



Gender as basis of decisions making: Women in judiciary and grass root level democracy

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Abstract

The paper runs on the lines of equality as promised by the constitution of India. The judiciary lacks number of judges and equality. The gender basis is in the ratio of 28:3. It is high time that women should be out of the private sphere and be the decision makers. We analyse this with the help of not only the courts but the original decision makers, Panchayats of India. We will see how typically in India the society affects law and how law affects the society. The paper not only reads on with the success and failure case studies of various women who have been decision makers but critically analyse them achieve a result that will help in betterment of the situation. The philosophical point of view of this paper goes down to the very jurisprudential question of exiting of a law, relating the private and public sphere and how the problem in hand actually starts at home when gender bias is normalized in our minds. Article 15(3) of the constitution which gives special privileges to women and question of reservation is also discussed in the paper, the question is do they really solve the problem. The paper runs on real life examples because gender bias can't be solved without going to the core of the society itself.

Keywords: the meaning of the following words remains the same unless specified in the Article itself

1. Introduction

The Supreme Court of India has been the backbone of the whole nation since the beginning of the time. This fact becomes even more important once we realize that there has been only eight female judges throughout the history of India. That means a large part of the nation had no part in decision making hence, voiceless. The reason can be looked in Mary beard's book *Women and power* 'Aristophanes devoted a whole comedy to the 'hilarious' fantasy that women might take over running the state ^[1]. While this was years ago women still are away from power.

In this article we will look at the problem of lack of female representation with a critical point of view. We will analyse the position of female in the apex court and in the third tier I have taken both the apex and judiciary because the condition and the situation of women in both the scenarios have been very different and hence the result is also different., we will also look at the benefits of having females in courts and why they are stopped from doing what they want to do this part is particularly important because we will see the real examples of women who were stopped from entering courts, and last but not the least what roles do external factors play in the entry and survival of women in law. With glimpses of both law and philosophy we will try to go to the very core of the problem.

In the first part of this paper we shall talk about, the courts in India where women representation is negligible and why the state and the society needs to look into it. we will analyse who article 15(3) is working and is reservation important for the development of women in the judiciary here we will analyse it with the philosophical view taking in consideration that judiciary is also a part of society and gets deeply affected by the same. The story of this part starts from the first female lawyer in India to step into a court and ends with the present female judges presiding over the

cases.

The next part dives into the bottom and grass root of judiciary to see how the 73rd amendment is working there. The question asked here too is the same whether the reservation works or not? From reservation to participation the question remains the same. With case studies of both success and failure of the government policies we will look how much we really helped in making women the decision maker. In the whole paper we will look at every problem with two microscopes the society and the need of judiciary.

Part II: Philosophical discussion and promises to women in decision making

Women have been pushed in the private sphere and neglected in the public realm since ages. 'Private, sphere is not seen as politically irrelevant. Marriage and the marriage contract are also deemed to be politically irrelevant' ^[2], that means all the work that a woman puts her life into is irrelevant to the political world that we live in. then came the time when women were educated, Cornelia Sorabji entered the law space that was flooding with men ^[3]. Some people argue that women are born for passive roles and should stay in the private sphere. In fact leadership and public speaking was an attribute of maleness ^[4]. In contrast to boys, girls are encouraged to play passive roles and given little opportunity to make decisions or develop leadership skills outside the family context. Instead, they are taught to accept the decisions that others - parents, teachers, brothers - make on their behalf. As a result, women tend to lack the self-confidence and skills needed to function effectively in

². Pateman, C. (n.d.). *The sexual contract*. p.3.

³. Ram, S. (2019). *The veiled history of India's first woman lawyer - Times of India*. [online] The Times of India. Available at: <https://timesofindia.indiatimes.com/home/sunday-times/the-veiled-history-of-indias-first-woman-lawyer/articleshow/70144831.cms> [Accessed 10 Nov. 2019].

⁴. Beard, M. (n.d.). *Women & power*. london: profile books, p.17.

¹. Beard, M. (n.d.). *Women & power*. London: profile books, p.9.

the public sphere^[5], but this is applicable to women are not able to reach to the power what about the ones that reach and still are stuck.

There are only 73 female judges out of 670 serving judges in the high court^[6] and 3 in the Supreme Court out of 34 serving judges^[7]. The problem is not with the opinions of women but with opinions of men and their accepted universality, its point of view is the standard for point-of-viewlessness; its particularity is the meaning of universality. It's this force is exercised as consent^[8], it's The question that should be asked are how is it possible that women are not getting higher positions when they are capable enough to reach it but could not touch it, what is stopping them? "Women are available but they are just not on the horizon of those who appoint judges," says senior advocate Indira Jaising. In any case judges can also be appointed directly from a pool of talented women practising at the bar: "The Supreme Court has done itself no favours by not considering the women who are excelling in the bar^[9]. The problem is that the selectors of the judges to the apex court are the present judges and to your surprise they are all male i.e. the collegium system. The raise of female lawyer in a world of all male lawyers will be as difficult as it could be. For this problem people have argued for the reservation of women in law. Though the parliament again a place dominated by men, refuses to talk about it, fortunately the court does not have the liberty to do the same, In the case of Priyanka Sharma And Ors vs. State (Panchayati Raj Dep) Ors the honourable high court of Rajasthan explained why the state does not have the power to give reservations for women in public employment, 'under Article 16(2), reservation to the women is taken under Article 15(3) of the Constitution though even Article 15(1) prohibits discrimination against citizen only on the grounds of religion, race, caste, sex, place of birth or any of them. Thus, Article 15(1) also reiterates what has been provided under Article 16(2) of the Constitution of India. Article 15(3) however permits State to make special provision for women and children. The aforesaid provision has been taken to save reservation in favour of women in ignorance of the fact that Article 15(3) does not speak about reservation but special provisions for women and children. If intention of framers of the Constitution would have been to provide reservation to women and children, then word reservation should have been used, instead special provision. Article 15(3) provides

⁵ Menon-Sen, k. and kumar, A. (2019). Women in India how free? how equal? Report commissioned by the Office of the Resident Coordinator in India, p.61.

⁶ Doj.gov.in. (2019). [online] Available at: <https://doj.gov.in/sites/default/files/HCS%2801.02.2019%29.pdf> [Accessed 11 Nov. 2019].

⁷ Main.sci.gov.in. (2019). Chief Justice & Judges | Supreme Court of India. [online] Available at: <https://main.sci.gov.in/chief-justice-judges> [Accessed 11 Nov. 2019].

⁸ MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8

SIGNS 635, 638 (1983) (footnotes omitted) [hereinafter cited as MacKinnon, *Toward Feminist Jurisprudence*].

This article was the sequel to MacKinnon, *Feminism, Marxism, Method, and the State*:

An Agenda for Theory, 7 SIGNS 515 (1982) [hereinafter cited as MacKinnon, *An Agenda for Theory*]

⁹ Bhandare, N. (2019). 67 years of Supreme Court, 6 women judges.

[online] <https://www.livemint.com>. Available at: <https://www.livemint.com/Leisure/Ak3TnCLWpQuoFaD3gJUnmM/67-years-of-Supreme-Court-6-women-judges.html> [Accessed 9 Nov. 2019].

special provision for women and children thus reservation in favour of women becomes illegal and unconstitutional as discrimination on the ground of sex is prohibited under Article 15(1) and 16(2) of the Constitution of India'^[10]. This means that the problem is not only social but also legal, but saying that would also be ironical because both of them shape the society and even each other. Reservations have worked in the past in bringing up the previously ill-treated people but why not women who as we have previously discussed have been forced into the private space, maybe because of the same reason they are not being described in the public realm. This is not just about the people who are participants in the working of the court but people who are there for justice. 'Many stressed that increased diversity within a judiciary, and ensuring judges are representative of society, enables the judiciary as a whole to better respond to diverse social and individual contexts and experiences'^[11] it's about the people who want to get represented and a sense of justice if one sees a person just like her/him sitting on the bench. The scope of appointing the female judges is not just to the benefit of equality but for the benefit of distributive justice.

In the preamble of India social and political equality was promised to the people. A democratic nation promises certain rights in return for the obedience of the state. Rule of law is tool of the democracy to reach equality. 'Core requirements of the rule of law are good governance and a functioning justice system that carries out its duties fairly, without bias or discrimination and which is accessible to all'^[12]. The question is whether the reservation of women comes under the social justice that was promised or is it even the answer to the question of appointment of more female judges to the courts of India.

Part III: Comparison between the Apex and the Grassroots

On the other hand at the grassroot level democracy i.e. The Panchayati raj system, is going in another direction at least on the face of it. The event, "Women Leaders as Change makers: Gender Equality for Good Governance", was organised by the Indian Ministry of Panchayati Raj and UN Women India on the side-lines of the General Assembly. In the same the stories of change makers were discussed, "Bhakti Sharma, who heads a Madhya Pradesh panchayat, said her role inspired women to ask for schools and roads so their daughters could also get an education and become sarpanchs like her^[13]. Not only had many speakers like her Spoke of how they are not just working as a representation but as a person of power who could change lives. People from around the globe had questions for them not to critique them but to know the functioning and apply the same to their nation and working places, but the issue of this debate was not just to glorify these women but to focus on another

¹⁰ Priyanka Sharma And Ors vs State (Panchayati Raj Dep) [2013] (raj).

¹¹ Women and the Judiciary Geneva Forum Series. 01. (2014). *Copyright International Commission of Jurists*, 1(1), p.2.

¹² Duban, E. and Radačić, I. (2019). Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice. *National studies on barriers, remedies and good practices for women's access to justice in five Eastern Partnership countries*, p.12.

¹³ The Economic Times. (2019). Women sarpanchs tell UN how rural India's power structure is changing. [online] Available at: <https://economictimes.indiatimes.com/news/politics-and-nation/women-sarpanchs-tell-un-how-rural-indias-power-structure-is-changing/articleshow/71387686.cms> [Accessed 9 Nov. 2019].

problem that is women just being a proxy for men.

“It is generally believed that women members are mostly illiterate, lack awareness about functioning of panchayati raj institutions, work under age old traditions and values like purdah system and gender discrimination and work at the dictates of their husbands or male family member^[14]. This is a major problem because, Under Article 243D (4) of the Constitution of India, not less than 1/3rd of the seats of Chairpersons of District Panchayats shall be reserved for women^[15] which is powered by Article 15(3) of the Indian constitution, but according to it the state can make special privileges for women and children but is it only a substantive law or a procedural law. The wordings of the Article does not force the state to make special laws for women but says that the article being anti-discrimination does not stop the state from making new laws for women.

On the other hand women show that reservation is not the only thing they are in the panchayat for. They have proved beyond the limits that the argument of capability does not apply. ‘Smt. Anuradha Joshi, 50, energetic and enthusiastic, Sarpanch of Kodaria Panchayat of Mau Tehsil of Indore District is a shining picture of women Leadership, Imposed self-taxation & tax awareness camp, ATM water vehicle was launched, Every house hold has a toilet today’^[16] she is an example of women not only being capable but can do better if given a chance. The problem is that society buries them under a burden of self-consciousness that they shall have i.e. the devotion that they should have for their family and husband, which at last reflects in their political career. Also there are women who realized that their husband is not their puppet handler and took their rights from them but this was because on the first hand they got the power to do so ‘Take the example of Savitri Devi, mukhiya, Manar panchayat, Aurangabad. Her husband’s involvement in panchayat work during her first stint as mukhiya from 2006-11 included weighing in on which village projects should get priority. Savitri was re-elected to the post in 2011 and now handles around ₹ 20 lakh worth of projects annually on her own, she says^[17].’

So what does the law need to do? Give more reservations to have the seat or give more education and awareness to reserve that seat? The answer is both. If the women are capable and educated enough they will be able to get what is rightfully theirs. But who is stopping them from getting to know their rights and duties which is the first step towards their betterment the answer is better found in this statement, “Fathers and brothers don’t think the girls can travel to school on their own where I come from, forget about making important decisions for the community,” says Prabha Devi, a ward member of the Lagma panchayat in

Sitamarhi, Bihar^[18] we are again back to the problem as discussed by Carole Pateman in sexual contract; of women not being able to take decisions, the quality of women being decision makers is not actually imbibed in the people of India. The men of the family think they own the women and hence can do whatever they want, and hence these attributes are taken to the public realm from the private sphere. As Carole Pateman rightly said, “the public realm can’t be understood in absence of a private sphere and similarly, the meaning of the original contract is misinterpreted without both, mutually dependent, halves of the story. Civil freedom depends on patriarchal rights”^[19] Hence the problem is still in our homes and laws can never fix that.

Part IV: Conclusion

Reservation and Judiciary as a way maker.

Reservation although sometimes gives an image of caste based intergenerational equality, both negative and positive to different people has been sort to be a problem solving method for socially backward group of people. “The policy of positive discrimination, especially one as extensive as the Indian, obviously raises important questions about the nature of justice, the trade-off between justice and such other equally desirable values as efficiency, social harmony and collective welfare, and the propriety of making social groups bearers of rights and obligations”^[20]. In minds of some people it does defy their rights to equality rather than giving some to others. In case of women, the judiciary has not given that such of weightage to women joining in but the same has been given in the grass root level democracy but it has turned into meagre representation than real participation.

On the other hand women representation is not just important but should be mandatory. There should be an inurement that they will receive as much respect and designation as their male counterparts. Some judges have reported nuisances happening with them, “At the beginning many male colleagues did not want us there. They were defending their castles and territories. Many colleagues refused to implement the orders we gave and we had to issue disciplinary orders”^[21] the problem does not stop at what reservation system aims to do but at what the society wants to preserve. If the collegium system wants to work it has to work like a equatorial and not what judiciary is not meant to be, because if the judges are not fare, the people are not represented then it is not equality that the constitution that judiciary serves promises.

Judiciary has always been ahead of the society and always gives it a hand in coming to a level where all are happy. Judiciary is the link between the state and the society, what happens when the link has only one point of view, the society remains where it is. The judiciary may give as many equalized judgements as it wants but the society will not

¹⁴ dak, T. and purohit, B. (2019). *Empowerment of women through participation in panchayati raj system*. p.34.

¹⁵ Pib.gov.in. (2011). *Participation of Women in Panchayati Raj System*. [online] Available at: <https://pib.gov.in/newsite/PrintRelease.aspx?relid=73916> [Accessed 11 Nov. 2019].

¹⁶ Nirdpr.org.in. (2013). *Women Panchayat Representative Of Madhya Pradesh*. [online] Available at: http://nirdpr.org.in/nird_docs/casestudies/shodh/shodh1.pdf [Accessed 15 Nov. 2019].

¹⁷ Khurana, C. (2019). *Women panchayat leaders find their voice*. [Online] <https://www.livemint.com>. Available at: <https://www.livemint.com/Leisure/XIVFC4NFGZHmaNWeKOYqnM/Women-panchayat-leaders-find-their-voice.html> [Accessed 12 Nov. 2019].

¹⁸ Khurana, C. (2019). *Women panchayat leaders find their voice*. [online] <https://www.livemint.com>. Available at: <https://www.livemint.com/Leisure/XIVFC4NFGZHmaNWeKOYqnM/Women-panchayat-leaders-find-their-voice.html> [Accessed 13 Nov. 2019].

¹⁹ Pateman, C. (1988). *The sexual contract*. california: stanford university press, p.4.

²⁰ Singh, A. and mohapatra, s. (2010). *Indian political thought*. Abingdon: Routledge, p.20.

²¹ Women and the Judiciary Geneva Forum Series. 01. (2014). *Copyright International Commission of Jurists*, 1(1), p.13.

accept that gender is not a constraint till one does not visually present that with real participation. The system needs to change but so does the society because as much as the judiciary affects the society, the society is the place from where the people who run the judiciary come from and the laws are born from. The entanglement of law and society can't be removed because without one another they do not exist on their own. If law is bad the society shatters and vice versa. One can't write about law without mentioning the society's problems for which it was made.

References

1. Beard M. (n.d.). *Women & power*. London: profile books, 9.
2. Pateman C. (n.d.). *The sexual contract*. p.3.
3. Ram S. *The veiled history of India's first woman lawyer - Times of India*. [online] The Times of India, 2019. Available at: <https://timesofindia.indiatimes.com/home/sunday-times/the-veiled-history-of-indias-first-woman-lawyer/articleshow/70144831.cms> [Accessed 10 Nov. 2019].
4. Beard M. (n.d.). *Women & power*. london: profile books, 17.
5. Menon-Sen K, Kumar A. *Women in India how free? How equal? Report commissioned by the Office of the Resident Coordinator in India*, 2019, 61.
6. Doj.gov.in. [online], 2019. Available at: <https://doj.gov.in/sites/default/files/HCs%2801.02.2019%29.pdf> [Accessed 11 Nov. 2019].
7. Main.sci.gov.in. Chief Justice & Judges | Supreme Court of India. [Online], 2019. Available at: <https://main.sci.gov.in/chief-justice-judges> [Accessed 11 Nov. 2019].
8. MacKinnon *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8
9. SIGNS 635, 638 (footnotes omitted) [hereinafter cited as MacKinnon, *Toward Feminist Jurisprudence*], 1983.
10. This article was the sequel to MacKinnon, *Feminism, Marxism, Method, and the State*:
11. *An Agenda for Theory*, 7 SIGNS 515 [hereinafter cited as MacKinnon, *An Agenda for Theory*], 1982.
12. Bhandare N. *67 years of Supreme Court, 6 women judges*. [Online] <https://www.livemint.com>, 2019. Available at: <https://www.livemint.com/Leisure/Ak3TNcLWpQuoFaD3gJUnmM/67-years-of-Supreme-Court-6-women-judges.html> [Accessed 9 Nov. 2019].
13. Priyanka Sharma, *Ors vs State (Panchayati Raj Dep)*, 2013. (Raj).
14. *Women and the Judiciary Geneva Forum Series*. 01. Copyright International Commission of Jurists. 2014; 1(1):2.
15. Duban E, Radačić I. *Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice*. National studies on barriers, remedies and good practices for women's access to justice in five Eastern Partnership countries, 2019, p.12.
16. *The Economic Times*. *Women sarpanchs tell UN how rural India's power structure is changing*. [online] Available at: <https://economictimes.indiatimes.com/news/politics-and-nation/women-sarpanchs-tell-un-how-rural-indias-power-structure-is-changing/articleshow/71387686.cms> [Accessed 9 Nov. 2019].
17. Dak T, Purohit B. *Empowerment of women through participation in panchayati raj system*, 2019, p.34.
18. Pib.gov.in. *Participation of Women in Panchayati Raj System*. [Online], 2011. Available at: <https://pib.gov.in/newsite/PrintRelease.aspx?relid=73916> [Accessed 11 Nov. 2019].
19. Nirdpr.org.in. *Women Panchayat Representative of Madhya Pradesh*. [Online], 2013. Available at: http://nirdpr.org.in/nird_docs/casestudies/shodh/shodh1.pdf [Accessed 15 Nov. 2019].
20. Khurana C. *Women panchayat leaders find their voice*. [Online] <https://www.livemint.com>, 2019. Available at: <https://www.livemint.com/Leisure/XIVFC4NFGZHmaNWeKOYqnM/Women-panchayat-leaders-find-their-voice.html> [Accessed 12 Nov. 2019].
21. Khurana C. *Women panchayat leaders find their voice*. [Online] <https://www.livemint.com>, 2019. Available at: <https://www.livemint.com/Leisure/XIVFC4NFGZHmaNWeKOYqnM/Women-panchayat-leaders-find-their-voice.html> [Accessed 13 Nov. 2019].
22. Pateman C. *The sexual contract*. California: stanford university press, 1988, p.4.
23. Singh A, Mohapatra S. *Indian political thought*. Abingdon: Routledge, 2010, p.20.
24. *Women and the Judiciary Geneva Forum Series*. 01. Copyright International Commission of Jurists. 2014; 1(1):13.