

Study on Feminist Discourse of Judicial Gender Diversity

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Abstract: *A feminist perspective on the legal system places importance on the viewpoints of women and marginalized communities. Numerous scholarly conversations revolve around the subject of judicial diversity, wherein a critical examination is conducted to assess the potential impact of augmenting the representation of women in the judiciary on the justice system. Feminist arguments can be broadly classified into three categories, namely "Difference Theory," "Equality Theory," and "Intersectional Theory." In the subsequent section, we will analyze the difference theory approach and the equality theory approach separately, utilizing their respective scholarly perspectives, while also critically evaluating each approach.*

Keywords: Judiciary system, gender diversity, women, theory, equality, feminism, appointment

I. INTRODUCTION

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. Numerous scholarly conversations revolve around the subject of judicial diversity, wherein a critical examination is conducted to assess the potential impact of augmenting the representation of women in the judiciary on the justice system. Feminist arguments can be broadly classified into three categories, namely "Difference Theory," "Equality Theory," and "Intersectional Theory." In the subsequent section, we will analyze the difference theory approach and the equality theory approach separately, utilizing their respective scholarly perspectives, while also critically evaluating each approach. Difference theory places emphasis on the empathy and community-oriented values of women judges, but Substantive Representation theory posits that women judges assume the role of prominent representatives of their respective social classes. Equality posits that legal structures that comprehensively include women are characterized by greater objectivity. A judicial of this nature accurately represents the experiences of all individuals.

Difference theory

Carol Gilligan's Different Voices Theory, proposed in 1992, posits that men and women exhibit distinct methods to moral thinking. When faced with moral issues, men employ a "ethic of justice" that focuses on autonomy (Gilligan, Citation1993). In contrast, women often employ a "ethic of care" as a means of addressing moral quandaries, placing emphasis on their obligation towards others. Difference theory posits that women judges contribute a "feminine perspective" to the process of judging within the legal system. They engage in the conceptualization of issues before courts and employ a specific feminine approach to resolving disputes. In his work, Wei (2021) provides a more comprehensive analysis of difference theory within the Asian setting. Wei observes that criminal law is commonly associated with masculinity. According to Wei (2021), female judges commonly utilize mediation as a favored approach for resolving disputes, so promoting reconciliation between involved parties and pursuing reparation for the victims (p. 356). The investigation conducted by Wei aligns with Gilligan's theory that women place a high priority on communication. In addition, female judges frequently decline to facilitate rape claims, citing their comprehension of the challenges survivors encounter in establishing communication with offenders. The aforementioned compassionate and

feminine perspective serves as a response to the lack of sensitivity towards rape survivors within the wider legal framework, while also advocating for individuals who have experienced gender-based and sexual assault (Wei, Citation2021, p. 360). According to Srimati Basu (Citation2012), in the Indian context, alternative dispute resolution techniques are perceived as having a higher likelihood of yielding good solutions for marginalized individuals. This perspective is frequently based on the recognition that mediation serves as a feminist alternative to the adversarial system, which is typically influenced by patriarchal ideologies (Basu, 2012, p. 472).

Difference theory places emphasis on the empathy and community-oriented values of women judges, but Substantive Representation theory posits that women judges assume the role of prominent representatives of their respective social classes. According to Chandrashekar et al. (2020), their efforts are focused on promoting class protection through direct litigation, with the aim of advancing the interests of women (p. 2). This leads to instances where female judges display distinct behaviors compared to male judges, particularly in matters pertaining to "women's issues," where policies will have an influence on women. Substantive representation, when applied to the legal system, posits that female judges will advocate for the interests of women and demonstrate a propensity to act in their best interests. Justice Leila Seth, a delegate of the 15th Law Commission of India (1997–2000), put out suggestions to modify the Hindu laws pertaining to succession, with the aim of conferring equitable inheritance rights upon daughters in relation to ancestral property (The Wire Staff Citation2017). In 2005, the Hindu Succession Act of 1956 underwent amendments based on the proposals put forth by Justice Seth. This amendment effectively removed the prior provision that prohibited daughters from inheritance.

Empirical research have provided additional support to the hypothesis of differential judging based on gender, revealing outcomes that deviate significantly from initial expectations. In 1994, Songer elucidated that at first, numerous social scientists had the expectation that women serving on the federal bench in the United States would render liberal rulings. This expectation, when coupled with prevailing cultural norms, would result in variations in judicial conduct (Songer et al., Citation1994). Nevertheless, the inclusion of female judges does not automatically result in distinct conduct, as evidenced by the rulings in several consequential constitutional disputes in India. In the case of Indian Young Lawyers' Association v. The State of Kerala (Citation2018), Justice Indu Malhotra served as a female justice on the bench. The court, in the case of Indian Young Lawyers' Association v. The State of Kerala, upheld the right to gender equality in worship. It ruled that women of all ages are allowed to enter the Sabarimala Temple. However, Justice Malhotra, a female judge on the bench, disagreed with this decision. Justice Malhotra argued that the court should respect a religious denomination's right to govern their internal affairs, regardless of the rationality or logic of their practices. Justice Malhotra's position in the Sabarimala case was subject to criticism by feminists who argued that she failed to acknowledge the impact of patriarchal structures on the development of religious practices. This oversight perpetuates a "ideological hegemony" within religious communities, leading to the subordination of women (Roy & Singh, Citation2018, para. 9).

Difference theory presents a compelling argument for the inclusion of women in the judiciary, yet it is entangled in contradictory reasoning. Critics contend that the application of difference theory can either bolster or undermine feminist objectives. Throughout history, the exclusion of women from public life has been justified based on perceived "differences." It is important to acknowledge that this reasoning might strengthen gender norms, confining women to addressing "women's issues" and punishing women who deviate from expectations. The main criticisms of this concept encompass its tendency to perpetuate specific "feminine ideals," its failure to acknowledge substantial variations among women, and its neglect of the limitations on the socialization of women legal professionals. Basu (2012) contends that women in Indian family courts frequently face the risk of being subjected to the judges' leniency, which is not always devoid of the anticipation of traditional gendered conduct. Moreover, it standardizes the classification of "women," asserting that all women are distinct from all men, thereby establishing a clear division. Intersectional theory challenges the dualistic perspective by acknowledging that a group of marginalized individuals encompasses multiple social positions, such as caste, race, religion, sexuality, and socio-economic status. The arguments in favor of judicial diversity are sometimes presented in terms of equality representation rather than difference theory, which is considered to be more persuasive.

Equality Theory

The notion of Equality posits that legal structures that comprehensively include women are characterized by greater objectivity. A judiciary of this nature accurately represents the experiences of all individuals. According to Aura-Odhiambo (2018, p. 59), the inclusion of women in the judiciary contributes to the generation of gender-sensitive judgments and the establishment of gender-sensitive judicial procedures. Indian feminist scholars, such as Ratna Kapur, contend that a comprehensive approach to equality can effectively tackle instances of prejudice at the individual, institutional, and systemic levels. They assert that the focus should not be on comparing similarities and differences, but rather on identifying and addressing structural disadvantages (Kapur & Cossman, Citation2022).

Recent research indicates that female judges in the United States exhibit a higher propensity to deem regulations impacting homosexual rights as unlawful in comparison to their male colleagues. The aforementioned theory pertains to the comprehension of gender roles and sexual orientation among women. According to Smith (2005), women are known to exert a moderating influence on panel judgments. Although no such trends were found in the Indian judiciary, Justice R. Banumathi's ruling in Mukesh v. State for NCT of Delhi emphasized the significance of gender awareness, even among young children, instead of implementing strict laws and penalties for crimes against women. This approach aims to prevent a rise in such crimes by addressing their underlying causes (Mukesh v. State of NCT of Delhi, p. 373, 2017). The significance placed by Justice Banumathi on the attainment of gender justice through "attitudinal change and change in mindset" within our culture, which is deeply entrenched in tradition (Mukesh v. State of NCT of Delhi, Citation2017, p. 521), demonstrates that female judges extend the scope of the judicial narrative beyond the confines of criminality.

In accordance with Goal 16 of the Sustainable Development Goals (SDGs), the United Nations Development Programme (UNDP) endeavors to advance representative and participatory decision-making, while also advocating for equal opportunities for women's involvement in political processes and institutions. According to the UN Stats. SDG Indicator Meta data (Citation2022, p. 6), the presence of diversity in judicial posts enhances the responsiveness of judicial decisions to the interests of the entire public. One could argue that an increased level of diversity among the bench has the potential to impact the decision-making process of tribunals, as judges possess a wider array of policy opinions. According to Escobar-Lemmon et al. (2021), the presence of different benches challenges conventional patriarchal standards, hence highlighting the necessity for the court to accurately reflect the gender makeup of society (p. 665).

The significance of including marginalized identities in the judiciary is reiterated in a 2014 report published by the International Commission of Jurists. The report highlights that a greater presence and increased visibility of women judges can enhance women's inclination to pursue justice and assert their rights through the judicial system. Furthermore, the report emphasizes that a greater diversity within the judiciary enhances and reinforces the capacity of judicial reasoning to encompass and address diverse social contexts and experiences (International Commission of Jurists, 2014, pp. 20–21). According to Chandra, Hubbard, and Kalantry (2019), the presence of a diverse bench of judges with a range of life experiences enhances the quality of judicial rulings. The case of State (Government of NCT of Delhi) v. Pankaj Chaudhary (Citation2018) exemplifies the verdict rendered by Justice R. Banumathi and Justice Indira Banerjee, the all-female panel of the Supreme Court. The two female judges noted that the assertions that the complainant in the case had a "habitual inclination towards sexual intercourse" and possessed a "easy virtue" did not imply that she was a "woman of loose moral character." Nevertheless, she retained the entitlement to decline engaging in sexual intercourse. This particular case holds significance due to the fact that in a comparable scenario, a panel consisting of two male Supreme Court justices exonerated the defendant. The judges noted that the victim had a history of engaging in sexual intercourse and that her decision to reside apart from her spouse, among other factors, contributed to the prosecution's inability to substantiate their argument (Ray, Citation2020).

The inclusion of female judges fosters a sense of unity in instances of gender-based violence. Justice Gita Mittal, one of the writers, shown solidarity in the case of Virender v. State of NCT of Delhi (Citation2009), where she highlighted the procedural obstacles that victims of sexual violence, especially minors, have when seeking justice. The individual implemented measures to simplify the protocols for reporting incidents of sexual assault and later took the lead in establishing the Vulnerable Witness Court Project with trial courts in Delhi. Justice Mittal subsequently implemented

nationwide training and awareness initiatives targeting judicial officers, members of the Bar, and court personnel at Vulnerable Witness Deposition Centres (Footnote8).

Certain critics contend that the presence of women judges does not ensure feminist rulings, as gender does not serve as a substitute for feminism. According to Dixon (2009), there is a belief that male feminist judges exhibit superior performance in terms of good judicial outcomes and feminist legal reasoning compared to their female counterparts (Dixon, 2009, pp. 1-3). Moreover, queer theory provides evidence that the concept of identity does not lead to liberation (Butler, 1988, p. 530). Nevertheless, the theory of equality raises the inquiry as to why there is a need for justifications regarding the inclusion of a specific demographic that is currently underrepresented, despite their inherent democratic entitlements. Regardless of whether women actively contribute to establishing a workplace that is inclusive of both genders or if caste oppressed women refrain from making judgments in support of anti-caste politics, their right to be included in the judiciary remains unaffected. Arguments positing that the incorporation of marginalized individuals is contingent upon their contribution to "the quality of justice" seek to substantiate the worth of a particular group in order to rationalize their inclusion. Conversely, the criteria of personhood and citizenship should serve as inherent reasons for inclusion within the judiciary.

Intersectional feminism

The concept of intersectionality, originally introduced by Kimberlé Crenshaw, a Black feminist scholar, in 1989, pertains to the manner in which many forms of oppression intersect with one another (Crenshaw, 1989). In the context of India, several demographic factors such as gender, class, indigenous status, caste, religion, and sexuality have the potential to cross. Intersectionality recognizes that the experiences of women cannot be standardized, as they encounter unique social obstacles due to the intersection of their race, socioeconomic status, caste, religion, and gender, among others. The social position of Dalit women as "outsiders within" shapes their unique social, economic, and political circumstances. This perspective can contribute to a more sophisticated approach in tackling the matter of gender diversity in the judiciary. By developing solutions that acknowledge the interconnected experiences of marginalization, a more nuanced approach can be adopted.

Numerous academics have posited that caste constitutes an implicit determinant that impacts the probability of securing a judicial position (Saxena, Citation2021, para. 3; Tannvi & Narayana, Citation2022, p. 3). As an illustration, there exists an implicit percentage allocation specifically designated for Brahmins. According to Saxena (2021), a total of 14 Chief Justices of the Supreme Court, who were appointed by April 2021, belong to the Brahmin caste. A former Solicitor General observed that during the course of 70 years, the Supreme Court had only a single Chief Justice who belonged to the Dalit community. This statement highlights the fact that the Dalit population is not adequately represented in the composition of our judiciary (Shah, Citation2021, para. 6). Among the eleven female judges who have been appointed to the Supreme Court, it is noteworthy that nine of them are predominantly Hindus from the ruling caste, while the remaining two justices are affiliated with Christian and Muslim communities. This demonstrates the heightened obstacles that Dalit women judges encounter as a result of the combined prejudice stemming from their gender and caste identities.

The significance of Dalit and Adivasi representation in the Supreme Court for the welfare of these marginalized communities has been asserted by Bej (Citation2017). While there is a lack of available statistics regarding the caste identities of women nominated to the judiciary, it can be inferred that Dalit women are predominantly marginalized.

Applying the principle of intersectionality to judge nomination would give priority to individuals who are marginalized. The judges would render judgments that encompass the various dimensions of oppression experienced by Dalit and Adivasi women, while also mitigating the adverse effects of the "private upper caste justice system." They would adopt an intersectional perspective in their decision-making process. Hence, a judiciary that embraces diversity acknowledges the significance of intersecting experiences and identities, so acknowledging the intricate and multifaceted dimensions that shape an individual's existence. According to Baudh (2017, p. 222), the lack of judges who embody the perspectives of the "queer subaltern" (Akali, Citation2016, p. 125), which encompasses Dalit and working-class queer individuals, results in the perpetuation of violence and prejudice experienced by doubly marginalized queer individuals, specifically Dalit and Adivasi individuals, as well as impoverished transgender individuals. According to Semmalar (2014, pp. 19, 24–25), the Supreme Court's ruling in National Legal Services Authority v. Union of India

(Citation2014) resulted in the classification of all transgender individuals as socially and educationally backward classes within the broader category of Other Backward Classes (OBCs). However, this decision failed to acknowledge the caste identities and experiences of Dalit & Adivasi transgender individuals.

Merely prioritizing the selection of female judges is insufficient in achieving genuine judicial diversity (Bonhuys, 2015, p. 129). The application of an intersectional framework provides insight into the intricate dynamics of marginalization and domination, necessitating the categorization of women into specific groups (Bonhuys, 2015, p. 144).

II. CONCLUSION

An investigation of the relationship between judicial diversity and the appointment of women in the judiciary highlights the complex dynamics that hinder the participation and advancement of women in this field. The judicial appointment of women is plagued by intersectional structural issues, which are further exacerbated by variables such as a lack of impartiality in assessing merit, nepotism, and caste-based bias. The collegium system of nominations is inadequate in promoting diversity, necessitating broader reform on a larger scale.

There exist compelling justifications for the augmentation of judicial diversity. One aspect to consider is the concept of democratic legitimacy. Ensuring equal participation of women and marginalized individuals fosters the perception that judicial panels are impartial and equitable, hence fostering confidence among minority groups that their concerns will be taken into account. The recognition of judicial diversity as a public benefit is a crucial measure in understanding the nature of law as a product of human rationality, influenced by experiential, ethical, and cognitive factors. Although there is no assurance of feminist judges being appointed, judicial appointments that challenge the uniformity of the court represent positive progress. These appointments challenge the belief that judging is a profession dominated by men from powerful socioeconomic groups. The judiciary operates under the fundamental values of equality and justice, and the upholding of these ideals by the judiciary serves to enhance the legitimacy of the law.

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