formation of internal complaints committees, their decisions in both the cases, and the impact of sexual harassment allegations on the accused. While in the ADJ case, law was explored and contested as a means for justice to both parties involved, the Supreme Court case understood law as justice in the manner in which the cases were disposed. If fair trial was a norm, the two cases discussed above would have had more similarities in terms of legal proceedings given the similar nature of allegations.

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