

STRUCTURAL AND DISCRETIONARY BIAS: APPOINTMENT OF FEMALE JUDGES IN INDIA

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ABSTRACT

Gender bias in appointments at different judicial levels, whether in explicit or implicit forms, has been a prominent cause of the skewed gender ratio in the higher Indian judiciary. By basing this assertion on empirically collected qualitative and quantitative data, I argue that such bias operates in two forms: Structural bias and discretionary bias.

Structural bias encompasses the biases embedded in judicial selection policies: First, the Supreme Court's unwritten "seniority norm," which favors the selection of the senior-most High Court judges to the apex court; and second, the "transfer policy" at the subordinate judicial level, which prohibits the appointment of judges at their place of residence or that of their spouse have emerged implicitly gender-biased.

Discretionary bias includes biases exercised by judicial decision-makers based on their conscious or unconscious preferences have emerged implicitly gender-biased. I conclude that the prominent reason for gender-biased appointments is the failure by policymakers and decision-makers to consider women's differential responsibilities of motherhood and marriage, and the lack of responsibility-sharing by their husbands.

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I. INTRODUCTION

It was a hot, sunny day. A female litigator with sunglasses mounted on her head approached the Bombay High Court bench to argue her matter. However, instead of listening to her arguments, the male judge reproached her for wearing the sunglasses, stating:

“What do you think you’re doing? You’re Hema Malini (an Indian actress), or something?”¹

To this, the advocate retorted:

It’s none of your business to comment on my preference. If I’m indecent, improperly dressed contrary to the rule, you may pull me out. There is no rule which says I can’t put my glasses off like this. And if I visit, you’ve no business to call me Hema Malini.²

This story illustrates one instance of sexism that a retired Bombay High Court judge shared, when I asked him if he had witnessed sexist remarks during his legal career. The incident happened to one of his female colleagues during his days at the Bar. While the reproaching judge apologized to the female litigator in open court and again later in his chamber, the episode nevertheless represents how sexism, whether acknowledged or not, is ingrained in the Indian judicial system. Gendered judicial appointments are one way in which such biases manifest. Currently, women compose less than 40% of the lower/subordinate judiciary and only about 10% of the High Courts and the Supreme Court.³

The present research probes the gender biases that persist in the Indian judiciary. While this Note only investigates the problem of gender bias in judicial appointments, the two broader issues that I strived to probe while conducting the empirical research are: (1) the factors that have led to an unequal gender ratio in the higher

1. Interview with Ret. Judge, Bombay High Court, male, Bombay (Jun. 17, 2018) [hereinafter Interview 2].

2. *Id.*

3. Arijeet Ghosh et al., *Tilting the Scale: Gender Imbalance in the Lower Judiciary*, VIDHI CTR. FOR LEGAL POLICY 7 (Feb. 12, 2018), <https://vidhilegalpolicy.in/2018/02/12/report-on-gender-imbalance-in-the-lower-judiciary/>.

Indian judiciary; and (2) whether the gender of the judge impacts the judicial decision-making process or the outcome of the case. To this effect, interviews were conducted with nineteen retired Bombay and Delhi High Court judges. Of these judges, seven belonged to the Bombay High Court (four male and three female) while the remaining twelve belonged to the Delhi High Court (six male and six female).⁴

Gender bias manifests both explicitly and implicitly in appointment policies at different judicial levels. Explicit (or overt) bias denotes behaviors and actions where the prima facie operation of discrimination is identifiable.⁵ Implicit (or covert) bias, on the other hand, exists in the effect of certain behaviors.⁶ Due to changing social norms that have rendered many explicit displays of sexism taboo, policies and behaviors have increasingly become *implicitly* gender-biased. Rules and social norms often conceal deep-seated biases and stereotypes, and many individuals remain unaware of their existence or effect.⁷ However, their presence is discernable through constant inspection of social, empirical realities.

By utilizing empirically gathered quantitative and qualitative data, I argue that gender bias is operative in two forms: Structural bias and discretionary bias. This Note will highlight a general lack of empathy for and awareness of women's differential burdens in marriage and motherhood as the primary factors contributing to their low representation in the Indian judiciary.

Structural bias includes the systemic biases embedded in judicial-selection policies which unduly advantage some candidates over others. The biases inherent in such policies reflect social stereotypes based on categories such as gender, caste, class, race, ethnicity, and age, and manifest in both explicit and implicit forms. At the Supreme Court (hereinafter "SC"), the "seniority norm," an unwritten appointment criterion of selecting the senior-most High Court (hereinafter "HC") judges to the apex Court, limits the elevation of women judges.⁸ At the subordinate judicial level, the judicial transfer policy, which prohibits a judge from being appointed at the place of their residence or that of their spouse, is implicitly gender-biased by failing to consider women's gendered responsibilities in the private sphere.⁹

4. Inquiry into lack of representation of transgender and nonbinary individuals is outside the scope of this study. India only in 2013 legally recognized transgender individuals, with the famous NALSA judgment—which in 2017 facilitated appointment of the first transgender judge at a local civil court in Assam. See *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438; PTI, *Assam to get its First Transgender Judge*, TIMES OF INDIA (Jul. 13, 2018), <https://timesofindia.indiatimes.com/india/assam-to-get-its-first-transgender-judge/articleshow/64980891.cms>. Thus, at present, it would still be difficult to find LGBTQ judges, because "coming out" may invite biases and stereotypes associated with these categories. See *Thinking of Coming Out*, UNIV. OF WASH. (Aug. 15, 2018), <https://www.washington.edu/counseling/resources/resources-for-students/thinking-of-coming-out/>.

5. Jerry Kang, *Implicit Bias: A Primer for Courts*, NAT'L CTR. FOR STATE COURTS 7 (2009), [https://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx](https://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx).

6. *Id.* at 8.

7. *Id.*

8. Abhinav Chandrachud, *Age, Seniority, Diversity*, FRONTLINE (May 3, 2013), <https://frontline.thehindu.com/cover-story/age-seniority-diversity/article4613881.ece>.

9. See generally Kang, *supra* note 5; see also Majda Halilović & Heather Huhtanen, *Gender and the Judiciary: The Implications of Gender Within the Judiciary of Bosnia and Herzegovina*, DCAF GENEVA

Discretionary bias occurs through the discretionary power of authorities making judicial appointments. Such biases function independent of any structural barriers, whether in explicit or implicit forms, based on the appointer's conscious or subconscious preferences.

An essential consideration that this Note integrates into its analysis of structural and discretionary gender bias is the role of intersectionality.¹⁰ Intersectionality recognizes that women hold multiple identities and may experience oppression from multiple sources differently. For example, different socio-economic, cultural, religious, or sexual-orientation identities will make some women less susceptible to discrimination or unequally placed in opportunities and treatment. Women from urban, higher-caste, higher-class, educated, and legal backgrounds are less susceptible to bias than women from rural, lower-caste, lower-class, uneducated, and non-legal backgrounds.¹¹

The Note will thus attempt to break assumptions surrounding and bring discourse to the assumed gender-neutral nature of judicial-appointment and transfer policies. Societal blindness to gender bias in judicial appointments arises from two distinct sources. First, systemic gender bias conflicts with our faith in the judicial system as the epitome of justice. Second, facially gender-neutral appointment policies currently in place create doubt as to whether gender bias actually exists.

This Note proceeds in three parts. Part II lays down the Note's research methodology. Part III begins with a historical narrative and discusses the presence of overt structural barriers in judicial appointments that prohibited the entry of women. It then explores covert structural barriers in the form of a "seniority norm" at the SC and "transfer policy" at the subordinate judiciary that structurally disadvantage women due to their differential gendered responsibilities. Part IV presents the scope of authorities' discretionary bias when making judicial appointments, which often leads to gender-biased appointments. This Note, by highlighting the huge costs for society in general and for women specifically, concludes by emphasizing the need to sensitize various stakeholders on different gender perspectives and the pressing need to reinvent the current, orthodox selection and transfer mechanisms to address women's social realities.

II. METHODOLOGY

This Note utilizes empirically collected quantitative and qualitative data. I conducted semi-structured interviews using a mix of closed and open-ended questions with nineteen retired Bombay and Delhi HC judges, who were contacted

CTR. FOR SECURITY SECTOR GOVERNANCE, 32–34 (2014), https://www.dcaf.ch/sites/default/files/publications/documents/Gender_Judiciary_ENG%20FINAL.pdf.

10. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43(6) STAN. L. REV. 1241–99 (1991).

11. Interview with Ret. Judge, Bombay High Court, female, Bombay (Jun. 13, 2018) [hereinafter Interview 1]; Interview with Ret. Judge, Bombay High Court, female, Bombay (Jun. 23, 2018) [hereinafter Interview 6]; Interview with Ret. Judge, Delhi High Court, male, Delhi (Jul. 17, 2018) [hereinafter Interview 14].

using snowball sampling. The three and six female judges from the Bombay and Delhi HC were from the total eleven and seventeen female judges who have retired from these courts as of June 2019. For the male judges, I interviewed four out of a total 397 judges retired from the Bombay HC and six out of a total 152 judges retired from the Delhi HC. When considering the low proportion of male judges interviewed, it is essential to note that, first, the Bombay HC was established in 1862, while the Delhi HC was established in 1966, and second, neither HC appointed women until 1978.

Since the sample is limited to only two out of twenty-five Indian HCs, the findings made in the present research are limited to only the two above investigated HCs. The small number of judges interviewed in proportion to the number of retired judges further makes the findings helpful but not conclusive. More research could be done, in this regard. I interviewed retired judges for the study because sitting judges are not allowed to interact with the general public. The judges' ages ranged from 62 to 88 years old, and the study aimed for an equal gender ratio among interviewees (ten male judges and nine female judges). Some of the interviewees have also served as puisne judges or Chief Justices at HCs other than Bombay and Delhi. Being a Chief Justice implies that the judge has also served on collegiums of these HCs that made judicial appointments.

All but one of the interviews were conducted in person at the interviewee's residence or office. The remaining interview was conducted via telephone. Most of the interviews lasted approximately one to two hours, although a few were shorter due to interviewees' schedules.

All interviewees' identities are confidential. Only eight out of the total nineteen interviews were recorded. These eight interviewees were from the first ten interviews conducted. I did not record later interviews, either because the interviewees did not consent, or in order to encourage more candid responses. This Note narrates responses where possible to questions relating to:

- Reasons behind the low gender ratio at the higher Indian judiciary;
- Whether, in their opinions, different standards were applied to male and female judges during their elevation to higher Courts;
- Whether the interviewees consider any of their colleagues sexist;
- Why some High Courts have better gender ratios than others;
- What the interviewees' experience with work-life balance has been.

With respect to quantitative data, I collected statistics on the representation of women as judges and Chief Justices at all HCs and the SC from their official websites, through June 2019. However, such data is not available in a uniform pattern across these websites. In some instances, I used the gendered honorific (Ms./Mr./Mrs./Smt./Shri.) of the judge to determine the gender, whereas in other instances, I relied on photographs or gendered pronouns (he/she) in the online biographies. In the absence of such determiners, I conducted a web search of news articles to assess whether there were any available gender identifiers of the judge.

III. STRUCTURAL BIAS

This segment argues that the operation of structural gender bias at different judicial levels in India, whether in written or unwritten forms,¹² has restricted the participation of women in the judiciary. Starting with Cornelia Sorabjee's fight to become the first female law graduate in India and England, this section traces the evolution of gendered structural barriers in India. Though written legal impediments to women's participation disappeared with the development of the rights perspective—the push to recognize equal rights for women—gender biases persist in implicit forms that hinder women's progress up the judicial ladder.

This section first analyzes empirically collected statistical data showing women's low representation within the judges and Chief Justices of the HCs, and it argues that their smaller numbers mean lower chances of elevation to the SC in light of the "seniority norm." This data set, when viewed in light of the interviews conducted, will help provide an *insiders' view* on the issue. Such an understanding will further help identify the factors effecting gender representation among different HCs. This section then illustrates how the transfer policy at the subordinate judicial level—which states that a judge cannot be appointed at the place of their residence or that of their spouse—is implicitly gender-biased.¹³

A. THE HISTORY: BREAKING THE SHACKLES

That women have been discriminated against through history is no secret. Across cultures, gender discrimination has stymied women's economic participation and progress. Women historically could not enroll or practice law because society deemed the profession unsuited for women.¹⁴ In India, Cornelia Sorabjee fought the historic battle to become the first woman graduate at Bombay University and later at Oxford University in 1892 where she studied for a Bachelor of Civil Law (BCL).¹⁵ However, she did not receive her degree from Oxford until 1920.¹⁶

12. See, e.g., Chandrachud, *supra* note 8.

13. See generally Kang, *supra* note 5.

14. Rano Devi Gupta, *Advent of Women in the Profession of Law*, ALLAHABAD HC, <http://www.allahabadhighcourt.in/event/AdventOfWomenInTheProfessionMrsRDGupta.pdf>.

15. Cornelia's admission and completion of her degree at Oxford became the watershed event that contributed to the women's suffrage movement in Britain. Not only was she the first Indian woman, but she was the first woman period to study at Oxford. See Joe Sommerlad, *Cornelia Sorabji: Who was India's First Female Lawyer?*, THE INDEPENDENT (Nov. 15, 2017), <https://www.independent.co.uk/news/world/asia/cornelia-sorabji-india-female-lawyer-first-woman-google-doodle-feminism-oxford-university-a8055916.html>.

16. Prof. Louise Richardson (V.C., Univ. of Oxford), when moderating a panel discussion organized by the Vidhi Centre for Legal Policy in Delhi to address concerns of gender diversity in the Indian judiciary, acknowledged the discrimination faced by Cornelia Sorabjee when she became the first woman to study the law at Oxford. She explained how Cornelia had to have special permission to attend lectures, visit the library, and take exams. She further discussed how Cornelia was denied a scholarship to study at Oxford as they were historically awarded only to men. VIDHI CTR. FOR LEGAL POLICY, *Women in Legal Profession*, YOUTUBE (Oct. 11, 2018), <https://www.youtube.com/watch?v=6P0JcXbpbic>.

In 1916, Regina Guha continued the battle for women's participation in law when she applied for the enrollment of women as pleaders under Section 6 of the 1879 Legal Practitioners Act, at the Calcutta HC.¹⁷ Guha argued that Section 6 was broad enough to include both sexes and not exclude women. Since her application was the first of its kind, a special bench—composed of all-male judges¹⁸—heard her case. The bench unanimously decided against Guha's petition, observing that the Act's intent was to make legislation for practitioners who were well-known and well-established—meaning *men*.¹⁹ The bench also relied on *Bebb v. Law Society*, a British case ruling that women were not “*persons*” under the Solicitor's Act of 1843 and could not enroll as solicitors.²⁰ Justice Asutosh Mookerjee further relied on the historically gendered interpretation of “legal practitioner” in the British Indian Courts and the Hindu and Buddhist religious texts, which did not contemplate the possibility of women as legal practitioners.²¹ Interestingly, the presence of women as both lawyers and judges existed under Islamic law. However, since such practices did not govern during the Indian Muhammadan period, Judge Mookerjee could not rely on this tradition to deviate from general historic policy.

Five years later, Sudhansubala Hazra raised the same question at the Patna HC in the “Second Person's case.”²² The question again failed, before an all-male bench.²³ Apart from *Bebb*,²⁴ the court relied on the Scottish *Nairn v. St Andrews University* judgment, which had denied five female graduates of St. Andrews and Edinburgh the ‘Right to Vote’ in the election of the universities’ parliament members.²⁵ The *Nairn* court interpreted “persons” as excluding women under the Representation of the People (Scotland) Act 1868.²⁶ Unfortunately, neither the admission of Cornelia Sorabjee at the Allahabad HC,²⁷ nor the passage of the 1919 Sex Disqualification (Removal) Act in England could persuade the court

17. The section enabled the HCs to make rules consistent with the Act on the issues of “qualifications, admission and certificates of proper persons to be Pleders in the subordinate Courts.” The Legal Practitioners Act, No. 18 of 1879, § 6 (India).

18. The bench comprised of Lancelot Sanderson, C.J. Asutosh Mookerjee, W. Chitty, Teunon, and Ashutosh Chowdhury, JJ.

19. In Re: Regina Guha v. Unknown, AIR 1917 Cal 161.

20. [1914] 1 Ch. 286; the petition only concerned interpretation on eligibility of unmarried women as legal practitioners. L. Phillimore, J., while dismissing the petition, observed the otherwise possible peculiar situation where the litigation may be caught upon marriage of the hitherto unmarried woman lawyer; that will make her legally incapable to enter contracts, and practice.

21. See, e.g., In Re: Regina Guha.

22. In Re: Miss Sudhansubala Hazra v. Unknown, AIR 1922 Pat 269.

23. The bench comprised of D Miller, C.J. B Mullick, and Prasad JJ.

24. See In Re: Miss Sudhansubala Hazra.

25. (1909) A.C. 147.

26. See *id.*

27. *Pretty Ones*, ALLAHABAD HC, http://www.allahabadhighcourt.in/event/Pretty_ones.pdf (last visited March 7, 2020).

to widen its interpretation of “persons”²⁸ to include women under the Legal Practitioners Act.

Determined to change the status quo, Hazra, with the support of her father—an advocate in his own right, Madhusudan Das—and her sister, Sailabala Das, wrote an application to the Privy Council.²⁹ Through further lobbying and collaboration with Hari Singh Gour, a lawyer, social reformer, and Central Legislative Assembly member,³⁰ Hazra helped pass the 1923 Legal Practitioners (Women) Act, which overruled the Regina Guha and Sudhanshubala Hazra judgments and permitted women as legal practitioners.³¹ To prevent further instances of discrimination, the Indian Bar Councils Act of 1926 reinforced the Legal Practitioners (Women) Act and prohibited the disqualification of women as advocates based solely on sex.³²

This historical account illustrates how judicial interpretations of legislative statutes were used as *structural* barriers to women’s entry and progression in the law. These rules operated as *overt* structural barriers, meaning rules and norms of entry that plainly discriminated based on gender. In a common argument, the judiciaries reasoned that an absence of legislative intent to *include* women—and the lack of women historically in the profession—justified their continued *exclusion*.³³ While inquiry into the role of gender in the decision-making process itself is outside the scope of this Note, an analysis of the aforementioned cases cannot ignore the role that the “[all-]male benches,”³⁴ whether Indian or English, likely played in the outcomes.

The above-described, female legal trailblazers paved the way for Anna Chandy in 1937 to become the first Malayalee woman appointed as the First Grade Munsiff.³⁵ Chandy was the first woman to enroll in Law College at Travancore; she braved the mockery of male colleagues and professors while studying there.³⁶ Chandy later became the first woman HC judge, in 1959.³⁷ It is

28. A similar battle was fought in Canada in the case of *Edwards v. Attorney General*, 1929 CanLII 438 (UK JCPC), where the Privy Council overruled the decision by the Supreme Court to include women under the definition of “persons.” In the United States, the Supreme Court’s decision in *Bradwell v. State of Illinois*, 83 U.S. 130 (1872), was eventually overruled by the Illinois legislature, which permitted licensing of women to practice at the Bar. See also Jhuma Sen, *The Indian Women Who Fought Their Way into the Legal Profession*, THE WIRE (Feb. 13, 2019), <https://thewire.in/law/women-lawyers-history-india>.

29. Sen, *supra* note 28.

30. *Id.*

31. *Respecting the Old*, CHHATTISGARH HC, <http://highcourt.cg.gov.in/artical/barcouncil2013.pdf> (last visited Mar. 7, 2020).

32. Sec. 9(3), Indian Bar Councils Act, 1926.

33. See Sen, *supra* note 28.

34. See, e.g., *supra* note 18, 23.

35. K Parameshwar & Medha Damojipurapu, *The Pioneer from Travancore- Justice Anna Chandy*, 42 THE INDIAN ADVOCATE: J. BAR ASS’N OF INDIA-WOMEN AND L. 212–222 (2018).

36. Parameshwar & Damojipurapu, *supra* note 35, at 214. Anna Chandy had radical ideas on issues concerning women’s autonomy and liberty, and rights of the accused. She actively advocated for women’s reproductive rights, promoted the use of contraception, and supported equal employment opportunities for women. *Id.*

37. *Former Judges*, KERALA HC, <http://highcourtofkerala.nic.in/frmrjudges.html> (last visited Mar. 7, 2020).

possible that she was the first female higher-court judge in the Anglo-Saxon world.³⁸ These developments likely helped lead to Fathima Beevi's appointment as the first female SC judge in any Asian nation in 1989.³⁹

While the removal of structural barriers—along with the evolution of the rights perspective and emergence of check mechanisms to combat discrimination—helped more women enter the Indian judiciary, bias did not disappear completely; its nature just changed. Patriarchal attitudes and perceptions have evolved but not vanished. Gender bias now manifests in *covert* structural barriers—the rules and norms for judicial appointment that are implicitly gender-biased in their operation.⁴⁰ Implicit bias means a person's subconscious prejudices may not even be apparent to them. These biases operate without the person's active awareness, intention, or knowledge.⁴¹ This prevents the person from recognizing and mitigating the operation of their biases based on stereotyped characteristics of race, ethnicity, age, gender, and appearance.⁴² An individual must constantly challenge their own ideas about society in light of social and empirical realities in order to identify and mitigate their own biases.

The next section explores covert structural barriers in detail at the SC, in the form of the “seniority norm,” which is the unwritten appointment “rule” of selecting the senior-most HC judges to the apex Court. This seniority norm exists because the appointing authority of SC judges since India's independence has drawn almost exclusively from the Chief Justices of the HCs for SC appointment consideration. Since fewer women have reached such positions of distinction due to historical discrimination, they consequently have not gained visibility at the highest Court. At the subordinate judicial level, the transfer policy of judges, which provides that a judge cannot be appointed at the place of their residence or that of their spouse, is also an implicitly gender-biased policy.⁴³

B. SENIORITY NORM

In India, HC judges form the primary pool for appointment consideration to the SC. Since independence, the appointing authority has chosen only eight

38. Rupsha Bhadra & Debroop Basu, *Manu and the 'Muse'*, THE TELEGRAPH (June 4, 2016), <https://www.telegraphindia.com/entertainment/manu-and-the-39-muse-39/cid/1421377>.

39. Beevi was also the first Muslim woman to rise to any higher judicial level in India. See Apoorva Mandhani, *India's First Female Supreme Court Judge, Justice Fathima Beevi, Turns 90*, LIVE LAW (May 1, 2017), <https://www.livelaw.in/indias-first-female-supreme-court-judge-justice-fathima-beevi-turns-90/>.

40. Kang, *supra* note 5. The Implicit Assessment Test (IAT) was developed by Harvard University to help identify implicit biases. A person can take the test and determine their biases, in order to observe them and ideally prevent their future operation. *Project Implicit*, HARVARD UNIV., <https://implicit.harvard.edu/implicit/education.html> (last visited Mar. 7, 2020); see also *Understanding Implicit Bias*, OHIO STATE UNIV., <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/> (last visited Mar. 7, 2020).

41. Halilović & Huhtanen, *supra* note 9, at 1.

42. *Id.*

43. Kang, *supra* note 5.

judges directly from the Bar, out of a total 194 SC judges.⁴⁴ While significant weight is given to the prior judicial experience of prospective SC judges, it is not the only criterion for judicial appointment to the highest Court.⁴⁵ The “seniority norm,” an unwritten judicial appointment norm that only the senior-most HC judges may be elevated to the SC, is also a key principle. The All India HC Judges’ Seniority List determines seniority. Given women’s later entry to the legal profession, as well as the societal responsibilities of marriage and motherhood, women are less likely to be senior HC judges and are thus less likely to be elevated to the SC.

George Gadbois, a distinguished scholar on judicial behavior, has observed that until 1989 in India, about 50% of judges who went to the SC from the HC were previously Chief Justices of the HCs, while 80% of the elevated judges were fourth or higher in seniority.⁴⁶ Dr. Abhinav Chandrachud observed that, after the Second Judges case,⁴⁷ which led to the formation of the collegium, about 70% of judges elevated to the SC in the 1990s were Chief Justices of HCs; this proportion increased to 88% in the 2000s.⁴⁸

In the context of women’s representation at the SC, it is therefore also essential to consider appointment trends of female judges at the higher judiciary. Though India’s first female HC judge, Anna Chandy, was appointed in 1959, it was not until 1989 that the appointing authority elevated Fathima Beevi, as the first female judge, to the SC.⁴⁹ Table–1 below shows that although twenty-five different HCs have had seventeen former female Chief Justices, only four of them have been elevated to the SC.⁵⁰

Dr. Chandrachud argues that while the seniority norm excludes women as prospective SC candidates, an informal quota system compensates for this disparity,

44. But some lawyers, including M.C. Setalvad, S.V. Gupte, H.M. Seervai, N.A. Palkhivala, and others, rejected elevation to SC. See ABHINAV CHANDRACHUD, *THE INFORMAL CONSTITUTION: UNWRITTEN CRITERIA IN SELECTING JUDGES FOR THE SUPREME COURT OF INDIA, 190–91* (Oxford Univ. Press 1st ed. 2014).

45. *Id.* at 185–214.

46. GEORGE H. GADBOIS, JR. *JUDGES OF THE SUPREME COURT OF INDIA 1950–89*, 366–67, (Oxford Univ. Press 2nd ed. 2012).

47. *Supreme Court Advocates on Record Association v. Union of India*, AIR 1994 SC 268. The case was a result of the power tussle between the executive and the judiciary over appointment of the higher judiciary. A nine-judge bench of the SC had overruled the *S.P. Gupta v. President of India* (AIR 1982 SC 149, ‘First Judges case’) judgment, which had established a primacy of the opinion of the President of India over the CJI. With the Second Judges case, the President was now bound by the opinion of the Chief Justice of India (CJI) unless there was a differing opinion of the CJI with the other two senior-most SC judges. *In re Presidential Reference* (AIR 1999 SC 1, ‘Third Judges case’) that was referred by the President of India to the SC further interpreted the nature of consultation of the CJI with other senior judges from the SC.

48. CHANDRACHUD, *supra* note 44, at 193.

49. See *Former Judges*, *supra* note 37.

50. Sujatha Manohar, J. was elevated from C.J. of the Kerala HC to the SC in 1994; Gyan Sudha Misra and R. Banumati, JJ. were elevated from the Jharkhand HC in 2010 and 2014. The latest was the elevation of Indira Banerjee, J. from the C.J. of Madras HC in 2018.

by appointing women to make the bench look gender representative.⁵¹ One interviewee attested to the presence of such a quota, noting that one or two seats are reserved for women on the SC.⁵² When asked if different standards were applied to male and female judges during appointments, one of the senior female interviewees⁵³ replied in the affirmative, rhetorically asking why, otherwise, judges like Indira Banerjee were not elevated.⁵⁴

Another female interviewee observed that women have to work much harder than men to achieve success.⁵⁵ Women, this interviewee noted, have to prove their capability in ways that actually make them *more* capable than men in similar positions, yet they receive fewer cases of social or political significance.⁵⁶ Another female interviewee agreed with that assessment and noted that additionally, administrative matters are sometimes not given to female judges, either.⁵⁷ Female judges' experiences ultimately often depend on the Chief Justice and the collegium.⁵⁸ While some Chief Justices have supported their female colleagues, others have not.⁵⁹ All these factors contribute to the appointment of women at different judicial levels and the consequent determination of their hierarchy. It is essential to further acknowledge the politics of appointment, whereby some female judges with stronger executive relations may have a better chance of elevation to the higher courts.⁶⁰

The seniority norm means that even if a woman becomes a HC judge and performs incredibly well, she may still not become a SC judge. She additionally needs to become the Chief Justice of the HC and be senior enough on the All India HC Judges' Seniority List to warrant consideration. Though this norm applies to all judges, the different social and cultural positioning of women and women's disproportionate burdens of motherhood and marriage structurally disadvantage female judges.⁶¹

51. CHANDRACHUD, *supra* note 44, at 192, 218.

52. Interview with Ret. Judge, Delhi High Court, male, Delhi (Jul. 21, 2018) [hereinafter Interview 19].

53. Interview with Ret. Judge, Delhi High Court, female, Delhi (Jul. 9, 2018) [hereinafter Interview 8].

54. The interview was conducted before the elevation of Banerjee, J. from the Madras HC to the SC.

55. Interview 6, *supra* note 11.

56. *Id.*

57. Interview with Ret. Judge, Bombay High Court, female, Bombay (Jun. 23, 2018) [hereinafter Interview 5].

58. Interview 8, *supra* note 53.

59. Interview 5, *supra* note 57.

60. For instance, take the women advocates who have served as government counsels. While this may hold true for their male counterparts as well, it indicates the significance of such status for women who are already fewer in number. See Interview with Ret. Judge, Delhi High Court, female, Delhi (Jul. 19, 2018) [hereinafter Interview 17].

61. See Mahalakshmi Pavani, *Lawyering, For Women, Is Not A Cake Walk!*, LIVE LAW (Mar. 10, 2019), <https://www.livelaw.in/columns/lawyering-for-women-is-not-a-cake-walk-143452> (The author, while describing the multiple hurdles faced by women advocates in India, highlights the role of motherhood and the approval of the spouse towards success of women in the legal profession.); Ulrike Schultz, *'I Was Noticed and I Was Asked. . . ' Women's Careers in the Judiciary. Results of an Empirical*

Upon the birth of her children, one female interviewee took a break from her job, and then rejoined after her children grew older.⁶² She firmly believed that had she not taken the break, she would have risen higher in the judicial hierarchy.⁶³ Another female interviewee was not able to work as an advocate during the evening, because she needed to take care of her children.⁶⁴ This non-level playing field structurally disadvantages women who aspire to join the higher judiciary.⁶⁵ Men's failure to share child-rearing burdens with their female spouses and the professional years that women consequently lose mean the seniority norm favors men in judicial appointments.⁶⁶

1. State-wide Ratio of Women Chief Justices

Table-1 highlights the minuscule ratio of female Chief Justices (including acting Chief Justices) at the various Indian HCs. Out of the twenty-four HCs that have had former Chief Justices, fourteen (58.3%) have not had a female Chief Justice at any point in time. Only five courts have had two female Chief Justices (20.83%) since their establishment; four courts have had only one female Chief Justice (16.67%). Kerala is the only Court that has had three female Chief Justices—namely, Judges Sujata V. Manohar, K.K. Usha, and Manjula Chellur.⁶⁷ The Court in 1959 was also the first to have any female judge in the country—Justice Anna Chandy.⁶⁸

Neither Tripura nor Manipur HCs have had a single female judge since their establishment in 2013. In total, women have held only eighteen out of 632 Chief Justice positions at the various HCs (2.85%). The situation at the highest Court of the country, the SC, is no better. Since its establishment in 1935, the Court, out of

Study for the Ministry of Justice in Northrhine-Westfalia, Germany, in GENDER & JUDGING 145, 152–164 (Ulrike Schultz & Gisela Shaw eds., Hart Pub., 2013).

62. Interview 6, *supra* note 11.

63. *Id.*

64. Interview with Ret. Judge, Delhi High Court, female, Delhi (Jul. 11, 2018) [hereinafter Interview 12].

65. By using the image of an unfair racing-track, Anand Mahindra highlighted the gender inequality between working men and women. While the track for men was clear, the path for women was obstructed by various domestic hurdles. TNN, *Anand Mahindra's Heartwarming Post about Working Women is Winning Hearts*, TIMES OF INDIA (Feb. 10, 2019), <https://timesofindia.indiatimes.com/lifestyle/health-fitness/de-stress/anand-mahindras-heartwarming-post-about-working-women-is-winning-hearts/articleshow/67925239.cms>. Additionally, though the Indian constitution under Article 124 provides for the appointment of “distinguished jurists” as judges to the SC, no full-time law professors have achieved this position. See CHANDRACHUD, *supra* note 44. This situation is more problematic for women scholars who have not received academic acknowledgment equivalent to their male counterparts. See Swetha Ballakrishnen & Rupali Samuel, *India's Women Legal Academics: Who They Are & Where You Might Find Them*, GENDER AND CAREERS IN THE LEGAL ACADEMY (Ulrike Schultz, et al. ed., Hart Pub., forthcoming). Academics and colleagues often stigmatize women academics as *only* the women's voice when their scholarship focuses on stereotypically gendered areas of law, such as family law.

66. Pavani, *supra* note 61.

67. *Former Judges*, *supra* note 37.

68. *See id.*

forty-four Chief Justices, has never had a female Chief Justice. The country, thus, still waits to see a woman head its highest judiciary.⁶⁹

TABLE-1. GENDER RATIOS OF FORMER FEMALE CHIEF JUSTICES AT THE HCS

S. No.	Court Name	Est.	Yr. - First W. App.	Total Former C.J.	Total Former W. C.J.	%- Former W. C.J. (through 15 th June'19)
1	Allahabad	1866	1991	46	0	0.00
2	Bombay	1862	1978	42	2	4.76
3	Calcutta ⁷⁰	1862	2001	13	2	15.38
4	Chhattisgarh	2000	2018	12	0	0.00
5	Delhi	1966	1978	30	2	6.67
6	Gauhati	1948	2005	36	0	0.00
7	Gujarat	1960	1994	25	0	0.00
8	Telangana	2018	2019	1	0	0.00
9	Andhra Pradesh ⁷¹	2018	2017	0	0	0.00
10	Himachal Pradesh	1971	1992	23	1	4.35
11	Jammu & Kashmir	1928	2018	32	0	0.00

69. Apurva Vishwanath, *Dear PM Modi, Just 3 Female Judges in the Supreme Court is No Cause for Celebration*, THE PRINT (Aug. 17, 2018), <https://theprint.in/opinion/off-court/dear-pm-modi-just-3-female-judges-in-the-supreme-court-is-no-cause-for-celebration/100253/>.

70. Despite establishment of the Court in 1862, the Calcutta HC website only provides the data for former Chief Justices from 1991. See *Former Judges*, *supra* note 37.

71. The Hyderabad HC was split into Andhra Pradesh HC and Telangana HC following the creation of the state of Telangana from the state of Andhra Pradesh. However, since the data of the former judges for the Hyderabad HC is not available online, the present paper does not comment on the statistics of women's representation for that Court. With respect to the appointment of the first woman judge to the Andhra Court, the date of appointment is based on her appointment to the parent Hyderabad HC.

TABLE-1. (CONTINUED)

S. No.	Court Name	Est.	Yr. - First W. App.	Total Former C.J.	Total Former W. C.J.	%- Former W. C.J. (through 15 th June'19)
12	Jharkhand	2000	2008	12	2	16.67
13	Karnataka ⁷²	1884	2012	29	0	0.00
14	Kerala ⁷³	1956	1959	49	3	6.12
15	Madhya Pradesh ⁷⁴	1936	1994	24	0	0.00
16	Madras ⁷⁵	1862	1986	47	1	2.13
17	Manipur	2013	NA	4	1	25.00
18	Meghalaya	2013	2005	6	1	16.67
19	Orissa	1948	2010	29	0	0.00
20	Patna	1916	1990	41	2	4.88

72. The Karnataka HC website provides the data for former C.J. from 1956 onwards, despite establishment of the Court in 1884. *Former Hon'ble Chief Justices of the HC of Karnataka*, KARNATAKA HC, https://karnatakajudiciary.kar.nic.in/judges_former_cjk.asp, (last visited July 1, 2019).

73. The HC was established after the State Reorganization Act (1956), which created the state of Kerala. It succeeded the Travancore-Cochin HC of which K.T. Koshi, J. was the Chief Justice at the time of succession; who then took over as the C.J. of the Kerala HC. The tenure of Koshi, J. as C.J. on the Kerala HC then also includes his term served at the parent Travancore-Cochin HC from 1944. *Royal Seat of Justice*, THE HINDU (July 7, 2003), <https://www.thehindu.com/thehindu/mp/2003/07/07/stories/2003070700490200.htm>.

74. After the State Reorganization Act (1956) passed and the subsequent creation of the state of Madhya Pradesh, the Nagpur HC was deemed the Madhya Pradesh HC. The HC website, despite establishment in the year 1936, provides the data for former Chief Justices from 1956 onwards. *History & Constitution*, HIGH COURT OF MADHYA PRADESH, <https://mphc.gov.in/history-constitution> (last visited July 1, 2019).

75. The Madras HC website provides data for the Chief Justices from the year 1801 despite its official establishment in the year 1862 by the Indian HCs Act of 1861. This is because of the inclusion of data for the Chief Justices from the SC of Madras that preceded the present Mad HC. This trend applies to only the Chief Justices of the Court and does not extend to its former Justices. *The Former Chief Justices*, MADRAS HC, <http://www.hcmadras.tn.nic.in/cjlist.html> (last visited July 1, 2019); Sweta Akundi, *Madras High Court Museum's Trip to its Colonial Past*, THE HINDU (Dec. 26, 2018), <https://www.thehindu.com/society/history-and-culture/the-court-is-back-in-session-madras-high-court-museum-history-trip/article25831602.ece>.

TABLE-1. (CONTINUED)

S. No.	Court Name	Est.	Yr. - First W. App.	Total Former C.J.	Total Former W. C.J.	%- Former W. C.J. (through 15 th June'19)
21	Punjab & Haryana	1947	1991	63	0	0.00
22	Rajasthan	1949	1978	35	0	0.00
23	Sikkim	1975	2015	20	1	5.00
24	Tripura	2013	N/A	3	0	0.00
25	Uttarakhand	2000	2010	14	0	0.00
Total CJ at HCs (from 1862– 2018)				632	18	2.85%

2. Differential Judicial Gender Ratio Among States

To understand the lower representation of women at the HCs, it is essential to identify and explore the reasons behind women's differential ratios at different HCs. Though certain HCs have had better representation of female Chief Justices, others have had no representation at all. A couple of the interviewed judges⁷⁶ linked urbanization in more cosmopolitan cities such as Bombay and Delhi to the social and economic independence of women at these HCs, which consequently increased the pool of female lawyers available for elevation.⁷⁷ One of the above judges⁷⁸ also linked a broader vision of female lawyers in these cosmopolitan cities to their career progress in the judiciary, in contrast to female lawyers in lesser-developed states like Chhattisgarh, which some of the judges termed "tribal areas"⁷⁹ or Adivasi community.⁸⁰ However, a female interviewee

76. Interview with Ret. Judge, Bombay High Court, male, Bombay (Jun. 20, 2018) [hereinafter Interview 3]; Interview with Ret. Judge, Bombay High Court, male, Bombay (Jun. 22, 2018) [hereinafter Interview 4].

77. Interview 3, *supra* note 76.

78. Interview 4, *supra* note 76.

79. Interview 17, *supra* note 60. Article 342 of the Indian Constitution provides the President the power to declare certain tribes as "Scheduled Tribes," which are the tribal communities that have suffered extreme socioeconomic backwardness. The fact that 31.8% of Chhattisgarh's population constitutes Scheduled Tribes explains the remarks of the interviewees. *See Background*, NAT'L COMM. FOR SCHEDULED TRIBES, <https://ncst.nic.in/content/background>; *Chhattisgarh, Data Highlights*, CENSUS OF INDIA, http://censusindia.gov.in/Tables_Published/SCST/dh_st_chhattisgarh.pdf.

80. Interview 6, *supra* note 11. The "tribal community" is also understood as "Adivasi community".

TABLE-2. GENDER RATIOS OF FORMER AND SITTING JUDGES AT THE HCs

S. No.	Court Name	Total Former J.	Total Former W. J.	%- Former W. J. (through 15th June'19)	Total Sitting J. (Including CJ)	Total Sitting W. J.	%- Sitting W. J. (through 15th June'19)	Total F+S J.	Total F+S W. J.	%- F+S W. J. (through 15th June'19)
1	Allahabad	595	9	1.51	105	6	5.71	700	15	2.14
2	Bombay	408	11	2.70	67	7	10.45	475	18	3.79
3	Calcutta	110	4	3.64	42	5	11.90	152	9	5.92
4	Chhattisgarh	22	0	0.00	15	2	13.33	37	2	5.41
5	Delhi	169	17	10.06	40	6	15.00	209	23	11.00
6	Guwahati	69	2	2.90	19	1	5.26	88	3	3.41
7	Gujarat	141	4	2.84	28	4	14.29	169	8	4.73
8	Telangana	2	0	0.00	10	1	10.00	12	1	8.33
9	Andhra Pradesh	3	0	0.00	12	3	25.00	15	3	20.00
10	Himachal Pradesh	35	2	5.71	10	1	10.00	45	3	6.67
11	J&K	70	0	0.00	9	2	22.22	79	2	2.53

TABLE-2. (CONTINUED)

S. No.	Court Name	Total Former J.	Total Former W. J.	%- Former W. J. (through 15th June '19)	Total Sitting J. (Including CJ)	Total Sitting W. J.	%- Sitting W. J. (through 15th June '19)	Total F+S J.	Total F+S W. J.	%- F+S W. J. (through 15th June '19)
12	Jharkhand	18	2	11.11	19	1	5.26	37	3	8.11
13	Karnataka	125	2	1.60	32	3	9.38	157	5	3.18
14	Kerala	164	5	3.05	33	5	15.15	197	10	5.08
15	Madhya Pradesh	182	8	4.40	33	3	9.09	215	11	5.12
16	Madras	321	1	0.31	58	10	17.24	379	11	2.90
17	Manipur	2	0	0.00	4	0	0.00	6	0	0.00
18	Meghalaya	12	1	8.33	2	0	0.00	14	1	7.14
19	Orissa	80	1	1.25	13	1	7.69	93	2	2.15
20	Patna	234	6	2.56	32	2	6.25	266	8	3.01

TABLE-2. (CONTINUED)

S. No.	Court Name	Total Former J.	Total Former W. J.	%- Former W. J. (through 15th June '19)	Total Sitting J. (Including CJ)	Total Sitting W. J.	%- Sitting W. J. (through 15th June '19)	Total F+S J.	Total F+S W. J.	%- F+S W. J. (through 15th June '19)
21	Punjab and Haryana	214	11	5.14	50	7	14.00	264	18	6.82
22	Rajasthan	172	6	3.49	24	1	4.17	196	7	3.57
23	Sikkim	11	0	0.00	3	1	33.33	14	1	7.14
24	Tripura	2	0	0.00	3	0	0.00	5	0	0.00
25	Uttarakhand	27	1	3.70	9	0	0.00	36	1	2.78
Total		3188	93	2.92	672	72	10.71	3860	165	4.27

was skeptical of the proposed explanation regarding progressive cultures and more cosmopolitan Courts, exclaiming that “*we’re all Indians.*”⁸¹

Interestingly, the states of Bihar (Patna) and Jharkhand have some of the lowest literacy rates in India⁸² but have had two female Chief Justices in their HCs. States such as Orissa, Chhattisgarh,⁸³ and Allahabad⁸⁴ have not had a high number of female lawyers—which means these states have also had a lower representation of female judges.⁸⁵ In this respect, one of the judges noted:

*In Chhattisgarh, if you drive a scooter, people might whistle at you; I don’t know, I’m thinking. But in Bombay, each and every lady goes, drives car. They’re a judge, a police constable. So, [people] get used to it. If this is an unusual phenomenon, you become the odd person out in the social circle. And then what happens is, it’s a two-way tension: Society has tension that “*memsahib (madam) has come*”; now, memsahib also has problem, “*people are looking at me.*” This doesn’t remain an aam (normal) issue but becomes a khaas (important) issue.*⁸⁶

The bench of any HC is reflective of the HC’s culture,⁸⁷ which is in turn determined by the socio-cultural thinking and conditioning of the particular state.⁸⁸ Thus, in a state where the pool for selecting female judges is smaller due to various socio-economic and cultural barriers, the likelihood for elevation to the apex Court is even smaller in light of the seniority norm. There is, therefore, a need for greater education and sensitization in the lesser-developed states to promote women’s economic independence and increase women’s participation in the legal profession. Additionally, there needs to be more gender-sensitivity training for collegium judges, many of whom may not appreciate the implications of an uneven playing field for women’s career progression.

81. Interview 1, *supra* note 11.

82. As per the 2011 census, Bihar and Jharkhand have a literacy rate of 63.82% (male: 73.39%, and female: 53.33%) and 67.73% (male: 78.45%, and female: 56.21%) respectively against the national average of 74.04% (male: 82.14%, and female: 65.46%). *State of Literacy*, OFFICE OF THE REGISTRAR GENERAL & CENSUS COMMISSIONER, INDIA, http://censusindia.gov.in/2011-prov-results/data_files/india/Final_PPT_2011_chapter6.pdf (last visited Aug. 17, 2019).

83. Interview with Ret. Judge, Delhi High Court, female, Delhi (Jul. 9, 2018) [hereinafter Interview 9].

84. Interview 3, *supra* note 76; see Mehal Jain, ‘*Constitution Itself is Feminist*’, *Justice Chandrachud on Transformative Constitution and Feminism*, LIVE LAW (Oct. 7, 2018), <https://www.livelaw.in/constitution-itself-is-feminist-justice-chandrachud-on-transformative-constitution-feminism/> (DY Chandrachud, J., in a lecture, observed that when, as the C.J. of the Allahabad HC, he had recommended the name of a woman advocate from a minority community with extraordinary legal prowess, she, due to non-fulfilment of the income criteria, could not be appointed.).

85. Interview with Ret. Judge Delhi High Court, male, Delhi (Jul. 18, 2018) [hereinafter Interview 15].

86. Interview 2, *supra* note 1.

87. See Interview 5, *supra* note 57.

88. Interview 2, *supra* note 1.

There seems to be no correlation between the year of establishment of the Court and the appointment of the first female judge. Courts such as Calcutta, Karnataka, and Jammu and Kashmir appointed their first female judges in 2001, 2012, and 2018, respectively—and were established in 1862, 1884, and 1928. The HCs of Jharkhand, Uttarakhand, and Chhattisgarh appointed their first female judges in 2008, 2010, and 2018—despite their more recent establishment, in 2000.

Further, having an early female-judge appointment to one Court does not seem to indicate any trend of appointing higher numbers of women overall. For example, despite being the first HC to appoint a female judge, Kerala has had only five female judges out of its total 164 judges. These numbers are worse than the numbers in Punjab and Haryana, and Madhya Pradesh HCs, which despite having their first female judges in 1991 and 1994, have had eleven and eight former female judges out of the total 182 and 214 former judges.

The state of affairs at the SC is again no better. The apex court, despite having its first female judge in 1989, has had only five female judges out of a total of 163 former judges (3.07%). With respect to the sitting judges, out of a total of thirty-one judges, only three are women. This effectively makes the representation of women in the SC one per decade. Justices Indu Malhotra and Indira Banerjee became the first pair of female judges appointed in the same year. Justice Malhotra was the first woman to have risen from the bar.⁸⁹

Table-2 further illustrates the diminutive overall representation of women in the higher Indian judiciary, which has not progressed beyond *tokenism*. Judicial appointment-makers should abandon the seniority norm, as it fails to consider differential gender roles and responsibilities in marriage and motherhood, which make women's playing field different from men's. They should look beyond this criterion that does not always determine the merit of the prospective apex Court judge. The next two sections will further explore the general limitation of the policy and decision-makers in selecting judges.

C. TRANSFER POLICY

The subordinate judiciary is not centrally controlled in India. Article 234 of the Constitution provides the HC and State Public Service Commission of each state with the combined authority to frame the selection and appointment rules of the judges. While this generally leads to a lack of uniformity in the selection process, it is general knowledge that there is a consensus among states on the transfer policy of judges.⁹⁰

89. PTI, *Indu Malhotra First Woman Lawyer to Become SC Judge*, THE ECON. TIMES (Apr. 26, 2018), <https://economictimes.indiatimes.com/news/politics-and-nation/indu-malhotra-becomes-first-woman-lawyer-to-become-sc-judge/articleshow/63916256.cms>.

90. See *Formation of an All India Judicial Service*, 116th LAW COMMISSION OF INDIA REPORT 2 (1986), <http://lawcommissionofindia.nic.in/101-169/Report116.pdf>; Diksha Sanyal, et al., *Report on Ranking Lower Judiciary Appointments*, VIDHI CTR. FOR LEGAL POLICY (Nov. 29, 2017), <https://vidhilegalpolicy.in/2017/11/29/2017-11-29-report-on-ranking-lower-judiciary-appointments/>; *Method of Appointment to Subordinate Courts/Subordinate Judiciary*, 118th LAW COMMISSION OF INDIA REPORT 17-23 (1986), <http://lawcommissionofindia.nic.in/101-169/Report118.pdf>.

First, subordinate judicial officers are transferred every two to three years.⁹¹ Second, states restrict the posting of judges at their place of residence or that of their spouse to avoid *Nemo iudex in causa sua*: none can be a judge in their own cause.⁹² If a judge is posted at their place of residence or that of their spouse, the chances of a dispute involving someone the judge knows are much higher. While this transfer policy may seem gender-neutral due to its uniform application to all judges, that is not the case.

Gendered implications arise because of the transferable nature of the job and because judges may not be posted at their place of residence or that of their spouse. They exist primarily because of the responsibilities (and at many times burdens) of motherhood and marriage that are not equally expected from or shared by men.⁹³ Additionally, they arise because of the prioritization of the career of the husband over the wife, regardless of the post at which she works. An unintended consequence of the transfer policy has been the developing trend of female judicial officers opting to remain single.⁹⁴ By prioritizing their careers, female judges sacrifice the joys of family, marriage, and motherhood—a choice their male counterparts do not have to make. To the extent that this gender bias is not *prima facie* apparent in the transfer policy, it is *covertly structurally biased*.

1. Marriage & Motherhood: The Unbalanced Responsibilities of Women

One of the interviewees described the general Indian tradition of women living in their matrimonial house following marriage, a norm largely accepted in our patriarchal society. Women who work, rather than relying on their husbands, rely on their mothers-in-law as “*the second-best alternative to a mother*” for their kids.⁹⁵ Their male counterparts, however, generally have their wives at home to attend to child-care needs.⁹⁶ However, the transfer policy restricts a female judicial officer from

91. While the transfer policy of subordinate judiciary should be a public document, it isn't available on all the HC websites. The differences among this policy arise because of each HC having discretionary power in making such policy available. Since my primary consideration for selection of the interviewees was their retirement from the Delhi and Bombay HCs, I had attempted to access their transfer policy. While such policy for the Delhi HC was available on its website, in the case of the Bombay HC it was neither available on the court's website nor was access provided despite repeated requests.

92. Under the Delhi HC transfer policy, health emergencies with first-degree relative(s) may be grounds for transfer at one's own residence or spouse's residence. DELHI HC, TRANSFER POLICY, http://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_K198ZKIYI6B.PDF.

93. Pavani, *supra* note 61.

94. See also Deborah L. Rhode, *Balanced Lives for Lawyers*, 70(6) FORDHAM L. REV. 2207, 2215-17 (2002); Nandini Khaitan, *The Firm Women: A Perspective on Indian Women Working in Law Firms*, BAR AND BENCH (Dec. 26, 2018) <https://barandbench.com/the-firm-women-a-perspective-on-indian-women-working-in-law-firms/> (The author, a young partner with one of the premier law firms in India—Khaitan & Co.—wonders whether to lament her single status or celebrate the growth of her career).

95. Interview 1, *supra* note 11.

96. Deborah L. Rhode, *The Unfinished Agenda Women and the Legal Profession*, ABA COMM'N ON WOMEN IN THE LEGAL PROF. 18 (2001), <http://womenlaw.law.stanford.edu/pdf/aba.unfinished.agenda.pdf> (highlighting how housework and motherhood aren't seen as responsibilities of men. Part of the reason is that it runs from the socialization patterns and rules of the legal profession that require long working hours that deter men from contributing equally to sharing domestic and parental responsibilities with women).

being posted to her matrimonial household, where her mother-in-law can help take care of her children. The policy therefore adversely affects women's presence and sustenance in the judiciary. In this regard, an interviewee further observed:

[A male judge] doesn't take that much care of his children, to run back to his children to find out whether the children had had their lunch and things like that, which a judicial woman officer will do. Now if you're going to not let him be transferred to the house of his spouse which may be in another district, say one is in Nasik, one is in Pune or something like this, it's okay for him. He is not going to his mother-in-law's house all the time. So, he is not going to go to that district. But if you tell [a female judge] to not go [to] her spouse's residence, how is she going to bring up her children?⁹⁷

The above statement succinctly captures the gender roles ascribed in our patriarchal society that allow fathers to relinquish parenthood responsibilities, other than financial, and leave all other parenting responsibilities the sole prerogative of women. Justice Roshan Dalvi questions these gender roles by asking: *"Is this an equal music for her (woman judicial officer)?"*⁹⁸

One of the female interviewees observed that had she needed to choose between her children and work, it would not have been possible for her to balance both; she, like many other women, would have opted out of her career.⁹⁹ The reason she was able to progress in her career was because of support from her husband and children. Their male counterparts in the profession do not have to make similar choices. The transferability provision is thus an implicitly gender-biased policy, given its differential impact on female judges, which the framers of the policy did not knowingly intend.¹⁰⁰

One possible reason for the gender-biased transfer policy is an administrative lapse; female policymakers and judicial officers are not included in the appointment process.¹⁰¹ This gender gap becomes apparent from the observations of one of the interviewees who highlighted the oversight of her male colleagues and policymakers: *"All these male judges never thought of it."*¹⁰²

She further informed me that she had written to the relevant authorities regarding this issue, but nothing was done.¹⁰³ Interestingly, while building this narrative, she also acknowledged the societal necessity for constraints arising from

97. Interview 1, *supra* note 11.

98. ROSHAN DALVI, *TANGIBLE JUSTICE: GLIMPSES OF A JUDICIAL LIFE* 190 (1st ed. 2019).

99. Interview with Ret. Judge Delhi High Court, female, Delhi (Jul. 18, 2018) [hereinafter Interview 16].

100. See generally Kang, *supra* note 5.

101. Anne Boigeol, *Feminisation of the French 'Magistrature': Gender and Judging in a Feminised Context*, in *GENDER AND JUDGING* 125, 131–32 (Ulrike Schultz & Gisela Shaw eds., 2013).

102. Interview 1, *supra* note 11.

103. *Id.*

parenthood responsibilities.¹⁰⁴ She posited these constraints are essential because they ensure investment in the well-being of children who will become future leaders, aiding in the creation of a good society.¹⁰⁵ For this reason, then, these responsibilities should not only be accepted but also helped and encouraged.¹⁰⁶ The problem arises when these expectations are only toward women, and the implications of such expectations are not recognized in our policies.

Apart from the lack of similar parenting and marital expectations, women are also burdened with the assumed inferiority of their careers vis-à-vis that of their husbands.¹⁰⁷ While making family decisions, the husband's career, in most cases, assumes priority.¹⁰⁸ This means that when the job of the female judicial officer is transferable, her husband may not be willing to move along with her. This may happen regardless of the nature of the husband's job. In this regard, another interviewee observed:

When lady judges are in the subordinate judiciary, they are subject to the rule of transfer after 3 years. So, as a result of which, let's say, my husband is working as a doctor here, now I get transferred. He can't leave his practice and come with me. So, she'll go to some district HQ or district, and there also she would have to stay alone, and then the child; what to do with the child. And the child is a very impressionable age; four to five year old girl, or boy what will you do [with] them?¹⁰⁹

What is telling in the above statement is the unwillingness of her husband to move along with his spouse upon transfer. It is common knowledge in India, however, that similar unwillingness is not exercised by wives. Female lawyers are more willing to move when their husbands are transferred for work, even when the move will adversely affect their career growth.¹¹⁰ This demonstrates not only that caregiving is generally the sole prerogative of women, but also the implied inferiority of women's careers—regardless of the level at which they work. Such a social web of responsibilities and subjugation systematically inhibits women's entry and sustainability in the profession and also deters the

104. *Id.*

105. *Id.*

106. *Id.*

107. Ranjana Prakash Desai, *Judge's Journey to the Highest Court: Justice Ranjana Prakash Desai*, BAR & BENCH (Dec. 22, 2018), <https://barandbench.com/judges-journey-highest-court-justice-ranjana-prakash-desai/?fbclid=IwAR07SN1Dk0JpdZN26j-VynazhfHcraSgWyEiizWCNTyFBWg0Tr3dWg79zLw> (The author, one of the eight female judges who made their way to the apex Court, in her retirement letter addressed to the nation, recognized the role of multiple people in her success. She further acknowledged the hurdles she faced within her family—starting from the initial unwillingness of her father and a maternal uncle who themselves were both distinguished lawyers, to her father-in-law who wanted her to manage the family property).

108. See generally Pavani, *supra* note 61.

109. Interview 2, *supra* note 1.

110. Interview 12, *supra* note 64. The interviewee had observed that “When husband is a non-lawyer, his transfer to another place means compromise of the woman with her legal carrier.”

appointing authority from preferring them, making the transfer policy *structurally biased*.¹¹¹ The different responsibilities of men and women leading to their differential growth in the legal profession shall be discussed in detail in another paper.

A couple of interviewees, in this regard, questioned a strict understanding of Article 14 of the Indian Constitution, which provides citizens with the fundamental “Right to Equality.”¹¹² They questioned the justification of an equal application of the transfer policy to men and women given their different social realities—specifically that women are expected to care for children of impressionable ages.¹¹³ This expectation is reflected in the adjudication of many child custody cases where the mother is seen as the first custodian of the child.¹¹⁴ In this respect, one of the above two interviewees considered women to be “*unequal persons*” for the purpose of transfer—and not for the responsibilities coming with the judicial job, but for the burdens of marriage and motherhood that weigh female judicial officers down against their male counterparts.¹¹⁵ Thus, while on its face the transfer policy seems gender-neutral, the above-observed implications tell a different gender-biased story.

2. The Choice Between Career and Personal Life: Singlehood of Female Judges

When asked about the reasons for low gender ratios at the higher Indian judiciary, one female interviewee, while describing the better representation of women in the Kerala subordinate judiciary, observed:

*This has been in the legal profession for a very long time. If you see the statistics, you see [women] may be enrolled, but how many were actually practicing, for how long and how many senior women lawyers above the age of 45 were practicing at any point of time; those are the ones who were considered for judgeships. Unless women become judicial officers, as in now Kerala has a large number of women, lot of women, single women who join as judicial officers at the lowest level. So, at some states, you'll find a lot of women at the lower judicial level.*¹¹⁶

What is intriguing in the above statement is the use of the adjective “*single*” to describe female judicial officers. Transferability is not a problem for single women like it is for married women, who are responsible for their marital household after marriage. As a follow-up question to the above response, I asked the interviewee if a woman who wants to join the judiciary ought to remain

111. Interview 4, *supra* note 76.

112. Interview 1, *supra* note 11; Interview 2, *supra* note 1.

113. Interview 2, *supra* note 1.

114. *Id.*

115. Interview 1, *supra* note 11.

116. Interview 5, *supra* note 57.

unmarried. To this, she replied, “*No, you have to have an understanding husband.*”¹¹⁷ All of the female panelists (Prof. Louise Richardson, Madhavi Divan, and Lavanya Rajamani) made similar observations at a discussion addressing the skewed gender ratio in the Indian judiciary.¹¹⁸ The above statement succinctly captures the differential gender expectations in our patriarchal society, which are exacerbated when husbands are unwilling to share the burden. Marriage and motherhood are the pious responsibilities of women, and the progression of women’s careers ultimately depends on the whims and fancies of their husbands.¹¹⁹

Justice Anna Chandy, the first female HC judge in India, contemplated the phenomenon of single-women professionals long before its emergence as a definitive trend. In a conversation with Velu Pillai, a notable administrator, scholar, and author, Pillai argued that married women are unsuitable for government employment because their employment would cause the concentration of wealth among a few families and would harm their husbands’ pride.¹²⁰ Chandy, rationalizing the social effects of Pillai’s suggestion, replied that following his recommendation would cause women to stop marrying in pursuit of their careers, leading to further stigmatization.¹²¹ While in the short run these consequences are limited to women, in the long run they threaten to dismantle the social fabric that allows people to prioritize the joys of family and parenthood.

3. Alternative Mechanisms

As discussed above, the transfer policy was made to counter the situation of *Nemo iudex in causa sua* that may arise if a judge develops a relationship with the local population. While ideally this premise seems just, its practical implications are problematic, especially in light of the fact that judgeships at the higher judiciary are non-transferable (as a matter of rotation). Higher court judges generally serve for at least a few years on average and have often practiced at the same court before their elevation. They thus have a high probability of being familiar with both the senior counsels arguing before them and the litigating parties.

The Indian judiciary should scrap or reconstruct the transfer policy because of its consequences for women, the resulting violation of the fundamental ‘Right of Equality’ under Article 14 of the Indian Constitution, and the fact that the highest judicial bodies already ignore the same transfer policy. It can then institute regulating mechanisms to monitor case allotment and ensure a lack of interest by the judge in a particular case. This need becomes crucial considering the negative implications of the transfer policy on women in particular and society in general. One of the interviewees noted the recent increased appointment of female judges

117. *Id.*

118. Richardson, *supra* note 16.

119. Interview 1, *supra* note 11.

120. J. Devika & Mini Sukumar, *Making Space for Feminist Social Critique in Contemporary Kerala*, 41(2) *ECON. & POL. WKLY.* 4469, 4470–71 (2006).

121. Parameshwar & Damojipurapu, *supra* note 35, at 215.

to the district courts in Delhi.¹²² This emerging trend is likely because judgeships in Delhi are non-transferable, unlike in other states. While this causes a higher number of meritorious women to apply for judgeships, it also reflects decreased competition from their male counterparts due to movement of the best male talent toward high-paying, private-sector law firms.¹²³

Some interim policies that may alleviate the consequences of the transfer policy until the time it is rewritten are:

- 1) Co-location Posting: This policy allows spouses employed under the central government to be posted to the same place where possible,¹²⁴ enabling them to lead a normal family life and look after the welfare of their children.¹²⁵ The core purpose of this policy would be to facilitate the representation of women in central government jobs who may opt out due to the transferable nature of the job. While this policy may be helpful, it is essential to consider the actual percentage of women with spouses employed in the central government and the lack of solutions for women with spouses in different professions.
- 2) Preferential Transfer Policy: This policy, applicable to the Public Sector Banks, considers the social positioning of female employees by allowing unmarried women to be posted near their homes and married women to be posted near their husbands' homes.¹²⁶ Such a provision could be incorporated as part of the current transfer policy for the judiciary. Article 15(3) of the Indian Constitution gives the state power to make special provisions for women, which creates a special carve out for affirmative action policies that lack gender neutrality.

Additional measures that may be taken to support women under the present policy are:

- 1). Gender Sensitization of Judges: This would aid female judges in balancing their gendered responsibilities of motherhood and marriage with their careers. Additionally, it would present an opportunity for building awareness among their male counterparts who in many cases do not even appreciate the contribution of their wives in their successful careers.¹²⁷

122. Interview with Ret. Judge Delhi High Court, male, Delhi (Jul. 10, 2018) [hereinafter Interview 11].

123. *Id.*; see also Boigeol, *supra* note 101, at 126.

124. See generally Rajashree Abhiraman v. Union of India, (2018) W.P.(C) 2564/2018. Posting at the same station with the spouse isn't an absolute right. The specific department may not grant people this right due to the exigency of the situation or nature of position held by any of the spouses that makes their presence at the particular location necessary.

125. MINISTRY OF PERSONNEL, PUB. GRIEVANCES AND PENSIONS, POSTING OF HUSBAND AND WIFE AT THE SAME LOCATION 1-3 (2009).

126. MINISTRY OF FINANCE, TRANSFER OF FEMALE EMPLOYEES IN PUBLIC SECTOR BANKS – MINIMISING THEIR HARDSHIP (2014).

127. Interview 1, *supra* note 11.

- 2). Crèche Facility: The availability of crèche facility, i.e. – a daycare facility for the children of judges, lawyers, or other people working at various levels of the courts will allow the parents to balance their work and parenthood responsibilities. This would especially help women, given how childcare is considered their gendered responsibility, thereby further facilitating women's participation in the legal profession.¹²⁸

Solutions to the present transfer policy will lead to more inclusivity within the courts and allow for more judges with broader perspectives to deliver judgments involving gendered expectations for women or men.

IV. DISCRETIONARY BIAS

The legal profession is considered one of the noblest professions; the judiciary is the last resort for people when every other institution has failed them. It follows, then, that citizens expect the temples of justice to abide by the same ideals that the courts outline for the country. However, courts have not always fulfilled this expectation when comes to gender neutrality in judicial appointments. During my inquiry into the issue, only six interviewees expressly denied gender bias in appointments (four male and two female).¹²⁹ Seven interviewees conditionally denied gender bias by citing an additional factor such as community/family background, legal background, or the role of the Chief Justice, which could influence the judge's appointment (two male and five female).¹³⁰ And three interviewees¹³¹ (two male and one female) positively indicated the presence of gender bias. The final three interviewees (two male and one female) could not comment due to a lack of knowledge on the appointment criteria followed by different collegiums at different HCs.¹³² The fact that only six judges out of nineteen could deny outright any gender bias in judicial appointments means the issue merits attention, because it indicates a lack of vital trust in the judicial appointment process by the judges who have played an essential role in running higher judicial institutions.

The present paper highlights the operation of gender bias in explicit and/or implicit forms. To the extent that such bias is exercised by individuals based on their conscious and/or unconscious preference and will, it is called *discretionary*

128. Interview 2, *supra* note 1; Interview 12, *supra* note 64.

129. Interview 3, *supra* note 76; Interview 9, *supra* note 80; Interview 12, *supra* note 64; Interview 14, *supra* note 11; Interview 15, *supra* note 85; Interview with Ret. Judge Delhi High Court, male, Delhi (Jul. 20, 2018) [hereinafter Interview 18].

130. Interview 1, *supra* note 11; Interview 4, *supra* note 76; Interview 5, *supra* note 57; Interview 6, *supra* note 11; Interview 16, *supra* note 99; Interview 17, *supra* note 60; Interview 19, *supra* note 52.

131. Interview 2, *supra* note 1; Interview 8, *supra* note 53; Interview 11, *supra* note 122.

132. Interview with Ret. Judge Bombay High Court, male, Bombay (Jun. 25, 2018) [hereinafter Interview 7]; Ret. Judge Delhi High Court, male, Delhi (Jul. 10, 2018) [hereinafter Interview 10]; Interview with Ret. Judge Delhi High Court, female, Delhi (Jul. 16, 2018) [hereinafter interview 13] (This interview was telephonic; the judge was located in Delhi while I was located in Jaipur).

bias. It becomes operative when a person in authority exercises bias independently of any structurally biased policy, whether explicit or implicit, within the scope of their discretionary power during appointments. Unfortunately, such gendered discretionary bias is not limited to judicial appointments; it also extends to appointments incidental to the functioning of the judiciary.

Justice Gautam Patel, in his compelling piece on sexism in the Indian judiciary, comments on the presence of appointment bias against women in the higher judiciary. He observes that bias occurs for two reasons. First, it exists because of the unfounded “income criterion,” where the income of an advocate is the yardstick for determining their success.¹³³ Many women fall short of that criterion because many are not senior counsels,¹³⁴ disadvantaging them against their male counterparts.¹³⁵ Second, the “systemic patriarchy,” with men in decision-making positions, adversely affects the judicial appointments and promotion of women.¹³⁶ Justice Patel hints at this proposition, relying on a lecture by Justice Gita Mittal, where she noted:

*“It is only when we come to places where men are making the decisions that we are falling out.”*¹³⁷

The Jindal Global Law School in India also identified the “male dominant collegium”—a collegium with an absolute or high percentage of male judges—as a contributing factor in the decreasing appointment of women to the higher judiciary in a 2013 survey.¹³⁸ The survey identified lack of transparency in the appointment process as another impeding factor.¹³⁹

One of the interviewees indicated the presence of an informal quota of one or two women at the HCs,¹⁴⁰ while another pointed toward the unwritten, subconscious need for female judges that influences appointments.¹⁴¹ The former interviewee further highlighted the public perception that an all-male collegium does not select female judges while a female dominant collegium would.¹⁴² Another

133. Gautam Patel, *Shattering Glass Ceilings on the Bar and on the Bench*, 42 INDIAN ADVOCATE: J. BAR ASS'N OF INDIA 27, 30 (2018).

134. Poulomi Banerjee, *When the Bar has a Male Tilt: Gender Imbalance in the Judiciary*, HINDUSTAN TIMES (Oct. 23, 2016, 7:01 PM), <https://www.hindustantimes.com/india-news/when-the-bar-has-a-male-tilt-gender-imbalance-in-the-judiciary-and-its-impact-on-verdicts/story-VuSxHvVDfClbi3ycmZyJgO.html>; see also Latika Vashist, *Under-Representation of Women in the Judiciary: An Argument for Gender Diversity on the Bench*, INDIA L. NEWS (Dec. 1, 2013), <https://indialawnews.org/2013/12/01/under-representation-of-women-in-the-judiciary-an-argument-for-gender-diversity-on-the-bench/>.

135. See also Jain, *supra* note 84.

136. Ghosh, *supra* note 3, at 15.

137. Jain, *supra* note 84.

138. Vashist, *supra* note 134.

139. *Id.*

140. Interview 19, *supra* note 52.

141. Interview 4, *supra* note 76.

142. Interview 19, *supra* note 52.

senior female judge, while finding it difficult to generalize about gender bias in appointments, indicated that gender bias depends on the head of the judiciary. She observed that, while there have been Chief Justices who have been very supportive of women, others have not been as supportive.¹⁴³ Yet another male interviewee observed that discretionary bias can function in favor of female judges who may not otherwise be eligible to be appointed as a judge.¹⁴⁴

This same male interviewee, earlier during the interview, tied possible bias in the selection process to the apprehension that women are not good enough to be judges;¹⁴⁵ however, he, along with another interviewee,¹⁴⁶ indicated a change in this trend. In this respect, another female interviewee, while disagreeing that different standards apply to male and female judges during elevation, recounted an instance about six years ago where she felt that a female lawyer was skipped over for appointment as a senior counsel. She observed:

*“Once when I realized that she was a very good lawyer, who could have been made a senior counsel, and she was skipped. And I found that they just kind of skipped her as if she was not to be considered.”*¹⁴⁷

This situation becomes more problematic because the number of senior female counsels is already fewer than men.¹⁴⁸ An essential consideration for the male judicial appointer, as observed by one senior judge I interviewed, is the social positioning of women, where the burdens of motherhood are considered the pious responsibilities of women.¹⁴⁹ A male judicial appointer may not want to elevate women because of their gendered responsibilities, which the male judge would not want to become a daily problem in his Court.¹⁵⁰ In this respect, he remarked:

*That sensitivity is required. Whereas, a [male] judge can as well say “I don’t care whether your child is sick or not. This matter is going on, we’re going to go on with the matter.” This he can say. And then, therefore, what happens is the man says, “Hey, who will fall in this mess? Don’t even take the . . . don’t let them come. If they’ll come so this will become our daily problem.”*¹⁵¹

The above account highlights the relevance and possibility of discretionary bias, whether in explicit and/or implicit forms, during the appointment of female

143. Interview 5, *supra* note 57.

144. Interview 11, *supra* note 122.

145. *Id.*

146. Interview 16, *supra* note 99.

147. Interview 1, *supra* note 11.

148. Vashist, *supra* note 134.

149. Interview 2, *supra* note 1.

150. Schultz, *supra* note 61, at 158-159; *see also* Rhode, *supra* note 96.

151. Interview 2, *supra* note 1.

judges. This may happen due to prescriptive gender roles and the consequent ascription of biases and stereotypes. It also occurs because of the lack of understanding and empathy for different women's gendered experiences and social realities on the part of decision-makers, who in many cases are men.¹⁵² Female judges, however, are not always immune from the same biases when in decision-making positions because they come from the same social structure. I will outline the different social realities of men and women judges and the possible impact that has on their ideas of gender justice in a subsequent research paper.

A female interviewee, in response to describing her experience witnessing and facing sexually colored remarks and jokes as part of the judiciary, exclaimed that the way she was received by one of the subordinate state judiciaries (other than Delhi and Bombay) was unfavorable.¹⁵³ The district judge to whom she had reported post-appointment, a man, scoffed at her, saying, "*Ugh, girl.*" Furthermore, the judge faced discrimination when her male counterparts, who had all cleared the same examination she had, were posted at the state capital while she was posted at a station eight hours from the city. Unsatisfied with such an arrangement, the interviewee went to the relevant authority to inquire into the reasons for her such appointment. He said:

"You're allotted to a remote part of the state so that other girls (do) not join seeing (you)."

Unhappy but not discouraged by such a response, the interviewee, with determination and hard work, worked her way up in the legal profession. In the remote place where she was posted, the judge survived alone but with support from a nearby family. During a later conversation, she described the atmosphere of the subordinate court where she was one of the first female judges by observing:

*People came to see me after my appointment. (They) were not impressed because I was thin, weighing 45 kg. They came to see the court of a woman. They said, "kaam karegi? (Will she work?)" ; "ladki hai (she is a girl)" ; "chhoti si hai (she is small)."*¹⁵⁴

The above account clearly shows doubt and disdain as the dominant sentiments with which the judiciary received the judge. The reception instilled in her the responsibility not only to prove her mettle, but also to set a precedent for other women in the judiciary to come. Her story demonstrates the masculine understanding of the profession, where anyone breaking from the norm is ridiculed. While this may be seen as an account of mere sexism and not discretionary bias, that is not the case, because the appointment of the judge to a remote location

152. Jain, *supra* note 84.

153. Interview 16, *supra* note 99.

154. *Id.*

could have reduced her prospects for future promotions—including appointment to the higher judiciary.¹⁵⁵

In India, the potential for discretionary bias at the subordinate judicial level increases due to variability and subjectivity in the appointment procedure stipulated by different State Public Service Commissions and HCs.¹⁵⁶ The situation becomes more problematic because of a lack of proper gender training for decision-makers.¹⁵⁷ Viva-voce, or an oral examination, as a possible element of the selection process, whether in combination with the written examination or not, presents the opportunity for the exercise of implicit and/or explicit bias by untrained interviewers. The 118th Law Commission report¹⁵⁸ observes how states like Gujarat and Maharashtra, until 1986, relied solely on interviews. Thus, although the criteria for judicial selection at different states have evolved with time, women continue to feel the ramifications of gender bias among judicial selectors.

In one instance at the Bombay HC, an interviewed judge¹⁵⁹ was put in charge of recruitment of court stenographers. After close scrutiny, he selected six stenographers from among 300 candidates. Out of this selected pool, four happened to be women. When this report was sent to the Chief Justice of the Bombay HC, he immediately called the interviewee and said, “*Brother, you can’t go on and employ women like this.*”

The interviewee countered by arguing that women are competent. The judge took pride in his ability to use the English language correctly, and any stenographer who could write in English correctly and return transcripts with the fewest number of errors was considered competent. The problem, however, did not end there. Judges need stenographers to travel with them, and so with a higher number of male judges, there is a high likelihood that courts would pair women stenographers with male judges, meaning two people of opposite genders would travel together whenever the judge had work outside the city. This major difficulty was ultimately resolved by the Chief Justice, who paired each female stenographer with a female judge on the bench at that time.

While the above situation affected the appointment of female stenographers and not female judges, it is essential to consider this incident in light of sexism in judicial appointments. The person exercising bias was the Chief Justice of the

155. Interview 14, *supra* note 11; Interview 19, *supra* note 52. This happens because of the lower visibility that a person appointed at a remote place receives from the authorities who are often located in the state capitals or other prominent cities.

156. See *Formation of an All India Judicial Service, Report on Ranking Lower Judiciary Appointment*, *supra* note 90 (showing lack of uniformity in selection due to the combined authority of the HC and each State Public Service Commission to frame the rules for selection and appointment of judges).

157. See Kang, *supra* note 5, at 4 (explaining that implicit bias predicts more negative evaluations of confident, aggressive, ambitious women in certain hiring situations).

158. 118th LAW COMMISSION OF INDIA REPORT, *supra* note 90, at 6 (discussing modes of recruitment among States).

159. Interview 2, *supra* note 1.

Bombay HC at that time, and he played a key role in the appointment of judges at his Court.¹⁶⁰ It is possible that his gender bias could have also affected judicial appointments he made.

In yet another interview, a female judge indicated the possibility of discrimination against women during the appointment of some subordinate staff.¹⁶¹ She provided an example where she stood up for a woman and secured her employment by facing the people involved in the discrimination and arguing that no law prevented the woman's appointment. The judge further highlighted men's fear of exploitation by women.¹⁶² The above two instances indicate that while there is an absence of overt structural barriers in the appointment of women due to the constitutional fundamental right of equality, the possibility for gendered discretionary bias by decision-makers during such appointments, either conscious or unconscious, still exists.

As discussed above, gender-biased appointments may stem from the masculine understanding of the profession, where anyone not following the written or unwritten social rules is considered an outsider. Since women, with their different social responsibilities in marriage and as mothers, are unable to fulfill judicial norms and expectations, they are considered *outcasts*. The unintended impact then, as emphasized in the section on the transfer policy of subordinate judges,¹⁶³ is women opting to remain single.¹⁶⁴ Additionally, gender-biased appointments stem from the lack of gender diversity among decision-makers, considering men in most positions of power lack the advantage of a woman's perspective in considering the different social realities of the two dominant genders.

Judicial decision-makers need awareness of the different ways they exercise their biases in order to avoid them. In most cases, such biases are a manifestation of social stereotypes and conditioning. In the present context, gender roles deem women unfit for the masculine legal profession. Interestingly, this social stereotyping of gender roles can work the other way around to make appointment based

160. See INDIA CONST. art. 217; (authorizing High Court Chief Justices to appoint other judges to their High Court); DEP'T OF JUSTICE, GOV'T OF INDIA, MEMORANDUM SHOWING THE PROCEDURE FOR APPOINTMENT AND TRANSFER OF CHIEF JUSTICES AND JUDGES OF HIGH COURTS 5 (2009), http://doj.gov.in/sites/default/files/memohc_0.pdf (last visited Feb. 27, 2020) (describing the process for appointing a Judge of a High Court).

161. Interview 17, *supra* note 60.

162. *Id.* When I asked the judge to further describe what she meant by "exploitation" she said, "you know what I mean." Her indication was then towards sexual exploitation of women. She refused to provide any further details on this point.

163. See discussion *supra* Section III. C.

164. *Cf.* Parameshwar & Damojipurapu, *supra* note 35, at 214–15 (describing how Justice Anna Chandy, the first female judge in India, advocated for women's employment by suggesting that women avoid pregnancy while employed and by arguing against a policy of employing only unmarried women on the ground that it would increase stigmatization of working women); Rhode, *supra* note 96, at 18 (highlighting that, in the US legal profession, housework and parenting are not seen as men's responsibilities and explaining that this is partly due to an expectation of long working hours, which deter men from sharing domestic and parental responsibilities).

on gender as a matter of requirement.¹⁶⁵ This is to say, that demand of the situation or establishment may influence the appointment of a female or male judge.¹⁶⁶ For instance, Section 4(4)(b) of the 1984 Family Courts Act in its selection process of family court judges provided for preferential appointment of women. In this regard, one interviewee highlighted how the Act's passage in the states of Andhra Pradesh and Maharashtra, created a demand for female judges.¹⁶⁷ The law was passed because family law was considered a stereotypically gendered area of law suited only for women. The Act prompted the recruitment of ten unknown female lawyers as judges. The interviewee felt that this indicated a leniency in merit requirements.¹⁶⁸

From an intersectionality perspective,¹⁶⁹ other factors that may accelerate the appointment of female judges are their legal background,¹⁷⁰ community background,¹⁷¹ urban upbringing, and education.¹⁷² The operation of these factors may mean better opportunities for some women and help them with progression in the judicial ladder.

The need of the hour, then, is training judges on gender stereotyping and role attribution that unduly advantage men and disadvantage women. A couple of interviewees¹⁷³ highlighted the lack of judicial training before elevation to the HC, which exists in theory but not in practice. One of them compared the appointment process to throwing the Indophiles to the lion for some judges.¹⁷⁴ Thus, considering the spaces for discretionary bias that malign judicial appointments, there is a crucial need for gender and overall sensitization trainings for judges. While the National Judicial Academy has adopted these trainings to some extent,¹⁷⁵ the process must be further strengthened.

165. Interview 16, *supra* note 99.

166. The Act provided Indian states with the power to establish family courts after consultation with the HC. Family Courts Act, No. 66 of 1984, § 3(1) (India), <http://indiacode.nic.in/bitstream/123456789/1844/1/198466.pdf>. In an analogous situation among police officers, for instance, section 24(1) of The Protection of Children from Sexual Offences (POCSO) Act provides for recording the statement of the child "as far as practicable by a woman police officer not below the rank of sub-inspector."; Protection of Children from Sexual Offences Act, No. 32 of 2012, PEN. CODE § 24(1) (India), <https://indiacode.nic.in/bitstream/123456789/2079/1/201232.pdf>. Further, section 27 of the Act provides for conducting the medical examination of a victim child in the presence of a woman nominated by the head of the medical institution, during absence of a person trusted by the child. *Id.* § 27(4).

167. Interview 16, *supra* note 99.

168. *Id.*

169. See Crenshaw, *supra* note 10, at 1244 (explaining intersectionality).

170. Interview 6, *supra* note 11; Interview 14, *supra* note 11; see also Ghosh, *supra* note 3, at 15 ("Women aligned to the chambers of an influential advocate, or related to a judge or senior lawyer, are more likely to be elevated to judgeship despite this bias [against women judges].").

171. Interview 1, *supra* note 11.

172. Interview 14, *supra* note 11.

173. Interview 1, *supra* note 11; Interview 10, *supra* note 128; see also Vashist, *supra* note 134.

174. Interview 1, *supra* note 11.

175. Interview 5, *supra* note 57.

V. CONCLUSION

Judges are human beings, and they are therefore just as susceptible to sociocultural biases as any other person. Without proper training as policymakers and decision-makers, they may exercise implicit and explicit gender bias during the appointment of female judges. This may be due to a lack of consideration and reflection on, first, women's historical struggle to enter male-dominant institutions and, second, the existing unbalanced social burdens of motherhood and marriage that, regardless of economic strata, are not, generally, shared by men.

Therefore, considering the huge social costs of appointment bias for society in general, and for women specifically, there is a crucial need for acknowledgment of gender bias and sensitization trainings for the decision-makers on different gender perspectives. Providing stakeholders with awareness of the negative implications of the work-life choices women in our patriarchal society face will allow them to look beyond the orthodox parameters of judicial appointments and rules of the legal profession that may not always determine merit. There is, therefore, a pressing need to *reinvent* the current rules for selecting and posting judges at all judicial levels. Doing so will not only help the judiciary cope with the changing social order, but will also help ensure diversity and representation of half of the country's population at its highest justice delivery institutions.