

THE UNATTAINABLE BAR: A LACK OF GENDER DIVERSITY IN THE INDIAN JUDICIARY

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ABSTRACT

Since its establishment, the Supreme Court of India has had only eight sitting women judges. A diverse bench is an essential characteristic of a fair and impartial judiciary. It provides minority sections of the society a voice and enhances the courts' representative quotient and democratic legitimacy. The percentage of women judges in the lower and higher judiciary at present is nothing less than deplorable. This article highlights the operation of gender bias in the judicial system. It includes influencing bench compositions, evaluating potential women judges on arbitrary criteria, applying higher standards when assessing women judges in addition to constantly challenging their professional competency.

Furthermore, an attempt has been made to understand the reasons for such gender based bias. These include inflexible workplace environments, occupational capacity and limitations drawn on the basis of gender, failure on part of women to be able to freely 'perform' gender, the nature of law as a profession and insecurity on the part of men due to fear of major overhauling of legal system due to women's disparate decision making style. This article also examines the affirmative actions taken by numerous states in the country and reviews them in light of constitutional mandates and international conventions. Finally, the article examines women's response to such organizational and professional barriers.

INTRODUCTION

The recognition of feminist principles in the United Kingdom can be traced back to the First World War; Britain experienced a shortage of work force in factories back home, hence, a large number of women were recruited while men were enlisted as troops to fight on the front.¹ However, inclusion of women in the legal profession was never given due thought and was, in fact, discouraged. In *Bebb v The Law Society*, three judges of the Court of Appeal in England, imposed an absolute and positive prohibition against

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¹ Saurabh Kumar Mishra, 'Women in India Courts of Law: A Study of Women Legal Professionals in the District Court of Lucknow, Uttar Pradesh, India' (2015) <<https://journals.openedition.org/ces/1976>> accessed 5 September 2018.

women practicing the profession of law;² they were debarred from becoming solicitors. The Representation of People's Act, 1918 and the Sex Disqualification (Removal) Act, 1919 changed the social order for women in terms of legal employment; women could now serve as magistrates or jurors and freely enter the legal profession.

In 1879, the Legal Practitioners Act was passed in India. A conjunctive reading of 'person' under the said Act and General Clauses Act was interpreted in a manner that would include women to the Bar. However, the 1916 Calcutta High Court decision of *In Re, Regina Guha*³ and the 1921 Patna High Court Decision of *In Re, Sudhanshubala Hazra* prohibited women law graduates from practicing law in Indian courts.⁴ In order to allow a Special Leave Petition in *Sudhanshubala's case*, the Patna High Court required depositing a high sum as security for costs. An application was addressed to Sir William Duke stating, "*The question relates to granting permission to lady lawyers to practise in courts. If there is any country where lady practitioners are necessary, it is India...where purdah system is stringent and purdah ladies are often parties to the suits.*"⁵

Cornelia Sorabji, hailed as India's first woman advocate faced multiple impediments before being accorded the right to represent *purdah nashin* women in court. On returning to India in 1892, after taking the Bachelor of Civil Laws exam at Oxford, it was not until 1921 that the Allahabad High Court granted her permission to practice law.⁶ Dr. Hari Singh Gaur, a member of the legislative assembly at the time, vouched for an amendment to the Legal Practitioners Act to remove the sex bar. Consequently, the Legal Practitioners (Women) Act, 1923 was passed on 21 March 1923.⁷ What followed was a plethora of applications for registration of women legal professionals at the Allahabad High Court. At the time, the token appearance of women practitioners in courts evoked a sense of curiosity and surprise.

² *Bebb v The Law Society* [1914] 1 Ch 286.

³ *Re Regina Guha* ILR 44 Cal 290.

⁴ *Re Sudhanshubala Hazra* ILR 1 Pat 104.

⁵ Ramo Devi Gupta, 'Advent of Women in the Profession of Law' (*Allahabad High Court*) <<http://allahabadhighcourt.in/event/AdventOfWomenInTheProfessionMrsRDGupta.pdf>> accessed 8 September 2018.

⁶ Suparna Gooptu, *Cornelia Sorabjee: India's Pioneering Woman Lawyer* (OUP 2006) 145.

⁷ Justice Sunil Ambwani, 'Ethics and Legal Profession' (*Judicial Training & Research Institute*) <<http://ijtr.nic.in/webjournal/2.htm>> accessed 9 September 2018.

JUDICIAL REPRESENTATION OF WOMEN IN THE SUPREME COURT

A diverse bench is an essential characteristic of a fair and impartial judiciary. It provides minority sections of the society a voice and enhances the courts' representative quotient and democratic legitimacy. The International Commission of Jurists and the OECD have also underscored the role of gender balance in preserving courts' legitimacy as representatives of the society they serve.⁸ Furthermore, bench diversity helps in understanding the social implications of rulings.⁹

Of the 229 judges appointed over a period of sixty-eight years to the Supreme Court of India, only eight have been women.¹⁰ The lack of gender diversity seems to have been ingrained in appointments since the Court's very inception. The collegium did not deem it necessary to appoint a women judge until 1989. It took thirty-nine years to appoint the first woman judge in the Court. Justice Fathima Beevi was the first woman to be appointed to the Supreme Court.¹¹ What made her appointment more lucrative was that she would fulfill the requirement of a woman judge and a Muslim judge. This proved to be a win-win situation for the court as it improved the token representation of women in the apex court and catered to religious sentiments of a minority group simultaneously. On retiring in 1992, she was appointed as the Governor of Tamil Nadu. Justice Sujata V Manohar, appointed in 1994,¹² was part of the bench in the landmark case of *Vishakha v State of Rajasthan*.¹³

Justice Ruma Pal, known to be one of the finest women judges in the Supreme Court thus far, missed the bus to becoming the first woman Chief Justice of India owing to a lack of timely communication. On the Supreme Court's Golden Jubilee year, three judges

⁸ International Commission of Jurists, 'Women and the Judiciary- Geneva Forum Series no 1' (ICJ, 2013) <<https://icj.org/wp-content/uploads/2014/10/Universal-Women-and-Judiciary-Gva-For-1-Publications-Conference-Report-2014-ENG.pdf>> accessed 8 September 2018.

⁹ 'Report on the Implementation of the OECD Gender Recommendations' (OECD, 2017) <<http://oecd.org/mcm/documents/C-MIN-2017-7-EN.pdf>> accessed 12 September 2018.

¹⁰ Harish V Nair, 'According to Experts, Number of Women Judges in Higher Judiciary Paltry' *India Today* (New Delhi, 30 May 2018) <<https://indiatoday.in/mail-today/story/experts-say-women-judges-still-underrepresented-in-higher-judiciary-1245370-2018-05-30>> accessed 15 September 2018.

¹¹ Namita Bhandare, '67 years of Supreme Court, 6 women judges' (*Livemint*, 2 September 2017) <<https://livemint.com/Leisure/Ak3TNcLWpQuoFaD3gJUnmM/67-years-of-Supreme-Court-6-women-judges.html>> accessed 15 September 2018.

¹² Bhandare (n 11).

¹³ *Vishakha v State of Rajasthan* (1997) 6 SCC 241.

including Justice YK Sabharwal, Justice Doraiswamy Raju and Justice Ruma Pal were to be appointed. The swearing-in ceremony was fixed on 29th January 2000. Justice Ruma Pal and Justice YK Sabharwal would have shared the same level of seniority on the retirement of Hon'ble CJI AS Anand. In case two judges shared seniority, the judge's name higher up in alphabetical order would be considered senior. On applying this rule, Justice Ruma Pal would stand to be the senior most. However, the swearing-in ceremony was advanced by a day at the last moment, in order to coincide with the Golden Jubilee celebrations of the Supreme Court. Unfortunately, Justice Ruma Pal did not receive communication regarding the same and even though both judges flew to Delhi on the same day, by virtue of arriving a few hours earlier, Justice YK Sabharwal was deemed to be the senior most judge and was sworn in accordingly.¹⁴

Justice Gyan Sudha Misra, the Chief Justice of the Jharkhand High Court completed a successful four-year stint at the Supreme Court from 2010 to 2014. She presided over the *Aruna Shanbaug case*.¹⁵ Justice Ranjana Prakash Desai was a Supreme Court Judge from 2011 to 2014, and shared the bench that upheld the death sentence of terrorist Ajmal Kasab.¹⁶ Justice Banumathi (2014-present) presided over the *Nirbhaya case*.¹⁷ In a separate judgment penned by her, the case definitely came within the 'rarest of the rare' cases and warranted for a death sentence.¹⁸ Justice Indu Malhotra was appointed as the 7th woman Supreme Court judge in April 2018. She is the first woman lawyer to be directly appointed from the Bar as a judge in the apex court.¹⁹ The latest woman judge to be appointed is Justice Indira Banerjee. She assumed office on 7th August 2018.²⁰

Of all eight women judges appointed, three belong to families with a legal background. Justice Ranjana Desai is the daughter of criminal lawyer S.G. Samant Desai. Justice Sujata Manohar is the granddaughter of the second Chief Justice of the Gujarat High Court (Kantilal Thakoredas Desai). Justice Indu Malhotra is the daughter of the Supreme

¹⁴ Alok, 'How India Missed Getting its First Woman Chief Justice' (*Critical Twenties*, 26 November 2010) <<http://criticaltwenties.in/lawthejudiciary/how-india-missed-getting-its-first-woman-chief-justice-india>> accessed 11 September 2018.

¹⁵ *Aruna Ramchandra Shanbaug v Union of India* AIR 2011 SC 1920.

¹⁶ *Mohd Ajmal Amir Kasab v State of Maharashtra* (2012) 9 SCC 1.

¹⁷ *Mukesh v State (NCT of Delhi)* (2018) 8 SCC 149.

¹⁸ *ibid.*

¹⁹ Apoorva Mandhani, 'Indu Malhotra Sworn in as SC Judge, SC Gets 7th Woman Judge' (*LiveLaw*, 27 April 2018) <<https://livelaw.in/breaking-indu-malhotra-sworn-sc-judge-sc-gets-7th-woman-judge-history-first-bar/>> accessed 3 September 2018.

²⁰ Apoorva Mandhani, 'Justices Indira Banerjee, Vineet Saran and KM Joseph Sworn in as SC Judges; No Change in Order of Seniority' (*LiveLaw*, 7 August 2018) <<https://livelaw.in/justices-indira-banerjee-vineet-saran-and-km-joseph-sworn-in-as-sc-judges/>> accessed 2 September 2018.

Court Senior Advocate Om Prakash Malhotra. A parallel question that arises is, do women judges belonging to legal families have a higher chance of being elevated? According to a 2016 report of the National Lawyers' Campaign for Judicial Transparency and Reforms (hereinafter NLC), of twenty eight sitting judges of the Supreme Court, nine happen to be close relatives of former legal luminaries (1/3rd of the total number of sitting judges).²¹ However, this question is beyond the scope of this article. Nevertheless, it is an important observation.

JUDICIAL REPRESENTATION OF WOMEN IN HIGH COURTS AND LOWER JUDICIARY

The number of women judges appointed in High Courts of the country is woeful. Overall, not more than 10% of the judges are women in the twenty-four High Courts of the country.²² The Sikkim High Court has the highest percentage of women judges (33%), followed by the Delhi High Court (27%) and Madras High Court (18%). Rajasthan has the least percentage of women judges (6%).²³ The number of women judges who are appointed can be linked to the number of women appearing for judicial exams. This, in turn, would depend on the number of women law graduates. The number of female law graduates would further depend on the number of women who choose law as part of tertiary education. Levels of women pursuing tertiary education would be dependent on the number of girls that complete primary and secondary level education. Furthermore, there is a moderate correlation of 0.44 between a state's sex ratio and the representation of women in the lower judiciary. In order to draw a parallel, it is important to note that Rajasthan has one of the lowest sex ratios as of 2013-2015 (861 females/1000 males).²⁴ However, this correlation is only moderate and there exist exceptions. Although Kerala has the best sex ratio amongst all states, only 33% of women are part of its lower judiciary. States such as Punjab, Sikkim, Meghalaya and Tamil Nadu, on the other hand, have a lower sex ratio than Kerala but have a higher representation of women judges in lower courts.²⁵

²¹ *National Lawyers' Campaign for Judicial Transparency and Reforms v The Supreme Courts Advocates-on-Record Association* WP (C) No 13 of 2015.

²² Arijeet Ghosh and others, 'Tilting the Scale: Gender Imbalance in the Lower Judiciary' (*Vidhi Legal Policy*, 12 February 2018) <<https://vidhilegalpolicy.in/reports/report-on-gender-imbalance-in-the-lower-judiciary>> accessed 6 September 2018.

²³ 'Chapter 5: Participation in Decision Making' (*Ministry of Statistics and Programme Implementation*, 2017) <http://mospi.nic.in/sites/default/files/reports_and_publication/statistical_publication/social_statistics/WM17Chapter5.pdf> accessed 15 September 2018.

²⁴ 'Sex Ratio (Females/1000 Males)' (*NITI Aayog*) <<http://niti.gov.in/content/sex-ratio-females-1000-males>> accessed 14 September 2018.

²⁵ Ghosh (n 22).

Statistics on lower judiciary are no different. 71.4% of the judges in the lower judiciary are men. Meghalaya (73.80%) and Goa (65.9%) have the highest percentage of women judges in the lower judiciary while Bihar (11.52%) and Jharkhand (13.98%) have the lowest percentages. In terms of the office held, there exists a near-uniform trend of proportion of women judges decreasing as one moves up the judicial hierarchy from a Civil Judge (Junior Division) to a District Judge.²⁶

THE CONCEPT OF GENDER BIAS AND HOW IT OPERATES IN THE JUDICIARY

In order to understand the concept of gender bias, the US Supreme Court judgment of *Price Waterhouse v Hopkins* is informative.²⁷ Ann Hopkins, a senior manager at an accounting firm, was denied partnership in a mixed motive case (where multiple reasons occur for denying partnership, only some of which depend on gender). She generated newer business for the firm than any of the 85 male co-applicants. Among 32 references sought, 13 gave positive reviews, while 8 rejected her. Despite majority number of positive reviews, she was denied partnership. Even though her management style was considered unfavourable, the firm was held liable because undue reliance was placed on the negative comments. Among the 8 comments, many statements reflected unconscious sexual stereotypes by male evaluators; such as, her chances of becoming partner would improve had she worn makeup or put on some jewellery.

Most men fail to perceive gender bias and deflect discrimination complaints as an overly sensitive reaction to their well-intentioned acts. Bias or discriminatory practices emerge on a daily basis and depend on decision-making and workplace culture, interactions and relationships.²⁸

Gender bias in the judiciary, often arises during case allotment. A woman judge may be excluded from a bench that is to hear a 'landmark' case. Individually, such behaviour may appear gender neutral because when considered in isolation, men are subject to these practices as well. However, cumulatively, they produce a pattern of gender bias.²⁹ An opportunity structure is a set of parameters that determine credentials needed to

²⁶ *ibid.*

²⁷ *Price Waterhouse v Hopkins* 490 US 228 (1989).

²⁸ PY Martin, JR Reynolds and S Keith, 'Gender Bias and Feministic Consciousness Among Judges and Attorneys: A Standpoint Theory Analysis' (2002) 27(3) *Journal of Women and Culture in Society* 665.

²⁹ Reichman and Sterling, 'Recasting the Brass Ring: Deconstructing and Reconstructing Workplace Opportunities for Women Lawyers' (2002) 2 *Capital University Law Review* 923.

achieve a highly coveted position such as a judge, dean etc.³⁰ Women face a 'glass ceiling' and are limited from reaching the highest echelons in the judicial hierarchy. As observed,³¹ the proportion of women that move up the judicial ladder from a Civil Judge (Junior Division) to a District Judge is miniscule.

Women, who demonstrate exceptional qualities, thus making it difficult to deny elevation, make the cut for judgeship.³² In order to be appointed, women must show extraordinary work commitment, as opposed to their male equivalents. Appointment processes involving subjective criteria like interviews leave more room for potential bias and discrimination than those based on objective examinations. Former Supreme Court Judge Gyan Sudha Misra has spoken about higher standards being applied to women judges over male judges for elevation.³³

Insufficient reasons as those cited in the *Price Waterhouse Cooper* case, become relevant parameters when inducting women into the judiciary. Former Delhi High Court Chief Justice AP Shah has described how a woman lawyer he had recommended for the judgeship was rejected on the grounds of being 'rude,' though he believes similar behaviour exhibited by a male lawyer would not have been judged as harshly. More overt forms of gender bias include the uncalled necessity of father figures. Women aligned to chambers of an influential advocate, or related to a judge or senior lawyer, are more likely to be elevated to judgeship than women without access to these networks. These women have little chance of being able to do so on their own merit.³⁴

Furthermore, professional competency is constantly challenged in case of women judges. Even after appointment to the highest posts, they continue to be subjected to harsher forms of assessment. A retired woman Supreme Court judge once stated that her judgments were accepted only when upheld by a larger bench, and another said that a fellow male judge would constantly question her understanding of an issue.³⁵ Women judges are shown less deference than their male counterparts. As opposed to women, address forms are usually correct ("your honour") when referring to a male judge. Justice Leila Seth, the first woman to be appointed as the Chief Justice of a High Court, expressed the same. In an interview she said, "*When I asked a question and my brother*

³⁰ Rosabeth Moss Kanter, *Men and Women of the Corporation* (5th edn, New York: Basic 1977) 216.

³¹ Ghosh (n 22).

³² Susan Martin and Nancy Jurik, *Doing Justice, Doing Gender: Women in Legal and Criminal Justice Occupations* (2nd edn, SAGE Publications Inc 2007) 154.

³³ Nair (n 10).

³⁴ Nair (n 10).

³⁵ Ghosh (n 22).

*judge pointed out to them that they should say 'My Lady', they thought the easiest way out was to say, 'My Lord' and look at the male judge as if the question had emanated from him! Very rarely was I addressed correctly."*³⁶

WHY GENDER BIAS IS PREVALENT IN THE JUDICIARY

Full time working women experience a double workday as they perform paid work for eight or more hours each day, and unpaid household and child care labour 'after work'. Inflexible workplace structures make it difficult to mesh work and family life. Since the profession demands an open-ended commitment of time and energy, women tend to face a 'time crunch'. They are forced to make life choices not required of their male colleagues.

Joan Williams observes that women lawyers place success that draws from work and motherhood on the same pedestal. Meeting expectations of the 'ideal worker', however, prevents women in law from meeting their children's daily needs with care and affection. This leaves them with three options: avoid having children, spend very little time with them or work part time thus minimizing career opportunities.³⁷ In general, the legal system asserts gender privilege instead of providing women with the freedom to choose between home and work.

Women are assumed to have feminine personalities and are perceived as not 'tough' enough to handle criminal law matters and courtroom stress (handling criminals, murderers). This places a condition on women- accept low visibility, less challenging cases and practice areas of law, or complain and risk the position one has attained by investing sweat and blood.³⁸ Moreover, 'tough' women face disapproval from both men and women colleagues for adopting a masculine model of behaviour, while women who decide to conform to the feminine behaviour are viewed as weak and unfit for the profession. Since the prototype of a lawyer is a man, characteristics associated with masculine dominance are used to explain a man's success. On the other hand, a woman's success is attributed to luck, chance or the inappropriate use of their sexuality. These gender-based opinions affect appointments as well.³⁹

³⁶ Press Trust of India, 'When Leila Seth Became a Victim of Gender Bias!' *Business Standard* (New Delhi, 23 April 2015) <www.business-standard.com/article/pti-stories/when-leila-seth-became-a-victim-of-gender-bias-115042300439_1.html> accessed 20 September 2018.

³⁷ Joan C Williams, 'Sameness Feminism and the Work/Family Conflict' (1990) 35 *NYL Sch Law Review* 347.

³⁸ Martin (n 32).

³⁹ *ibid.*

Even while making small talk with colleagues, women face multiple dilemmas. A friendly woman judge may be suspected of 'coming on', whereas one who is too serious is rejected as unfriendly. Women constantly need to negotiate their personality and find a style that is acceptable to all. Thus, a woman is never free to assert her own sense and understanding of personal gender or identity. Justice Leila recalled in an interview, "*I think it was hard for the male judges, particularly those who came from feudal backgrounds and were not used to the idea of a woman being the decision maker. At full court meetings, I made a conscious effort to be gentle but firm.*"⁴⁰

The legal profession is a clear example of a gendered occupational culture that creates barriers for women. Professional opportunities depend on informal social networking, private clubs, bar associations and even the golf course. Total commitment and round the clock availability is expected from a lawyer and/or judge. Originally, such expectations stemmed from an era where the prototypic lawyer had a wife taking care of his home and family. With respect to both work time and leisure time, professional men have an advantage over women because they can expand hours spontaneously, flexibly, and informally. As a result, they successfully meet organizational criteria of putting work first.

Women lawyers and judges now share the professional sphere with men; however, for many of them, work-related expectations generate difficult choices on a daily basis. These uncertainties pose a dilemma for women. When women do not choose or are unable to perform in accordance with the required open ended availability, especially women with families, their commitment is questioned. Alternatively, men with families are prima facie assumed to be committed owing to financial necessity and are in fact rewarded with higher salaries.⁴¹ Several prominent women lawyers, including the likes of Indira Jaising and Meenakshi Arora, have spoken about discrimination that women litigators encounter and an entrenched 'old boys club' mentality that makes it harder for women to lobby for judicial posts.⁴² These informal forums accord power and status. Justice Leila Seth recalled how she was denied the membership of Delhi Gymkhana Club because she was a 'woman judge'.⁴³ Law, when perceived as a

⁴⁰ Leila Seth, *On Balance* (Viking Penguin 2003) 325.

⁴¹ Martin (n 32).

⁴² Soni Mishra, 'I Was Sexually Harassed in the Corridors of the Supreme Court' (*The Week*, 13 November 2016) <<https://theweek.in/theweek/cover/interview-indira-jaising-senior-lawyer.html>> accessed 13 September 2018.

⁴³ Rana Siddiqui Zana, 'Capital Chronicles: Delhi now loves money and chamak-dhamak' *The Hindu* (New Delhi, 3 November 2014) <www.thehindu.com/news/cities/Delhi/delhi-now-loves-money-and-chamak-dhamak-says-justice-leila-seth/article10994169.ece> accessed 15 September 2018.

masculine profession, strengthens men's resistance to include women in the circle. Non-participation of women in these organizations renders them 'misfits' for the profession. It further affirms a sense that women are not skilled and lack 'commitment' to the practice of law.

Insecurity on part of men becomes a major cause of encumbrance to women in the judiciary. The opposition is associated not only with men's fears that women will compete with them for appointments and promotions, but also, with concerns that women may alter the nature and organization of the whole legal system itself. Some scholars have debated the ability of women to change the dynamics of the legal system. Feminist legal scholar Carrie Menkel Meadow argues that women's experiences and values differ from those of men and their presence in sufficient numbers could transform the organization and practice of law. Men focus on abstract concepts of rules and rights, an abstract ethic of justice. Women are concerned with relationships and responsibilities, an ethic of care. Women may tend to emphasize on 'feminine values' that include less litigation, more mediation, greater empathy and more reformation orders.⁴⁴ A counter argument that could be raised to this line of thinking would include Justice Banumathi's strict interpretation of the law in the *Nirbhaya* gang rape case. Cultural feminists argue that the feminine concept of 'ethic of care' could help transform public life for the benefit of all. Displacing masculine with feminine culture would reduce violence, workplace hierarchy and increase consensual decision making and concern for clients.

PROTECTING GENDER DIVERSITY: A CONSTITUTIONAL MANDATE?

Addressing gender diversity achieves equality of opportunity for women in the legal profession sought under Article 16 of the Indian Constitution. An appointment process that is merit-based, fair, and non-discriminatory highlights and enforces the constitutional mandate. India is a signatory to Convention on Elimination of Discrimination against Women (hereinafter CEDAW), 1979. The convention seeks to create equality between men and women by ensuring women's equal access, and equal opportunities in political and public life. Article 11 of the Convention urges state parties to take all appropriate measures to eliminate discrimination against women in the field of employment. In particular, Article 11(b) describes the right to same employment opportunities, including the application of the same criteria for selection in matters of

⁴⁴ Carrie Menkel-Meadow, 'The Comparative Sociology of Women Lawyers: The "Feminization" of the Legal Profession' (1986) 24(4) Osgood Hall Law Journal 897.

employment. Additionally, right to promotion, equal treatment in respect of work of equal value and equal treatment in the evaluation of the quality of work are factors for which protective legislation, if required, must be implemented.⁴⁵

The word discrimination under Article 15(1) of the Constitution connotes an element of unfavourable bias. This Article comes into picture when the legislature has discriminated only on one of these grounds and no other factor could possibly have been present. Article 15(3) is an exception to Articles 15(1) [and 15(2)]. Article 15(3) allows a departure from Article 15(1) in order to provide socio-economic parity to women.⁴⁶ In *Government of Andhra Pradesh v PB Vijay Kumar*, the Supreme Court upheld the validity of quota for the appointment of women in government services.⁴⁷ It described that an important limb of gender equality is creating job opportunities for women. Making special provisions for women in respect of employment or posts by the state is an integral part of Article 15(3). Furthermore, Article 15(3) is not whittled by Article 16 in any manner.

Though there is no reservation for women in the higher judiciary, a number of states have provided quotas for women in the lower judiciary. States like Andhra Pradesh, Assam, Bihar, Chhattisgarh, Jharkhand, Karnataka, Odisha, Rajasthan, Tamil Nadu, Telangana and Uttarakhand provide for reservation, which ranges between 30%-35% of the total seats, for which recruitment is done through direct appointment.⁴⁸ Of the total number of 15,959 judges in the country, 11,397 are male.⁴⁹ In its 96th report on Demand for Grants (2018-2019) of the Ministry of Law and Justice, the Standing Committee on Personnel, Public Grievances and Law and Justice headed by Mr. Bhupender Yadav reiterated that strength of women judges should be increased to 50% of the total strength.

A parallel question that arises then is, whether such wide sweeping quotas are required? Considering the pitiable state of affairs, such affirmative action would only foster equal opportunity of judgeship in each cadre of the judiciary. It would give women a head start and an incentive (even if meagre) to join the judiciary.

⁴⁵ Convention on the Elimination of all forms of Discrimination Against Women 1979.

⁴⁶ MP Jain, *Indian Constitutional Law* (LexisNexis 1962) 937.

⁴⁷ *Government of Andhra Pradesh v PB Vijay Kumar* AIR 1995 SC 1648.

⁴⁸ Ghosh (n 22).

⁴⁹ Apoorva Mandhani, 'Increase Strength of Women Judges to 50%, Suggests Parliamentary Panel' (*LiveLaw*, 14 March 2018) <<https://livelaw.in/breakingincrease-strength-women-judges-50-suggests-parliamentary-panel/>> accessed 3 September 2018.

WOMEN'S RESPONSE TO GENDER BIAS IN THE LEGAL PROFESSION

According to contemporary scholars, femininity and masculinity are neither settled beforehand nor fixed for life. They are accomplished in everyday social interactions. The expression 'doing gender' refers to the embodied and situated accomplishment of gender difference. Individuals are not allowed to 'do gender' in just any manner they desire. The construction of social identities is 'structured', i.e., individuals know they will be socially accountable for their actions. Over the decades, women in the legal profession have adopted various coping strategies for dealing with various forms of gender bias. Very often, they try to develop an ideal identity that is tailor made specifically for the profession. This additionally helps them seek mentors and ward off sexual harassers.⁵⁰ Other strategies include settling in for specialties that are deemed appropriate for women such as Family law and Environmental law.

Separate women's bar associations have been established as well. These forums help women participate in professional life by serving as groups and centres for mutual support, giving leadership opportunities and providing visibility. In 2015, the Supreme Court Women's Bar Association filed a writ petition requesting the apex court to increase the number of appointments of women judges. Article 14 and 15(3) were relied upon. It was submitted by the association that an increase in representation would advance the cause of justice in cases of domestic violence, female foeticide, women trafficking, matrimonial disputes and women's right to property.⁵¹

ENHANCING THE REPRESENTATION OF WOMEN JUDGES IN LANDMARK CASES

Having acknowledged the dearth of women judges in the judiciary, it is crucial to review the number of women judges that have constituted the benches hearing landmark cases. For example, in *Shayara Bano v Union of India*, the bench constituted of Justice Kurian Joseph, Justice UU Lalit, Justice RF Nariman, Chief Justice Khehar, and Justice Abdul Nazeer.⁵² Even though the judgment affected women the most, Justice Banumathi

⁵⁰ Kathleen Hull, 'Assimilation, Choice or Constraint? Testing Theories of Gender Differences in the Careers of Lawyers' (2000) 79(1) Social Forces 229.

⁵¹ Live Law News Network, 'After Complaint of Gender Bias, SC Promises More Women Judges in Apex Court, High Courts' (*LiveLaw*, 10 November 2015) <<https://livelaw.in/after-complaint-of-gender-bias-sc-promises-more-women-judges-in-apex-court-high-courts/>> accessed 12 September 2018.

⁵² *Shayara Bano v Union of India* (2017) 9 SCC 1.

was not part of the bench. Nevertheless, the bench that consisted of the judges from all faiths did compensate for the loss of a women judge. Similarly, in *Goolrokh Gupta v Burjor Pardiwala*, the bench did not include Justice Banumathi. The case was concerned with merging a wife's religious identity with that of her husband.⁵³

In October 2017, a three-judge bench comprising of Chief Justice Dipak Misra, Justice Banumathi and Justice Ashok Bhushan referred the matter pertaining to the entry of women in Sabarimala Temple to the Constitution Bench. The revised Constitution Bench formed on 7th July 2018 included the newly appointed Justice Indu Malhotra. Justice Malhotra was expected to add a new perspective to the issues pertaining to gender equality,⁵⁴ however, she ruled against the entry of women in the temple. The celebrated case of *Navtej Singh Johar v Union of India*, saw Justice Indu Malhotra being part of the Constitutional Bench that decriminalized Section 377 of the Indian Penal Code.⁵⁵ These reassuring steps affirm the apex court's conscious effort in transforming its outlook towards appointment and inclusion of more women judges in the court.

⁵³ *Goolrokh Gupta v Burjor Pardiwala* (2013) 2 RCR (C) 91.

⁵⁴ Express News Service, 'Sabarimala Case: Supreme Court Appoints Woman Judge' *The New Indian Express* (New Delhi, 7 July 2018) <<http://newindianexpress.com/states/kerala/2018/jul/07/sabarimala-case-supreme-court-appoints-woman-judge-1839469.html>> accessed 15 September 2018.

⁵⁵ *Navtej Singh Johar v Union of India* WP (Crl) No 76/2016.