

Study on the Appointment of Female Judges in India with Reference to Structural and Discretionary Bias

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Abstract: *The presence of gender bias in the recruitment process at various levels of the judiciary, whether it is explicitly stated or implied, has significantly contributed to the imbalanced female representation in the upper Indian judiciary. Drawing upon empirically gathered qualitative data, the bias manifests itself in two distinct forms: Structural bias and discretionary bias. The concept of structural bias pertains to the biases that are inherent in judicial selection policies. Firstly, there is the unspoken "seniority norm" within the Supreme Court, which exhibits a preference for appointing the most senior High Court judges to the highest court. Secondly, there is the "transfer policy" at the lower judicial level, which implicitly promotes gender bias by prohibiting the appointment of judges at their own place of residence or that of their spouse. Discretionary bias encompasses the gender-biased biases that are implicitly exhibited by judicial decision-makers, which are influenced by their conscious or unconscious preferences. It may be inferred that the primary factor contributing to gender-biased appointments is the failure of policymakers and decision-makers to adequately acknowledge the distinct roles and duties that women assume in terms of parenting and marriage, as well as the absence of equitable distribution of tasks among their spouses*

Keywords: Women judges, India, prejudice, appointments, Structural bias, Discretionary bias

I. INTRODUCTION

Gendered judicial appointments serve as a manifestation of such biases. At present, the representation of women in the lower/subordinate judiciary is below 40%, while their presence in the High Courts and the Supreme Court is under 10%.

This study investigates the enduring gender biases inside the Indian judiciary. This Note exclusively examines the issue of gender bias in judicial appointments. However, the empirical research conducted aims to explore two overarching concerns:

- (1) the determinants contributing to an imbalanced gender representation in the higher Indian judiciary; and
- (2) the potential influence of judge gender on the judicial decision-making process or case outcomes.

In order to achieve this objective, interviews were carried out with a total of nineteen retired judges from the Bombay and Delhi High Courts. Out of the total number of judges represented, seven were affiliated with the Bombay High Court, consisting of four males and three females, and the remaining twelve judges were affiliated with the Delhi High Court, comprising six males and six females.

Gender bias is evident in appointment policies at many levels of the judiciary, both through explicit and implicit means. Explicit bias refers to behaviors and actions that clearly demonstrate the presence of bias. Implicit bias, on the other hand, refers to the impact of certain behaviors. As social norms have changed, many explicit displays of sexism are now considered unacceptable. As a result, policies and behaviors have become more and more gender-biased. The prevalence of deep-seated prejudices and stereotypes is typically concealed by rules and social conventions, and many persons are ignorant of their existence or impact. However, the presence of these biases can be observed by continuous examination of social and empirical facts.

Through the utilization of empirically collected quantitative and qualitative data, this study posits that gender bias manifests itself in two distinct forms: Structural bias and discretionary bias. This note aims to emphasize the prevailing

absence of empathy and awareness regarding the distinct challenges faced by women in the context of marriage and motherhood, which are identified as the main factors contributing to their limited presence within the Indian court.

Structural prejudice

Structural prejudice refers to the inherent biases present in judicial-selection policies that excessively benefit certain candidates at the expense of others. The rules in question exhibit inherent prejudices that are rooted in social stereotypes pertaining to several categories, including gender, caste, class, color, ethnicity, and age. These biases are evident in both overt and covert manifestations. At the Supreme Court (referred to as "SC"), the "seniority norm" is an unspoken criterion for appointing the most senior High Court (referred to as "HC") judges to the highest court. This norm restricts the promotion of women judges. At the lower judicial level, the judicial transfer policy, which prevents a judge from being appointed to their place of residence or that of their spouse, is implicitly biased towards gender by neglecting to take into account women's gendered responsibilities in the private sphere.

Discretionary bias arises from the exercise of authority by those responsible for making judicial appointments. These biases operate autonomously from any structural obstacles, whether they are explicit or implicit, and are influenced by the apprehensive or subconscious inclinations of the appointer.

This Note incorporates the concept of intersectionality into its research of structural and discretionary gender bias. Intersectionality acknowledges that women possess several identities and may encounter oppression from various sources in distinct ways. Various socio-economic, cultural, religious, or sexual-orientation identities can potentially reduce the vulnerability of certain women to instances of prejudice or unequal access to opportunities and treatment. The susceptibility to bias is found to be lower among women from urban, higher-caste, higher-class, educated, and legal origins compared to women from rural, lower-caste, lower-class, illiterate, and non-legal backgrounds.

The Note aims to challenge and address the prevailing notion that judicial-appointment and transfer practices are gender-neutral. The lack of awareness among society regarding gender prejudice in judge nominations stems from two separate origins. To begin with, the presence of institutional gender bias contradicts our belief in the legal system as the ultimate embodiment of justice. Furthermore, the current implementation of facially gender-neutral appointment policies raises concerns regarding the presence of gender bias. This Note is divided into three sections. Part II outlines the research methodology employed in the Note. Section III commences with a historical account and delves into the existence of explicit structural obstacles in the realm of judicial nominations, which effectively barred the participation of women. Subsequently, it delves into hidden structural obstacles in the shape of a "seniority norm" inside the Supreme Court and a "transfer policy" within the lower judiciary, which inherently put women at a disadvantage due to their distinct gender-based duties. Part IV explores the extent of authorities' subjective prejudice when selecting judges, resulting in appointments that are typically influenced by gender bias. This note underscores the significant societal and women-specific costs associated with this issue. It concludes by emphasizing the importance of raising awareness among various stakeholders about diverse gender perspectives. Furthermore, it highlights the urgent necessity to redefine the existing, conventional methods of selection and transfer in order to effectively address the social realities faced by women.

Structural bias

This section posits that the presence of institutional gender prejudice throughout various judicial tiers in India, whether manifested via explicit or implicit means, has impeded the involvement of women in the judiciary. This section examines the progression of gender-based structural obstacles in India, beginning with Cornelia Sorabjee's struggle to become the first female law graduate in both India and England. While stated legal barriers to women's involvement have been eliminated due to the advancement of the rights viewpoint, which advocates for equal rights for women, gender biases continue to exist in implicit ways that impede women's advancement in the court system.

This section initially examines empirically gathered statistical data that demonstrates the underrepresentation of women in the judiciary and Chief Justices of the High Courts. It contends that their smaller numbers result in reduced opportunities for advancement to the Supreme Court, considering the "seniority norm." By considering the interviews conducted, this data set will offer an insider's perspective on the matter. This comprehension will also aid in the identification of the components that influence gender representation throughout various healthcare centers. This

section subsequently demonstrates the latent gender prejudice inherent in the transfer policy at the subordinate judicial level, which stipulates that a judge cannot be appointed in their place of residence or that of their spouse.

This historical narrative demonstrates the utilization of judicial interpretations of legislative provisions as structural impediments to the inclusion and advancement of women in the legal field. These rules functioned as explicit structural obstacles, referring to rules and standards of admission that clearly exhibited bias based on gender. The judiciaries often argued that the lack of legislative intent to include women, as well as the historical underrepresentation of women in the profession, justified their ongoing exclusion. Although it is not within the scope of this Note to examine the role of gender in the decision-making process, an analysis of the mentioned cases cannot overlook the influence that the "all-male benches," whether Indian or English, likely had on the outcomes.

The elimination of institutional obstacles, coupled with the development of the rights perspective and the establishment of mechanisms to address prejudice, facilitated the increased participation of women in the Indian judiciary. However, it is important to note that bias did not totally vanish; rather, its characteristics underwent a transformation. Patriarchal attitudes and perceptions have undergone transformation; however, they have not completely disappeared. Gender bias is currently evident in hidden structural obstacles, such as the laws and practices governing judicial appointments that inherently favor one gender over the other. Implicit bias refers to the unconscious biases that individuals may not be aware of. These biases function without the individual's conscious awareness, intention, or knowledge. Consequently, individuals are unable to acknowledge and address their biases rooted in stereotyped attributes such as race, ethnicity, age, gender, and appearance. To effectively identify and mitigate their own biases, individuals must consistently critically examine their own societal beliefs in relation to social and empirical evidence.

The subsequent section delves into the intricate examination of hidden structural obstacles at the Supreme Court, specifically focusing on the "seniority norm." This norm refers to the implicit practice of appointing the most experienced judges from the High Court to the highest court. The existence of this seniority requirement can be attributed to the fact that the appointment authority of Supreme Court (SC) justices in India has predominantly relied on the Chief Justices of the High Courts (HCs) for the purpose of considering SC appointments since the country gained independence. Due to past prejudice, fewer women have attained esteemed positions, resulting in their limited exposure at the highest Court. The transfer policy of judges at the subordinate judicial level, which prohibits the appointment of judges based on their place of residence or that of their spouse, might be interpreted as an inherently gender-biased policy.

Seniority norms

In India, High Court judges constitute the main group for consideration in the recruitment of Supreme Court judges. Following the attainment of independence, the appointing authority has exclusively selected a mere eight judges from the Bar, out of a grand total of 194 Supreme Court (SC) judges. Although considerable importance is placed on the previous judicial experience of potential SC judges, it is not the sole determinant for their appointment to the highest Court. Additionally, the "seniority norm," an implicit judicial appointment norm that restricts the elevation of only the most senior High Court (HC) judges to the SC, is also a fundamental principle. The determination of seniority is based on the All-India High Court Judges' Seniority List. Due to the delayed participation of women in the legal profession, along with the cultural obligations associated with marriage and motherhood, there exists a lower probability of women attaining senior High Court (HC) judges and then being promoted to the Supreme Court (SC).

In the realm of women's representation within the Supreme Court (SC), it is imperative to take into account the patterns of appointment of female justices in the higher court. Despite Anna Chandy being appointed as India's first female High Court judge in 1959, it was not until 1989 that the appointing authority promoted Fathima Beevi, the first female judge, to the Supreme Court.

Dr. Chandrachud contends that the seniority norm excludes women as potential SC candidates, but an informal quota system addresses this imbalance by appointing women to ensure gender representation on the bench. One interviewee confirmed the existence of such a quota, stating that one or two seats are reserved for women on the SC. When asked if different criteria were used for hiring male and female judges, one of the senior female interviewees responded affirmatively, rhetorically questioning why judges like Indira Banerjee were not promoted.

Another female interviewee noted that women face greater challenges in achieving success compared to men. They must demonstrate their abilities in ways that make them more capable than men in similar positions, yet they are given fewer cases of social or political importance. Another female interviewee agreed with this assessment and also noted that female judges are sometimes not given administrative matters. The experiences of female judges often depend on the Chief Justice and the collegium. While some Chief Justices have supported their female colleagues, others have not. These factors collectively influence the appointment of women at various judicial levels and the subsequent determination of their hierarchy. It is crucial to recognize the influence of politics on the appointment process, where female judges who have greater executive connections may have a higher likelihood of being elected to higher courts. The seniority standard dictates that despite a woman's exceptional performance as a High Court judge, she may still be ineligible to become a Supreme Court judge. In addition, she must attain the position of Chief Justice of the High Court and possess a sufficient level of seniority on the All India High Court Judges' Seniority List to justify her consideration. While this principle is applicable to all judges, the distinct social and cultural status of women, as well as the unequal responsibilities of motherhood and marriage, contribute to a structural disadvantage for female judges.

Discretionary bias

The legal profession is widely regarded as one of the most esteemed occupations; the judiciary serves as the final recourse for individuals when all other institutions have proven ineffective. Consequently, it can be inferred that individuals anticipate the temples of justice to adhere to the identical principles that the courts delineate for the nation. Nevertheless, the courts have not consistently met this expectation in terms of gender neutrality in the nomination of judges. During my investigation into the matter, only six interviewees explicitly refuted gender bias in appointments (four male and two female). Additionally, seven interviewees denied gender bias by citing factors such as community/family background, legal background, or the role of the Chief Justice, which could potentially impact the judge's appointment (two male and five female). Furthermore, three interviewees (two male and one female) positively indicated the existence of gender bias. The three remaining interviewees, consisting of two males and one female, were unable to provide comments due to a limited understanding of the appointment criteria employed by various committees at different High Courts (HCs). The observation that only six out of nineteen judges were able to completely deny any gender bias in judicial appointments highlights the significance of this issue, as it suggests a lack of crucial confidence in the judicial appointment process by the judges who have played a crucial role in overseeing higher judicial institutions.

This research elucidates the functioning of gender bias in both explicit and implicit manifestations. Discretionary bias refers to the extent to which individuals exercise bias based on their conscious and/or unconscious preferences and will. The phenomenon occurs when an individual in a position of power demonstrates prejudice, regardless of any policy that is inherently biased, whether it is either stated or implied, within the boundaries of their decision-making authority throughout the process of making appointments. Regrettably, the presence of inherent prejudice in decision-making is not exclusive to the selection of judges, but also encompasses appointments that are peripheral to the operation of the judiciary.

According to a survey conducted in 2013, the Jindal Global Law School in India identified the presence of a "male dominant collegium," which refers to a collegium with a significant proportion of male judges, as a contributing factor to the declining appointment of women to higher judiciary positions. Additionally, the survey highlighted the lack of transparency in the appointment process as another hindrance.

There is also the existence of an informal quota of one or two women at the High Courts (HCs), while another mentioned the implicit and unspoken demand for female judges that affects appointments. There is the public belief that a male-dominated collegium does not choose female judges, whereas a female-dominated collegium would. Another senior female judge, although it is challenging to make generalizations about gender bias in appointments, stated that gender bias is contingent upon the head of the judiciary. The author noted that certain Chief Justices have shown significant support for women, while others have not exhibited the same level of support.

Gender-biased appointments may arise from the patriarchal perception of the profession, when those who deviate from the established or implicit societal norms are regarded as outsiders. Due to their distinct societal obligations in marriage and as moms, women are deemed outsiders as they are unable to meet judicial norms and expectations. The section on

the transfer policy of subordinate judges highlights the unintended consequence of women choosing to remain single. Furthermore, the presence of gender bias in appointments can be attributed to the limited gender diversity among decision-makers. This is because men in positions of authority often lack the valuable perspective of women, which allows them to consider the distinct social realities of the two dominant genders.

Judicial decision-makers must possess an understanding of the various methods through which they manifest their prejudices in order to prevent their occurrence. In the majority of instances, these prejudices can be attributed to the influence of societal stereotypes and conditioning. Currently, gender roles consider women unsuitable for the traditionally male-dominated legal profession. Curiously, the societal categorization of gender roles can also be reversed to ensure that appointments are made based on gender as a necessity. In other words, the demands of a particular situation or institution can influence the selection of a female or male judge. For example, Section 4(4)(b) of the 1984 Family Courts Act establishes a preference for women in the selection process of family court judges. One respondent emphasized that the Act's enactment in Andhra Pradesh and Maharashtra resulted in a need for female judges. The law was enacted due to the perception that family law was a traditionally gendered field of law that was only suitable for women. The legislation inspired the enlistment of ten unidentified female attorneys to serve as judges. From an intersectionality standpoint, additional factors that could expedite the selection of female judges include their legal expertise, community background, urban upbringing, and educational attainment. The interplay of these factors may potentially lead to enhanced prospects for certain women and facilitate their advancement within the judicial hierarchy.

The current imperative is to provide judges with training on gender stereotyping and role attribution, which results in an unfair advantage for males and a disadvantage for women. Several respondents emphasized the absence of judicial training prior to being promoted to the High Court, a concept that is theoretically present but not effectively implemented. One individual drew a comparison between the appointment process and the act of throwing Indophiles to the lion for certain judges. Consequently, given the potential for subjective prejudice that undermines the selection of judges, it is imperative to provide gender and comprehensive sensitization trainings for judges. Although the National Judicial Academy has partially implemented these trainings, there is a need to enhance the procedure even more.

II. CONCLUSION

Judges, being human beings, are equally vulnerable to sociocultural biases, just like any other individual. Policymakers and decision-makers who lack adequate training may exhibit both unconscious and explicit gender bias when appointing female judges. This could be attributed to a deficiency of contemplation and contemplation regarding, firstly, the historical challenges faced by women in accessing male-dominated establishments, and secondly, the prevailing inequitable societal responsibilities associated with motherhood and marriage, which are typically not shared by males across all economic classes.

Hence, given the significant societal ramifications of appointment bias, both in general and specifically for women, it is imperative to recognize gender bias and provide decision-makers with training to enhance their awareness of diverse gender viewpoints. Raising stakeholders' understanding regarding the adverse consequences associated with the work-life decisions made by women in our patriarchal culture will enable them to transcend the conventional boundaries of judicial appointments and legal profession regulations, which may not consistently assess merit. Hence, it is imperative to overhaul the existing regulations governing the appointment and placement of judges across all levels of the judiciary. Implementing this approach will not only assist the judiciary in adapting to the evolving social structure, but also guarantee the inclusion and representation of 50% of the nation's population in its highest judicial bodies.

REFERENCES

- [1]. Arijeet Ghosh et al., Tilting the Scale: Gender Imbalance in the Lower Judiciary, VIDHI CTR. FOR LEGAL POLICY 7 (Feb. 12, 2018), <https://vidhilegalpolicy.in/2018/02/12/report-on-gender-imbalance-in-the-lower-judiciary/>.
- [2]. Jerry Kang, Implicit Bias: A Primer for Courts, NAT'L CTR. FOR STATE COURTS 7 (2009), <https://www.ncsc.org/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kang1Bprimer.ashx.Id>.

- [3]. Abhinav Chandrachud, Age, Seniority, Diversity, FRONTLINE (May 3, 2013), <https://frontline.thehindu.com/cover-story/age-seniority-diversity/article4613881.ece>.
- [4]. Kang, supra note 5; see also Majda Halilovic' & Heather Huhtanen, Gender and the Judiciary: The Implications of Gender Within the Judiciary of Bosnia and Herzegovina, DCAF GENEVA
- [5]. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43(6)STAN.L.REV.1241-99(2017).
- [6]. Rano Devi Gupta, Advent of Women in the Profession of Law, ALLAHABAD HC, <http://www.allahabadhighcourt.in/event/AdventOfWomenInTheProfessionMrsRDGupta.pdf>
- [7]. The bench comprised of Lancelot Sanderson, C.J. Asutosh Mookerjee, W. Chitty, Teunon, and Ashutosh Chowdhury, JJ.
- [8]. In Re: Regina Guhav. Unknown, AIR 1917 Cal 161.
- [9]. In Re: Miss Sudhansubala Hazra v. Unknown, AIR 1922 Pat 269.
- [10]. The bench comprised of D Miller, C.J. B Mullick, and Prasad JJ.
- [11]. Respecting the Old, CHHATTISGARH HC,
- [12]. <http://highcourt.cg.gov.in/artical/barcouncil2013.pdf> (last visited Mar. 7, 2020). Sec. 9(3), Indian Bar Councils Act, 1926.
- [13]. Sen, supra note 28. See, e.g., supra note 18, 23.
- [14]. K Parameshwar & Medha Damojipurapu, The Pioneer from Travancore- Justice Anna Chandy, 42 THE INDIAN ADVOCATE: J. BAR ASS'N OF INDIA-WOMEN AND L. 212-222 (2018).
- [15]. Parameshwar & Damojipurapu, supra note 35, at 214.
- [16]. Former Judges, KERALA HC, <http://highcourtofkerala.nic.in/frmrjudges.html> (last visited Mar. 7, 2020).
- [17]. Rupsha Bhadra & Debroop Basu, Manu and the 'Muse', THE TELEGRAPH (June 4, 2016), <https://www.telegraphindia.com/entertainment/manu-and-the-39-muse-39/cid/1421377>.
- [18]. LIVE LAW (May 1, 2017), <https://www.livelaw.in/indias-first-female-supreme-court-judge-justice-fathima-beevi-turns-90/>.
- [19]. ABHINAV CHANDRACHUD, THE INFORMAL CONSTITUTION: UNWRITTEN CRITERIA IN SELECTING JUDGES FOR THE SUPREME COURT OF INDIA, 190-91 (Oxford Univ. Press 1st ed. 2014).
- [20]. GEORGE H. GADBOIS, JR. JUDGES OF THE SUPREME COURT OF INDIA 1950-89, 366-67, (Oxford Univ. Press 2nd ed. 2012).
- [21]. Mahalakshmi Pavani, *Lawyering, For Women, Is Not A Cake Walk!*, LIVE LAW (Mar. 10, 2019), <https://www.livelaw.in/columns/lawyering-for-women-is-not-a-cake-walk-143452>
- [22]. *Study for the Ministry of Justice in Northrhine-Westfalia, Germany*, in GENDER & JUDGING 145, 152-164 (Ulrike Schultz & Gisela Shaws., Hart Pub., 2013).
- [23]. PTI, Indu Malhotra First Woman Lawyer to Become SC Judge, THE ECON. TIMES (Apr. 26, 2018), <https://economictimes.indiatimes.com/news/politics-and-nation/indu-malhotra-becomes-first-woman-lawyer-to-become-sc-judge/articleshow/63916256.cms>.