

# CURRENT CRISIS IN SC IS AN OPPORTUNITY TO ADDRESS SERIOUS GENDER DISPARITY ON THE BENCH

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

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The writer is senior resident fellow, Vidhi Centre for Legal Policy, Karnataka.

The Indian judiciary is facing its worst hour of crisis. The allegation of sexual harassment and victimisation levelled against the Chief Justice of India by a former Supreme Court staffer, followed by what can only be termed as a mockery of due process and law, has brought the judiciary to a tipping point. It is now left with no choice but to undertake a massive exercise in introspection and reform. Judicial reforms are no longer empty rhetoric. They are essential to keep the judiciary from becoming irrelevant and severed from the idea of justice. Nothing can be more damaging to this idea than going unheard and unrepresented before the judiciary — a fear that constantly plagues all disadvantaged sections of the society, especially women.

In the context of the apathy shown towards the woman complainant by an all-male bench (headed by the CJI) in the immediate aftermath of the allegations, and by the in-house committee which has given a clean-chit to the CJI, one cannot help but ponder: Would this incident have been handled differently if the judiciary was not as male-dominated as it always has been?

The judiciary is one of the least diverse institutions in India, with the lack of gender diversity being the most visible yet ignored aspect. Since 1950, the SC has had only eight female judges out of 239, with the present three out of 27 being the highest concurrent representation women have ever had on the SC bench. In the subordinate judiciary, merely 27.6 per cent of the judges are female. This lack of women on the bench, at all levels of the judiciary, is at the very root of the impunity with which the top court has, in a single stroke, destroyed decades worth of progress made in deterring sexual harassment of women from all walks of life.

The stark gender disparity on the bench is reflected in, and in fact, stems from the minimal representation of female advocates in the bar as well. The deep-rooted systemic issues that act as barriers for women to enter and remain in the legal profession are all too well known. Even if a female advocate crosses these barriers to continue and thrive in her profession, the current collegium system for the appointment of judges is simply not designed to ensure her elevation to the bench. At present, the appointment of a judge to a high court is based on a recommendation made by a collegium of the three senior-most judges of that HC, and approved by a collegium of the three senior-most judges of the SC. Although the state and central governments have a role to play in the process, the final say, for all practical purposes, rests with the SC collegium.

This appointments process in itself is severely lacking in women's representation. In 25 HC collegiums across the country, there are just five senior female judges with 19 of the collegiums having no female judge at all. Only one woman so far has been a member of the SC collegium (Justice Ruma Pal), with Justice R Banumathi set to become the second later this year; and, at least until 2025, no female judge is going to occupy the CJI's position.

This nearly all-male composition of the highest decision-making bodies in the judiciary has made gender disparity a self-perpetuating phenomenon which becomes amply clear when one studies the decisions made by the SC collegiums in the recent past.

This author undertook a study of 80 (out of 191) SC collegium resolutions made public since October 2017, pertaining to elevations of judges to the SC and various HCs, and, it shows that the gender gap in the judiciary is here to stay.

The data shows that out of the 363 persons recommended for elevation, merely 39 were female (just over 10 per cent). Of these, only 21 were confirmed with the remaining 18 names either being remitted to the HCs or deferred for later appointments. Interestingly, for both male and female candidates, the conversion rate from recommendation to elevation is the same, around 55 per cent: It would be tempting to conclude from this that the all-male SC collegium is immune to the gender of the recommended candidates. However, what it actually signals is that this body is simply not invested in correcting the prevailing gender disparity.

In the current scheme of things, the chances of female judges occupying decision-making positions, either as chief justices or as part of the HC and SC collegiums in significant numbers, is very bleak. Hence, the only way out of this vicious cycle is for the nearly all-male collegiums to go beyond their inherent biases and take affirmative measures to improve gender diversity on the bench. The HC collegiums should consciously recommend more female names for elevation and the SC collegium must consider such recommendations more favourably. Further, the female judges should be elevated early enough in their careers so that they make it to the collegiums and become decision makers (the average age of the 19 female judges elevated since October 2017 is 53 years).

Lack of gender diversity is not just a perception problem. It is seen to have a real impact on the manner of proceedings and the nature of the final verdict — as is evident in the present instance. Especially in the judiciary, gender diversity is a virtue in itself — it reassures litigants that diverse opinions are taken into consideration and re-instils their trust in the justice-delivery system. The present calamity in the judiciary, as unfortunate as it is, also provides an unprecedented opportunity to course correct on several accounts. Here's hoping the men in power have the wisdom to seize it.

***This article first appeared in the print edition on May 8, 2019, under the title 'No courts for women'. The writer is senior resident fellow, Vidhi Centre for Legal Policy, Karnataka. Inputs by Anamika Kundu and Alok Prasanna Kumar***

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