

REPRESENTATIVE JUDICIARY IN INDIA: AN ARGUMENT FOR GENDER DIVERSITY IN THE APPOINTMENT OF JUDGES IN THE SUPREME COURT

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Abstract

After 72 years of independence, higher judiciary of India paints a gory picture when it comes to equal representation of women in the benches. The popular discourse in India takes place on case backlog, inadequate number of judges, and predominance of caste or religion based appointments of judges but not on having an inclusive judiciary with an equal gender representative character. The constitutional courts were earlier, impenetrable for women due to multifarious social and educational reasons; however, now with equal access to education, number of women opting for legal profession is on a rise. Standing from that point, this article intends to delve upon the ubiquitous diversity factor that prevails in the higher judiciary on convention in India. The article aims to explore the presence and effect of gender diversity in the method of selection of Supreme Court judges.

I Introduction

II Equation of male-female judges in constitutional courts: Speaking through facts

III Advocating for diverse judiciary

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I Introduction

INDIA IS a diverse nation with diverse pursuits, customs, traditions and more significantly is a land of diverse opinions. In this diverse backdrop, when we try to walk on the edges of gender diversity, we cannot help but notice that largely it is dominated by gender alienation rather than empowerment. The picture was not always this stark. For instance, as Sen has argued¹, if we look back a few centuries, in the *Brihadaranyaka Upanishad*, we can read about the famous intellectual argument put forward by Gargi to Yajnavalkya in the presence of great pundits, we can also find Maitreyi raising a significant question on ‘the reach of wealth in the context of the

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¹ Amartya Sen, *The Argumentative Indian* 7 (Penguin Books Ltd., London, U.K., 2006).

problems and predicaments of human life, in particular what wealth can or cannot do for us' to Yajnavalkya, her husband. Women have, throughout the history, been accorded a tender and peace-loving image which often runs in contradiction when we see women speakers playing powerful roles like that of the above and even Draupadi in *Mahabharat*, who instigates a war.² With time, this position of women has been sidelined to the extent that the 'human argumentative nature' has been assigned a 'male gender' and has often been exclusively associated with men. Therefore, women legal practitioners often tend to be at the receiving end for being too argumentative before the bench. The gender stereotypes³ create an occupational barrier for women lawyers thus, indulging in alienation of women from the profession. A significant question thus, becomes relevant in modern times especially while studying the role of the constitutional courts in India⁴ - How can we create an inclusive judiciary with the prevalence of true gender diversity in constitutional courts? More the judiciary reflects the composition of population more will it aid in conferring legitimacy to court decisions.⁵ Public perception of judge gender plays a pivotal role in garnering public support for a judicial decision as has been argued by the Professor.⁶ Therefore, removing gender stereotypes could possibly be the first step in creating an unbiased public opinion of judicial decisions.

More the diversity, more is the empowerment. This empowerment is not about women alone but for men as well. Diversity does not lie in alienation but in inclusiveness of the genders. What is this empowerment that we are talking about? To this question, one would be able to give a cogent answer as the power to make or take calls about one's life as well as participate individually and collectively in building the nation. Empowerment is all about being adequately represented to voice a constructive opinion which would make a difference. Empowerment of any group of individuals or as an individual lies in the fact of being heard, of being accepted and

² *Ibid.*

³ OHCHR has acknowledged that gender stereotyping 'is an obstacle to women's rights to meaningful progress'. It has categorically explained 'Gender stereotyping' as the practice of ascribing to an individual woman or man specific attributes, characteristics, or roles by reason only of her or his membership in the social group of women or men. UNHCR, "Gender stereotypes and Stereotyping and women's rights" (Sep. 2014), *available at*: www.ohchr.org/documents/issues/women/wrgs/onepagars/gender_stereotyping.pdf (last visited on Oct. 15, 2019)

⁴ In India, the Constitution has not designated any court as Constitutional Court. For the purpose of the paper, the Supreme Court of India is described as Constitutional Court as it has been bestowed with the jurisdiction to review the legislation and adjudicate the dispute between the constituent units.

⁵ M.P. Fix & G.E. Johnson, "Public Perceptions of gender bias in the decisions of female state court judges" 70 *Vanderbilt Law Review*, (2017), *available at*: <https://wp0.vanderbilt.edu/lawreview/2017/11/public-perceptions-of-gender-bias-in-the-decisions-of-female-state-court-judges/> (last visited on Aug. 20, 2019).

⁶ *Ibid.*

of being acknowledged. At the outset of the International Conference on People's Empowerment and Development held in Dhaka, Bangladesh on 5th August, 2012, the then UN Secretary General, Ban Ki Moon has particularly stressed on the empowerment and development of women to bring gender equality all over the world which in turn would favour empowerment. The larger goal of empowerment is to ensure that people have better opportunities to live better lives in dignity and security. Empowerment cannot be achieved without holistic development.

India as a nation has been battling gender biases and prejudices since the time it gained independence. Indian judiciary does not paint a picture that is any different. The idea of building an all reflective judiciary has been on the judicial horizon of India off late but the sculpting of a new India has been 'an uphill task progressing at a meandering pace'.⁷ As per the recent reports the chronic problem of gender imbalance in higher judiciary with only 12% of the total strength being women is indeed startling. The popular discourse in India takes place on case backlog⁸, inadequate number of judges⁹, predominance of caste based or community based appointments of judges but not on having an inclusive judiciary with an equal gender representative character. The Law Commission report has categorically defined the different terms of delay, backlog, arrear and pendency which are often used interchangeably after the concern was raised in *Imtiyaz Ahmad v. State of Uttar Pradesh*.¹⁰ The Law Commission also highlighted Justice M.J. Rao Committee Report,¹¹ for the purpose of speedy disposal of cases on the part of the judges. The committee has examined the current patterns of institution, disposal and pendency, to address the question of whether more judicial resources are required (and where they should be targeted) in order to clear the current pendency and prevent the accumulation of backlog in the future.¹²

⁷ Upendra Baxi, "Women in Judiciary: From Raw Deal to New Deal?", available at: www.indialegallive.com/viewpoint/women-in-judiciary-from-raw-deal-to-new-deal-57342 (last visited on Aug. 20, 2019).

⁸ Law Commission of India, "230th Report on *Reforms in the Judiciary - Some suggestions*" (Aug. 2009) available at: www.lawcommissionofindia.nic.in/reports/report230.pdf (last visited on Aug. 20, 2019).

⁹ Law Commission of India, "245th Report on *Arrears and Backlog: Creating Additional Judicial (Wo)manpower*" (July, 2014) available at: www.lawcommissionofindia.nic.in/reports/Report245.pdf (last visited on Aug. 20, 2019).

¹⁰ AIR 2012 SC 642.

¹¹ Justice M.J. Rao Committee, Vol 2, "*Report on Judicial Impact Assessment In India*" (2008) available at: http://doj.gov.in/sites/default/files/judicialimpactassessmentreportvol1%20%201_0.pdf (last visited on Aug. 29, 2019).

¹² *Ibid.*

Selection of high court judges, broadly speaking, takes place in two ways, either through judicial service or through the bar, *i.e.*, two types of persons can be appointed as a judge of high court: a) judicial officers of 10 years' standing, b) high court lawyers' of 10 years' standing.¹³ When it comes to the Supreme Court judges, the Constitution provides that following individuals can be appointed as judges: a) high court judges of five years' standing, b) high court lawyers of 10 years' standing or, c) distinguished jurists¹⁴ in the opinion of the President.¹⁵ This kind of qualifications does not specifically speak much about the kind of candidates that are appointed to the court. Informal norms alongside formal constitutional rules have prevailed till date to govern the criteria of appointment of judges.¹⁶ In this article, the author aims to pursue the globally resonating argument of building a diverse judiciary in respect of India and how it is relevant in perspective of a diverse India. The higher judiciary not only is the final dispute resolution body but is also into determining policies and setting up good governance mechanisms.¹⁷ Therefore, in larger interests, it should reflect the diversity that the country projects in terms of geography and demography. A diverse judiciary not only highlights the equal representative character of the justice delivery mechanism but also can lead to creative solutions to problems by utilizing the diverse human resources.

II Equation of male-female judges in constitutional courts: Speaking through facts

Selection criteria of judges have been an elusive subject in India until recently, when legal academicians and political scientists started taking a keen interest in identifying and understanding the reasons behind the same.¹⁸ What goes on while selecting a judge, what parameters are ticked before appointment has come up to the forefront in Rajya Sabha debates as well when allegations of corruption and high-handedness started cropping up against justices of the esteemed apex judiciary.¹⁹ The higher judiciary's covert approach of appointment has also

¹³ The Constitution of India, art. 217(2).

¹⁴ The only distinguished jurist to have ever come close to being appointed was Nagendra Singh as a Supreme Court Judge.

¹⁵ The Constitution of India, art. 124(3).

¹⁶ Abhinav Chandrachud, *The Informal Constitution: Unwritten criteria in selecting judges for the Supreme Court of India* (Oxford University Press, New Delhi, 2014).

¹⁷ Arghya Sengupta, *Independence and Accountability of Indian Higher Judiciary 1* (Cambridge University Press, Cambridge, U.K., 2019).

¹⁸ Jr. G.H. Gadbois, *Judges of the Supreme Court of India 1950-1989* (Oxford University Press, New Delhi, 2011).

¹⁹ Press Trust of India, "Justice Soumitra Sen Resigns Ahead of Monday's Impeachment Motion" *The Hindu* (2011) available at: www.thehindu.com/news/national/other-states/justice-sen-resigns-ahead-of-mondays-impeachment-motion/article2417401.ece (last visited on Aug. 20, 2019).

been criticized for ‘nepotism’ and ‘hypocrisy’ by none other than the members of judiciary themselves.²⁰ Ever since the establishment of the Supreme Court of India till 1989, all the 93 judges who have served the all-powerful apex Court have all been men.²¹ Legal education has been off limits for women for many decades, yet few of them who made the difference by seeking legal education did not have a bed of roses to walk on.²² Looking upon the trend in Indian Judiciary, it took almost four decades after the establishment of the Supreme Court of India for a woman to become a judge in the Supreme Court. Till date, there have been only seven female judges in the Supreme Court of India. It was only in 2018 that a female senior lawyer was directly appointed as a Supreme Court Judge.²³ Indu Malhotra J.’s direct move from bar to bench is seen as breaking a major glass ceiling by many in the legal fraternity, as it has cleared the decks for more woman advocates to get directly nominated as judges of the Supreme Court. All the six previous woman judges of the court were elevated from the high court, the first being M. Fathima Beevi J. in 1989. Her appointment signifies the position of women at bar and the acceptance of the talent of women. In two decades of independence, India has elected a woman Prime Minister whereas even in six decades, the country is yet to have a woman Chief Justice of India. It is argued²⁴ that in the year 2000, three judges were appointed to the Supreme Court – Y.K. Sabharwal, Ruma Pal and Doraiswamy Raju JJ.. Y.K. Sabharwal and Ruma Pal JJ. would have been on the same level of seniority in the year 2005 when R.C. Lahoti J. were to retire, however she was sworn in after Sabharwal J., which, is argued to have, made her lose her seniority.²⁵ The usual tie-breakers of seniority²⁶ includes that if both were sworn in on the same day, the one with more years of service in high court would win the seniority stakes, which was

²⁰ C. U. Bhaskar, “Guest Column: Supreme Court faces unprecedented crisis” *The Week* (2018), available at: www.theweek.in/news/india/supreme-court-faces-unprecedented-crisis.html (last visited on Dec. 20, 2019); S. Rautray, “Judicial secret out in open - Former judge skewers appointment process” *The Telegraph* (2011), available at: www.telegraphindia.com/india/judicial-secret-out-in-open-former-judge-skewers-appointment-process/cid/324284 (last visited on Dec. 20, 2019).

²¹ Jr. G.H. Gadbois, *Judges of the Supreme Court of India 1950-1989* (Oxford University Press, New Delhi, 2011).

²² P. Kannan, “An Empirical Study on the Satisfaction Level of Women Lawyers towards Their Work Life Balance” *IOSR Journal of Business and Management* (2013), available at: www.iosrjournals.org/iosr-jbm/papers/Vol12-issue3/D01231619.pdf?id=6423 (last visited on Aug. 20, 2019).

²³ S. R. Singh, “Who is Indu Malhotra?” *The Hindu* (2018), available at: www.thehindu.com/news/national/who-is-indu-malhotra/article22480945.ece (last visited on Dec. 20, 2019).

²⁴ Alok, “How India missed getting its first woman Chief Justice of India” *Law School Policy Review, Critical Twenties* (2010), available at: www.criticaltwenties.in/lawthejudiciary/how-india-missed-getting-its-first-woman-chief-justice-india (last visited on Dec. 20 2019).

²⁵ *Ibid.*

²⁶ Abhinav Chandrachud, *The Informal Constitution: Unwritten criteria in selecting judges for the Supreme Court of India* (Oxford University Press, New Delhi, 2014).

also the case with YK Sabharwal J. in comparison to Ruma Pal J.'s stint in High Court service.²⁷ Instances are many to suggest that the issue lies not with the number but with the outlook and the yardstick with which women are being judged for the higher judicial posts.

Studies²⁸ have indicated that around 27.6% of judges in the lower judiciary are female, which is higher than the average in the constitutional courts. Statistics seemingly indicate that the number is not a bottle neck in the matter of consideration of judges for elevation to the higher judiciary. The problem of poor representation lies somewhere else which is yet to be uncovered. Judicial officers are not often the preferred choices for constitutional court judgeship. Rather, practicing advocates are more preferred for higher judiciary. It can be argued that women can participate in the selection process through bar as well, however, spending a significant amount of time in courts can easily point out the gender biases that prevails in practicing law there as well. Practicing law has always been identified with men in black robes however, when women started venturing in this profession, they had to identify themselves with the set male standards that characterize a practicing advocate. Therefore, there has never been any initiative in understanding what women can contribute to the judiciary because they have so far been contesting in a professional set up which is not gender neutral. Number of female students as compared to male students in law schools and colleges in India at undergraduate level is also not at par²⁹ but the dropout rate gets higher and higher as one starts moving up the ladder in the profession.³⁰ The students enrolled in law stream are 3.3 lakh out of which 2.2 lakh are males. Where are the 1.1 lakh female law pursuers going then? In a valuable profession like law, women do not hold a position of equivalent power as her male counterpart. There has to be some reasons as to why women are being represented at a dwindling rate. A lot of senior advocates and judges in interviews have said that being a women, they were never taken seriously by their

²⁷ Y. P. Singh & N. Mittal, "Judiciary and the Supreme Paradox" *The Indian Express* (March 5, 2019), available at: www.newindianexpress.com/opinions/2019/mar/05/judiciary-and-the-supreme-paradox-1946828.html (last visited on Aug. 20, 2019).

²⁸ A. Ghosh, D. Sanyal, N. Khaitan, & S. Reddy, "Tilting the Scale: Gender Imbalance in the Lower Judiciary" *Vidhi Centre for Legal Policy* (2018), available at: www.static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/5a818f5a9140b73f5d6d67ff/1518440304789/180212_Tilting+the+Scale_Final.pdf (last visited on Aug. 20, 2019).

²⁹ All India Survey on Higher Education (2015-2016), 13, available at: http://mhrd.gov.in/sites/upload_files/mhrd/files/statistics/AISHE2015-16.pdf (last visited on Aug. 20, 2019).

³⁰ P. Kannan, "An Empirical Study on the Satisfaction Level of Women Lawyers towards Their Work Life Balance" 12 *IOSR Journal of Business and Management* (2013), available at: www.iosrjournals.org/iosr-jbm/papers/Vol12-issue3/D01231619.pdf?id=6423 (last visited on Dec. 20, 2019).

counterparts.³¹ Gyan Sudha Misra J. in an interview said, “I guess lack of faith and belief in the abilities of women is still rooted in society and more so in the male psyche and we prefer to have their token presence, especially in the higher judiciary, more for the sake of symbol rather than their equal participation”.³² Former High Court of Delhi Chief Justice AP Shah described how a woman lawyer he had recommended for judgeship was rejected on the grounds that she was ‘rude’, though he believes similar behaviour exhibited by a male lawyer would not have been judged as harshly.³³ Senior advocate Indira Jaising observes, “There is a live and kicking patriarchy that prevents women from breaking the glass ceiling. The entrenched ‘old boys’ club mentality makes it harder for women to lobby for judicial posts”.³⁴ Addressing the issue of gender diversity several scholars³⁵ have pointed out that presence of women in judiciary symbolizes participatory democracy, diversity of opinions gives an inclusive characteristic to the judiciary and signals equality of opportunity for all.

III Advocating for diverse judiciary

Advocating for a diverse judiciary is the need of the hour because of the expanding role of the same in governance and policy making. It is well criticized that the parliament being the chief legislating organ has not been successful in ensuring Constitution’s broader goal of ‘controlled revolution’ which has led the judiciary to expand its horizon to a larger mandate beyond adjudication.³⁶ Deficiency of India’s other representative organs forms a popular theory for the changing role of Indian judiciary. Higher judiciary’s leap from an adjudicating organ to a welfare

³¹ Staff Reporter, “Gender diversity: Talk held on women in legal profession” *The Hindu* (2018), available at: www.thehindu.com/news/cities/Delhi/gender-diversity-talk-held-on-women-in-legal-profession/article25139430.ece (last visited on Dec. 10, 2019).

³² S. Mishra, “The Sexist Bar” *The Week* (2016), available at: www.theweek.in/theweek/cover/gender-discrimination-in-judiciary.html (last visited on Dec. 10, 2019).

³³ A. Ghosh, D. Sanyal, N. Khaitan, & S. Reddy, “Tilting the Scale: Gender Imbalance in the Lower Judiciary” *Vidhi Centre for Legal Policy* (2018), available at: www.static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/5a818f5a9140b73f5d6d67ff/1518440304789/180212_Tilting+the+Scale_Final.pdf (last visited on Nov. 29, 2019).

³⁴ V. Doshi, “Indira Jaising: In India you can’t even dream of equal justice. Not at all” *The Guardian* (2017), available at: <https://www.theguardian.com/global-development-professionals-network/2017/mar/09/indira-jaising-india-is-in-crisis-this-fight-is-going-to-go-on> (last visited on Dec. 3, 2019).

³⁵ Rosemary Hunter, “More than Just a Different Face? Judicial Diversity and Decision-making” *68 Current Legal Problems* 119-141, (2015), available at: <https://academic.oup.com/clp/article/68/1/119/337616> (last visited on Nov. 20, 2019).

³⁶ Nick Robinson, “Expanding Judiciaries: India and the Rise of the Good Governance Court” *8 Washington University Global Studies Law Review* 1 (2009), available at: <https://www.cprindia.org/sites/default/files/articles/Expanding%20Judiciaries%20India%20and%20the%20Rise%20of%20the%20Good%20Governance.pdf> (last visited on Dec. 20, 2019).

policy promoting organ has made it all the more important to become a representative diverse organ. Expansion of the scope of article 21 and rise of public interest litigation (*hereinafter referred to as "PIL"*) are two other significant reasons which can be associated with the changing role of the Judiciary. Enforcement and recognition of unenumerated rights through PILs can be cited in many cases, one being *Vishaka v. State of Rajasthan*,³⁷ where 'government's failure to enforce its own constitutional safeguards prompted the judiciary to intervene in the form of recognition and enforcement of unenumerated rights.³⁸ Presence of a woman judge in the above mentioned PIL again strengthens the role of women in the changing role of the higher judiciary. Therefore, at the core of the question – why there is a need for a more diverse judiciary - lies the understanding of the fact as to what difference 'gender' brings in decision making. This type of understanding is loosely associated with the nature and characteristics of gender, which actually exists in the perception of people rather than in the gender itself. The nature and characteristics of a woman in no way hamper or affects her decision-making skills as a judge.³⁹ The gender stereotypes of women being soft, extra-sensitive and vulnerable have not proved to be sensible indicators in identifying women's contribution in judiciary. What difference then the gender diversity will bring remains to be a question to be observed in the long run. Till date, scholars and judges have explained that women can provide a unique perspective, or "different voice"⁴⁰ which is relevant in the present scenario when the earlier disenfranchised section is gradually aiming to gain a dominant place in the profession. The basic arguments put forward for justifying how women judges make a difference can be summarized as follows. Firstly, presence of women judges gives democratic legitimacy to the highest seat of dispute resolution because it

³⁷ AIR 1997 SC 3011.

³⁸ Zachary Holladay, "Public Interest Litigation in India as a Paradigm for Developing Nations" 19 *Indiana Journal of Global Legal Studies* 555-573 (2012), available at: <https://www.repository.law.indiana.edu/ijgls/vol19/iss2/9/> (last visited on Nov. 20, 2019).

³⁹ Law in Action conducted an experiment in the terms proposed by Lord Neuberger with students at Durham Law School. The students were presented with 16 Court of Appeal judgments in the areas of family law, employment law, and criminal law, eight written by men and eight written by women, and asked to identify the gender of each judgment writer. The results were equivocal. The students correctly identified the gender of the judge about half the time, and were incorrect half the time. As Erika Rackley concluded, the experiment said more about the students' assumptions about gender performance than it did about any actual gender differences in decision-making. See Rosemary Hunter, "More than Just a Different Face? Judicial Diversity and Decision-making" 68 *Current Legal Problems* 119-141 (2015), available at: <https://academic.oup.com/clp/article/68/1/119/337616> (last visited on Aug. 20, 2019).

⁴⁰ Michael P. Fix & Gbemende E. Johnson, "Public Perceptions of Gender Bias in the Decisions of Female State Court Judges" 70 *Vanderbilt Law Review* (November 28, 2017), available at: <https://wp0.vanderbilt.edu/lawreview/2017/11/public-perceptions-of-gender-bias-in-the-decisions-of-female-state-court-judges/> (last visited on Nov. 20, 2019)

enhances court's representativeness. Ideally women should be represented in equal numbers as men are in judiciary since, this would reflect their proportion both in general population and in number of law graduates.⁴¹ Secondly, it gives a voice to the section of society which for a very long time has remained under subjugation by providing an equal platform to voice her experiences and observations. Thirdly, diverse bench signifies a basic component of judiciary that is of being fair, equal and impartial and that leads to the fourth point, which induces public confidence in judiciary. Fifthly, presence of more women judges would encourage active mentoring of young graduates, both men and women. It will also trigger younger women to seek and aspire to flourish in the profession and improve the gender balance therein. This has a probability of actively reducing the instances of gender stereotyping. Sixthly, all judges bring with them their personal experiences when they use their judicial discretion to decide a novel case.⁴² Women judges deciding gender issues or women related cases are likely to be more empathetic and provide a better courtroom experiences for these victims.⁴³ Their presence in the bench will ensure that women (be as a victim or as practitioner) will not be subjected to overtly sexist approach and gender biases. To an extent, it will sensitize the entire judicial system from stereotyping women by male colleagues. This sixth point of 'gendered sensibility' has two theories attached with it as to why women will bring sensitization in judiciary. One theory states that when a judge decides a case, she brings her myriad life experiences into the ambit of judicial decision making which are pertinently different from men. Thus, according to this theory, inclusion of women's experiences will make law more representative of the variety of human experiences.⁴⁴ The second theory observes that when women judge they judge with a feminine "ethics of care" as opposed to masculine "ethic of justice". This theory is based on the work of Carol Gilligan⁴⁵ and her followers who believe that female voice is being concerned to preserve social relationships whereas masculine voice is more concerned with individuals and hierarchy of rights. In a way, female voice is subjective and male voice is objective in nature. This theory

⁴¹ This was the argument accepted and promoted by the House of Lords Constitution Committee. See Rosemary Hunter, "More than Just a Different Face? Judicial Diversity and Decision-making" 68 *Current Legal Problems* 119-141 (2015), available at: <https://academic.oup.com/clp/article/68/1/119/337616> (last visited on Nov. 20, 2019).

⁴² Rosemary Hunter, "More than Just a Different Face? Judicial Diversity and Decision-making" 68 *Current Legal Problems* 119-141 (2015), available at: <https://academic.oup.com/clp/article/68/1/119/337616> (last visited on Nov. 20, 2019).

⁴³ *Ibid.*

⁴⁴ Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge Taylor and Francis Group, UK, 2013).

⁴⁵ Carol Gilligan, *In a Different Voice* (Harvard University Press, USA, 1982).

is not free from criticism; the biggest critique being the experiment carried out by law in action's '*Neuberger Experiment*' which indicate that it is impossible to 'read off' judicial gender from simple heuristics based on either female life experience or the ethic of care.⁴⁶ The perception of contribution put forward by women in judiciary is largely seen through the lens of gender as perceived by the society. The basic difference between 'gender' and 'sex' is that the former is perceived through social functions and the latter is a biological process. However, as Hunter points out, both these theories appear to contain some grains of truth.⁴⁷

The Indian Constitution has not been silent on the point of maintaining diversity, however, what has been observed is that only certain aspects of diversity like religious minority, caste backwardness, and regional representation have been taken into consideration while preserving the diversity factor in appointment of judges in the higher judiciary.⁴⁸ The idea of having an inclusive judiciary is inbuilt in the Constitution itself.⁴⁹ The need of the hour is to reflect that ideology in all the constitutional offices. Though Indian Constitution does not make any formal criterion (policy of affirmative action) for maintaining gender diversity in selecting judges yet there exist informal criterions in Supreme Court's judges' appointment practices.⁵⁰ On appointment of female judges to the apex court, an informal "ladies quota"⁵¹ or "an informal quota system"⁵² are often applied, which are 'black holes' in the selection 'space' of higher judiciary since no one gets to know what are the criterions or parameters for the selection. Mention of a convention can be also found⁵³ that high courts should have at least one female judge. After Fatima Beevi, J. in 1989, Sujata Manohar, Ruma Pal, Gyan Sudha Mishra, Ranjana Desai, R. Bhanumathi, Indu Malhotra and Indira Bannerjee, JJ. were appointed in 1994, 2000, 2010, 2011, 2014, 2018 and 2018 respectively. A close look at their selected judgments might unveil the insight of constitutional adjudication involving important question of interpretation of

⁴⁶ *Supra* note 33.

⁴⁷ *Ibid.*

⁴⁸ Abhinav Chandrachud, *The Informal Constitution: Unwritten criteria in selecting judges for the Supreme Court of India* (Oxford University Press, New Delhi, 2014).

⁴⁹ Indian Constitution has promoted the concept of inclusivity for the genders through Preamble, Fundamental Rights and Directive Principles of State Policy.

⁵⁰ *Supra* note 33.

⁵¹ *Supra* note 48 at 218.

⁵² *Ibid.*

⁵³ *Supra* note 33.

the Constitution or law. For the purpose of this article, selected judgments are taken to strengthen the argument of the inclusiveness of the bench.

A. Justice Sujata Manohar

In *Government of Andhra Pradesh v. P B Vijay Kumar*,⁵⁴ R.M. Sahai and S.V. Manohar, JJ. were part of the bench who had to deliberate upon the fact that whether preference given to women in matters of direct recruitment would violate constitution. In pursuance to the fact that women were not getting their due share in public employment, the Government of Andhra Pradesh brought in Rule 22-A(1) in the Andhra Pradesh State and Subordinate Service Rules, 1996 under the proviso to article 309 of the Constitution of India, stating that in the matter of direct recruitment to posts for which women are better suited than men, preference shall be given to women not to the total exclusion of men. It was challenged as unconstitutional as it was violative of articles 14, 16(2) and 16(4) and had seriously affected all male unemployed persons in the State of Andhra Pradesh. The Court upheld the validity of the impugned rule after an elaborate discussion and interpretation of Articles 14, 15 and 16. The court adopted reasoning similar to that in *Shamsher Singh v. State of Punjab* along with brief narration of the origin of article 15(3) in the Indian Constitution.⁵⁵ Both reservation and affirmative action are permissible under article 15(3) in connection with employment or posts under the State. Both articles 15 and 16 are designed for the same purpose of creating an egalitarian society. The court recognized the fact that creating job opportunities for women also forms an important facet of article 15(3) under the Indian Constitution. Therefore, the court did not agree to the contention drawn that article 16 could be employed to whittle down employment prospective for women under article 15(3). The court went beyond article 15(3) and drew parallel from the provision of article 16(4) and argued that if positive affirmative actions are permissible for uplifting any backwardness then why the same cannot be done for women under the virtue of article 15(3) given the amount of backwardness the gender has faced since ages. The court did not falter in mentioning the

⁵⁴ AIR1995 SC 1648.

⁵⁵ AIR1995 SC 1648. (Para 11: ...The preference contemplated under Rule 22-A(2) will come into operation at the initial stage when in the selection test for the post in question, candidates obtain the same number of marks or are found to be equally meritorious. Rule 22-A(2) prescribes a minimum preference of 30% for women, clearly contemplating that for the remaining posts also, if women candidates are available and can be selected on the basis of other criteria of selection among equals which are applied to the remaining candidates, they can also be selected. The 30% rule is also not inflexible. In a situation where sufficient number of women are not available, preference that may be given to them could be less than 30%).

limits of reservation as well for article 15(3). Having pointed the fact that positive affirmative action has been a recognized method of ensuring equality, the court did not agree that Rule 22 A(2) can strictly come under reservation since the preference contemplated so under this provision is applicably equally for meritorious men and women. It is an example of limited affirmative action, thus keeping it within the ambit of article 15(3) without violating article 16(4). Court provided for a harmonious construction of these two provisions rendering the Rule valid.

In *Vishaka v. State of Rajasthan*,⁵⁶ a writ petition was decided by a division bench comprising of J.S. Verma, C.J.I., S.V. Manohar and B.N. Kirpal, JJ. The immediate cause of this petition was a brutal gang rape of a social worker in Rajasthan which was brought up in a class action with the aim to take up cudgels against sexual harassment of women at workplace through judicial process in the absence of any suitable legislation. This judgment laid down duties of the employer, preventive steps, criminal proceedings, disciplinary actions, complaint mechanism, and awareness mechanism and made the same binding and enforceable in law until suitable legislation gets enacted. Through its analysis, Supreme Court concluded that sexual harassment in the workplace is a violation of women's human rights. However, the significant factor here is the presence of a woman judge in the 1990's Supreme Court bench in a case which had neither any precedent nor any legislation before. Her presence not only ensured the representative character but also made the bench gender sensitive and more participatory in nature. It took the government seventeen years to pass the law against sexual harassment, post the wake of the Delhi gang rape in December, 2012, despite of the laying down of the Vishaka guidelines by the Supreme Court on the matter in 1997 itself. It can be well argued in this case that presence of a female judge in deciding this case has contributed in giving a holistic understanding of the problem and finding a realistic solution to it. Manohar, J. later on has also stated to rethink the Vishaka guidelines since at the time of framing the guidelines, the judges only focused on dealing with the present cases. However, in her opinion now the time has come to rethink about giving the legislation retrospective effect.⁵⁷

⁵⁶ *Supra* note 37.

⁵⁷ K. M. Sheriff, "Need to rethink Vishakha to include incidents from past: Its author Justice Sujata Manohar" *The Indian Express*, October 22, 2018, available at: indianexpress.com/article/india/metoo-need-to-rethink-vishakha-to-include-incidents-from-past-its-author-justice-manohar-5408334/ (last visited on Aug. 20, 2019).

B. Justice Ruma Pal

In *A Jayachandra v. Aneel Kaur* (hereinafter referred to as “*A. Jayachandra*”),⁵⁸ the judgment was delivered by Ruma Pal, Arijit Pasayat and C.K. Thakker, JJ. on December 2, 2002. The sanctity of marriage as an institution was put to question before the Supreme Court whereby two highly educated medical practitioners were at loggerheads for seeking divorce on the ground of mental cruelty. The court categorically laid down that physical violence is not absolutely essential to constitute cruelty since in mental cruelty collecting hard evidence is not only difficult but impossible. To constitute mental cruelty, the conduct of the defendant party needs to be measured reasonably so as to constitute that no person of ordinary prudence would have tolerated to live with such behavior. It should be something beyond the ordinary wear and tear of married life. Conduct has to be considered in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It must be of the type so as to satisfy the conscience of the court that the relationship between the parties had deteriorated to such an extent that it is beyond recovery. A consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of section 10 of the Hindu Marriage Act, 1955. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party. Ruma Pal, J. through her judgments in *A. Jayachandra* and *Vinita Saxena*⁵⁹ has extensively deliberated upon the concept of mental cruelty and created a significant understanding of the term ‘cruelty’ in the modern times. In *Vinita Saxena* it was observed that to establish cruelty, there must be such willful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case. The word ‘cruelty’ has not been defined anywhere in the Hindu Marriage Act, 1955 because of which time and again, it has become difficult to give it a precise definition. Ruma Pal, J. along with A. R. Lakshmanan, J. penned down that what will constitute mental cruelty for purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but will also depend upon the intensity, gravity and stigmatic impact of it when meted out even once. The deleterious effect of it on the mental

⁵⁸ AIR 2005 SC 534.

⁵⁹ *Vinita Saxena v. Pankaj Pundit*, AIR 2006 SC 1662.

attitude, necessary for maintaining a conducive matrimonial home will also play a significant role in establishing mental cruelty. Looking into the mental aspect of cruelty, more than a decade back, when the definition of ‘cruelty’ was itself going through a change, this case gave an impetus to the growing need of expanding the definition. Presumably, the possibility of gaining from the insight of a lady judge, the court has aptly amplified the understanding of ‘cruelty’ under matrimonial disputes.

C. Justice Gyan Sudha Mishra

Justices Harjit Singh Bedi and Gyan Sudha Misra delivered a brave judgment in *Pyla Mutyalamma @ Satyavathi v. Pyla Suri Demudu*.⁶⁰ Non-entitlement of maintenance to women who have been on the non-favorable side of the law on bigamy under section 125 of the Code of Criminal Procedure has continued as a practice. The lacuna in this set practice was that it failed to take note of the plight of those women who did not have a say in the bigamous situation. Even though men flouted the norms of monogamy, it was women who were denied their crucial needs of maintenance. The court strictly iterated that high court in its revisional jurisdiction ought not to have entered into a scrutiny of the finding recorded by the Magistrate as it is well-settled that the revisional court can interfere only if there is any illegality in the order or there is any material irregularity in the procedure or there is an error of jurisdiction. In revision against the maintenance order passed in proceedings under section 125 of the CrPC, she warned that the revisional court has no power to re-assess evidence and substitute its own findings. The Court also highlighted the role of a civil court in matrimonial matters and spoke at length about its conclusiveness in disputes relating to marriage. Supreme Court vehemently recorded that the high court wrongly exercised its jurisdiction while entertaining the revision petition against an order granting maintenance to the appellant-wife under section 125 Criminal Procedure Code.

In *Aruna Ramachandra Shanbaug v. Union of India*,⁶¹ Justice Gyan Sudha Mishra was part of the bench of the judgment along with Justice Markandeya Katju, which has laid down guidelines on ‘passive euthanasia’. Although court declined the petitioner’s plea on the ground of lack of locus standi yet, it laid down guidelines on passive euthanasia. Considering the low ethical levels prevailing in our society today and the rampant commercialization and corruption, the court

⁶⁰ (2011) 12 SCC 189.

⁶¹ (2011) 2 SCR 869.

could not rule out the possibility that unscrupulous persons with the help of some unscrupulous doctors may fabricate material to show that it is a terminal case with no chance of recovery.

D. Justice R. Bhanumati

In *Mukesh v. State for NCT of Delhi*,⁶² Bhanumati J., observed in her separate concurring judgment that mere stringent legislations cannot contain the situation; gender sensitization at the early stages of the formative years of a child should be made mandatory. More than a physical crime, rape is an exertion of power and demeaning of the entire personality of the woman as observed in *Gurmit Singh*.⁶³ Therefore, it is very important to make a child learn to respect another person irrespective of his/her gender from childhood itself. Her observation of bringing change in the mindset of the society at large resonates with the larger psychological view of the society.⁶⁴ Her observations added a different perspective to the role of the court while dealing with sensitive cases of offences like rape.

She observed:

Persisting notion that the testimony of victim has to be corroborated by other evidence must be removed. To equate a rape victim to an accomplice is to add insult to womanhood...Where the victims are helpless women, children or old persons and the accused displayed depraved mentality, committing crime in a diabolic manner, the accused should be shown no remorse and death penalty should be awarded.

Very minutely she differentiated between what can be termed as material omission of facts and what cannot be. In this case, since there were multiple dying declarations given by the prosecutrix, Bhanumati J., expressed that the court should consider whether they are consistent with each other. If there are inconsistencies, the nature of the inconsistencies must be examined as to whether they are material or not. In cases where there is more than one dying declaration, it is the duty of the court to consider each one of them and satisfy itself as to the voluntariness and reliability of the declarations.

⁶² (2017) 3 SCC 719.

⁶³ *State of Punjab v. Gurmit Singh* (1996) 2 SCC 384.

⁶⁴ G. P. Rao, K. L. Vidya & V. Sriramya, "The Indian "girl" psychology: A perspective" 57 *Indian Journal of Psychiatry* (2015), available at: www.researchgate.net/publication/281517580_The_Indian_girl_psychology_A_perspective (last visited on Dec. 20, 2019).

E. Justice Indu Malhotra

In *Indian Young Lawyers' Association v. The State of Kerala*,⁶⁵ popularly known as the Sabarimala Temple Entry Case, the Court observed that the right to gender equality to offer worship to Lord Ayyappa is protected by permitting women of all ages, to visit temples where he has not manifested himself in the form of a 'Naishtik Brahamachari', and there is no similar restrictions in those temples. This judgment is significant from the point of dissent, that too, coming from the only woman judge on the Bench. The minority opinion rendered by Justice Indu Malhotra, was not only applauded by the legal fraternity on points of law but was considered brave too, for going against the popular majority view. Justice Indu Malhotra's journey to the Supreme Court is one of its kind. She became the first senior woman advocate to be directly appointed as a judge to the Supreme Court. She was the second woman lawyer to be appointed as senior advocate by the Supreme Court, first being Leila Seth.

In *Joseph Shine v. Union of India*,⁶⁶ Justice Indu Malhotra was also a part of the Supreme Court Bench that, in a landmark judgment, decriminalized adultery after striking down a British-era law, section 497 of the Indian Penal Code, terming it as unconstitutional, archaic and manifestly arbitrary.⁶⁷ The history of the plight of women and adultery law, international situation and how the Law Commission of India and the Malimath Committee have deliberated upon the issue, all these factors have been very concisely taken into consideration in her judgment, before drawing the conclusion.⁶⁸ She clearly stated that- "Section 497 fails to consider both men and women as equally autonomous individuals in society." If one cannot prosecute against the other then vice versa should also not be allowed. The situation of women has changed since section 497 was

⁶⁵ 2018 (8) SCJ 609.

⁶⁶ AIR 2018 SC 4898.

⁶⁷ A.Vaidyanathan, "All About Justice Indu Malhotra, Who Dissented In Sabarimala Verdict" *NDTV* (2018), available at: www.ndtv.com/people/all-about-justice-indu-malhotra-who-dissented-in-sabarimala-verdict-1923894 (last visited on Aug. 20, 2019).

⁶⁸ "The constitutional validity of section 497 has to be tested on the anvil of Article 14 of the Constitution. Any legislation which treats similarly situated persons unequally, or discriminates between persons on the basis of sex alone, is liable to be struck down as being violative of Articles 14 and 15 of the Constitution, which form the pillars against the vice of arbitrariness and discrimination. Article 14 forbids class legislation; however, it does not forbid reasonable classification. A reasonable classification is permissible if two conditions are satisfied:

- i. The classification is made on the basis of an 'intelligible differentia' which distinguishes persons or things that are grouped together, and separates them from the rest of the group; and
- ii. The said intelligible differentia must have a rational nexus with the object sought to be achieved by the legal provision.

included in IPC 155 years back.⁶⁹ As far as article 15(3) is concerned, she reasoned it out on the ground that it perpetuates beneficial legislation for upliftment of women and children and section 497 IPC, in that light, puts a woman in a disadvantageous position by not letting her prosecute against her adulterous husband. While answering on the criminality of adultery, she reasoned out efficaciously that if there is a public element in the wrong, such as offences against State security, and the like, then criminal sanction is justifiable- where the victim is not the individual, but the community as a whole. However, the issue that lies beneath is whether in adultery there is a sufficient element of wrongfulness to society in general, in order to bring it within the ambit of criminal law? Answering to this, she stated:

The State must follow the minimalist approach in the criminalization of offences, keeping in view the respect for the autonomy of the individual to make his/her personal choices. The right to live with dignity includes the right not to be subjected to public censure and punishment by the State except where absolutely necessary. In order to determine what conduct requires State interference through criminal sanction; the State must consider whether the civil remedy will serve the purpose. Where a civil remedy for a wrongful act is sufficient, it may not warrant criminal sanction by the State.

IV The way forward

The selected judgements are representative in nature to establish that the viewpoint or the presence of the women on the bench has given either a new dimension or broader acceptance to legal principle/interpretation. The judicial pronouncements have presented a new narrative on the issue of gender. In case the judgment is authored by a male judge, assumably, the interaction between the judges on the bench, including a female judge, has led to the acceptance of protectionist or sameness approach on the issue of gender equality.

The Supreme Court of India is not only the highest dispute resolution body but plays a pivotal role also in shaping the public policy of the nation.⁷⁰ Whenever the court has dealt with the issues of policies or matter of larger societal ramifications, there has been a doubt casted on the

⁶⁹ As was held in *Joseph Shine*- “The time when wives were invisible to the law, and lived in the shadows of their husbands, has long since gone by.”

⁷⁰ *Aruna Ramachandra Shanbaug v. Union of India*, [2011] 2 SCR 869.

legitimacy of the intervention by the judiciary. Aspersions were cast on the ground that it does not have mandate to determine policy issues or it lacks the popular support of the people which is essential for bringing in reform in the society. In such situations, either the court should abdicate the responsibility or make the composition representative in order to address the criticisms.

Whenever a matter of national importance has been brought to the apex court, it has uprightly dealt with it understanding the limitations of its ambit.⁷¹ There have been a number of instances where it has extended its ambit of separation of powers. However, in matters where there is no legislation or where the existing law is not sufficient, the Supreme Court cannot sit splitting its hairs in dilemma whether to take a call on that issue or not. If it has a dispute regarding policy it has to sort the issue, as well as has to make sure that the issue is addressed by the appropriate organ of the government. That is why the higher judiciary needs to be more gender diverse because it is not only a dispute resolution body but it is an institution integral to the governance of the country.⁷² Diversity of the judges of the Supreme Court enhances the court's legitimacy.⁷³ Legitimacy is a significant requirement of any decision-making body and therefore, it can be argued that a diverse judiciary, which gives substantive and not mere symbolic representation to women, is indeed a necessity for the Supreme Court of India at present. The importance of gender as a criterion for appointment has not been a predominant model so far with the higher judiciary. It is also to be observed what kind of gender diversity does the Indian judiciary require; where the intervention should be; should we also take into consideration inter-sectoral gender diversity? If inter-sectoral gender diversity is to be taken into consideration, what effect will it have on the quality of law education imparted in the Indian model? What kind of representation are we looking for? What kind of approach needs to be followed to achieve this gender diversity? All these are concerns that need meticulous attention. Understanding the role of judges and understanding the fact that divergence in values reflects divergence in judging might throw some light on the need of a diverse judiciary. The issue at hand raises multifarious concerns, which forms a suitable base for carrying forward further research.

⁷¹ *Supra* note 37.

⁷² Arghya Sengupta, *Independence and Accountability of Indian Higher Judiciary* 1 (Cambridge University Press, Cambridge, U.K., 2019).

⁷³ Abhinav Chandrachud, *The Informal Constitution: Unwritten criteria in selecting judges for the Supreme Court of India* 274 (Oxford University Press, New Delhi, 2014).