



HOW TO REALISE REPRESENTATIVE HIGHER JUDICIARY

*By Ashmi P.S and Abhinav Kumar
From Unitedworld School of Law, Karnavati
University*

Abstract

This paper tries to present a discursive analysis of judicial appointments and representation in the Supreme Court and different high courts over the last seven decades after the independence. This analysis covers the broad spectrum of the monopoly of few families, gender and caste discrimination, and tries to point out problem area as well as the inherent bias and underlying patriarchy in the higher courts of justice. In this paper, we ascertain whether the nature of the appointments procedure impacts the biographical and other characteristics of the judges that are eventually selected. And this is done by the analysis of judges appointed by the executive system (before 1993) and collegium system (on and after 1993). We covered the concept of the real meaning of 'merit' and how it should be defined and utilised in higher Indian judiciary. We analysed the middle path of 'uniform representation' would be achieved without the traditional Indian reservation in higher judiciary.

Introduction

Judiciary represents one of the three pillars of democracy in India. It checks arbitrariness of legislative and executive. It functions as the watchdog of constitutional safeguard and fundamental right of a common people. It also guarantees to protect the basic structure of the constitution and the interpretation of the law. To ensure the independence of

judiciary, very specific provisions have been made in the constitution under article 124,217,233,234 and 235. However, there are certain contentions over the appointment of judges and their representation in the higher judiciary. Our judicial system faces an allegation to ignore the norms of social justice, there is the hegemony of certain families and caste. Unlike constitutional provisions, official policies and practical measures that have put in place a system of reservation for weaker segments of society in jobs in the government sphere and public sector, no law or policy stipulates similar quotas in the Supreme Court or the High Courts. Lots of the studies published during recent time shows the poor representation of Scheduled Castes (SCs), Scheduled Tribes (STs), minorities and women in the higher judiciary. There have been several judge cases, commissions and committees, bills formed on that matter. Some committees and bills even suggested the interference of government in appointments of the judiciary to maintain social justice. Let's take a brief analysis of appointments and representation of judges.

Judicial appointments in India

Articles 124 and 217 governs the appointments of judges for the Supreme Court and the High Courts respectively. The early decades since the adoption of the Constitution, the appointments were done by the president on the advice of concerned minister after consultation with the judiciary and the suggestion expressed by Chief Justice wasn't binding on executive. This created controversy during the 70s and 80s era then



checked by the Supreme Court in the First Judges case¹.

However, changes were initiated during the 80s, after a few highly criticised political appointments of judges by the president or we can say, law minister. In the Second Judges case² and later the Third Judges case³, the Supreme Court expressed that the judiciary has the power in their appointments. It was said that the Chief Justice of India, alongside senior-most Judges of the Supreme Court, would assume an essential function in arrangements to the judiciary. Systems and rules were set down concerning legal arrangements. The president's job was reduced and the judiciary had a major control. They formed the collegium system for appointments and this system of appointments has attracted critique for carrying nepotistic tendencies. It has been raised out by several researchers and scholars⁴ about this system where the judiciary itself chooses their representative is profoundly vulnerable to partiality. It might even be said that these outcomes in a circumstance of legal nobility - taking into account how a small bunch of Judges wind up taking pivotal choices, including the choice of who these Judges will be. This leads to the new dimension of reservation by some certain families and peoples in higher judiciary and it deprives the reasonable representation of various communities in the judiciary.

This does not mean, in any case, that the executive based model of judicial appointments is liberated from such propensities. As referenced before, in the pre-collegium era, appointments in the higher judiciary were observed as bothersome and nepotistic by many. This circumstance might be more inconvenient than that of legal nobility - considering how an important function of the judiciary in a society is to keep a check on the executive. On the off chance that the executive chooses whom to designate, the arrangements would be political and the decisions would support their political agenda. Both the circumstances are the two extremes polarisation in different directions and equalization for the equivalent was endeavoured to be struck by the NJAC. The legislature claimed this act as more transparent, would bring the check and balance to judicial appointments and enacted the National Judicial Appointments Commission Act, 2014 or the Constitution (Ninety-Ninth Amendment) Act, 2014. The Supreme Court, however, struck down the Acts for violating the basic structure⁵ of the Constitution⁶.

Issue of representation

In a constitutional democracy, representation is very important to maintain a better diverse society and judiciary isn't an exception. A judiciary mirrors the composition of the society it serves appreciates a more prominent level of authenticity, as it signals equal opportunity and justice for marginalised groups.

¹ S.P. Gupta v. Union of India, 1981 Supp SCC 87.

² Supreme Court Advocates-on-Record Assn. v. Union of India, (1993) 4 SCC 441.

³ Special Reference No. 1 of 1998, In re, (1998) 7 SCC 739.

⁴ Prashant Bhushan, The Dinakaran Imbroglio: Appointments and Complaints against Judges, 44

EPW 10 (2009); See also Indira Jaising, National Judicial Appointments Commission - A Critique, 49 EPW 6 (2014).

⁵ Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

⁶ Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1.



However, systemic barriers create impediments in the passage of such people into these institutions. In India, the portrayal of socially backward in both the higher and the lower judiciary stays inauspicious. Woman judges representation is only about 10% in the high court and 27% in the lower court. If we consider caste representation, then statistics fall more drastically. It is assessed that OBC constitutes just 12% of the lower judiciary, which is quite lower than their actual population share, estimated roughly to 40%. And according to the 2011 census, Dalits population share is 16.6%⁷ but constitute 14%. But judges belonging to the ST community constitute 12% of the lower judiciary figure, which is higher than their population share of 8.6%.⁸

To cure this, varieties of measures have been taken by certain nations. In the UK, for example, a 'Judicial Diversity Taskforce'⁹ was set to manage the usage of proposals to make the judiciary more comprehensive. South Africa has a constitutional **mandate** to keep up an impression of its social composition in its judiciary which incorporates both gender and racial composition.

In India, however, the discussion around the betterment of judicial diversity does not rise above the question of reservation. For example, a report published by the National Commission for Scheduled Castes in 2011 suggested governmental policy regarding minorities in society as the best way to fix the

absence of portrayal in the higher judiciary, However, there is almost no observational proof concerning the relative success of such strategy. The lack of observational proof created impediments in the way of policymakers to even completely understand the issue. We haven't seen the efforts to regularly compile and publish data on the social, economic and professional backgrounds of judges in either the higher or lower judiciary. But in November 2017, this question was raised in parliament and response came out that some data on the overall proportion of women judges in the lower judiciary was assembled and unveiled. Even this data was fragmented as it had not been arranged for all states. The Union minister of law and justice likewise explained this was not a normal exercise for the Central government.

Women representation in higher judiciary

Women representation is one of the major concern in our court. Not only in the higher judiciary but also litigation but unfortunately, we haven't seen the establishment of any special committee or commission for that.

Last month retirement of Justice R. Banumathi left India's Supreme Court with just two women judges of 31, a female representation of less than 6.5%, compared to Parliament's insubstantial 14%.¹⁰

While Parliament's poor showing gets a fair measure of media attention (here and here), there is virtually none on the more glaring

⁷ Scheduled castes and scheduled tribes - Census of India
https://censusindia.gov.in/census_and_you/scheduled_castes_and_scheduled_tribes.aspx

⁸ We Need Annual Diversity Statistics for the Judiciary, Diksha Sanyal
<https://thewire.in/law/annual-diversity-statistics-judiciary>, published on 25/MAY/2018

⁹ Improving Judicial Diversity - Judicial Diversity Taskforce Annual Report
<https://www.gov.uk/government/publications/improving-judicial-diversity-judicial-diversity-taskforce-annual-report>, Published 13 September 201
 From: Ministry of Justice

¹⁰ <https://www.article-14.com/post/the-higher-judiciary-s-gender-representation-problem>



gender gap in the Supreme Court. In the 70 years since its inception, the Supreme Court has had only eight women judges.

In a country where 48% of the population is female, of 245 judges who have made it to India's highest court, including the current judges, less than 3.3% have been women. No woman has served as the Chief Justice of India.

The data thus shows a near-uniform trend of the proportion of women judges decreasing as one moves up the tiers of the lower judiciary. Men and women are equally meritorious, in the absence of discrimination, one would assume that the proportion of women judges will remain the same from the lowest to the higher tiers, for any given batch of judicial officers

The Leaking Judicial Pipeline

More women tend to enter the lower judiciary at the entry-level because of the method of recruitment through an entrance examination. The higher judiciary has a collegium system, which has tended to be more opaque and, therefore, more likely to reflect bias. With the increasing number of women in the bar and social changes recognizing women's rights, we would have expected the collegium system to be associated with a greater number of women judges on the Supreme Court, but there appears to have been no meaningful change in the likelihood of a female

appointment to the [Supreme Court of India] following the establishment of the collegium¹¹

Reservation quota for women is perhaps just one among many factors that encourage and facilitates more women to enter the system. In states where other supporting factors are present in sufficient measure, women's quotas perhaps help bridge the gap in gender representation¹².

Factors of age and family responsibilities also affect the elevation of women judges from the subordinate judicial services to the higher courts. Women judges are not immune to the "leaking pipeline", the term used to describe how many employed women quit the workforce mid-career when children face board exams and parents need additional care—jobs that fall to women.

Why women judge matters

With more women in courts, gender discrimination and bias would likely reduce. A change in the judicial culture is also likely to have knock-on effects for litigants. "Higher numbers, and greater visibility, of women judges can increase the willingness of women to seek justice and enforce their rights through the courts¹³. Diversity on the bench would bring in alternative and inclusive perspectives to statutory interpretations. Increased judicial diversity enriches and strengthens the ability of judicial reasoning to

¹¹ From Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3417259#:~:text=Sital%20Kalantry,-Cornell%20University%20%2D%20Law&text=At%20the%20founding%20of%20the,primary%20authority%20over%20judicial%20appointments.&text=We%20find%20that%20both%20the,the%20candidates%20that%20are%20appointed

¹²The Rise of Women in the Lower Judiciary Breaking through the Old Boys' Club, by Sumathi Chandrashekar, Diksha Sanyal, Shreya Tripathy, Tarika Jain <https://www.epw.in/journal/2020/4/special-articles/breaking-through-old-boys%E2%80%99-club.html>, Vol. 55, Issue No. 4, 25 Jan, 2020

¹³2014 report by the International Commission of Jurists. <https://www.icj.org/>



encompass and respond to varied social contexts and experiences. This can improve justice sector responses to the needs of women and marginalized groups¹⁴

When it comes to the distinct perspectives that women judges have brought to the bench, several judgements that uphold the dignity of rape victims are noteworthy.

For example, an all-women bench of the Supreme Court comprising Justice R. Banumathi and Justice Indira Banerjee in *State (Govt. of NCT of Delhi) vs Pankaj Chaudhary*¹⁵ held in 2018 that even if “the victim was habituated to sexual intercourse” it could not be inferred that she was a “woman of loose moral character” and that even if the prosecutrix was of “easy virtue”, she has right to refuse to submit herself to sexual intercourse. The judgement stands in contrast with and ignores a 2016 all-male verdict in *Raja vs State of Karnataka*¹⁶ with similar circumstances wherein the judges had imputed an implication to the victim being “accustomed to sexual intercourse”.

Representation Is Necessary but Not Sufficient

There is no denying that progressive male judges too can pronounce pro-women judgements. Likewise, the isolated instances of some women judges championing gender

justice, highlighted above, do not mean that all women judges are progressive or feminist. There is no empirical evidence to suggest that women judges are likely to pronounce gender-sensitive judgements. On the contrary, women judges may be more reticent to being openly feminist in their rulings. Many feminist judges are wary of even suggesting that gender might be relevant to their judging for fear that they may appear biased¹⁷

REPRESENTATION OF SOCIETAL DIVERSITY IN HIGHER JUDICIARY

Unlike constitutional provisions, official policies and practical measures that have put in place a system of reservation for weaker segments of society in jobs in the government sphere and public sector, no law or policy stipulates similar quotas in the Supreme Court or the High Courts. In recent times lots of studies have shown the poor representation of Scheduled Castes (SCs), Scheduled Tribes (STs), minorities and women in the higher judiciary. In a broadly examined article, its authors pointed out, just 11% of women judges are in high courts and none of the High Courts had a Chief Justice representing to the Dalit (SC) community¹⁸

¹⁴ International Commission of Jurists report. <https://www.icj.org/wp-content/uploads/2014/10/Universal-Women-and-Judiciary-Gva-For-1-Publications-Conference-Report-2014-ENG.pdf>

¹⁵ *State (Govt. of NCT of Delhi) Vs. Pankaj Chaudhary and Ors.* [Criminal Appeal No.2298 of 2009]

¹⁶ *Raja & Ors vs State Of Karnataka*, CRIMINAL APPEAL NO. 1767 OF 2011

¹⁷ Rosemary Hunter’s 2018 research paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3198259

¹⁸ 70 Years Of Indian Judiciary | Opinion: Composition Terribly Skewed, Higher Levels Bastion Of Upper Caste Males, By Tarika Jain, Shreya Tripathy

<https://magazine.outlookindia.com/story/india-news-70-years-of-indian-judiciary-opinion-composition-terribly-skewed-higher-levels-bastion-of-upper-caste-males/302658#:~:text=At%20present%2C%20women%20constitute%20a,justice%20in%20any%20high%20court.&text=When%20the%20Supreme%20Court%20diluted,skewed%20representation%20in%20the%20judiciary.published on February 03, 2020>



The media buzz bought up in the year 1999¹⁹ in regarding with a file noticing wrote by the former President of India, Shri K R Narayanan prescribing that due consideration be given to reasonable applicants from the fragile community of society like SCs, STs and women, for appointment as judges of the Supreme Court of India. More recently, in November 2017, at a meeting arranged by NITI Aayog and the Law Commission of India to recognise Law Day, the incumbent of that office, Hon. Shri Ramnath Kovind said his concern²⁰ at the "unacceptably low representation of traditionally weaker sections such as women, OBCs, SCs and STs, especially in the higher judiciary" and called for steps to remedy this problem

In January 2018, Shri P.P. Chaudhary, Ex Union Minister of State for the Ministry of Law and Justice requested the chief justice of HC and SC to ensure adequate representation for suitable candidates of weaker sections of society in the courts²¹.

As Henry Abraham noted: "Balancing 'representation' on bases of religion, geography, race, and sex has also played a

major role in the presidential choice of Supreme Court nominees" in the United States.²²

India isn't the exception of such kind of practices. Before 1947, the Judicial Committee of the Privy Council was dealing with the issue of judges in India.²³ Similarly, representation was given to specific communities in specific High Courts taking into the account of their strength of those communities inside the regional furthest reaches of those High Courts.²⁴ Somewhat, these contemplations have been considered since independence and care is duly taken to provide representation to various communities and areas in the Supreme Court. Such practice has been scrutinized because it could come in the method of the ablest among the imminent possibility for the judgeship in arriving at the Bench.²⁵ The criticism has, however, come without any reference or attention to the principle of the 'reflective judiciary'. Unexpectedly, on numerous occasions, the requirement for and certainty of representation of various areas and minorities in the appointment of Judges,

¹⁹ President within his rights to make suggestions to Chief Justice, say lawyers, by Amberish K Diwanji <https://www.rediff.com/news/1999/jan/22court.htm>, published on January 22, 1999

²⁰ President Ram Nath Kovind voices concern over poor representation of weaker sections in higher judiciary, <https://www.financialexpress.com/india-news/president-ram-nath-kovind-voices-concern-over-poor-representation-of-weaker-sections-in-higher-judiciary/947372/>, published on November 25, 2017

²¹ RAJYA SABHA UNSTARRED QUESTION NO. 2187, <https://humanrightsinitiative.org/download/RS-Q&A-Jun18.pdf>

²² He says that a woman, black, Jewish and Roman Catholic seat — one each — is almost an unwritten rule in the Court appointments. For a similar demand

in England see, R. Stevens, *The Independence of the Judiciary*, 177ff. (1993)

²³ See e.g., the Judicial Committee Act 1833 providing for two Indian Judges as assessors, the Appellate Jurisdiction Act 1908 providing for full members of the Judicial Committee up to two Judges from India. For names of some of the Indian native Judges who sat on the Judicial Committee of the Privy Council, see M.P. Jain, *Outlines of Indian Legal History*, 394, No. 2 (3rd. Edn., 1972)

²⁴ See the examples of Calcutta and Cochin High Courts providing for representation to Muslims and Christians respectively in *The Hindustan Times*, p. 2 cols. 3-4, 24-1-1999

²⁵ See, e.g. Law Commission of India, above, No. 13, p. 34, para 6, p. 55, para 52(1) and p. 105, para 82(8) (1958). Also Eightieth Report, above, No. 13, p. 23 para 6.9



especially in the Supreme Court, has been underlined.²⁶

Muslims in judiciary

There has been a deplorable and abysmal representation of minorities in both lower and higher Indian judiciary. We had only four of 43 or 9.3% Muslim chief justices in India since independence, and we saw the last Muslim CJI Altamas Kabir who retired in 2012, and total 10 out of 154 judges, i.e. 6.5 percent judges²⁷

Before Justice Kabir, between 1994 and 1997 AM Ahmadi served as the CJI, Mirza Hameedullah Beg (January 1977 to February 1978) and Mohammad Hidayatullah (February 1968 to December 1970) was appointed CJI.

In Indian higher judiciary, we saw a sheer lack of diversity, including our high courts. Minority representations are merely 26 judges out of 601 sitting judges across 24 high courts while Muslims contributes nearly 15 percent of the Indian population.

India Justice Report²⁸ revealed that there has been no representation of Muslim judges in the apex court after the retirement of Justice MY Eqbal and Justice Fakkir Mohamed Ibrahim Kalifulla, who was elevated to the bench in 2012. The report went on to sum that this is “the first time in 11 years and only the second in about three decades that the SC has been deprived of a Muslim judge

Positive Discrimination

The collegium asserts that their decisions in appointing judges are based on merit, but merit is an “empty vessel” that requires cautious filling.

The contention that aspirant for elevation to the Supreme Court and the high courts must be selected on merit only, could essentially mean to choose “people like us”.

For peoples to have belief in those judgements making — often impinging on life and demise — upon them, the judges ought to be reflective of a multi-religious, multi-ethnic community. Furthermore, various perspectives settle on for stronger laws and better choices. We have been seen that representation or fair reflection of the society was not an issue before the Court in judge cases²⁹. What might have been the response of the Court if it had been an issue before it, cannot be expressed with sureness? In any case, given our constitutional provisions and practices which indisputably accommodate and watch the portrayal of more backward sections, minorities, and women in legislative and executive bodies and the administrative services and lower judiciary might sensibly be normal that if the issue is routed to the Court then it won't contradicting with the ‘principle of fair reflection of the society’ in the higher judiciary³⁰. High legal qualifications and the bounded number of seats in the higher

²⁶ See, e.g. Law Commission of India, above, No. 13, p. 23 para 6.9 and p. 30 para 7.10 (1979) and One Hundred Twenty First Report, above, No. 8, p. 19 para 3.14; Third Judges Case; (1998) 7 SCC 739 at 767.

²⁷ Muslim Population at 15% But Few Muslim Judges in SC, High Courts, <https://www.thequint.com/voices/opinion/muslim-population-at-15-but-minority-representation-in->

judiciary-poor-muslim-judge-supreme-court-altamas-kabir, published on 07 Sep 2016

²⁸ India Justice Report 2019 - Tata Trusts, <https://www.tatatrusters.org/upload/pdf/overall-report-single.pdf>

²⁹ Supra 1,2,3

³⁰ The Constitution specifically reserves seats in Parliament and State legislatures for Scheduled Castes and Scheduled Tribes as well as for Anglo Indians and



judiciary the Constitution doesn't explicitly discuss the portrayal of more vulnerable segments in the judiciary, however, that cannot be contention for denying representation to them, whenever qualified competitors are accessible among them. For the entire push of the Constitution are social equity and social change through the liberation of the more fragile segments of the general public, especially the Scheduled Castes and Scheduled Tribes and, to a lesser extent, also women.

The 'reflective judiciary' ought not to be confused with mistaken with arrangement for reservations or quotas. No one is asking or appears to have ever requested for reservation in the appointment of Judges except in Kariya Munda committee³¹ but it is quite impossible to ignore the diversity of Indian society. However, for the current motivation behind accomplishing, maintaining, keeping up and improving the nature of equity directed by the courts and for resting more prominent confidence of the people in them consequently guaranteeing the competence and independence of the judiciary, the 'principle of reflection' of the society need to be considered. With the law set somewhere near the Court on the appointment of Judges better justification lies for the recognition of the principle. Earlier a president had presumed to have an absolute

role in the appointment of the Judges, while that role has been shifted to the Judges, and now there is no direct or indirect role of the executive. A huge duty, therefore, lies upon the Judges to show that even though they are self-selected, they speak for general peoples and that they are not a secret society propagating their standard. They should discharge that responsibility with keenness, broadmindedness, sagacity and prescience and welcome recommendation for the appointment of Judges from various sources, including the executive, the legal luminaries and the bar. Presently it fundamentally lies on them to make and set up the judiciary which isn't just autonomous of the executive and the legislature but which is also competent to able to play out the incomplete errand of social unrest— not just reformation — which the Constitution creators had foreseen for it³²

“Judges are part of the democratic dialogue” and “are partners in the common endeavour of representative government.”³³ Therefore, “they must not be removed from the community and must not espouse to a narrow ideological philosophy of one part of the community but should reflect the broad cross-section of the society.”³⁴ For that end, it is not necessary or even desirable that the judiciary must be elected in the same way as the other two organs of the Government.

in the municipalities and panchayats also for women. It makes special provision for women, children, Scheduled Castes, Scheduled Tribes and other sections of the society. See, M.P. Singh, Affirmative Protection of Minorities in India, in G. Alfredson & P. Macalister-Smith (eds.), *The Living Law of Nations*, 301ff. (1996)

³¹ COMMITTEE ON THE WELFARE OF SCHEDULED CASTES AND SCHEDULE TRIBES https://eparlib.nic.in/bitstream/123456789/66474/1/1_3_Welfare_of_Scheduled_Castes_and_Scheduled_Tribes_13.pdf

³² For this see, Austin, above, No. 6 at 164ff. Even the title of the chapter “The Judiciary and the Social Revolution” is striking. Also see generally on the revolutionary role of the Judges, B. Ackerman, *We the People: Transformations* (1998)

³³ N. Redlich, *Judges as Instruments of Democracy*, in S. Shetreet (Edn.), *The Role of Courts in Society*, 149,156 (1988).

³⁴ S. Shetreet, *Judging in Society: The Changing Role of Courts*, in S. Shetreet (Edn.), id. at 479.



Studies on judicial behaviour have long proved that a Judge's experience and background assumes a significant function in his dynamic.³⁵ For a reasonable representation of various backgrounds, not just accurate or numerical proportional representation but it is expected only a fairer image of the society in the judiciary. Such reflection is essential for the competence as well as the independence of the judiciary. He bolsters his contention by referring to instances of nations which are known for the independence, competence and supremacy of the judiciary such as United States, Canada, England, Germany and also other various nations practising a 'reflective judiciary' either as a matter of convention or statutory rule³⁶

Concept of merit

It may not be well discussed in the tradition of liberal constitutions, the Constitution of India envisaged social justice with merit. Therefore, it shouldn't be questioned that merit must be the observation for **holding** and appointment in public offices. Yet, it might likewise be recollected that merit is certainly not a set or fixed standard³⁷. In normal sense, merit implies the characteristics **pertinent** to the reason for accomplishing certain objectives and destination. With regards to a public office, it implies the characteristics **pertinent** for accomplishing the objectives of that office. These characteristics in any event

in certain regards will vary from office to office because the objectives of various workplaces won't be the equivalent in all regards. That, however, the objectives of a similar office may likewise contrast every once in a while and from society to society. Appropriately, the substance of legitimacy or merit alluring for that office will likewise change. For instance, merit for a Judge in a pluralistic and different society will positively require a couple of components which may not be equivalent to merit for a Judge in an inflexible and homogenous society.³⁸

In this manner, yielding that merely merit is the observation in the appointment of Judges and was expected to be so by the Constitution creators and has been so held by the Court, even the meaning of merit neither has been given in any precedent nor provided in the constitution. The Constitution only talks about the judge's qualification. The precedents at places carry opinions by each judge about the further qualities a Judge to have been expected. For example, in the Judges Case Bhagwati Judge (later CJ.), after quoting, among others, the following words of Krishna Iyer J³⁹ "the choice of Judges for the higher Courts which makes and declares the law of the land, must be in tune with the social philosophy of the Constitution. Not mastery of the law alone, but social vision

³⁵ see e.g., B.N. Cordozo, *The Nature of the Judicial Process* (1941); H.J. Abraham, *The Judicial Process* (7th Edn., 1998); T. Freyer & T. Dixon, *Democracy and Judicial Independence*, 261, 263 (1995)

³⁶ *Supra*27

³⁷ For an insightful discussion on this issue see, C. McCrudden, *Merit Principles*, 18 *Oxford Journal of Legal Studies* 543 (1998). He notes down and discusses five different conceptions of merit. Also see, R. Fallon, *To Each According to His Ability, From None According to His Race: The Concept of Merit in*

the Law of Antidiscrimination, 60 *Boston University Law Review* 815 (1980) and several writings cited by McCrudden in his above writing in No. 6; and also M.P. Singh, *Jurisprudential Foundations of Affirmative Action: Some Aspects of Equality and Social Justice*, 10 & 11 *Delhi Law Review* 39 (1981-82)

³⁸ Former Chief Justice of India, Justice P.N. Bhagwati Speaking to the students of the Faculty of Law, University of Delhi in the spring of 1997

³⁹ 1981 Supp SCC 87 at 222.



and creative craftsmanship are important inputs in successful justice

Justice Verma J. (later CJ.) in second judge case pointed out the following qualities of a judge: “Legal expertise, ability to handle cases, proper personal conduct and ethical behaviour, firmness and fearlessness are obvious essential attributes of a person suitable for appointment as a superior Judge.”⁴⁰

Reformations and suggestions

Indeed, even before we banter the overall benefits of strategic measures to improve judicial diversity, there is a requirement of hard evidence. While data and statistics solely can't fitting change proposals, they are a fundamental guide for any measure or strategy to be planned or assessed. Regular publication of such statistics would moreover help keep up a supported public pressure around the issue.

Publish annual diversity statistics

One way forward is for the Ministry of Law and Justice to publish 'Annual Diversity Statistics' for the higher and lower judiciary. This is similar to what is done in the UK by the Courts and Tribunal Service, where statistics are published on an annual basis on April 1 each year. This compilation provides a breakdown of gender, ethnicity, professional background and age. Regular, systematic publication of data enables transparency and accountability. Ultimately, such a publication could help in the realisation of a more socially diverse judiciary which might arguably reduce the

barriers of access for litigants from marginalised communities.

Gender-sensitisation training –

Justice Sridevan's experiences lend merit to the value of gender sensitization training. She learned how the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)⁴¹ could be used in judgements during one such training camp and applied what she learned in a case involving two women who had been denied membership to an educational trust. Gender-sensitisation training not only for judges but lawyers and suggested it become part of the legal-education curriculum.

Jaising's open letter recommended that sexist remarks in judgements be documented and barred from judicial language, and lawyers and judges who condone sexist behaviour not be promoted.

Encouraging Diversity

Today, other than trustworthiness, the problem of merit is being faced by Indian judiciary. Normally a Hindu male judge with certain skills as lawyers and who have served as judges of high courts can promote to the Supreme Court easily compare to one needs to be an exceptional religious minority or a woman to make an impact.

More prominent diversity promoting and encouraging the best from a wider pool of backgrounds would mean overall better quality of the judiciary and a significantly better equity conveyance framework. At the point when the judiciary doesn't mirror an extensive agent cross-segment of Indian culture, the public recognition would be that

⁴⁰ (1993) 4 SCC 441 at 696.

⁴¹ Convention on the Elimination of all Forms of Discrimination Against Women
<https://www.un.org/womenwatch/daw/cedaw/>



there is a verifiable inclination against strict minorities. So this should be control and decent diversity ought to be empowered

Conclusion

Judiciary is not only meant to achieve the social revolution. But, in our Constitution, which is the basis of our aspirations and polity, we have accepted a democratic society based on liberty, equality, fraternity and justice under the rule of law. The Judge's roles are not only to interpret interpreters but also they are the lawmakers through precedents. They are not expected less than the legislature and executive to ensure liberty, equality, fraternity and justice through law. Representation, it is already pointed, does not mean proportional or numerical representation. But obviously, the Judges should show to the extent of fair reflection of the diversity of society in all its important aspects including ideological. Not exclusively is such representation consistent with the Constitution yet it is additionally particularly required by it. It **need not** be underlined anything else than the law should likewise be in close touch with social reality so it doesn't lose its character as law. That touch can be best guaranteed if the lawmakers are representative of social reality in some way.

Different interests of society should be served by law. They are best served if their subjects are equal participants in law-making. Therefore, the judiciary should ensure the possible participation of various interest communities. In any case, in the matter of interest with the weaker sections of the society, the Constitution has sufficiently been supported that they must be served through their participation in the law-making.

Of course, the designating body consists of the highest Constitutional functionaries and

we ought to have confidence in them. But when those functionaries themselves contrast in their view of legitimacy or merit, there is sufficient avocation for its assurance. No ready-made formula or solution is within reach for such assurance from which direction might be looked for. This much may, in any case, be by and large said that our Constitution defines certain expansive objectives to be accomplished through the cycle of law. One such objective isn't just the assurance of the backward communities of the society, especially of the SC, ST and women but also their representation and support in the law-making process. Merit in the appointment of Judges must, therefore, take account of this goal.
