

Two Papers on Judicial Bias in India

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Two papers studying bias in judicial decision-making in India using large data sets have come to very different conclusions. One examines bail decisions and finds that childhood exposure to communal riots seems to influence whether a judge is likely to grant bail. The other examines convictions and finds no trace of similar bias on grounds of religion or gender. Both papers shed light, in different ways, on the working of India's legal system and are not necessarily contradictory.

Judges are supposed to carry out their judicial duties without fear or favour, ill will or malice. Some variations of these words are found in the oaths of office administered to judges, from the chief justice of India down to the judicial magistrate. Each case before them is unique and has to be decided on its own merits. However, it is not uncommon to see allegations of bias against Indian judges, on the basis of caste, religion, gender, or other such criteria. Such allegations do have basis in reality, but is such biased decision-making among judges systematic? While there are biases, no doubt, built into the system against certain groups, does this necessarily translate into adverse verdicts against them by judges?

Two recent attempts have been made in answering this question but have arrived at what seem to be two opposite results, provoking more questions than providing answers. In "The Early Origins of Judicial Bias in Bail Decisions: Evidence from Early Childhood Exposure to Hindu-Muslim Riots in India," Nitin Kumar Bharti and Sutanuka Roy find that district court judges in Uttar Pradesh, who have had early childhood exposure to communal riots, tend to deny bail more often than their counterparts who have not had such exposure (Bharti and Roy 2021). In "Measuring Gender and Religious Bias in the Indian Judiciary," Elliott Ash, Sam Asher, Aditi Bhowmick, Daniel Chen, Tanaya Devi, Christoph Goessmann, Paul Novosad, and Bilal Siddiqi find that there is no "in-group" bias on the basis of religion or gender when it comes to convictions in criminal cases in trial courts (Ash et al 2021).

Given that these papers have both enjoyed coverage in the mainstream media (Vishwanath 2021) and been scrutinised and debated in public fora, it is necessary to understand their findings

in the proper context and draw the right conclusions, putting future researchers on the right path towards studying the Indian judicial system.

In this column, I intend to analyse the methodology followed and the main findings of the two papers in question, and explore how to make sense of the findings.

What the Research Shows

Both the papers use large data sets and econometric methods to arrive at their conclusions. Both studies rely on the fact that judges' record in bail cases or convictions does not influence whether or not certain cases are allocated to them.

Bharti and Roy focus on Uttar Pradesh alone, looking at data related to 668 judges and 3,23,380 cases pertaining to bail between 2013 and 2018. Analysing judges' publicly available biographies and a database with details of communal riots in the state, the researchers have been able to link the occurrence of a communal riot in a district when the judge was at a young age. Their data show that a judge who had been exposed to Hindu-Muslim riots in their district before the age of five was 17% more likely to deny bail than one who was not. The effect seems to be neutral to religion or gender. Their conclusion is that early childhood exposure to riots seems to have influenced judges to be harsher when it comes to matters of bail. Given that ostensibly, at a pre-trial stage, bail is the rule and jail the exception, this finding is all the more important.

Ash et al on the other hand use an all-India data set of eight crore criminal cases registered between 2010 and 2018 in India's subordinate judiciary. For the analysis, they focus their attention only on a smaller number of cases which relate to offences under the Indian Penal Code, 1861 and the Code of Criminal Procedure, 1973, and where a definite outcome is seen in the case. Of the 55 lakh cases which they eventually examine, they find that a Muslim accused is no more likely to be acquitted by a Muslim judge than a Hindu and, likewise, a woman judge is no more likely to acquit a woman accused than a male judge. This, they conclude, suggests the absence of in-group bias, where judges

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of a certain identity favour those of the same identity; a phenomenon noted in judiciaries around the world, prominently with Arab and Jewish judges in Israel. In addition, they also find that while time taken to complete the trial varies widely across states in India, religion and gender of the judge and the accused do not seem to play a part.

While the papers are yet to be peer-reviewed and published in a journal, the results of the analysis are nonetheless thought-provoking and deserve some closer reading. On the one hand, Bharti and Roy seem to suggest that judges' background or personal experience of communal riots seems to affect their decision-making, whereas on the other, Ash et al do not seem to find any trace of judges' identity affecting their decision-making. However, there is nothing per se contradictory about the results of the two studies, and a careful reading of the two papers would suggest that they are both correct.

Making Sense of 'Bias'

In understanding the papers, one important caveat needs mentioning: the authors of the papers are economists who use the term "bias" in a slightly different sense than lawyers do. In alleging bias, a lawyer does not take into account the identity of a judge or their background (*Gullapalli Nageswara Rao v AP State Road Transport Corporation* 1959). Rather the concern is to see if the individual litigant in a case can expect a fair hearing and outcome. There are formal legal tests established for the same and the authors in the two papers do not examine these formal legal tests.

The concerns of Ash et al and Bharti and Roy are to study the system as a whole. Their papers look at large data sets running into lakhs of cases either from a single state or from across the country. For this reason alone, their research ought to be applauded. With the digitisation of courts gathering pace, Indian courts are generating vast amounts of data. One hopes efforts like this not only spur researchers to dig through the data that they have collected and made public,¹ but also prompt courts and governments to put out this data in the first place. Data sets such as these offer many nuances and detail in understanding the systems as a whole and should drive

further research in the field.² Such data sets offer the potential of being able to critique the system and its working in new ways and identify problems that may have lain hidden for too long. This is only the beginning and much remains to be done.

That said, the results in Bharti and Roy's paper do not contradict Ash et al dramatically. As earlier pointed out, they are looking at different stages of a litigation process. Bail hearings often take place before the investigation is complete, and the material before the judge is preliminary. Judges are not required to examine evidence in depth, or speculate on the outcome of the trial when deciding a bail application. The concern is generally whether the accused is prima facie guilty, is needed for further investigation, is likely to flee trial or tamper with witnesses, or might re-offend if released, among other factors.

On the other hand, conviction requires the prosecution to prove its case beyond reasonable doubt. This requires marshalling of evidence and witnesses on the part of the prosecution—a significant challenge in and of itself. Even if the defence leads no evidence, it is enough to acquit if the defendant is able to raise reasonable doubt in the mind of the judge about their guilt. Proving guilt beyond reasonable doubt and getting a conviction therefore is dependent on a number of external factors beyond just the judge's own views or personal predisposition. Even if there is systematic evidence of bias, it might prove hard to unearth in the context of convictions and acquittals given the various factors that go into the final verdict in a criminal trial.

As Ash et al take pains to clarify, by no means should their paper be read to say that there is "no bias" among judges in India's district courts. Rather, a limited and correct way of understanding their study is to note that the data does not show evidence of in-group bias in the outcomes of trial court verdicts in criminal cases at the trial court level. A similar study on in-group bias at the bail stage may, for instance, throw up very different results which do not necessarily invalidate the conclusions of the Ash et al paper. Likewise, it would no doubt be interesting to see if the judges' prior exposure to communal riots influenced conviction rates.

Religion and gender are, however, not the only ways in which in-group bias is expressed in Indian courts. Caste is a major factor in judicial decision-making but one which does not easily lend itself to study through large data sets or at a national level. While the use of machine learning algorithms allowed Ash et al to decode religion and gender, the same may not be possible with caste.

That said, there is scope to use large data sets to also study the way in which the caste of the judge (available through public records at the time of recruitment) might influence the outcomes in a case concerning the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act where the accused is necessarily a person not belonging to a Scheduled Caste or Scheduled Tribe.

In Conclusion

Data-driven research into the Indian judicial system is still at a nascent phase but Ash et al and Bharti and Roy's papers suggest exciting possibilities. Efforts are ongoing in India and elsewhere to create large data sets on Indian courts and offer them up for study. With Ash et al's data set having been made public, one hopes researchers in India and elsewhere do not let go of the opportunity to pore through it. To paraphrase a line from Louis Armstrong's "What a Wonderful World"—they will learn so much more than we will ever know.

NOTES

- 1 See <http://www.devdata.org/judicial-bias-data>.
- 2 See <https://agami.in/ideas/civildatalabs/>.

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