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Dr. Rinu Saraswat

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Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

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More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.



Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

GENDER JUSTICE IN INDIA: AN ANALYSIS OF REPRESENTATION OF WOMEN IN HIGHER JUDICIARY

AUTHROED BY - VANITA SHARMA ¹

Abstract

In India the judiciary has been the custodian of individual rights, an interpreter of constitutional rights and the protector of the fundamental rights of the people of India. The Supreme Court of India and the High Courts have, from time to time, emphasized upon the sanctity of rights of individuals irrespective of the religion, race, caste or sex. One such right is the right of inclusivity at workplace. However, the higher judiciary comprising of the Supreme Court of India and the High Courts have fewer inclusivity vis-a-vis other workplaces. This is evident from the fact that the number of women judges in the High Courts are less than 15%. Further of the 34 Supreme Court Judges, only three are women. While women constitute half of the population, their representation at the highest level of justice delivery mechanism is meagre. Women are actively pursuing law as a career and making significant strides in the field. However, their participation at the higher level is significantly less. There seems to be a proverbial glass ceiling at the higher judiciary. This leads to several fundamental issues such as an absence of a female perspective on critical issues pertaining to women, which ultimately hampers gender justice. This paper seeks to highlight the respective issue of less inclusivity of women in the Bench of higher judiciary. The paper also aims to offer solutions to address the issue to make the Bench of the higher judiciary more inclusive.

INTRODUCTION

“Women belong in all places where decisions are being made. It shouldn’t be that women are the exception.”

This quote by Ruth Bader Ginsburg, a former Associate Justice of Supreme Court of the United States of America is a powerful statement and telling of the current state of judiciary in general and higher judiciary in particular in India. By higher judiciary, we mean the institutions established under the Constitution of India namely the Supreme Court and the High

¹ Ph.D. Research Scholar, Himachal Pradesh National Law University, Shimla.

Courts operating in India.

In India, the judiciary has been the custodian of individual rights, an interpreter of constitutional rights and the protector of the fundamental rights of the people of India. The Supreme Court and High Courts in India have, from time to time, emphasized upon the sanctity of the rights of individuals irrespective of the religion, race, caste or sex.

One such right is the right of equal representation of all the genders in the social, economic and political sphere. We, as a society have grown a lot in achieving the gender justice under the broad theme of human rights, still there are a lot of spaces where we cannot say satisfactorily that we have reached the pinnacle of gender justice. For example, the representation of women in the legislature and judiciary of India.

The number of female judges in the High Courts of India are less than 15%.² Further, of the 34 Supreme Court Judges, only three are women. Females nowadays are actively pursuing law as a career and have been making significant strides in the field. However, their participation at the higher level is significantly less.

This leads to several fundamental issues such as the absence of a female perspective on critical issues pertaining to women, which ultimately impacts to ensure gender justice. Further, having lesser women at the Bench of higher judiciary acts as an impediment to the girls pursuing law as a career for whom it becomes a virtual glass ceiling.

Sometimes, there are instances where such matter is put up before the honourable High Courts and the Supreme Court which are gender sensitive and which require a female opinion not as a matter of fact or as a matter of law but purely as a matter of logic. We are not asserting that the want of a female justice in such matters impacts the decision making of the respective courts or hampers the principle of justice, equity and good conscience. But, having the opinion only adds to the richness of the *obiter dicta* of the judgement.

This paper seeks to highlight the reasons for such lack of representation, its impact on

² Only 107 of 788 Sitting High Court Judges are Women, available at: <https://www.google.com/amp/s/www.scobserver.in/journal/only-107-of-788-sitting-high-court-judges-are-women/amp/> (last visited on March 17, 2025).

the decision making and aims to advocate for a gender diverse judiciary in India. This paper also attempts at forwarding certain solutions at the level of individuals as well as at the level of the policymaking to make judiciary inclusive in character.

NEED OF WOMEN IN HIGHER JUDICIARY

The presence of women in the judiciary, especially higher judiciary has been a recent phenomenon around the world. Florence Allen became the first woman to serve on a federal bench in 1922 in Ohio state in United States of America. Similarly, Elizabeth Lane became the first female English High Court Judge in 1965. Recently, Republic of South Africa got its first female Chief Justice of the Supreme Court Mandisa Maya.³

Similar developments have taken place in India, which can be traced back to early 20th century. In 1937, Justice Anna Chandy became the first female judge of India. She also had the distinction of being the first woman Justice of an Indian High Court on February 9, 1959; when she became a judge in the Kerala High Court.⁴ In 1991, Justice Leela Seth became the first Chief Justice of an Indian High Court when she was sworn in as the Chief Justice of the High Court of Himachal Pradesh.

While these instances are empowering and encouraging, not much has been achieved in increasing the number of women on Indian Benches especially Benches of the High Court and the Supreme Court. As of September 2024, the Supreme Court of India has only two female Justices- Justice B.V. Nagarathna and Justice Bela Trivedi. Further, there have been just eleven female Supreme Court Justices with the first being Justice Fatima Beevi in 1989. Also, the Supreme Court of India has never had a female Chief Justice. Though this is expected to end in a couple of years.

In terms of High Courts in India, there are many High Courts that are currently functioning without a female judge. Also, there are just two women chief justices of High Court in India namely Justice Sunita Agarwal of Gujarat High Court and Justice Kumari Ritu Bahri of Uttarakhand High Court.

³ South Africa Appoints First Woman Chief Justice, *available at*: <https://www.reuters.com/world/africa/south-africa-appoints-first-woman-chief-justice-2024-07-25/> (last visited on March 17, 2025).

⁴ Justice Anna Chandy: The pioneer from Travancore and India's first female judge, *available at*: <https://www.barandbench.com/columns/justice-anna-chandy-the-pioneer-from-travancore-and-indias-first-female-judge> (last visited on March 17, 2025).

As per the State of the Judiciary Report, women constitute as 13.4% of Judges in the High Court and 9.3% of the judges in the Supreme Court.⁵ With the nation as large as ours and the female population constituting almost 50%, these numbers are meagre. It is clear that we need more women in the higher judiciary.

But the question is why do we need women in higher judiciary? Why are we advocating a structural change in an institution that has been functioning perfectly for almost 75 years? What is wrong with the current system that needs to be changed? The answer is a lack of opinion. While it is true that the benches at all the courts of India, including the district courts are filled with people of legal prowess and knowledge, it cannot be denied that a female opinion, in the *obiter dicta* is sometimes missing.

Recently, *In Re: Alleged Rape and Murder of Trainee Doctor in RG Kar Medical College Hospital, Kolkata and related Issues*⁶ ; the Bench comprises of Chief Justice DY Chandrachud, Justice J.B. Pardiwala and Justice Manoj Misra. While there is no question on the legal acumen of the honourable judges, but an instance that concerns a woman and perhaps the most important issue of women in India, should have had a female in the Bench. The Court would nonetheless be impartial and deliver verdict on the trifecta of “Justice, Liberty and Good Conscience”, but having a woman in the bench would have provided an opinion which might go unnoticed or perhaps under-noticed by the male counterparts.

The situation becomes a little grim when one knows that there are a number of High Courts in India that are functioning without a female judge. This makes the justice delivery mechanism seem patriarchal and the body which must be the harbinger of equity and equality seems to be a little far away from these principles itself.

The constitution of India has made the Supreme Court and the High Court as the custodian of Fundamental Rights in India. The respective courts- that constitute the higher judiciary in India have, from time to time, interpreted the fundamental rights to make them inclusive to include almost all aspects of life and all the people.

⁵ Supreme Court of India, “State of the Judiciary A Report on Infrastructure, Budgeting, Human Resources, and ICT” ix (November, 2023).

https://main.sci.gov.in/pdf/CRP/15122023_082223.pdf.

⁶ SMW(CrI) 2/2024.

Although, there are certain matters that needs a female opinion as a matter of logic, if not as a matter of principle. For instance, in the landmark case of *Vineeta Sharma v. Rakesh Sharma*⁷ whereby it was decided that a daughter can inherit the self-acquired property of her father, the Bench comprised of all male justices. Though the judgement pronounced was neither contrary to law or principles of justice, equity or good conscience; nor the non-inclusion of a female justice makes the decision any less authoritative. But, having a female opinion in *obiter dicta* could have been a welcome step.

Also, there are certain issues that are by nature gender sensitive. In the recent case of *A (Mother of X) v. State of Maharashtra and Another*⁸ which related to abortion, the Bench comprised of all male members, despite there being two women Justices in the Bench of the Supreme Court. Again, the decision given was not erroneous on any ground. However, not including the women judges in a matter intimately related to women and women rights does not seem rational.

Opinion of Justice Indu Malhotra, in *Indian Young Lawyers Association v. State of Kerala*⁹ is one of the most influential and significant view on gender relativity of religious rights. Despite the opinion being a minority judgement, the *dicta* pointed out significant issues when the court and the religious institutions alike, have to face when dealing with the balancing of religious rights, gender justice and fundamental rights as a whole.

The aforementioned instances, in no way insinuate that a Bench comprising of only male members would give an erroneous opinion. Or that they would not be able to verdict on rational grounds. The centripetal idea behind these instances, and this paper as a whole is that what we need is an inclusive judiciary, both at the bar as well as the Bench and especially when *prima facie*, the matters seem to include issues pertaining to women or their fundamental and legal rights.

This could also encourage women who are currently in the legal profession or aspiring to be part of the Courts as litigators or as members of the Bench. This would send a positive signal to the female fraternity in relation to their inclusivity in the justice delivery mechanism.

⁷ (2020) 9 SCC 1.

⁸ (2024) 5 SCR 470.

⁹ (2018) 9 SCR 561.

This may also lead to more women opting for legal education which, on any given day, is an extremely welcome step for the future of legal fraternity in India.

REASONS FOR FEWER WOMEN WITHIN HIGHER JUDICIARY IN INDIA

While it is established that there is a stark need of women in the Benches of Higher Judiciary. We need to highlight the causes for their less representation at the level. There have been multiple reasons that one can attribute to having fewer women in the judicial landscape of India, especially at the level of the Higher Judiciary namely:

➤ *Fewer Women at the Bar*

A lot has been achieved since Cornelia Sorabji became the first woman Barrister of India in 1924. As per the response given to an unstarred question in the Rajya Sabha by the then Law Minister Sh. Kiren Rijiju, there are a total of 284,507 women advocates in India on 31st January 2023.¹⁰ This accounts for 15.31% of the total advocates. Although this number is not promising after a century of women entering the Indian legal system, when looked from a bigger point of view, the situation seems grimmer.

In the similar response, Sh. Kiren Rijiju mentions that as per January 31st, 2023; the percentage of women judges in the High Court is 9.5% of the total strength and 13.6% of the working strength. This disparity in the participation in the Bar and the Bench is telling of the deficit of women in higher judiciary.

Since there are fewer women in the Bar, consequently, there would be fewer women at the Bench. While women are actively seeking legal education and holding meritorious positions in their colleges and universities, many legal experts wonder at the lower participation of women at the bar.¹¹

➤ *Promotion from Lower Judiciary*

One of the reasons of lower presence of women in the higher judiciary is also the presence of the fact that women at the lower judiciary are not getting promoted at a significant

¹⁰ Rajya Sabha Unstarred Question no. 123 on February 2, 2023 available at: <https://sansad.in/getFile/annex/259/AU123.pdf?source=pqars#:~:text=As%20per%20the%20data%20for,advocates%2C%20accounting%20for%2015.31%25> (last visited on March 17, 2025).

¹¹ HC judge laments “huge disparity” in legal profession, says only 15 % of practising lawyers are women, available at: <https://indianexpress.com/article/india/hc-judge-laments-huge-disparity-legal-profession-15-percent-practising-lawyers-women-8877994/> (last visited on March 17, 2025).

manner. According to India Justice Report, 2022; women at lower judiciary account for 35% of the total strength of judges.¹² On similar plane, this number is 13.6% at the level of the High Court.

This means that women are present at the lower judiciary, though not in a very large number, but significantly higher than in higher judiciary. The issue is that they are not moving up the judicial ladder due to several reasons.

One such reason can be that while majority of selection at lower judiciary is through a competitive examination conducted by the respective State Public Service Commission. The selection at higher judiciary is mostly through collegium with few instances of examinations such as the Higher Judicial Services.

➤ ***No Statutory or Legal Compulsions***

Further, there is no law and *ipso facto* no legal obligation that compels the State to have a minimum number of women at the Bar at any level of the judiciary. The Constitution (One Hundred and Sixth Amendment) Act, 2023 did provide a 33 percent of female participation in the legislatures of India. However, there is no such compulsion, legislative or conventional to recruit women in judiciary.

The entry of women in the higher judiciary is through the collegium system and in few instances through higher judicial service examinations. These methods are though tried and tested, but have their own limitations.

As pointed out earlier, women constitute just a little over 30% of the total judicial workforce in lower judiciary. Further, only 15.31% of advocates are women. Hence, when one has less women at the Bar, there is only so much that the collegium or the examination mechanism can do to include women in the higher judicial setup.

➤ ***Judiciary has traditionally been an all-male profession***

The legal fraternity has been a male dominated field for a very long time. The initial years when the judiciary in India was developing, it was occupied by men. Although this was a trickle-down effect of the fact that during that era, education was highly confined to men and women education was not a norm but an aberration.

As the level of education spread, both vertically as well as horizontally; and women

¹² Judicial glass ceiling: More women judges at districts courts than HCs, *available at:* <https://www.thehindu.com/news/national/judicial-glass-ceiling-more-women-judges-at-districts-court-levels-than-hcs/article66697740.ece> (last visited on March 17, 2025).

started to pursue education beyond the primary and secondary level, we saw women entering various domains and professions including the legal fraternity. Despite being fewer in number in relation to their male counterparts, they achieved significant heights, reaching to the top of the Bar and the Bench alike.

Despite this success, the representation of women in the higher judiciary is not at par with men. A nation with almost 50 percent of female population has less than 15 percent representation in the higher judiciary. Despite high indicators of literacy and inclusive stance of all sectors towards women, this does not give a positive picture. While it is claimed that the legal profession has become inclusive, it does not seem so at the level of the Benches of the higher judiciary.

Hence, one cannot point out a single source or pin point a single issue that is hindering the presence of women at higher judiciary in India. There are multiple issues that range from being a structural issue to being an issue rooted in the social and professional setup of the judiciary and legal profession as a whole. The issues separately as well as collectively result in fewer women participating at the highest level of the judicial setup in India.

POSSIBLE SOLUTIONS

So, how can we ensure that women are more participative in the justice delivery mechanism at the level of higher judiciary? The answer to it lies at several initiatives that need to be taken from a structural as well as social point of view. A few of the solutions can be the following:

➤ ***Encourage Women to become Active Member of the Bar***

Women still constitute only about 15% of the strength of the Bar which is a very low number. Since there are less women at the advocacy level, consequently the number of women in higher judiciary is bound to be less.

We need to encourage women to become active member of the advocate fraternity. This can be done through programs at the graduation level where female students are counselled regarding the career at the litigation level. Further, having a counselling session with the parents of such students can be done so that they are not averted from the idea of their daughters joining the practice.

Once women are an active member of the Bar, the chances of them joining the judiciary in general and higher judiciary in particular would be increased.

➤ ***Bring changes at lower judiciary regarding Promotion of Women***

Women at the lower judiciary are 35% of the total strength. As per the India Justice Report 2022, Goa has highest number of women judges at lower judiciary with 70% female judges.¹³ However, these high numbers do not translate to women judges at the higher judiciary level.

There needs to be a change at the level of lower judiciary whereby women judges are promoted at a healthy rate. This can be done through policy measures where number of seats for women in higher judiciary through promotions are increased. This initiative can be initiated by collegium and the policy makers, both individually as well as collectively.

➤ ***Have a Dedicated Law or Policy***

A dedicated law or policy can be framed for having a greater number of women at the level of higher judiciary. Measures mirroring the 106th Constitutional Amendment Act, 2023 can be taken whereby certain seats for women can be reserved at the level of higher judiciary.

Also, a policy can be framed whereby a certain number of female judges are promoted on a periodical basis to the higher judiciary. Or if such promotion is through an examination system, a certain number of vacancies can be reserved for women applicants.

➤ ***Make the Legal Profession more Gender Inclusive***

There is a need to make the legal profession more inclusive for women in general. Girls are an active participant in the legal education but the same number does not translate to higher participation in the judiciary in general and higher judiciary in particular. There is a need to make legal profession inclusive for women and empower them to become an active member of the Bar and the Bench while encouraging them to target for higher judiciary as a career path.

CONCLUSION

Therefore, we can conclude that there is a need to make judiciary more gender diverse in nature. A lot has been achieved since Justice Anna Chandy's elevation as the first female judge of India in 1937. But the numbers show that a lot is still to be achieved. Women are still not part of the judicial spectrum let alone the situation at higher judiciary. A nation that has produced profound female legal luminaries does not have a substantial female number of

¹³ *Supra* Note 12.

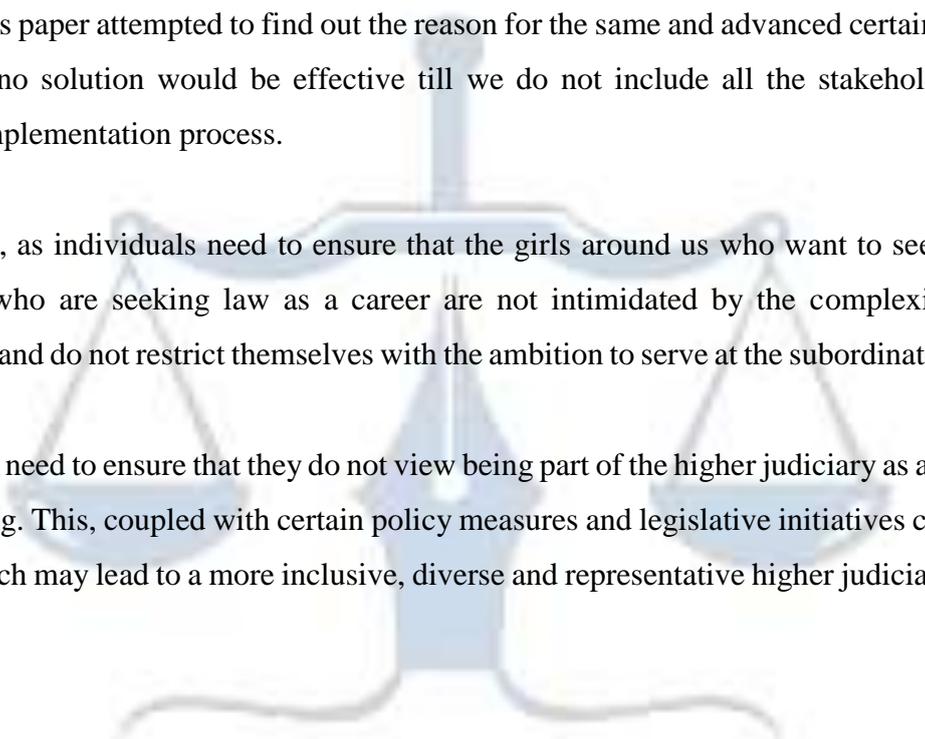
women at the Bench of higher judiciary in India despite being 50 percent of the population in the nation.

While the legal field has been stereotyped as an all-male fraternity, women are progressively moving up the professional ladder. However, the number of women that climb it needs to be increased. At present there are very few female chief justices in the High Courts of the nation and just two female justices at the highest court of the land.

This paper attempted to find out the reason for the same and advanced certain solutions. However, no solution would be effective till we do not include all the stakeholders in the solution implementation process.

We, as individuals need to ensure that the girls around us who want to seek law as a career or who are seeking law as a career are not intimidated by the complexities of the profession and do not restrict themselves with the ambition to serve at the subordinate judiciary.

We need to ensure that they do not view being part of the higher judiciary as a proverbial glass ceiling. This, coupled with certain policy measures and legislative initiatives can produce results which may lead to a more inclusive, diverse and representative higher judiciary in India.



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