

Judicial Diversity in India: Promoting Women's Equal Participation in the Higher Judiciary

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Abstract: *The presence of diversity is an intrinsic characteristic of democratic nations. Nevertheless, in numerous democratic nations like India, the court fails to accurately represent the extensive variety of the country. The majority of judges in the Supreme Court and High Courts in India are males of the cisgender gender and belong to the upper caste. This leads to a uniform viewpoint on law and justice. Female judges and lawyers encounter systemic obstacles such as gender biases, prejudice, mistreatment, and inadequate institutional and infrastructural assistance. Moreover, the presence of caste, class, sexuality, and religious identity contributes to the existence of several dimensions of oppression that necessitate careful consideration. This study employs a critical analysis of several feminist perspectives to shed light on the structural and hidden biases that contribute to the underrepresentation of women in the judiciary. Subsequently, we propose implementing institutional reforms aimed at fostering the establishment of a more inclusive higher judiciary in India.*

Keywords: Gender diversity, judicial appointments, constitutional courts, gender stereotyping, women participation

I. INTRODUCTION

The Commission on the Status of Women (CSW) convened its 66th session from March 14th to March 25th, 2022. The primary aim of this session was to promote gender equality and empower women and girls, particularly in relation to policies and programs addressing climate change, environmental issues, and disaster risk reduction (Commission on the Status of Women Sixty-Sixth Session, Citation2022, p. 1). Conclusion 20 of the Agreed Conclusions acknowledges the significance of women's right to work in facilitating a fair workforce transition and the generation of high-quality employment opportunities aligned with nationally established development objectives (Commission on the Status of Women Sixty-Sixth Session, Citation2022, p. 5). In accordance with Conclusion 23, the Commission emphasized the importance of addressing enduring historical and structural disparities, stigmatization, imbalanced power dynamics between genders, detrimental societal norms, and gender stereotypes in order to achieve gender equality and empower women and girls (Commission on the Status of Women Sixty-Sixth Session, Citation2022, pp. 5–6).

Ensuring proper representation of women in the Indian judiciary is crucial for achieving the global objective of protecting women's right to work on an equal basis with men, while also eliminating gender stereotypes, biases, and prejudices. On a global scale, women make up 27% of the total number of judges, while in the South Asian region, the proportion of women judges is less than 10% (UN Women, Citation2011, p. 60). According to Justice Leila Seth, who became the inaugural female judge to be appointed to the Delhi High Court in 1978, and the first female Chief Justice of a High Court in Himachal Pradesh, she observed that following her inauguration, her male colleagues expressed a desire for her to assume responsibility for the tea arrangements during celebratory occasions (Press Trust of India, Citation2013, para. 7). Kiruba Munusamy, a first-generation Supreme Court lawyer, documented instances of prejudice she encountered as a Dalit woman in 2019. According to Munusamy (2019), the Judge expressed that the individual's haircut possessed greater appeal compared to their argument (para. 9). Both of these occurrences, despite being separated by a span of four decades, demonstrate the constrictive structure that regulates the Indian court, which is predominantly controlled by individuals from higher castes (Bej, Citation2017).

This paper posits that the judiciary in India is constructed around a framework rooted in Brahmanical patriarchy. Consequently, there persists a preference for upper-caste men in the selection process for judicial appointments,

resulting in a limited presence of women judges. This study examines the issue of judicial diversity within the framework of institutional obstacles encountered by women in the judiciary. The initial section provides an overview of India's judicial system, including the collegium structure, as well as the prevailing gender ratio within the judiciary. Next, we thoroughly examine the structural obstacles faced by women in the court, uncovering the absence of institutional backing and infrastructure, demoralizing stereotypes, and protocols for appointing judges that hinder women's participation and advancement in the judiciary.

The next section examines feminist perspectives on judicial gender diversity, utilizing legal precedents from India and other countries in the Global South to assess the contribution of female judges in advancing progressive and gender-responsive legal principles. The last segment of this essay provides suggestions for implementing more impartial criteria, transparent mechanisms, and the creation of adequate infrastructure to promote gender diversity in the judiciary.

It is imperative to underscore that gender, as a societal construct, is not limited by the traditional dichotomy between men and women, but rather encompasses a diverse range of identities and manifestations. Transgender and gender-variant individuals face systemic oppression, marginalization, and exclusion when it comes to judicial appointments. In India, the first transgender judge was recently appointed in a Lok Adalat (Chanda, Citation2017). There remains a notable absence in the representation of transgender and gender variant individuals within judicial establishments. This article largely focuses on cisgender women and the structural challenges they face, despite the use of the term gender diversity.

The procedure of appointing judges: ambiguous and capricious

On March 10, 2022, the inaugural International Day of Women Judges marked the inception of the Women in court/for Justice movement, which aims to advance gender equality within the court system. The forum attendees highlighted the significance of women as catalysts for fostering a judicial system that is characterized by fairness and equality. According to the Minister of Justice of Austria, Ms. Alma Zadic, the presence of a diverse judiciary contributes to the inclusion of various views and perspectives within the courtroom and in broader societal contexts. Abundant research demonstrates that diversity enhances the judiciary. Overcoming implicit biases and unconscious preconceptions is beneficial. According to the United Nations Office on Drugs and Crime (2022), women judges have played a pivotal role in making significant and innovative rulings aimed at addressing various manifestations of prejudice. The presence of women in the courts is essential for a fair and democratic society. Nevertheless, the intricate procedure of judicial appointment in India is a hindrance to this endeavor.

The court system in India consists of three tiers. The highest judicial body is the Supreme Court. According to Robinson (2014, p. 330), it is worth noting that every state within the country is equipped with a High Court. According to Singh (2012, p. 49), the High Courts and Supreme Court are constitutional courts, whereas district and trial courts primarily handle civil, family, labor, and criminal matters. The Indian independence movement advocated for the division of governmental and judicial powers, leading to the establishment of an independent judiciary (Constituent Assembly Debates, Citation1948a, Citation1948b).

The government branch held the major control over judicial nominations with the establishment of the Indian Supreme Court in 1950. The collegium system of judge selections was established by the Supreme Court in 1993. In the Supreme Court, the collegium is led by the Chief Justice of India and consists of the five most senior judges. The appointment of judges to the Supreme Court involves the consideration of names that are deemed appropriate, regardless of their association with the executive branch (Mahajan, Citation2021, para. 4). The supreme court implemented the collegium system as a means to safeguard judicial independence, although it has faced criticism due to its perceived lack of transparency (Abeyratne, Citation2016). According to Kumar (2016), the collegium is not obligated to provide information regarding the criteria used for judicial appointments or the rationale behind the selection of judges. The presence of systemic opaqueness and subjectivity gives rise to potential instances of nepotism and corruption (Ray, Citation2020).

Around 69% of judges in India are selected from the legal profession, while only 31% are appointed from the judicial services. Notably, prominent female litigators have faced prejudice, which hinders their ability to advocate for judicial positions (Ghosh et al., Citation2018, p. 15). Implicit biases have a substantial impact on gender balance, particularly in

relation to systemic gender biases that arise from policy makers' failure to acknowledge the distinct responsibilities of women, such as marriage and pregnancy. Additionally, judicial decision-makers may exhibit discretionary biases due to conscious or unconscious prejudices (Chouhan, 2019).

According to Ghosh et al. (2018), there is a noticeable decline in the presence of female judges when they transition from trial courts to higher courts. According to the data provided on the official websites of the Court (2019), Goa exhibits a 72% representation of women in trial courts, which are subordinate to district courts. However, the percentage decreases significantly to approximately 13% in Goa's High Court. According to Varghese (2022), as of May 2022, out of the total 713 High Court judges in the country, 94 (13.18%) are women. However, it is worth noting that there are 5 High Courts in the country where there is a lack of women judges on their bench. Critics of the collegium contend that there exists no substantial disparity in the proportion of female judges during the pre-collegium and collegium eras, suggesting that enhanced female representation might potentially transpire irrespective of the collegium framework (Chandra, Hubbard & Kalantry, Citation2019).

Until now, the nomination of women to the highest courts has been purely symbolic and lacking in practicality. Justice Ruma Pal, appointed as a Judge of the Supreme Court in January 2000, is an important example to mention. She became the third woman to be appointed to the highest court. If Justice Pal had not been sworn in after her male colleagues on the same day, she could have become the first woman Chief Justice of India. This was done to ensure that, according to the rule of seniority, she would retire as the second most senior judge while her male colleague would be sworn in as the Chief Justice of India. Moreover, the female candidates who have been promoted to the Supreme Court possess a limited duration of service, so hindering their capacity to make substantial legal contributions and attain membership in the collegium (Rajagopal, 222).

A study examining the impact of the appointment system on judges' characteristics found that women Chief Justices of High Courts in India have a slightly higher age of appointment compared to men (Chandra, Hubbard & Kalantry, Citation2019). This results in shorter tenures for women Chief Justices compared to their male counterparts. Out of the 11 female judges who have been appointed to the Supreme Court of India thus far, just two have possessed or will possess a tenure surpassing five years, which is the typical duration for a judge serving in the highest court. The apparent outcome of this inequality is seen in the instance of Justice B.V. Nagarathna, who was designated to the Supreme Court in August 2021 and is anticipated to become the inaugural female Chief Justice of India. In contrast to the majority of male justices of her time who have occupied the position, Justice Nagarathna's stint as Chief Justice will extend for a duration of slightly more than one month. The aforementioned disparity, in comparison to the mean duration of 1.5 years served by former Chief Justices of India (Rajamane, Citation2021), with the longest tenure being seven years and four months, highlights a significant constraint of tokenism in judicial appointments. This constraint impedes the implementation of any comprehensive systemic transformation. Hence, it is apparent that the collegium system alone is insufficient in promoting diversity.

The legal profession presents several structural impediments for women

The document titled "Progress of the World's Women: In Pursuit of Justice" by UN Women delves into the various injustices experienced by women. It elucidates the significance of achieving gender equality in both social and economic contexts, while also recognizing women as catalysts for transformative progress. The study emphasizes the tangible obstacles encountered by women, namely those who are the most disadvantaged (UN Women, Citation2011). According to UN Women (1979), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides a comprehensive definition of gender-based prejudice, encompassing actions that hinder women from fully exercising their rights. Hence, the lack of gender equality in the workplace, especially as it pertains to the governance of women's rights, becomes a manifestation of prejudice that necessitates rectification. India faces various structural impediments that hinder the achievement of judicial diversity. This section delves into the constraints associated with the appointment process, characterized by a lack of objectivity and its integration within the framework of Brahmanical Patriarchy, resulting in the systematic exclusion of women. Women from marginalized communities, including as Dalit, Bahujan, and Adivasi women lawyers, are particularly impacted by this issue. The absence of institutional support and infrastructure for women in the courts, as well as the influence of gender stereotypes, are additional structural hurdles that will be examined sequentially.

The absence of impartiality in the process of appointing judges

The lack of variety in judicial composition might be attributed to the procedures employed for the recruitment of judges at different levels of the court. According to a recent study, the selection of judges for lower positions is based on state-specific judicial service regulations (Chandrashekar et al., Citation2020, p. 2). According to the authors, around 75% of district judges are promoted either internally based on merit and seniority or through competitive examinations. Additionally, 25% of district judges are recruited directly from advocates who have at least seven years of experience. The greater participation of women in the lower courts can be attributed to the transparent techniques employed for the appointment of judges. This approach offers greater convenience and accessibility in comparison to the opaque process of appointing judges to the High Courts and Supreme Court of India (Chandrashekar et al., Citation2020, p. 10). In order to become a district judge, an individual must possess a minimum of seven years of experience as an advocate or a pleader. In the cases of *Sushma Suri v. Government of National Capital Territory of Delhi* (1999) and *Deepak Aggarwal v. Keshav Kaushik* (2013), the Supreme Court has provided an interpretation that equates to a period of seven years of uninterrupted practice. This practice exhibits bias since it neglects to acknowledge the societal expectation to engage in caregiving duties, hence rendering numerous female candidates ineligible owing to their marriage commitments, child-rearing responsibilities, and other domestic duties. Moreover, the absence of standardized protocols for the selection of judges gives rise to instances of bias and opposition to reform across many jurisdictions. Chouhan (Citation2019) contends that biases such as the "seniority norm" put women candidates at a disadvantage in the process of selecting judges. The concept of the "seniority norm" refers to a standard that signifies a preference for certain employees over others, taking into account their length of service. This implies that men who have worked as attorneys for a longer period of time are automatically granted certain jobs. The systemic exclusion of women from the judiciary can be attributed to a cyclical pattern in which the presence of predominantly male selectors, inherent in the selection process, hinders the inclusion of women. Additionally, the prevailing patriarchal biases among selectors contribute to their tendency to favor male candidates when making decisions. The caste, class, and indigenous identities of Dalit, Bahujan, and Adivasi women contribute to the compounding of systemic inequalities they experience. According to Kiruba Munusamy (Citation2018), nepotism and caste-based prejudice are prevalent in the judiciary, and first-generation Dalit lawyers encounter substantial bias.

Gender stereotypes and bias

The impact of gender stereotypes on the treatment of women by their colleagues is highlighted in a study from the Women and Judiciary Forum, which was hosted by the International Commission for Jurists in Geneva in 2013. Female judges experience several sorts of mistreatment, including harassment, gender-based bias, heightened public scrutiny and criticism, as well as gender-specific forms of intimidation. Female judges encounter instances of sexual harassment from their peers, particularly those in positions of authority (International Commission for Jurists, Citation2013, p. 6). Indira Jaising, the first woman to hold the position of Additional Solicitor-General in India and the first woman to be appointed as a senior advocate, recounted an incident in which she experienced sexual harassment from a male colleague in the corridors of the Supreme Court, despite her seniority and age (Mishra, Citation2016). In an open letter addressed to Justice Ranjan Gogoi, the former Chief Justice of India, Indira Jaising highlighted instances where a senior male lawyer derogatorily referred to her as "that woman," while referring to other male lawyers as "my learned friend" (Jaising, Citation2019, para. 9). Jaising urged the Chief Justice to address and eradicate sexist language within the courtrooms.

Women are often subjected to derogatory sexist statements that are often disregarded as jokes. Gender stereotypes that depict women as inept further impede the fairness of the legal process. Munusamy's plea for a one-day leave to menstruate was met with mockery. The senior counsel with whom she was collaborating advised her to resign and enter into matrimony. He further explained that this is the reason for his decision to refrain from hiring female juniors (Munusamy, Citation2019, para. 9). A.P. Shah, the former Chief Justice of the Delhi High Court, recounted a time when he suggested a female lawyer as a judge, but she was not chosen because to her perceived rudeness (Chowdhury & Shankar, Citation2019, p. 206).

Moreover, the proportion of women serving in the judiciary may not necessarily reflect the progress made in achieving gender equality, but rather it could be seen as a form of symbolic representation. Target 16.7 of SDG Goal 16 aims to

guarantee decision-making that is responsive, inclusive, and participatory at every level. The UN's SDG Indicator metadata for Goal 16 and Target 16.7 emphasizes the significance of achieving diversity in key national and local-level judicial positions to promote responsive, inclusive, and participatory decision-making by the judiciary. This includes addressing issues related to sex, age, disability, and population group status (UN Stats. SDG Indicator Meta data, Citation2022, p. 6). Nevertheless, a simple rise in figures, while suggesting advancements in addressing past prejudice, fails to acknowledge the presence of tokenism caused by institutional, cultural, and other limitations that impede women from exerting their authority in decision-making (UN Stats. SDG Indicator Meta data, Citation2022, pp. 6–7). If women are admitted into the judiciary without any efforts to address their structural needs and challenge the patriarchal society, it could impede their ability to make decisions.

Gender-sensitive regulations and quotas in India are insufficient to address the pervasive patriarchal attitudes and caste-based hierarchies that are deeply ingrained in the country's social structure. From an intersectional feminist standpoint, it may be argued that the legal system can be understood as a patriarchal institution that perpetuates caste-based and heteronormative norms, while also incorporating gendered stereotypes. It maintains its success by relying on a uniform group of male judges from higher castes.

Insufficient infrastructure

An investigation into the variables that contribute to the limited representation of women judges, particularly in the upper judiciary, uncovers substantial institutional obstacles. The absence of adequate infrastructure is a significant determinant in the dearth of gender-diverse courts. Due to the historical exclusion of women from the public realm, the court architecture exhibited a deficiency in providing the essential accommodations to address their distinct requirements.

According to Ghosh et al. (2018), the presence of gender-insensitive infrastructure, characterized by deficiencies like as non-functional toilets and absence of maternity leave policies, has resulted in women opting for business sector professions instead of pursuing long-term careers in litigation. Despite the lack of female representation, there is a lack of regular efforts to gather and disseminate fundamental statistics regarding the percentage of women judges at various levels of Indian courts. The devaluation of women's work and the lack of recognition of their expertise create an uncomfortable environment for women, both physically and mentally, within courtrooms. During a felicitation ceremony hosted by the Lady Advocates of the Supreme Court of India, Justice N. V. Ramana, the former Chief Justice of India, highlighted the impact of inadequate courtroom infrastructure on women. He observed that women were disproportionately affected by this issue, as only 22% of the 6,000 trial courts in the country had designated washrooms for women (Roy, Citation2021). An additional illustration of the disrespect for the interests of female lawyers and judges within courtrooms is evident in the lack of childcare facilities within court premises. According to Rajagopal (2022), the establishment of the first crèche on the premises of the Supreme Court occurred in 2018. This development was prompted by a public interest case, in which Senior Advocate Indira Jaising petitioned the court for the provision of a crèche within its premises, with the aim of providing support to working parents.

Various feminist ideas examine the challenges encountered by women in the public realm, focusing on their navigation of the legal system. Feminist legal analysis elucidates the exclusion of women from the legal framework and highlights their potential to enhance the system by promoting complete equality and representation. The subsequent part delves more into the feminist conversation around women in the judiciary.

II. CONCLUSION & SUGGESTION

Based on the preceding sections that analyze obstacles to the appointment of women judges in the Indian judiciary, it is evident that institutional barriers, systemic biases, stereotypes, and opaque appointment procedures hinder women from being appointed and promoted in judicial services on equal footing with their male counterparts.

The 66th session of the CSW recognized that the simultaneous presence of many types of prejudice and exclusion impedes women's complete engagement and influence in public affairs. It is imperative to eradicate prejudiced practices, detrimental societal norms, and gender stereotypes. Citation2022, pp. 5–6. Commission on the Status of Women, Sixty-Sixth Session. The inclusion of women, especially those from marginalized backgrounds, in the judiciary necessitates a reorganization of the legal system, which primarily favors the most advantaged individuals in

society. Goals 5 and 16 of the Sustainable Development Goals (SDGs) aim to attain gender equality by ensuring the complete involvement of women and promoting equal chances for leadership across all levels of decision-making processes that are responsive, inclusive, and participatory. These goals are specifically outlined as Targets 5.5 and 16.7 of SDG Goals 5 and 16, respectively. This section presents suggestions that can help achieve these objectives, elucidating measures that will guarantee gender diversity within judicial institutions in India.

Our initial suggestion pertains to the necessity of implementing more impartial benchmarks in the selection criteria. The persistence of gendered attitudes and stereotypes in judge nominations is apparent. In order to increase the representation of women in high positions within the court, it is imperative to modify the judicial selection process to ensure objectivity. This entails giving appropriate consideration to the competence and talents of individuals, irrespective of their gender. It is imperative to acknowledge the intersectional obstacles that marginalized women may face in their pursuit of advancement within the judiciary, which are influenced by their caste, class, and religious identities. According to the SDG indicator for Target 16.7, Goal 16, in order to address intersectional barriers, groups that are disproportionately underrepresented may be granted temporary special measures, such as representation quotas (UN Stats. SDG Indicator Meta data, Citation2022). The aforementioned approach is supported by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which asserts that temporary special measures, such as quotas, should not be regarded as a type of prejudice, as its primary objective is to attain gender equality (UN Women, Citation2011). Implementing affirmative action initiatives has the potential to significantly reduce the negative effects of the "leaking judicial pipeline" (Ray, Citation2020, para. 18) and facilitate the advancement of more female judges from lower positions to higher courts or from the legal profession. It is imperative to establish affirmative policies within the legal education sector in order to promote diversity and inclusion within professional environments.

Furthermore, in order for the judiciary to achieve gender diversity, it is imperative that it implements a more open system of appointment. The judiciary in South Africa has undergone a transformation due to the incorporation of racial and gender diversity, as well as disability and queer diversity, to a lesser extent (Andrews, 2006, p. 566). The South African judiciary is structured in accordance with the constitutional vision established after the end of apartheid. According to Andrews (2006, p. 567), the Judicial Services Commission (JSC) has expressed that its objectives of diversity and representation extend beyond mere efforts to augment the presence of black individuals and women in judicial positions. The transparent procedure of soliciting nominations from a diverse array of legal entities, along with the openness of the interview process to the public and media, fosters accountability and facilitates public participation. Recent research indicates that the involvement of civil society organizations in advocacy efforts may have a positive impact on the number of women candidates nominated for judicial positions (Albertyn&Bonhuys, 2015). The Indian judiciary places significant importance on the transparent process, as it must consider the diverse aspects of gender, sexuality, caste, and class, among other factors.

The third proposal is based on the recognition that the court, in its present state, imposes limitations on women's prospects for professional growth due to a lack of necessary infrastructure and institutional backing, which hinders the establishment of a more gender-inclusive bench. The regulations concerning the transfer of judges and the criteria for appointing judges, such as the length of their practice and age, indicate a noticeable deficiency in the institutional comprehension of the gender-specific obligations that women are expected to undertake. The lack of essential infrastructure like as childcare facilities, restrooms, and sanitary facilities exacerbates the challenges faced by women in the judiciary. Women experience higher levels of prejudice and mistreatment in the professional environment, as defined by CSW66 as "hindrances to women's complete and efficient involvement and influence in public affairs... [The commission] acknowledges and appreciates the variety of circumstances and conditions faced by women and girls, and acknowledges that certain women encounter specific obstacles to their empowerment" (Commission on the Status of Women Sixty-Sixth Session, Citation2022, p. 5). Hence, it is crucial to implement institutional reforms pertaining to selection and transfer rules that consider the unique conditions of women in the legal profession. These reforms should also acknowledge the distinct experiences of women, taking into account their intersectional backgrounds. This necessitates the incorporation of gender mainstreaming into policy creation, in order to effectively address the requirements of female judges from various backgrounds. Moreover, it is imperative for the government to implement

strategies to enhance the infrastructure, encompassing health, sanitation, and childcare amenities within courts, in order to guarantee that perks such as maternity leave are readily available to female judges.

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