

INDIA BUSINESS LAW JOURNAL

LEGAL INTELLIGENCE FOR IN-HOUSE COUNSEL



HER PLACE IN JUSTICE

What factors affect the rise
of women in India's judiciary?

What every business should know about GAAR

The case for a multilateral data protection framework

Behind Beijing Digital Telecom's acquisition of Spice Online

Will institutional arbitration finally make an impact in India?



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COVER STORY

JUDICIARY



HER PLACE IN JUSTICE

NITIKA KHAITAN AND SUMATHI CHANDRASHEKARAN ANALYSE INFORMATION
ON WOMEN JUDGES TO SHOW HOW EDUCATION, APPOINTMENT PROCESSES
AND GEOGRAPHY INFLUENCE THEIR RISE IN THE JUDICIARY

In 1937, CP Ramaswami Aiyer, the dewan of the princely state of Travancore, made a momentous decision in Indian judicial history. Trivia enthusiasts may know that we refer to the decision to appoint Anna Chandy as a munsiff in the state, making her the first woman judge on the Indian subcontinent. She had already become the first woman in Kerala to get a law degree, and she later also became the first woman high court (HC) judge in India, setting an example for generations of women to follow. Eight decades later, we have only one woman sitting on the hallowed bench of the Supreme Court of India (SC). Surely, this is as good a time as any to take stock of the participation of women in the Indian judiciary.

A lot has been written about the abysmal number of women judges in India. Nationwide data on women judges in the lower or subordinate judiciary are not available, but regional estimates published by *The Hindu* and National Social Watch suggest the figure is under 30%. In the higher courts, the number falls further. Only 11% of the working strength of HC judges are women, based on information from the Department of Justice last updated in February. The sole woman judge in the SC is one of 28 (see table opposite).

Globally, India ranks second-lowest for women's representation in courts of last resort, above only those countries that have no women judges in their highest courts, according to statistics from UN Women.

The decreasing proportion of women as one moves up the judiciary is an important trend to investigate. Besides suggesting a general lack of opportunities for women in tertiary education or in the legal profession, these figures also highlight concerns that the judiciary and its mechanisms for promotion are biased against women judges, which several commentators have documented.

While some reports on HC and SC judges focus on their legal background before appointment, age of appointment, and so on, women-specific data on these metrics is missing from public discourse. To fill this gap new data on HC and SC women judges – based on their profiles in Department of Justice documents, court websites and news articles – are presented below. This will also help us understand the internal diversity of women judges: whether women from certain geographical regions, backgrounds, etc., enjoy greater representation in the higher judiciary than other women.

APPOINTMENT OF JUDGES

Before analysing why the percentage of women drops at each level of the judiciary, it is necessary to provide a brief background on how appointments are made at different levels. At the lowest level of the justice system, judges are recruited through an examination

process, which includes both written and oral components. While some states require a minimum number of years of practice to be eligible to take the judicial service exams, others allow fresh law graduates to do so. The next rung of the judiciary, comprising district and sessions court judges, is also appointed through examinations. Prospective recruits must either be advocates with at least seven years of practice, or senior civil judges.

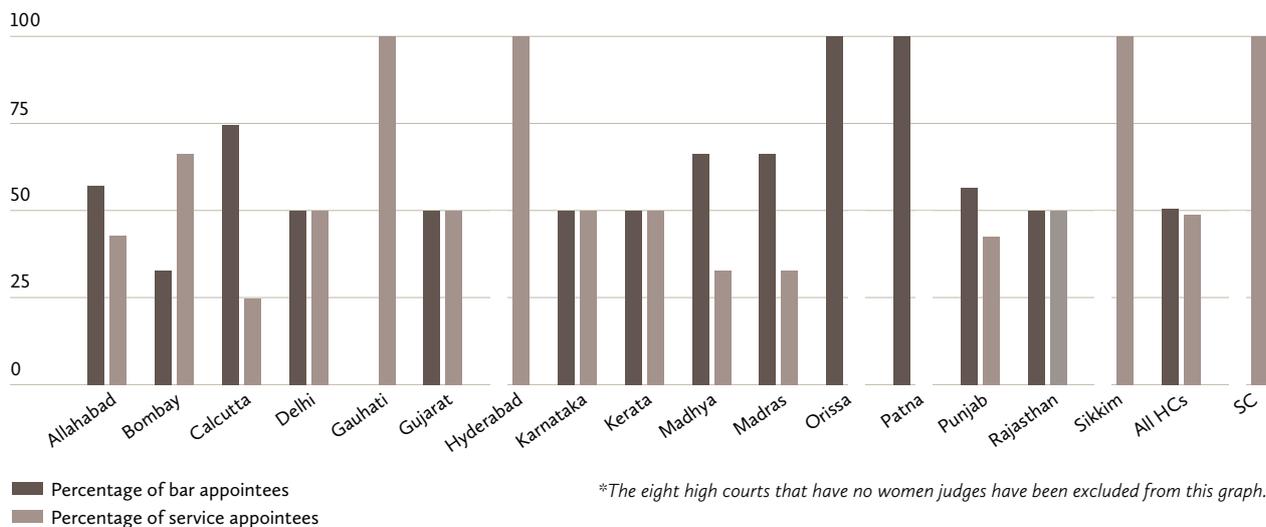
For the higher judiciary (HCs and SC), appointments are decided by a collegium comprising the chief justice and senior-most judges.

REPRESENTATION OF WOMEN JUDGES AT THE SUPREME COURT AND HIGH COURTS

| COURT | NUMBER OF WOMEN JUDGES | NUMBER OF WORKING JUDGES | % OF WOMEN JUDGES |
|------------------|------------------------|--------------------------|-------------------|
| Supreme Court | 1 | 28 | 3.6 |
| All high courts | 71 | 646 | 11.0 |
| Sikkim | 1 | 2 | 50 |
| Delhi | 10 | 38 | 26.3 |
| Bombay | 12 | 62 | 19.4 |
| Punjab & Haryana | 7 | 47 | 14.9 |
| Karnataka | 4 | 30 | 13.3 |
| Gujarat | 4 | 31 | 12.9 |
| Hyderabad | 3 | 27 | 11.1 |
| Kerala | 4 | 37 | 10.8 |
| Calcutta | 4 | 38 | 10.5 |
| Madras | 6 | 57 | 10.5 |
| Allahabad | 7 | 83 | 8.4 |
| Madhya Pradesh | 3 | 37 | 8.1 |
| Patna | 2 | 30 | 6.7 |
| Gauhati | 1 | 17 | 5.9 |
| Rajasthan | 2 | 34 | 5.9 |
| Orissa | 1 | 18 | 5.6 |
| Chhattisgarh | 0 | 11 | 0 |
| Himachal Pradesh | 0 | 9 | 0 |
| Jammu & Kashmir | 0 | 9 | 0 |
| Jharkhand | 0 | 13 | 0 |
| Manipur | 0 | 3 | 0 |
| Meghalaya | 0 | 3 | 0 |
| Tripura | 0 | 3 | 0 |
| Uttarakhand | 0 | 7 | 0 |

Calculations based on information provided in Judges of the High Courts, Department of Justice, 1 February 2017. The total number of women and working judges for HCs includes both additional and permanent judges.

PERCENTAGE OF WOMEN BAR AND SERVICE APPOINTEES IN THE HIGHER JUDICIARY



This difference in appointment procedures may be a key reason behind the different gender compositions of the lower and higher judiciary. As several lawyers and judges have pointed out, appointing judges through examinations as is done in the lower judiciary leaves less room for gender bias than the subjective and opaque deliberations of a collegium.

ELIGIBILITY CRITERIA

Another commonly cited reason for the low proportion of women in the HCs and SC is that the majority of higher judicial posts are drawn from the bar, and not from the judicial services. Measures such as objective examinations may ensure a more gender-balanced subordinate judiciary. But if bar candidates are favoured over service candidates for HC and SC appointments, this gender distribution may not necessarily carry over into the higher judiciary.

According to the constitution, HC judges must either have served as a judicial officer or practised as a HC advocate for at least a decade. But instead of this being a 50-50 split, candidates from the bar constitute a disproportionate percentage of HC judges. A recent study in the *Economic and Political Weekly* (EPW) found that 69% of all HC judges for whom data were available were appointed from the bar and only 31% from the service.

SC judges in turn are either drawn from HC judges with a minimum of five years of experience, or HC advocates with a minimum of 10 years' experience. Since HC judges are mostly drawn from out-

side the subordinate judiciary, this affects the composition of the SC as well. According to a *Business Standard* report in June 2016, for instance, only around 10% of the SC's working strength came from the subordinate judicial service.

The bar/service split for women judges in the higher judiciary, however, is in contrast with the figures generally found in the judiciary. Our analysis shows that the percentage of women HC judges from the bar and from the judicial service are nearly equal, at 50.7% and 49.3% respectively, though this varies significantly across individual HCs (see graph above). The sole woman judge in the SC comes from the subordinate judicial service.

This represents an encouraging trend, for several reasons. Drawing more equally from service and bar backgrounds provides better career prospects for subordinate judges and better incentives for

Appointing judges through examinations, as is done in the lower judiciary, leaves less room for gender bias than the ... deliberations of a collegium

competent candidates to join the lower judiciary. In contrast, low chances of promotion within the judicial service can deter meritorious candidates from joining the lower judiciary, and hence decrease its efficiency and ability to deliver justice.

AGE AT APPOINTMENT

While women HC judges consist equally of direct bar appointees and subordinate judges, our analysis shows that subordinate judges are appointed to the high court at a later age, which gives them a shorter window for further elevation than bar appointees. The disparity in ages corresponds almost exactly with the findings of the EPW study for all HC judges.

According to the EPW study, the median appointment age for bar appointees was 49 years, and for service judges, 56. According to our analysis, the median appointment age for women bar appointees is 48.5 years, and for women service judges, is also 56. Thus, bar appointees have a window of around 13.5 years until they retire (at 62), whereas service judges have only six years. As the EPW study points out, this reduces the chances of service appointees being elevated to chief justice or to the SC, since seniority plays a decisive role in these decisions.

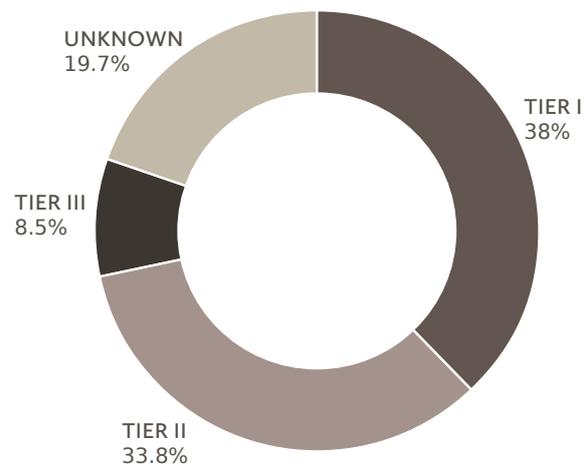
GEOGRAPHIC DIVERSITY

Another important insight from our analysis relates to the geographic diversity among women judges. Information on the colleges they attended for their primary law degree was available for about 80% of the judges, and we classified the locations of these colleges into tier I, tier II, and tier III cities/towns, according to the central government's categorization of Indian cities based on population and other metrics (see graph opposite).

The graph shows that the vast majority of women judges received their primary law degree in tier I and tier II cities. The lack of geographic diversity becomes more apparent within individual HCs. All the women judges in Calcutta High Court and 90% of women judges in Delhi High Court attended a law college in a tier I city. All the women judges in Kerala High Court and 71% of women judges in Punjab and Haryana High Court attended the same law

This [data] raises questions about the openness of higher judicial posts to those unable to access education in bigger cities due to distance from home, financial constraints, and so on

PERCENTAGE OF WOMEN HIGH COURT JUDGES EDUCATED IN TIER I, II, AND III CITIES



college. All of this raises questions about the openness of higher judicial posts to those unable to access education in bigger cities, due to distance from home, financial constraints, and so on.

THE WAY FORWARD

Until October 1989, the SC had never invited a woman to be a judge, nor had a woman ever headed a HC. Thus it is notable that the present chief justices of three major HCs – Justice Manjula Chellur in Bombay, Justice G Rohini in Delhi, and Justice NN Mhatre, the acting chief justice of Calcutta High Court – are women. In addition, Justice Indira Banerjee's appointment as chief justice of Madras High Court is also underway. But as this brief sketch of women in the higher judiciary in India reflects, women remain deeply disadvantaged, particularly in terms of educational or professional opportunities.

Our findings also suggest that women from backgrounds of legal practice and with access to education in major cities enjoy an advantage over others when it comes to appointments to the higher judiciary. Efforts to increase women's representation must keep these insights in mind to ensure that women benefit from such efforts equitably. To this end, policy-making can be immensely aided by data-driven research of the kind pointed to above. ▲

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