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Women in the Indian Judiciary: Transitioning from the present into the future- Rishit Vimadala¹

In a country as diverse as India, there has been ample of ponderation in the area of judicial diversity. India encloses within herself a vast array of demographic characteristics such a race, ethnicity, case, socio economics background, religion, and gender amongst others. It is important to note that a significant majority of this discourse around judicial diversity in India has focused almost exclusively on areas such as caste, religion and other socio-economic factors whereas gender has indubitably been put on the side-lines. (Malia Reddick 2009) The sitting bench of the Supreme Court of India currently has only three female judges in a total strength of twenty-five judges which points out that women comprise an abysmal twelve percent of the total strength of the Supreme Court. (Dodda 2018) Since the inception of the institution of the Supreme Court of India, only eight women judges have found a place in the apex court with Justice Fathima Beevi being elevated to the court as late as thirty nine years after the formation of the court. In the twenty-four High Courts of India, only around ten percent of judges are female. Only 86 women have rose to the position of High Court judges in India since the elevation of the first women judge to the Kerala High Court in the year 1959. (AK 2017)

In spite of these dismal statistics, there have been made no concrete efforts by the government to ensure that necessary measures should be taken in order to bridge this astounding gap. In contrast to the Indian situation, countries such has the United Kingdom have taken extensive steps to ensure that such a gap in the judiciary could be diagnosed and understood with the help of diversity statistics. (Judicial Office Statistics Bulletin 2016) In the upper echelons of the judiciary, there is data available to the public which ensures that a

¹ Student of Jindal Global Law School

tab could be kept of the number of women in the respective strata of the judiciary but the severe lack of data for the lower judiciary in India is the core of the problem. In spite of being *prima facie* gender-neutral, the entry of women in the lower judiciary is prevented by more fundamental obstacles such as that of access to education, embedded societal roles and the reduced availability of other means that would enable them to enter the judicial profession. The recently struck down National Judicial Appointments Commission (NJAC), according to the Central Government, was argued to be a step forward from the collegium system of appointing judges but failed to lay down explicit measures to increase the representation of women in the higher judiciary. This paper seeks to propose policy decisions that could be made in order to bridge this astounding gap in the representation of women in the judiciary. In order to achieve this aim, the paper will elucidate upon the need for women in the judiciary, historical and contemporary factors causing this gender gap, a critical analysis of the lower court gender composition, comparative analysis with the judiciaries of a few other countries followed by the ultimate recommendations and conclusion in order to achieve its goal.

In order to formulate recommendations to increase the representation of women in the judiciary, it is important to know the need for including women in the judiciary at multiple levels which include the health of the judiciary and evolution of the society in addition to other reasons. In order for the judicial system to secure the confidence of the public, especially the intelligentsia, it is quintessential that women's importance in the system rises. Females constitute a little less than 49% of the Indian population; a system with more representation of women will ensure that one half of the population does not feel alienated because of the male dominance in the judiciary. (Worldometers 2018) In a country like India which prides itself on the nature of its democracy, it is important to have representation of all aspects of the society; this will provide the legitimacy to both the democracy along with the judiciary. The presence of women at such prestigious posts in the upper echelons of the judiciary will serve to be a powerful factor in the emergence of female role models who will in turn help in the enfranchisement of the new generation of women both as practicing lawyers and members of the judiciary. In many judgements, it has been observed that male judges have passed sexist remarks both in court as well as in the judgements; the presence of women in such courtroom will have a mitigating effect on such occurrences. One of the most important reasons for the presence of women in the judiciary is because women bring a

different perspective into passing judgements. Not only in India, but world over, women have different cultural, social and historical experiences. This empowers them to add a unique perspective in deciding the cases that come before a court. A healthy mix of men and women can make a substantive difference to the passing of a judgement that a bench comprising only of men in matters that benefit from a diverse composition. (Shodhganga 2008)

In addition to adding diversity to the bench, the presence of women can do much more than increase gender representation. Madame Justice Bertha Wilson of the Canadian Supreme Court, in a lecture, had said that gender and diversity of other forms are not mutually exclusive; Black, Asian, lesbian and working-class women bring experiences to the court that have not only been gained as a result of their gender, but also due to the interaction of their gender with the previously mentioned factors, thus making their struggle unique. (Wilson 1990) This observation by Justice Wilson could be seen in a different lens in the Indian context. In a diverse and multi-cultural country such as India where the presence of factors such as caste, religion and economic status can play a huge role in forging the career and struggles of a person, a woman can add a different perspective if she conquers all these struggles to become a judge in addition to the obstacles strewn in her way because of her gender.

In order to arrive at constructive policy suggestions to improve the disproportionate representation of women in the Indian judiciary, it is important to understand the reasons for the same in the Indian context. It is no hidden fact that India was under the aegis of the British Empire till she achieved independence in 1947. India borrowed a majority of its administrative institutions from the remnants of the respective British systems; the judiciary was no different. The Constitution of India replaced the Government of India Act, 1935 and thus enabled the relatively seamless transition of the judiciary from British India to the newly independent India. This ensured that the existing traditions, culture and rituals of the judiciary were carried on to the newly formed Indian judiciary without much critical examination or change. The colonial legacy also ensured that the patriarchal language with which laws were drafted and judgements were passed did not change as well. (Kunhu 2009) Thus, at a time when several borrowed institutions were evolving with the monumental societal changes of that time, the judiciary remained embedded in its insular approach borrowed from the British. Thus, the structural discrimination and alienation faced by women at the point of entering the

judiciary was not done away with, but in fact continued implicitly. (Shodhganga 2008) Women have always been seen as being meant for a household role which is in furtherance of carrying forward stereotypical Indian culture. The social construct that women were confined to did not enable them to enter many professions including the legal profession. This is the reason why females, who make up almost half of India's population, yet occupy only around ten percent of the High Courts in India. This glass ceiling manifested itself in different ways for women who had managed to enter the profession. The subtle biases against women manifests themselves in forms such as salary gap, the dual role of women in their household as well as workplace, in addition to different treatment from their male colleagues.

In the Indian Judiciary, there is no explicit recognition given to the struggle of women in reaching the judiciary and there is no provision to guarantee the number of sitting women judges in a court. In contrast, Belgium has a system which resembles a quota system in the Belgian Constitutional Court. Article 11 (b) of the Belgian Constitution tackles gender parity in the executive branch of the government in a way where the equality of men and women in the eyes of the law is guaranteed. Since 2003, the Belgian Constitutional Court has mandated that judges of both the sexes should be a part of its total strength. In furtherance of this commitment, in 2014, the court has set an aim to achieve a thirty- three percent quota for women judges. Since 2014, every third appointment to the court must be of a female (underrepresented sex) judge. Although this system has not been adopted by all Belgian Courts, the High Council of justice, which is responsible for several functions like supervising the judiciary, handling complaints, training magistrates amongst other functions, has to mandatorily be composed of thirty three percent of female members. (Cambridge Studies in Law and Society 2018) This policy by the Belgian Constitutional Court could be replicated in India at the levels of the higher judiciary. The Supreme Court Collegium System could be modified to include a quota for women judges in the higher judiciary; this quota could only be exercised till the ratio of the female to male has increased to the level that is deemed appropriate by the judiciary. It is important to note for the policymakers that such a quota system needs to be complemented with measures such as data collection, far reaching judicial training programmes and increased awareness that ensure that the merit based approach of judicial appointments is not compromised.

In addition to the measures elucidated above, it is essential that such strong steps are supplemented by secondary measures. These measures will help the policymakers in understanding the gravity of the problem and setting a time period in which the desired goal should be achieved. There are several measures that the government and judiciary can take in order to take cognisance of this deficit and then to enact measures to tackle it. In the United Kingdom, the government maintains statistics on judicial diversity in order to identify and correct patterns associated with judicial appointments. In India, there is no such government mandated body that does the same. There is an urgent need to collect and publish such statistics in the public domain which consider several parameters such as gender, caste, religion, economic status amongst other social factors that relate to appointed judges. The higher echelons of the judiciary have similar data in the public domain but the lower judiciary which forms the crux of the judicial system remains alien to such efforts. There is the possibility of a conflict arising between the Law Ministry and the High Courts in this regard since High Courts have administrative control over the lower courts. The lack of reservations in the appointment of judges in the higher judiciary has ensured that no such statistics are maintained by the government. It is important for the government and the judiciary to diagnose the problem in its appointment system and that is only possible if the right data is monitored. This exclusion of one half of the population should not be treated in a trivial manner; the High Courts and the Government needs to find a solution to this conflict which prevents data collection and an appropriate authority must initiate the collection and regular updating of data. (Arijeet Ghosh 2018)

In recent times, the discourse on appointment of judges focuses almost exclusively on issues such as the conflict between the judiciary and the executive, disposal rates and vacancies in the courts. There is minimal focus on the composition and equitability in choosing judges. There have been a few arguments that propose that the number of female judges in the judiciary should be in proportion to the number of female practicing lawyers. Such arguments are inherently flawed since they fail to tackle the deep rooted social obstacles that women face to enter the legal profession in the first place. It is the need of the hour that the judiciary takes measures such as increasing the number of women in the higher judiciary gradually to bring it on par with the male judges. In a first, all four High Court Chief Justices of Delhi, Mumbai, Chennai and Kolkata were women during the same period of time. The Chief Justices of the High Courts recommending judges for elevation should explicitly ensure that their

recommendations are well balanced in terms of the excluded sections in existing judiciary. (Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice 2016) Recently, Senior Counsel Indu Malhotra was directly elevated as a judge of the Supreme Court. In spite of the darkness that is currently covering the gender representation in the judiciary, there is light at the end of the tunnel as far as awareness is concerned; this recent surge in awareness of this problem should be a stepping stone for both the government and judiciary to be proactive in giving justice to one half of India's population.

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