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Research Article

Gender Perspective of Judicial Appointment Process in South Africa and India

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ABSTRACT: Requiring a woman to choose between her work and her personal life is the most severe form of discrimination she can face. The large disparity between the number of women and men in practice is a reality that isn't getting much attention, despite the significant increase in women studying law. From a colonial misogynist whim to a post-colonial facade of the "new-age construct of Indian woman," the legal profession has done nothing to decolonize itself from its rudimentary understanding of "equality of opportunity." When Indian jurisprudence was (and continues to be) swooning over the sweeping effect of transformative constitutionalism in the understanding of equality as enshrined in the Indian Constitution, one cannot help but wonder why the legal profession was left out of its brushing effect. This leads us to examine the existing literature on bar policies and the steps taken by regulatory bodies in assessing situations that are favourable or unfavourable to furthering women's issues in modern-day India. From a comparative feminist standpoint, South Africa's pro-women Bar policies are appealing in terms of evaluating their applicability and extent in terms of promoting inclusivity at the Bar. This article seeks to capitalise on the potential of these two countries in carving out a niche for women to play a substantive role in designing governance policies through the judiciary. The methodology makes use of a comparative and analytical understanding of doctrinal resources. The article examines the current gender composition of the legal profession while supporting the concept of substantive equality as a requirement in designing an appropriate judicial appointment process. The welfare policies of Bar, for instance, the parental leave, keeping track of the demographic composition of advocates in South Africa plays a distinct role in transforming the gender composition of the judiciary. Moreover, the transparency practised by JSC puts the constitutional commitment to diversity at the next level.

KEYWORDS: Gender Representation; Legal Profession; Substantive Equality.

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I. INTRODUCTION

Cross-interaction of diverse legal systems and cultures is increasing in an increasingly global world as borders become less significant. In the larger interest of a true welfare state, therefore, observing and closely monitoring the legal developments in different jurisdictions and borrowing from their experience comes as a handy exercise, if required. In this context, comparative legal studies between African and South Asian scholarships, to find the true meaning of substantive equality, provide an extremely fertile ground for unlocking an unexplored area of constitutional importance. Gender representation in decision-making positions, including judiciary, is a growing concern all over the world. With India assuming the presidency of the G20 summit (2022-2023), it puts India at the centre stage of the global north and global south debate[1], which among a plethora of responsibilities includes the need to carry out reforms in the decision-making process.[2] Although there is a lack of consensus in formulating a working definition of global north & south, the broad factors of differentiation rest on geographical location (excluding Australia and New Zealand) and economic development.[3] This paper attempts to bring a comparative analysis of the judicial appointment process between India and South Africa, two nations representing two new voices of the global spheres.

Women in the judiciary in Asia-Pacific are an understudied area, with some jurisdictions having women representation even before some jurisdictions in the Global North.[4] Women first entered the Supreme Court in countries such as the United States, Canada, Australia, and India during the 1980s. Sandra Day O'Connor was appointed to the Supreme Court in 1981 as the first woman judge and immediately after a year in 1982, Canada appointed

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1 Lemuel Ekedegwa Odeh, "A Comparative Analysis Of Global North And Global South Economies" (2010) 12:3 Journal of Sustainable Development in Africa 338–347.

2 Nalin Kumar Mohapatra, "The Many Issues Of The Global South And India's Emergence As Its Voice In Reshaping Global Order", *The Outlook* (17 March 2023), online: <https://www.outlookindia.com/national/the-many-issues-of-the-global-south-and-india-emergence-as-its-voice-in-reshaping-global-or\der-news-270851>.

3 Sinah Theres KloB, "The Global South as Subversive Practice: Challenges and Potentials of a Heuristic Concept" (2017) 11:2 The Global South 1–17.

4 Melissa Amy Crouch & Natasha Naidu, "The Feminisation of the Judiciary in the Global South" in *Women and the Judiciary in the Asia-Pacific* (Cambridge University Press, 2021).

Justice Bertha Wilson as the first woman judge who was already making headlines with ground-breaking decisions such as accepting battered women syndrome as self-defence[5] and insisting on a woman's right to abortion[6]. A few years later, in 1987, Australia appointed Justice Mary Genevieve Gaudron, and in 1989, India appointed Justice Fatima Beevi. South Africa appointed Justices Yvonne Mokgoro and Kate O'Reagan in 1994, following the end of the apartheid era and the formation of a new constitution. Much later, in 2003, the UK elevated Justice Brenda Hale to the House of Lords, which served as the apex court before the Supreme Court was established in 2009.

Any comparative study of an African country is incomplete unless the "historical layering and geographical splintering" caused by colonialism is understood.[7] African countries are a mash-up of various traditions and customary laws on the one hand, and Western common law and civil law traditions on the other. In general, it consists of Francophone and Anglophone African legal systems that arose as a result of colonial dominance.[8] A comparative study of African countries altogether makes no sense due to the vast differences in legal systems and local traditions in each country. Even within states, diverse communities with different legal systems coexist. Therefore, with a common history of colonialism and a dedicated focus on a functional problem "gender representation in the judiciary", South Africa resonates with our goal of conducting a comparative study with India. Colonialism in India has reinforced the internalization of caste and class differences rather than challenging them which has rendered women, in a disadvantageous position, located within a specific class, caste or race.[9] It was not that women in India did not try to venture into the legal profession in the early days of the 19th century, however, continuous indifference to British perception of the profession made it impossible for the initial

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5 R v Lavallee, [1990] 1 SCR 852.

6 R v Morgentaler, [1988] 1 SCR 30.

7 Chris Nwachukwu Okeke, "African Law in Comparative Law: Does Comparativism Have Worth?" (2011) 16:1 Rogers William University Law Review 1–50.

8 *Ibid*.

9 Lata Singh, "Gender and race in colonial India", *Economic & Political Weekly* (2009), online: <https://www.epw.in/system/files/pdf/2009_44/44/Gender_and_Race_in_Colonial_India.pdf >.

trailblazers like Regina Guhaa or Sudhanshubala Hazra. South Africa's history of independence can be studied under three phases – 1909-1910, 1910-1990 and 1990 to present. The effects of colonialism in both countries are distinctly different. South African women faced open discrimination on the intersection of gender and race under the Apartheid regime whereas in India, the discrimination is intrinsic and complex since women are situated within a well-established patriarchal structure. A comparative study of South Africa and India has its own set of constraints. With different judicial appointment processes, it might seem that the paper is merely comparing "apples with oranges". However, that is not the case. To make a profession woman-friendly, it must make it accessible for them keeping their lived experiences in mind and that is universal. Every constitution enshrines equality and speaks of equality of accessability for all irrespective of whatever markers that separates them from one another. South Africa offers a fertile ground for researching 'representativeness' as a constitutional obligation and how it has been successful in addressing the layered understanding of gender in modern times, leading to a paradigm shift in understanding substantive equality.

The discussion in this article is spread over four sections. Section II describes the methodology adopted for analysing the comparative aspects of the judicial appointment process and policies adopted in furtherance. Section III speaks about the judicial appointment process that is practised in both countries. It reflects upon the history behind both countries and traces down the process practised therein. Theoretically speaking, both processes highlight the effect of different models of appointment on the initiatives of diversity. Section IV highlights the disparities that exist in terms of gender in both countries and deliberates on the South African experience, which narrates that policies can be formed in this regard when there is a substantive strong pressure-building mechanism in place. Section V delves into equity arguments for the South African bar and judiciary in an attempt to build a case for 'equity' for India that resonates with the South African transformation of the judiciary.

II. METHODOLOGY

The methodology makes use of a comparative and analytical understanding of doctrinal resources. It employs quantitative analysis of secondary data collected from various websites about bar councils and courts. For this paper, authors have heavily relied on information that is easily accessible and analysed by the public at large from authoritative sources. This research has included a policy-oriented qualitative analysis of policies framed for accommodating women in the profession. The significance of the comparative study, from the authors' point of view is to understand how the issue of the representative judiciary has evolved in a country which has adopted a new progressive constitution in the last decade of the last century and possible learning lessons for India. The paper relies on "Judges Matter", "Democratic Governance and Rights Unit" surveys, statistical reports of demographic composition released by the Republic of South Africa, and reports from various law societies from South Africa to get a holistic understanding of the workings of their judiciary.

III. JUDICIAL APPOINTMENT PROCESS

Much has been written about judicial appointments in both countries.[10] Nonetheless, substantive 'women representation' has long been an elusive area of scholarship when it comes to judicial appointments. Demographic reflection, in terms of 'gender' as women having equal access,[11] has remained limited to an 'informal' criterion in India to advance the cause of women's representation.[12] so far it has moved on a premise that lacked an intersectional understanding of discrimination that women practitioners go through. By that, we are certainly not speaking about third or fourth-generation women lawyers or judges, our focus lies on women who are first-generation in the profession. If, despite being in a privileged position they

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[10] Rachel E Johnson, "Women as a Sign of the New? Appointments to South Africa's Constitutional Court since 1994" (2014) 10:4 Politics and Gender 595–621.

[11] Anu Singh, "Economic Objections to the Policies of the Government of India in Supporting Cultural Motherhood" (2023) 2:1 Human Rights in the Global South (HRGS) 27–40 at 28.

[12] Abhinava Chandrachud, *The Informal Constitution: Unwritten Criteria In Selecting Judges For The Supreme Court Of India* (Oxford: Oxford University Press, 2012).

face stiff backlash from the system, then it is not much hard to imagine the plight of a fresh entrant. On the other hand, for a long time in South Africa, the concept of women's representation was limited to white women until the South African Constitution was drafted in 1994 with its ambitious provision of Section 174(2).[13] Even after that, it took concerted work to push for the inclusion of black women judges in South Africa, demonstrating that it was not automatic.[14]

A. How It All Started?

The story begins with the cases[15] in South Africa to consider whether women (irrespective of race) could be allowed to practice law, which had historically and traditionally been the domain of men in England, primarily. Little less than a decade later, a similar narrative could be cited from the Indian sub-continent as well, whereby, Regina Guhaa, was ruled not a 'person' who can practice law as per the colonial traditions.[16] The society before World War I perceived very little of women and expected very little from women.[17] In the words of Penelope Hetherington, before the 1960s, women in South Africa were practically invisible.[18] The country's complex history of independence and setting of apartheid in 1948 crippled any movement for women's liberation. Bozolli's substantial survey tied the absence of feminist movements in South Africa with a lacuna in gender awareness among

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13 Rachel E. Johnson, *supra* note 10; Murray Wesson & Max Plessis Du, "Fifteen Years On: Central Issues Relating to the Transformation of the South African Judiciary" (2008) 24:2 South African Journal on Human Rights.

14 Alice J Kang et al, "Diverse and inclusive high courts: a global and intersectional perspective" (2020) 8:4 Politics Groups & Identitie 812–821.

15 Schlesin v Incorporated Law Society, 1909 TSC 363; Incorporated Law Society v Wookey 1912 AD 623.

16 In Re Regina Guhaa (1916) Calcutta HC; In Re: Sudhanshubala Hazra (1921) Patna HC.

17 Tae H Kim, "Where Women Worked During World War I", *University of Washington* (2003), online: <https://depts.washington.edu/labhist/strike/kim.shtml#:~:text=Before%20the%20World%20War%20I,of%20the%20family%20and%20children>.

18 Penelope Hetherington, "Women in South Africa: The Historiography in English" (1993) 26:2 The International Journal of African Historical Studies, online: <https://www.jstor.org/stable/pdf/219546.pdf?refreqid=excelsior%3A65368e2cb457e4579bab186698a7ca5d&ab_segments=&origin=&initiator=&acceptTC=1> at 242.

scholars.[19] With the end of the apartheid era, the country exposed itself to the global changes that were taking place in the 1990s and embraced them in its Constitution in 1996. Reforms in the Judicial appointment process have been a highly debatable topic in these countries. South Africa's apartheid history has witnessed the brutal effect of the 'separate but equal doctrine,'[20] as well as the battle that the South African judiciary has fought, despite being confined by a constitution wedded to race-discriminatory laws.[21] On the other hand, the judiciary has also come under fire for adhering to 'formalism,' that is, failing to interpret the law when the legislative intent was bending towards racial injustices. Baxter, citing *Minister of the Interior v. Lockhart,*[22] observed that in the 1960s and 1970s South Africa witnessed the failure of the judiciary in protecting individual freedom and liberty.[23]Before the adoption of the Constitution, discussions were largely limited to anti-apartheid changes, with no mention of gender. Gender equality became a core principle of the "democratic transition in South Africa" with the adoption of the Constitution of the Republic of South Africa, in 1996.

Indian premise of judicial appointment remained largely uncontroversial till the 1970s after independence in 1947, which went for a toss with the supersession of three judges of the supreme court – justices Shelat, Hegde and Grover. This issue of sudden deflection from the seniority tradition was raised in the parliamentary debates.[24]The rest is history. The mistrust in the parliament (post-emergency) that steeped in the judiciary has haunted us so much that we are still reminiscing about it. The friction between these two organs has eluded other concerns, except who gets to have the final say in

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19 Belinda Bozzoli, "Marxism Feminism and South African Studies" (1983) 9:2 Journal of Southern African Studies, online: <https://www.tandfonline.com/doi/abs/10.1080/03057078308708055> at 139.

20 Plessy v. Fergusson 163 US 537 (1896).

21 Lawrence G Baxter, "Apartheid and the South African Courts" (1987) 5:2 Duke Law Magazine, online: <https://core.ac.uk/download/pdf/213021363.pdf>.

22 1961 (2) S A 587 (A.D.).

23 Lawrence G Baxter, *supra* note 21.

24 Lok Sabha Debates, *Appointment of Chief Justice of India (Dis.),*7th session, at 199 (4 May 1973) (Shri N K P Salve) "They have superseded three judges. I am not here to propound the theory that seniority is sacred and should be always upheld. But what is the principle you want to bring in when you want to break a tradition? You have to tell the people, that this is the principle we want to follow hereafter. You have not done it." See Lok Sabha Secretariat, *Lok Sabha Debates* (Lok Sabha Secretariat New Delhi, 1973).

appointment. Amidst this, the women trailblazers went unnoticed. Shortly after the supersession, parliament debates revealed serious deliberations regarding the appointment process and criteria of appointment, which categorically stated the Supreme Court to be a part of the political system and need not be innocent of political views. [25] This coincided with Ambedkar's opinion on judges being part of the same society that nurtures every other Indian.[26] Pressing the fact that judges necessarily need not be averse to political opinion, Mohan Kumaramagalam's speech gave a different narrative of what the role judiciary should be in a democratic India. To quote Shri Kumaramangalam:

> "But we do want judges who can understand what is happening in our country the wind of change that is going across our country, who can recognise that Parliament is sovereign."[27]

B. Appointing Process

The South African Judicial Service Commission (henceforth, JSC) was established to streamline judicial appointments under the Constitution in a post-apartheid country. JSC has an unusually large number of politicians among its members. 11 of its 23 founding members are politicians, with the president having the authority to appoint another four. The process of appointing judges other than the chief justice and deputy chief justice to the constitutional court is worth noting briefly. The JSC is required to prepare a list of nominees, which is then forwarded to the President for approval, and the President, after due deliberation, selects from that list. There is an 'advice' criterion similar to that of India that has been interpreted as a mandatory provision, implying that the JSC recommendation cannot be deviated from. The JSC conducts interviews of the shortlisted candidates in

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25 *Ibid*.

26 Constituent Assembly Debates, vol no 8 (24 May 1949) (B R Ambedkar). "But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I, therefore, think that is also a dangerous proposition." See *Constituent Assembly Debates* (New Delhi: Constitution of India, 1949).

27 Lok Sabha Secretariat, *supra* note 24.

public but keeps their deliberation secret. The substantive requirements for reflecting 'diversity' and 'merit' are enshrined in sections 174 (1) and (2), which are rather brief. The first subdivision qualifies the merit requirement that judges be fit and proper, as well as appropriately qualified. It is followed by the representative requirement, "[t]he need for the judiciary to reflect broadly the race and gender composition of South Africa must be considered when judicial officers are appointed". This is the pivotal point in the transformation of the judiciary. This idea of transformation is well debated as is evident from Albertyn and Bonthyus, who point out the contesting ideas of merit and transformation via demographic representation and various approaches that either support or negate or try to balance between the two.[28] What qualifies an advocate as 'appropriately qualified' is a risky proposition for which the need for a framework of guidelines, if not granular, was felt. The JSC in 2010 came up with criteria guidelines and revised the same in 2022.[29] The criteria guideline has defined "appropriately qualified" in a qualitative manner. Along with academic qualifications, her leadership skill, interpersonal skills, maturity in judgment writing and experience is considered. "Fit and proper" has been holistically defined to include a bundle of cumulative factors that can assess a candidate's inclination of mind and character. What is interesting is that the guidelines have also included what should be the approach of the interviews. There exists a balancing mechanism in this in the sense, that there is a lower limit and upper limit of this approach. On one hand, it sets the benchmark to 'relevant questions' and on the other, it gives 'discretion' to the JSC to frame the approach. Similarly, the commission's job is to highlight the positive qualities in the candidate and for that, it may design any line of questioning that can lead to discovering the 'highest calibre' in a candidate. It is ultimately to test how a judge can handle pressure in a public forum. In the quest of finding the right person, the commission does not neglect serious disqualifying red flags in a candidate. That is reflected in the judicial interviews, which can become very

[28] Cathi Albertyn & Elsje Bonthuys, *A Transformative Constitution and a Representative Judiciary*, 1st ed (Routledge, 2015) edition: 1st.

[29] Republic of South Africa Judicial Service Commission, *Summary And Explanation Of The Criteria And Guidelines Used By The Judicial Service Commission When Considering Candidates For Judicial Appointment* (Republic of South Africa Judicial Service Commission, 2022).

lengthy in some cases and extremely short in others.[30] JSC consistently reviews its procedures to enhance consistency in its decision-making process and to enhance public understanding of this process.

In India, judicial appointments to the Supreme Court and High Courts have been a power struggle between the executive and the judiciary.[31] **India is** the only democra**tic country** where the judiciary appoints its judges. In 1950, India adopted and granted itself a constitution. Till then, women's representation in the judiciary or 'gender' as a topic of discussion in judicial appointments had not yet occurred. Concern of dangers associated with unfettered powers either in the hands of the executive or the judiciary was largely discussed in the Constituent Assembly Debates.[32] Though the Law Commission discussed at length on judicial appointment, they have remained defiantly silent on the issue of gender representation.[33] The concerns around the present process point towards a lack of accountability, a lack of clear criteria for selection and a lack of diversity in its composition. The memorandum of procedure that is yet to be revised post-NJAC judgment speaks volumes about who the recommending authority would be in the appointment of the judges of the Supreme Court. Seniority is the only quality that is to be considered as the criteria for the appointment of a CJI. In case of any doubt regarding 'his' fitness to the office, the opinion of other puisne judges as envisaged under article 124(2) is all that is required to settle the doubt. Too much adherence is placed to the opinion of judges instead of defining what is to be considered 'fit', and what should be the factors to be taken into consideration while deciding upon an appointment. The Union Minister is the point of contact for the executive in this appointment process but is not left with much to say in this process, except delaying the process

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30 Adv M M P Mdalana-Mayisela, *For The Gauteng Division Of The High Court JSC interviews* (2019).

31 Supreme Court Advocates-on-Record Association v Union of India, AIR 2015 SC 5457.

32 Constituent Assembly Debates, Vol no 8 (24 May 1949). K T Shah- "In matters of making high appointments as a pure consideration of balance of power I suggest that the Council of States should be associated, if only to avoid the influence that is likely to dominate when the Prime Minister alone advises the President on such matters." note 26.

33 Ministry of Law and Justice Government of India, Law Commission of India, *Reform of Judicial Administration* (14th Report, 1958).

by withholding the nominations. Few cases set the trajectory, as to how the discussion around 'process' has developed in both these countries.

C. Judicial Decisions

The broad constitutional requirements, stated in Articles 127 and 217 of the Indian Constitution do not leave much space to assume what the substantive requirements of these appointments should be. Therefore, when deadlocks appear, it falls upon the Supreme Court to decide whose 'primacy' of opinion matters. Sankhalchand Seth was the first instance when out of public interest in the politicisation of the judicial appointment process, the Supreme Court put both the judiciary and governments on the same pedestal while deciding appointments. [34] However, minority opinion, of insulating itself from executive excess, was seen as the only way of saving judicial independence. The second attempt in S.P. Gupta, saw the majority negating any 'primacy' of either organ over each other in judicial appointment decisions. [35] It resonated with the original idea embedded in Constituent Assembly Debates (CAD), that both judiciary and executive were to have a mutual consultative process of deciding on appointments.[36] Framers did not include any primacy of opinion, probably, because it did not recognise any hierarchy of authority in these appointments unlike, executive counterparts in Australia [37] and Canada [38], who enjoys unfettered powers regarding the federal judges' appointment. However, the minority opinion in S. P. Gupta dominated the future debates, which remained entangled in a power struggle rather than focussing on making up a reflective judiciary that could have re-modelled the judiciary according to the needs of the democracy that India was going to be. Justice Pandian's observation in SCAORA v Union of India,[39] did touch upon 'representation':

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34 (1977) 4 SCC 193.
35 S.P. Gupta v Union of India, AIR 1982 SC 149.
36 note 26.
37 Constitution of Australia, 1900, s 72.; High Court of Australia Act, 1979.
38 British North America Act, 1867, s 101.; Supreme Court Act, 1875.
39 SCAORA v Union of India, (1993) 4 SCC 441(India).

> "Along with other factors, such as proper representation of all sections of the people from all parts of the country, legitimate expectation of the suitable and equally meritorious Judges to be considered in their turn is a relevant factor for due consideration while choosing of the most suitable and meritorious amongst them, the outweighing consideration being merit, to select the best available for the apex court."[40]

The collegium appointment process, which includes the CJI and three senior judges, has since been criticised for being opaque and carrying informal appointment criteria. [41] The next attempt to democratise the judicial appointment process was the setting up of the National Judicial Appointment Commission by the Parliament in 2014 through an enactment that was backed by both the houses of Parliament as well the required half of state legislatures. An 'isolationist approach' of the Supreme Court rendered it almost blind to the international experiences cited by the Union of India and made it reject NJAC with a 4:1 majority.[42] A constitutional amendment that was backed by most people's representatives was struck down by the court, which straightaway made the populace question its legitimacy. It became perhaps, more pertinent, post NJAC judgment, to know who our judges are and how are they appointed. The formation of NJAC altered the foundation of the premise that the Supreme Court has built over all these years in terms of interpreting Articles 124&217. Through Indira Jaising v Supreme Court of India, Secretary General and,[43] a brief attempt was made to bring some air of transparency. The petition questioned the system of senior advocate designation and asked for guidelines to govern the Supreme Court and the High Courts(HC). Judges are chosen from a pool of advocates; every judge in the higher judiciary was previously an advocate. Before this decision, each HC had its mechanism for appointing

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40 *Ibid.*

41 Rangin Tripathy & Soumendra Dhanee, "An Empirical Assessment of the Collegium's Impact on Composition of the Indian Supreme Court" (2020) 32:1 National Law School India Review; Rangin Tripathy, "Supreme Court Collegium and Transparency: An Empirical Enquiry" (2021) 56:22 Economic and Political Weekly.

42 Arghya Sengupta, "Justice Chelameshwar's Dissent: Reforming To Preserve" in Arghya Sengupta & Ritwika Sharma, eds, *Appointment of Judges To The Supreme Court of India: Transparency, Accountability and Independence* (Oxford: Oxford University Press, 2018) publisher-place: India.

43 (2017) 9 SCC 766(India).

senior advocates, which was not uniform in "age, income, length of practice, requirement of practice in the High Court".[44] The Indira Jaising judgement attempted to resolve this situation by systematising the availability of sufficient advocates through a uniform system[45] but did not add much to the diversity debate. To sum it up, the working of the executive-judiciary model of appointment in India has blatantly ignored every other question apart from who has the reign of power in terms of appointment. In that process, it has ignored other means of securing independence and legitimacy.

In South Africa, the JSC's major criticism has been related to its discretionary power of 'non-disclosure'.[46] Transparency in the judicial appointment process is a major concern. JSC's power to deliberate in private about the candidates to be recommended for appointment can be traced back to its constitution. Section 178(6) of the Constitution and Rule 53 of the Uniform Rules of Court[47] empowers the JSC to determine and control its process.[48] This rule of non-disclosure is linked with the prohibition to the disclosure of confidential information u/sec 38(1) of the JSC Act which is bound by certain exceptions.[49] These are some strongly guarded provisions, which does empower the JSC. However, when South Africa decided to have

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44 *Ibid.* Para 18.

45 Indira Jaising v Supreme Court of India through Secretary General and others, (2017) 9 SCC 766(India).

46 Johannesburg City Council v The Administrator Transvaal (1) 1970 (2) SA 89 (T) at 91G-92B; Turnbull-Jackson v Hibiscus Coast Municipality [2014] ZACC 24; City of Cape Town v South African National Roads Agency Ltd [2013] ZAWCHC 74.

47 Rule 53(1)(b) provides: "save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected: calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make and to notify the applicant that he has done so".

48 Section 178(6): The Judicial Service Commission may determine its procedure, but decisions of the Commission must be supported by a majority of its members.

49 Sec 38(1) -
(a) to the extent to which it may be necessary for the proper administration of any provision of this Act;
(b) to any person who of necessity requires it for the performance of any function in terms of this Act;
(c) when required to do so by order of a court of law; or
(d) with the written permission of the Chief Justice.

constitutional supremacy, it made this power accountable to be tested against the mantle of larger constitutional principles. In De Lille v Speaker of the National Assembly, the Court held:

> "It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well-meaning can make any law or perform any act which is not sanctioned by the Constitution…No Parliament, no official and no **institution** is immune from judicial scrutiny in such circumstances."[50]

By being an 'institution' coupled with the definition provided under section 239 of the Constitution[51], JSC and its functioning had to be under constitutional scrutiny. The *Mail & Guardian v Judicial Service Commission*[52] again reviewed the ambit of this discretionary power of JSC, in respect of barring media from its hearing and investigation of Judge President Hlophe for "incapacity, incompetence or misconduct". The high court held that any kind of limitation on media rights had to pass through the scrutiny of section 36[53] of the constitution and must be in proportion to the purpose.[54] In this case, the case has moved far from preliminary findings to the extent that the identity of the judge was already in the public domain and as such is of immense public interest.[55] The High Court, therefore, held that JSC's

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50 De Lille v Speaker of the National Assembly [1999] 4 All SA 241.

51 Sec 239: "organ of state" means—
(a) any department of state or administration in the national, provincial or local sphere of government; or
(b) any other functionary or institution—
(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;

52 Mail & Guardian v Judicial Service Commission 2010 (6) BCLR 615 (GSJ), para 15.

53 Sec 36 (1): The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including; (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

54 *Ibid.* Para 19.

55 *Ibid*. Para 22.

decision to have a closed hearing is to be set aside. The Constitutional Court has remarked in President of the Republic of South Africa v M & G Media Ltd[56]that 'it is impossible to hold accountable a government that operates in secrecy'. It will be prudent to interpret that any institution with a public function that operates in secrecy, away from the eyes of public scrutiny undermines the principles of democracy and becomes a breeding ground for corrupt practices. JSC's major criticism of not making public the post-interview deliberation was challenged in Helen Suzman Foundation v Judicial Service Commission[57] (HSF case). The issue was "whether the Judicial Service Commission (JSC) is obliged, under rule 53(1)(b) of the Uniform Rules of Court, to furnish a review applicant seeking the review and setting aside of a JSC decision with a recording of the private deliberations that inform the decision".[58] As per this rule, JSC is required to file a record[59] with the registrar of the high court, which it did but without the transcripts and minutes of JSC deliberation. On being enquired, JSC gave the blanket justification of 'confidentiality' which led to the case. The court has earlier[60] shifted from the dictum propounded by the court in the Johannesburg City Council case[61] and has placed "emphasis on the fact that

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56 President of the Republic of South Africa v M & G Media Ltd 2012 (2) SA 50 (CC) para 10.

57 2018 (7) BCLR 763 (CC) 8.

58 Constitutional Court of South Africa, "Helen Suzman Foundation v Judicial Service Commission (Media Summary)", *Constitutional Court of South Africa* (24 April 2018), online: <https://www.concourt.org.za/index.php/judgement/238-helen-suzman-foundation-v-judicial-service-commission>.

59 This record consisted of (a) the reasons for the decision by the JSC; (b) the transcripts of the JSC interviews; (c) each candidate's application for appointment; (d) comments on each candidate by various professional bodies and individuals; and (e) related research, submissions, and correspondence.

60 City of Cape Town v South African National Roads Agency Ltd [2013] ZAWCHC 74 para 48. "any record of the deliberations by the decision-maker would be relevant and susceptible to inclusion in the record. . . . The content of such deliberations can often be the clearest indication of what the decision-maker took into account and what it left out of account. I cannot conceive of anything more relevant than the content of a written record of such deliberations, if it exists, in a review predicated on the provisions of section 6(2)(e)(iii) of [the Promotion of Administrative Justice Act], that is that impugned decision was taken because irrelevant considerations were considered or relevant considerations were not considered."

61 Johannesburg City Council v The Administrator Transvaal (1) 1970 (2) SA 89 (T) Para 91G: "The words 'record of proceedings' cannot be otherwise construed, in my view, than as a loose description of the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question. It may be a formal record and dossier of what has happened before the tribunal, but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the

deliberations are relevant to the enquiry as to what it is that informed the decision". The constitutional court's majority ruling (Zondo DCJ, Cameron J, Froneman J, Kathree-Setiloane AJ, Mhlantla J, Theron J, Madlanga J and Zondi AJ) in HSF case, a blanket ban on disclosure of post-interview deliberation was unjustifiable in a democratic society, gives access to the public to the records which resulted in the selection of judges. However, the judgment also raises some interesting points regarding confidentiality and the disclosure of confidential information. In a dissenting opinion, J Jafta reiterated the dictum of the Johannesburg city council case. In a separate dissenting judgment, Kollapen AJ considered whether deliberations form part of the record. Although he agreed with the majority judgment on the point of non-exclusion of deliberations from the record but dissented on the point that they should only be part of the record if they satisfy the test of relevance. However, even then that deliberation can be excluded if justifiable reasons are provided, which he believed existed in this case and thus, preferred preserving confidentiality over others.

What the paper tries to highlight is that both countries reveal a clear picture as to how they have developed a mechanism of coordination (or non-coordination) among their appointing authorities, which research[62] shows have a direct nexus with achieving diversity. The lack of coordination in the judiciary-executive model in India sketches a miserable picture of gender diversity. Whereas South Africa's multi-stakeholder model has shown comparatively better prospects as is discussed in the next section. There are different models of appointment, which are concentrated on how well coordinated the members are when it comes to pushing for constitutional principles in shaping the appointment structure. Studies suggest that executive-led models are better suited to promote diversity since they

proceedings were, both procedurally and evidentially. A record of proceedings is analogous to the record of proceedings in a court of law which quite clearly does not include a record of the deliberations after the receiving of the evidence and preceding the announcement of the court's decision. Thus the deliberations of the Executive Committee are as little part of the record of proceedings as the private deliberations of the jury or of the Court in a case before it. It does, however, include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it."

62 Nancy Arrington et al, *Appointment Rules and Gender Diversity on High Courts* (2019).

promote greater accountability along with credit claiming.[63] Canada and Australia are purely executive-led models that enjoy absolute power in appointments. The rise in the number of women judges in their apex court in the last decade does prove that where the appointing authority has an opportunity to claim credit for making appointments, they get an impetus by encashing diversity. Though the efficacy of this process raises serious concerns about the intent of the executive as well as what should be the limit and parameters of ensuring diversity, there is no running away from the fact that these two countries have managed to increase their women's participation in decision-making roles. Every model of appointment has an underlying political context[64] and can be better suited if armed with multiple members to dissipate and share that political pressure instead of making it closed or burdening any single authority. With the advent of multiple stakeholder models, like that of South Africa, perhaps, it might be assumed they might be better suited to dissipate that political pressure. Theoretically speaking, the paper explores whether some of the policy initiatives of South Africa are beneficial in the Indian context. Indian process is not accommodative of women, let alone other genders, because it doesn't acknowledge the lived experiences of women; at least, not when direct actions are required to make it accommodative of women. As long as the appointment process remains shrouded in secrecy, it will render every venture of attaining substantive equality futile leading to the fitting of a square peg in a round hole.

IV. WOMEN IN JUDICIARY VIS-A-VIS DIRECT POLICIES: SOUTH AFRICAN EXPERIENCE

"Achieving equality for women judges, in terms of representation at all levels of the judiciary and on policy-making judicial councils, should be our goal- not only because it is right for women, but also because it is right for the achievement of a

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63 Melody Valdini E & Christopher Shortell, "Women's Representation in the Highest Courts: A Comparative Analysis of the Appointment of Female Justices, 69" (2016) 69:4 Political Research Quarterly 865–876.

64 Nancy Arrington et al, *supra* note 62; Valerie Hoekstra, "Increasing the Gender Diversity of High Courts: A Comparative View" (2010) 6:3 Politics and Gender 474–484.

more just rule of law. Women judges are strengthening the judiciary and helping to gain the public's trust." - Judge Vanessa Ruiz[65]

The above statement holds when we look deeper into the data related to the judiciary which reveals the effort to remodel itself according to the needs of the changing times.

A. Number Matters

Although an exact figure is difficult to obtain, the number of women advocates in 2021 is estimated to be around 19 lakhs, representing only 13% of all advocates registered in India.[66] Before Justice Chandrachud was appointed CJI, only 81 of the 677 judges in the higher judiciary (including High Courts) were women, representing only 12% of all judges.[67] According to an RTI filed in 2013, the total number of advocates in India in 2011 was close to 1.3 million.[68] According to the data, the total number of advocates enrolled in India in 2009 was around 52000.[69] Though the data does not specify how many of them were women, the number of advocates in total was on the rise. In comparison to the higher judiciary, India's lower judiciary has a gender diversity of 27%, which, while not impressive, is certainly better than the former.[70] Women, generally agreed, are best represented in the lower tiers of the judiciary, which plays no vital role in the country's decision-making process, which is also supported by the recent United Nations General Assembly report on the Independence of judges and lawyers -

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65 Vanessa Ruiz, "The Role of Women Judges and a Gender Perspective in Ensuring Judicial Independence and Integrity", *United Nations Office on Drugs and Crime (UNODC)* (2019), online: <https://www.unodc.org/dohadeclaration/en/news/2019/01/the-role-of-women-judges-and-a-gender-perspective-in-ensuring-judicial-independence-and-integrity.html>.

66 Sricheta Chowdhury, RTI filed on 16/11/2021, Ref no: BCIND/R/E/21/00630.

67 Department of Justice, *Combine list of Supreme Court and High Court Judges.* (Department of Justice, 2023).

68 *Kian Ganz, "RTI reveals: 1.3m advocates; 1 in 300 Delhi-ites a lawyer; Maharashtra lawyers 'richest'; Jharkhand, Assam, J&K fastest", Legallyindia (18 February 2013), online: <https://www.legallyindia.com/the-bench-and-the-bar/rti-reveals-number-of-lawyers-india-20130218-3448>.*

69 *Ibid.*

70 Arijeet Ghosh, Diksha Sanyal, & Nitika Khaitan, "Tilting the Scale: Gender Imbalance in the Lower Judiciary", *Vidhi: Centre for Legal Policy* (12 February 2018), online: <https://vidhilegalpolicy.in/research/report-on-gender-imbalance-in-the-lower-judiciary/>.

Participation of women in the administration of justice.[71] Indian data on the judiciary does not speak about women (professionals) as a component with multiple subsets. Description of judges in general (both men and women) are limited to their professional description, making it almost impossible to ascertain any information about their family, race, ethnicity, and other markers that will let the public have an uncomplicated idea about who their judges are.[72]

The problem of women's representation in South Africa is different from that of India. South Africa's struggle against gender discrimination focuses on visible intersectional aspects of race and gender, thereby acknowledging that all women are not placed equally and thus leading to the designing of policies accordingly. The fact that they can ascertain that all women are not placed equally is because of a clear generation of demographic and professional data at (bar to judiciary) all levels, which is discussed below:

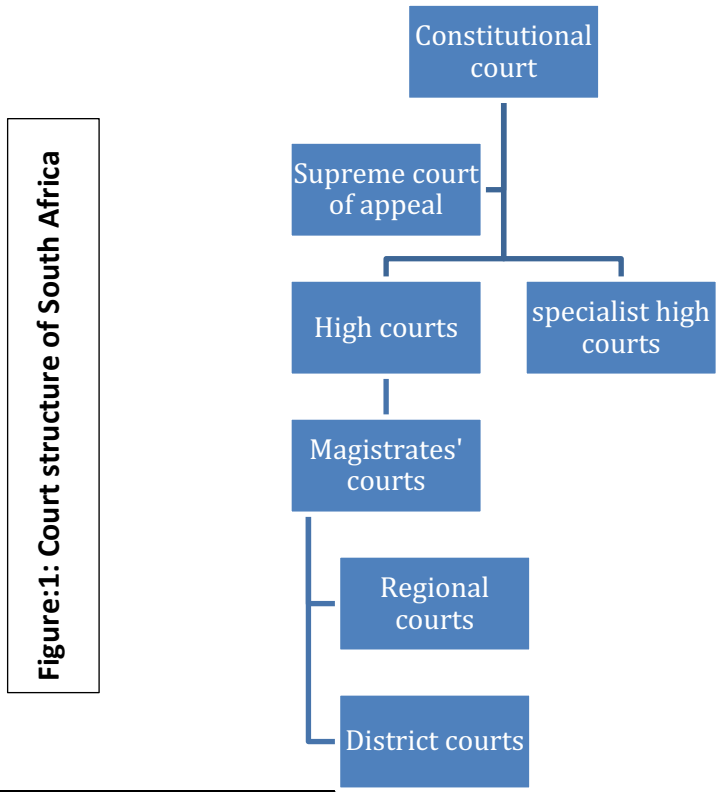


Figure:1: Court structure of South Africa

[71] *Participation of women in the administration of justice*, by Diego García-Sayán, Report of the Special Rapporteur on the independence of judges and lawyers (United Nations General Assembly, 2021).

[72] High Court of Calcutta, Justice Moushumi Bhattacharya, https://www.calcuttahighcourt.gov.in/Judges/59 Justice Harish Tandon https://www.calcuttahighcourt.gov.in/Judges/35; High Court of Delhi, Justice Jyoti Singh https://delhihighcourt.nic.in/judges/court/cj_sitting/current?page=2, Justice Yashwant Verma https://delhihighcourt.nic.in/judges/court/cj_sitting/current

It is widely acknowledged that women, particularly black women, are best represented in the lower tiers of the judiciary.[73] According to magistracy statistics, 49% of all magistrates were female in 2021.[74] Superior courts show a slightly less optimistic picture, with women accounting for 44% of the total. Even though black women outnumber white women in the total population, their representation in decision-making positions is lower, as shown in the tables below. White and Asian/Indian women are disproportionately represented. The composition of the constitutional court has not changed between 2017 and 2021, with only three women judges out of nine.[75]

Race	**African women**	**White women**	**Coloured women**	**Asian/Indian women**
Percentage of permanent judges	18.18%	10.27%	4.34%	3.95%
Percentage of magistrates	21%	13%	5%	6%
Percentage of total South African population (2017)	41.3%	4.1%	4.5%	1.2%

Table 1: *Source: Annual Report 2017-18*[76]

Race	**African women**	**White women**	**Coloured women**	**Asian/Indian women**
Percentage of permanent judges	21%	13%	6%	4%

[73] Ruth B Cowan, "Woman's representation on the courts in the republic of South Africa" (2006) 6:2 University of Maryland Law Journal of Race, Religion, Gender and Class, online: <https://digitalcommons.law.umaryland.edu/rrgc/vol6/iss2/4/> at 291.

[74] See *Judiciary Annual Report 2020/21*, by The Judiciary Republic of South Africa (The Judiciary Republic of South Africa, 2021). Race and Gender Composition: Magistrates' Courts, Judiciary Annual Report 2020-2021, Republic of South Africa at 48.

[75] Elsje Bonthuys, "Gender and Race in South African Judicial Appointments" (2015) 23 Feminist Legal Studies 127–148 page: 127–148; *Annual Report 2017/18*, by The Judiciary Republic of South Africa (The Judiciary Republic of South Africa, 2018).

[76] *Ibid.*

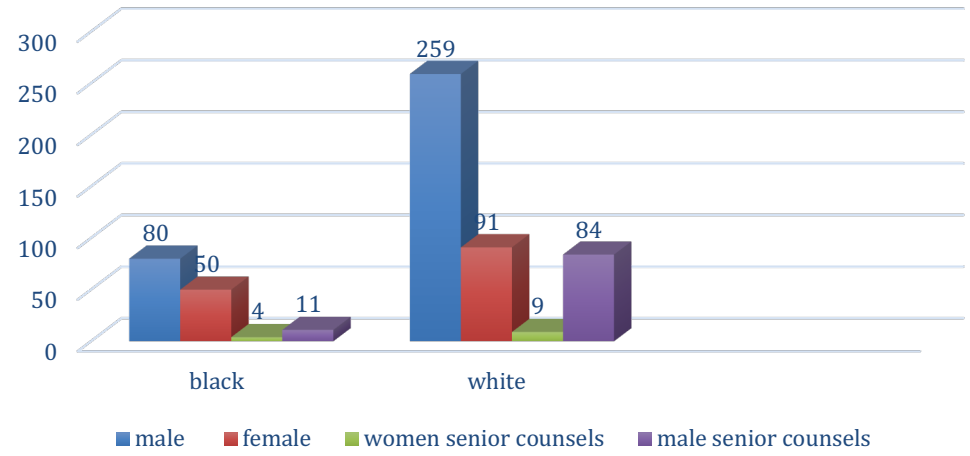
Percentage of magistrates	24%	13%	5%	7%
Percentage of total South African population (2021)	41.36%	3.99%	4.51%	1.25%

Table 2: *Source: annual report 2020-21*[77]

As can be seen above, there has been some improvement in the percentages of both black and white women in 2021; however, this has come at the expense of under-representation of African and coloured women. Access to consolidated data on the demographic composition of judges and lawyers in India is the biggest issue in establishing a data set in the above-mentioned way.

As seen in South Africa judges are predominantly chosen from the traditional pool of advocates, so it makes sense to take a brief look into the representative policies that are in place in South Africa. Three of South Africa's major cities (Cape Town, Kwazulu-Natal, and Johannesburg) have been selected (based on accessibility) to assess the general perception of specific women-related policies in place using available literature.

Figure 2: Cape Bar society of advocates



[77] Department of Statistics South Africa, *Mid-year population estimates 2021, Statistical Release P0302* (Departement of Statistics South Africa, 2021); The Judiciary Republic of South Africa, *supra* note 74.

The Cape Bar policies on women were only recently introduced in 2009.[78] The data cited in Figure 2[79] is collected from the official websites of the Bar. As of November 2022, the bar is disproportionately composed of white men, with a total membership of 480 counsels. With 4 senior female black attorneys and 9 white senior female counsels out of a total of 108 senior counsels, the fate of women senior advocates in the Bar does not look promising. However, the representation of black women among their race is higher (26.66%) than their white counterparts (9.67%). The Cape Bar adopted a maternity policy in April 2009, under which female members may take a six-month maternity leave period during which they are entitled to a remission of Bar dues as well as a Bar contribution towards their chambers rental and floor dues.[80] Maternity leave includes adoption and results in no loss of domestic seniority. The Johannesburg 'maternity policy,' adopted in 2012,[81] prevents loss of seniority due to maternity leave taken for a 'maternity period' of three months, which is extendable for a maximum of 12 months subject to the Bar Council's prerogatives.[82] The policy also mentions paternity leave but does not specify the duration or any other specifics. The KwaZulu-Natal Bar Council's policy on equality and diversity includes remission of bar fees and no loss of domestic seniority for a one-year leave period that can be extended for good cause.[83] Though the lack of uniformity in maternity leave, as well as the lack of clarity on paternity leave, casts serious doubt on the initiative, it does demonstrate that the legal profession is ready to accommodate women in the true sense of their lived experience. The policy in place is relatively very new (it began with Cape Bar in 2009) and so we might have to wait to observe at least a generation of women to have the fruits of this labour and overcome an array of barriers that includes - shortage

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78 Cape BAR, *Constitution of the Cape BAR* (Cape BAR, 1993); Geoff Budlender, "Cape Bar adopts new maternity policy", *BAR News* (December 2009), online: <https://www.gcbsa.co.za/law-journals/2009/december/2009-december-vol022-no3-pp10-11.pdf>.

79 Transformation Directory, Cape Bar Society of Advocates, https://capebar.co.za/directory/transformation/

80 Geoff Budlender, *supra* note 79.

81 Johannesburg BAR, *Johannesburg Society Of Advocates Maternity Policy In Relation To Members* (Johannesburg BAR, 2012).

82 *Ibid*; Johannesburg BAR, *Policy On Leave Of Absence, Leave To Practise From Home, Leave To Practise From Legal Centres, Door Chambers And Others* (Johannesburg BAR, 2020).

83 Kwazulu-Natal BAR, *Kwazulu-Natal BAR Society Of Advocates Equality And Diversity Policy* (Kwazulu-Natal BAR, 2016).

of jobs and few connections to established members of the profession, cultural alienation, bias based on historic roles of black women, racism, sexual harassment, briefing patterns (although the inverse is also true in that clients may demand diversity in their legal representation); behaviour based on gendered roles and lack of childcare facilities & the trailblazer phenomenon (exceptional women who have reached the senior levels of the profession have set a standard of excellence required for black women to succeed that does not apply to white men). [84]

B. Pool of Advocates

As in India, the pool from which JSC selects judges is made up of judges, attorneys, and advocates. The South African judiciary is structured along the lines of the British model, with attorneys[85] on one side and advocates[86] on the other. Similar to India, the profession has seen a predominance of higher ranks of prosecutors in judicial appointments, which were previously dominated by white people.[87] South Africa, like India, has seen an increase in the number of women pursuing law,[88] but without effective intervention and a true understanding of the challenges that women face, it is difficult to expect women to reach the highest echelons on their own.

Based on the data available on the demographics of attorneys in South Africa, it can be asserted that the problem of racial minority group's over-representation persists over gender representation.[89] According to statistics, women in South Africa's major law societies have long surpassed or achieved

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84 Centre for Applied Legal Studies, *Transformation of the Legal Profession* (Centre for Applied Legal Studies, University of Witwatersrand, 2014).

85 Attorneys are officers of the court and are registered on the roll of attorneys at the Legal Practice Council. See Law Society of South Africa, "Statistics for the attorneys' profession", *Law Society of South Africa* (January 2022), online: <https://www.lssa.org.za/about-us/about-the-attorneys-profession/statistics-for-the-attorneys-profession/>.

86 Albie Sachs, *Justice In South Africa* (California: University of California Press, 1973).

87 Democratic Governance and Rights Unit, *The 2019 Survey of South African Magistrates' Perceptions of Their Work Environment* (Democratic Governance and Rights Unit, 2020); Law Society of South Africa, *supra* note 86.

88 *Women in Law report: findings from South Africa's women in leadership in law roundtables*, by The Law Society (Woza & The Law Society, 2019).

89 Law Society of South Africa, *supra* note 86.

parity with men in terms of entering the profession of attorney.[90] As a result, it can be assumed that there are enough women in the pool to nominate for judgeship, but they are discouraged somewhere in the profession. As of January 2022, 53% of attorneys are white, and white males and females outnumber black males and females, as well as people of colour and Asian origin.[91] Traditionally, the pool from which judges are appointed is not diverse in terms of racial representation. The appointment process differs in both countries, but the challenges that women undergo, perhaps tie the two countries together. Expecting women's representation to spread, will necessitate concerted efforts to remove traditional barriers and make the judiciary more accommodating of women's needs and experiences.

C. Gender Stereotyped Roles

Talking about the experiences of women practitioners in India is incomplete without discussing the unrecognised informal challenges faced by women, which primarily include parenthood,[92] in addition to bias and gender stereotypes. This is not to say that motherhood is a necessary condition in a woman's life. It is a choice. Having said that women are expected to be the primary carers for their children, and the 'maternal wall'[93] emerges as a structural barrier to career advancement. As revealed during our interviewing process of women advocates and retired judges in the Indian higher judiciary, the perspectives of women lawyers on losing years due to impending motherhood provided a strong foundation for us to make an argument in favour of policies that recognise this aspect of the life of a woman lawyer. Although law is a profession that may be started at any time, it is necessary to not take a break to succeed and advance in the courts. Taking a break means losing contacts, clients, and assignments. Nonetheless, it provides

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90 Law Society of South Africa, *Statistics For Legal Profession 2017/2018* (Law Society of South Africa, 2019).

91 *Supra* note 79.

92 Anshika Misra, "Women lawyers fear pregnancy may stall their careers: survey", *Hindustan Times* (1 August 2012), online: <https://www.hindustantimes.com/mumbai/women-lawyers-fear-pregnancy-may-stall-their-careers-survey/story-IvzesggaliSkPdlywLFanL.html>.

93 Alexandrine Guyard-Nedelec, "A Legal Maternal Wall? No Revolution in Motherhood for Women Lawyers in England" (2018) 23:1 Revue Française de Civilisation Britannique, online: <https://journals.openedition.org/rfcb/1859#quotation>.

enough opportunity to read between the lines to conclude that caregiving is frequently discriminatory. In the case of KT Mini[94], the Kerala High Court recently acknowledged the existence of FRD discrimination.[95] In the absence of any written policy on the part of the institution or complaints brought in by female legal practitioners, the existence of such discrimination is difficult to challenge in a court of law. In a roundabout way, women are being asked to choose between family life and a career at the bar.

Bringing analyses based on stereotyped understanding of gender roles has not garnered much appreciation. For instance, the South African constitutional court's decision in *Hugo v. President*[96] opened a catena of arguments for achieving substantive equality based on gender-stereotyped roles. Justice Mokgoro drew the harsh realities by stating that gender-stereotyped reasons for establishing substantive equality end up creating more rift between genders. She observes that on one hand, it prevents women from participating in larger public life because of being the primary caregiver.[97] On the other, it prevents men from exploring their nurturing side or puts them in an unfairly advantageous position of extracting maximum benefits from public life in comparison to women. Despite her reservations against gender stereotyping, she upheld the Presidential proclamation for uniting some children with parents instead of none.[98] Moreover, the proclamation gave special benefits to women prisoners with children but it didn't take away the rights of those male prisoners with children to apply for pardon separately. Every time a female-centric legislation is passed it categorically gets judged by the extent of disadvantage caused to the opposite gender. For instance, the Indian Supreme Court's judgment in Babita Puniya[99] case highlights the fear of eating away vacancies of male officers as a major concern. Ms Meenakshi Lekhi and Ms Aishwarya Bhati have highlighted the inherent bias of the Indian Army;

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94 KT Mini v Senior Divisional Manager (Disciplinary Authority), Life Insurance Corporation of India, Divisional Office, Kozhikode & Others WP(C) No 22007 of 2012 (A).

95 Andrea Miller L, "The Separate Spheres Ideology: An Improved Empirical and Litigation Approach to Family Responsibilities Discrimination" (2014) Minnesota Law Review at 239.

96 Hugo v President of the Republic of South Africa and Another, 1996 (4) SA 1012 (D).

97 *Ibid.* Para 93. Online:< http://www.saflii.org/za/cases/ZACC/1997/4.html>.

98 *Ibid.* Para 106. Online:<http://www.saflii.org/za/cases/ZACC/1997/4.html>.

99 The Secretary Ministry of Defence v Babita Puniya, 2020 7 SCC 469.

> "The women officers have been and are regularly being posted by the Indian Army to all possible field units (combat zones) where male officers from the same corps are also serving. Consequently, the Army follows a policy of non-discrimination when it comes to postings but does not follow the same when it comes to granting PC(permanent commission) to its women officers. Thirty per cent of all women officers are posted in the field (combat zones)".[100]

D. Negotiating Intermediaries

The judiciary has been chastised for being insufficiently accommodating to the needs of women in terms of infrastructure. Women must negotiate their rights through women, which necessitates adequate representation at all levels of stakeholders in the legal profession. Having said that, the membership of the Indian State Bar Councils paints a very different picture, as shown in Table 3 below. Despite being elected by fellow advocates, the body that is primarily responsible for advocating advocates' issues is gender imbalanced. The absence of unified women's policies at the Bar level, which serves as the pool of selection for judges, is thus, not surprising. Thus, instead of rooting for reservation only at the Bench level, a holistic representation of 'feminist-minded' women lawyers at all levels of the legal profession's stakeholders is perhaps, what is required.

State Bar councils	**Male**	**Female**
Uttar Pradesh	26	0
Bihar	23	1
Kerala	25	0
Delhi	25	0
West Bengal	25	0
Maharashtra & Goa	27	0
Gujarat	27	0
Punjab & Haryana	25	0
Jammu & Kashmir	5 (key members)	0

[100] *Ibid.* Para 41. Online:< https://main.sci.gov.in/supremecourt/2010/20695/20695_2010_8_1501_20635_Judgement_17-Feb-2020.pdf>.

Tamil Nadu	5 (key members)	0
Kerala	24	0

Table 3: *Source state bar councils website (2023)*

E. Transparency Ensures a Better Case for Representative Judiciary

Transparency is one of the key attributes of good governance as enunciated in the UN Commission on Human Rights[101] which resonates with that of the UN Economic and Social Committee for Asia and the Pacific.[102] When compared to other judicial appointment bodies around the world, holding JSC interviews on a public platform in South Africa is a great initiative to bring transparency to the appointment process. [103] However, JSC's deliberations on a candidate's suitability, like the Indian collegium, are not open to the public as discussed before.[104] The process is highly opaque in the Indian collegium system because nominations are not made public; only final appointments are.[105] Scholars argue that in studies of the pre-collegium and post-collegium appointment systems, more representation from under-represented groups, including women, has occurred or can be expected to occur. It does, however, come with the caveat that the collegium system may either accelerate or retard this process.[106] Without instances like that of senior advocate Saurav Kirpal speaking of a conjecture, based on which his candidature has been deferred at least four times, the fact that he was a

[101] OHCHR, "About Good Governance OHCHR and Good Governance", *United Nations Human Rights Office of the High Commissioner*, online: <https://www.ohchr.org/en/good-governance/about-good-governance>.

[102] Yap Kioe Sheng, *What is Good Governance* (United Nations Economic and Social Commission for Asia and the Pacific). "Good governance has 8 major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law."

[103] Norma Young, "What Ruth Bader Ginsburg thought the US could learn from South Africa's modern constitution", *Quartz* (23 September 2020), online: <https://qz.com/africa/1907952/why-ruth-bader-ginsburg-was-a-fan-of-south-africas-constitution>.

[104] Ashok K M, "South Africa SC Upholds Non-Disclosure Of Private Deliberations In Judicial Appointments", *Livelaw* (6 November 2016), online: <https://www.livelaw.in/south-africa-sc-upholds-non-disclosure-private-deliberations-judicial-appointments/>.

[105] Rangin Tripathy, *supra* note 40 at 7.

[106] Aparna Chandra, William Hubbard, & Sital Kalantry, *From Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court* (Cornell Law School, 2019).

nominated candidate for judgeship would never have come to light.[107] While defending the collegium system, the judges have repeatedly stated that judges do not appoint judges.[108] It is a lengthy process that includes the executive, making it democratic. However, as Prof Faizan Mustafa points out, the issue is a lack of transparency throughout the process.[109] The Indian constitution has carefully woven the cumulative method of appointment without making either the judiciary or the executive the sole repository of power.[110] The Memorandum of Appointment, which was supposed to be renegotiated in 2016 by the SC's directives, is still pending.[111] As correctly pointed out, the current government had no difficulty appointing judges without the implementation of NJAC.[112] The lack of transparency appears to be the issue that neither party wanted to address. On the other hand, the JSC interview process has been further criticised for being uneven in terms of questions and questioning timeframes, as observed by the Democratic Governance and Rights Unit at UCT Law.[113] However, a partially transparent process is far better compared to a completely opaque process.

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[107] OP India Staff, "SC collegium recommends homosexual son of former Justice for elevation as judge to Delhi HC, has foreign national as a partner", *Op India* (16 November 2021), online: <https://www.opindia.com/2021/11/saurabh-kirpal-gay-homosexual-high-court-judge-sc-collegium-recommends/>.

[108] Padmakshi Sharma, "Present Model Of Appointing Judges Is Near Perfect : Former CJI UU Lalit Defends Collegium System", *Livelaw* (18 February 2023), online: <https://www.livelaw.in/top-stories/cji-uu-lalit-collegium-system-judges-appointment-present-model-appointing-judges-near-perfect-221905>.

[109] Faizan Mustafa, "Kiren Rijiju on Supreme Court Collegium: Constitution has the solution to judicial appointments", *Indian Express* (6 November 2022), online: <https://indianexpress.com/article/opinion/columns/faizan-mustafa-kiren-rijiju-supreme-court-collegium-constitution-judicial-appointments-8253203/>.

[110] Constituent Assembly Debates, vol IV (July 1947); Constituent Assembly Debates vol VIII (May-June 1949).

[111] Faizan Mustafa, *supra* note 110.

[112] *Ibid*.

[113] Judges Matter, "DGRU Submission to JSC Ahead of April 2022 Interviews", *Judges Matter* (17 March 2022), online: <https://www.judgesmatter.co.za/opinions/dgru-submission-to-jsc-ahead-of-april-2022-interviews/>.

V. DEBATE AROUND REPRESENTATIVENESS: DECONSTRUCTING THE MEANING OF 'EQUALITY'

The discussion in the above two sections led us to the final discussion where the authors examine 'equality' concerning women's representation. With South Africa's history of colonial rule and the Apartheid era, the indigenous population became a powerful force in demanding 'representation' when the new Constitution was written in 1990.[114] That decade, both before and after, saw major global transformations in terms of post-colonial feminism and equality rights, providing a foundation for the development of a modern constitution. With the birth of the UN Charter in 1945, the UN cemented its commitment to women's rights.[115] In 1979, the General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which established what stereotypes are and how far they could prevent women from utilizing their full rights.[116] The Convention explicitly defines discrimination against women in its 30 articles and establishes a national action agenda to end such discrimination. The world witnessed the "birth of global feminism" in Nairobi in 1985, at the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development, and Peace. After a decade, the Fourth World Conference on Women, held in Beijing in 1995, became known as the Beijing Declaration and Platform for Action during South Africa's post-constitutional era. For many years UN struggled with the lack of a unified body to direct cooperated activities on gender equality

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[114] Ruth B Cowan, *supra* note 72 at 13.

[115] Charter of United Nations 26 June 1945, Article 1, "Achieve international cooperation... in promoting and encouraging respect for human rights and fundamental freedoms for all, regardless of race, gender, language, or religion.". Online:< https://www.un.org/en/about-us/un-charter/full-text>.

[116] CEDAW, Article 5, "States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, to achieve the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases." Online:<https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/cedaw.pdf>.

issues. In July 2010, UN Women was created to accelerate and generate resources for making a greater impact on women's rights.[117] The UN is now focusing its global development efforts on the recently established 17 Sustainable Development Goals (SDGs). Women play an important role in all SDGs, with many targets emphasising women's equality and empowerment.

To investigate the historical context of Article 15(3), authors deconstruct the "text" of equality and, perhaps, comprehend the "hidden antimony in thought process" underlying the true meaning of equality. Article 15(3), formerly draft article 9, was discussed in CAD in 1948 but did not elicit many comments from the assembly's female members. Even though few women participated in the negotiation process that resulted in the Constitution, and no matter how hard they pressed for women's issues, they were lost in obscurity. 'Communicating' and 'Bargaining' are two major strategies in securing better deals everywhere, which were not readily available to the women of the Constituent Assembly. The dawn of independence was a watershed moment for every Indian, especially when they took control of their sovereign fate. However, when it came to women's issues, there was repression of marginalised representation of women in the same. Sir Syed Rouf's naive observation that enacting an anti-discrimination law in favour of women would be 'sufficient' to advance the cause was ill-conceived.[118] The equality provisions pushed women to the forefront of the country's socioeconomic and political landscape without considering the challenges they would face and without deliberating on potential solutions. Furthermore, K.T. Shah's observation[119] about women being excluded from 'dangerous provisions' reflects the paternalism that later became visible in the judicial treatment of Article 15(3). In addition to paternalism, masculine toxicity pervaded the assembly as well. Purnima Bannerjee's hesitation of being ridiculed in the Assembly for seeking indirect reservation in Assembly

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[117] UN-Women, Historical perspectives, https://www.unwomen.org/en/about-us/about-un-women

[118] Constituent Assembly Debates (29 November 1948) (1948).Syed Abdur Rouf: "…As for "sex", I do not think that in the middle of the twentieth century, there will be anybody attempting to make any discrimination on that ground. What was possible in bygone days is not possible now."

[119] *Ibid*. (K.T. Shah). This amendment was rejected by Dr B.R. Ambedkar on the grounds of being fallacious.

seats left vacant by the death of Smt. Sarojini Naidu is a clear example of this.[120] Add to that the trend of androcentrism in drafters' language, which indicates a collective lack of consciousness towards inclusivity.[121] The debates formed the foundation of the 'protectionist' interpretation of equality provisions,[122] because male members took it upon themselves to decide for the 'betterment' of women, ignoring the marginalised voice of women in that debate.[123] The society's depiction of women's passive nature in issues of 'Andarmahal' (within the periphery of a house) easily transitioned into the role of modern women in a free India, subduing the radical women's voices of the time.[124] A scanty number of women members and their individual experiences of manoeuvring through the overly male-represented constitutional assembly paint a rough picture of what it was like for women to work in the assembly.[125]

Under the guise of post-colonialism, the understanding of the workings of the legal profession has remained very colonial, largely because gender could never take precedence among other priorities. The 'equality' provisions of the Indian Constitution were entrenched with feminist ideologies long before its conception. It was interpreted through the lens of paternalistic feminism. The intention behind framing Article 15 in general and Article 15(3) specifically was to acknowledge and correct the 'historical wrongs' that have happened with 'vulnerable groups' and 'indigenous groups' of the country. The nature of Article 15(3), as interpreted by the court later, has remained

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120 *Constituent Assembly Debates* (New Delhi, 1949).

121 Rajesh Kumar, "Equality for Women: The Constituent Assembly Debates and the Making of Equality Jurisprudence by and for Women" (2022) 52:3 Social Change 350–368.

122 *Ibid*.

123 Constituent Assembly Debates, vol 7 (29 November 1948). K.T. Shah: "The rage for equality which has led to providing equal citizenship and equal rights for women has sometimes found exceptions about special provisions that, in the long-range, in the interest of the country or of the race, exclude women from certain dangerous occupations, certain types of work. That, I take it, is not intended in any way to diminish their civic equality or status as citizens. It is only intended to safeguard, protect, or lead to their betterment in general; so that the long-range interests of the country may not suffer." Online:< https://www.constitutionofindia.net/debates/29-nov-1948/>.

124 Nila Mohanan, "Negotiating Political Power at 'Critical Junctures': Women and Constitution Drafting in South Africa and India" (2021) 57:3 Journal of Asian and African Studies, online: <https://journals.sagepub.com/doi/full/10.1177/00219096211025806>.

125 Achyut Chetan, *Founding Mothers of the Indian Republic: Gender Politics of the Framing of the Constitution* (Cambridge University Press, 2022).

limited as an exception to Article 15(1) to the extent that it does not nullify the competing rights under Article 15(1). The Court's interpretation of protective discrimination under article 15(3) remained focused on a limited and stereotypical understanding of the social construct of 'gender'. Professions that were considered suitable for women were put under the purview of protective discrimination. At the same time, the court also interpreted Article 15(3) in the most restrictive sense and made a mockery of womanhood by upholding regulations of Air India to terminate the services of air hostesses in case of imminent pregnancy.[126] As a result, upon a casual reading, it has found itself at odds with men's rights being subjugated, without noticing that women are barred both directly and extraneously in many field jobs.[127] Because of this stereotypical protectionist approach of controlling women's choices through Article 15(3), it could not do much to empower substantive equality for a very long time. Treating women as vulnerable has promoted many actions of the state under the garb of its protectionist approach. Take for example the Factories Act of 1948, the provision of not letting women work between 10 pm and 5 am,[128] not only catapulted into reenforcing the traditional gender roles but it gave an excuse to those organizations who do not want to hire women. Including women in the workforce leads to an increase in infrastructural investment (toilets, restrooms, and nurseries). So instead of seeing that women face double-edged discrimination, it was observed that women are passive victims because of their gender alone. Instead of removing the discrimination both executive and judiciary have ended up reinforcing it. This prejudicial notion came to a halt with Anuj Garg.[129] Before that, Justice Sujata Manohar's guidelines against sexual harassment in Vishakha have purportedly reflected

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126 Air India v Nargesh Meerza, AIR 1981 SC 1829

127 Charan Singh v Union of India, ILR 1979 Delhi 422

128 Section 66. Further restriction on employment of women. (1) The provisions of this Chapter shall, in their application to women in factories, be supplemented by the following further restrictions, namely: (a) no exemption from the provisions of section 54 may be granted in respect of any woman; (b) no woman shall be required or allowed to work in any factory except between the hours 6 A.M. and 7 P.M.; Provided that the State Government may, by notification in the Official Gazette, in respect of any factory or group or class or description of factories, vary the limits laid down in clause (b), but so that no such variation shall authorise the employment of any woman between the hours of 10 P.M. and 5 A.M..

129 Anuj Garg v Hotel Assn. of India (2008) 3 SCC 1

what the presence of women on the Bench can mean.[130] Reinforcement of stereotypes under the guise of protectionism has been noted explicitly by the Court in Joseph Shine. [131] However, by putting women in an equal autonomous position in marriage along with men, it has opened a pandora's box. These interpretations are all instances of how 'equality' has been constructed and deconstructed in the past years.

For the judiciary to be truly gender representative, it must also evaluate its standpoint on representation from its scheduled caste (SC) and scheduled tribe (ST) communities. None of the women judges in the history of the Supreme Court of India appointment have been women from an SC or ST community. The Ministry of Law and Justice very carefully puts the onus on the collegium to provide social diversity and representation to all sections of the society including SC/ST/OBC/Women/ Minorities.[132] In this context, the Karia Munda Commission Report strongly criticized the neglect towards the SC & ST community in the judiciary and has urged the government to change its policy of "running with the hare and hunting with the hounds".[133] The government brought in a constitutional amendment to reform the judicial appointment process in 2015 but was met with a painful death at the altar of justice. India needs to stop analyzing the position of women as a singular entity and understand that they also have further subsets based on religion, caste, ethnicity etc. which then combine to put them even in a further backward position. The collegium can only appoint from the available pool of candidates which has a very limited number of women from these communities, it cannot eradicate barriers to accessing opportunities.

Deconstructing the existing literature because of a transformative understanding of gender equality may lead us to strategize for decolonizing the judiciary. Deconstruction theory necessitates a continuous process of

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[130] Vishakha & Ors. v State of Rajasthan, AIR 1997 SC 3011.

[131] Joseph Shine v Union of India, (2019) 3 SCC 39

[132] *Ministry of Law and Justice, Judges Belonging to SC, ST and OBC Communities* https://pib.gov.in/PressReleasePage.aspx?PRID=1812040

[133] Thirteenth report of Committee on the welfare of Scheduled Castes and Scheduled Tribes, 23 April 2001.

negotiating competing concepts.[134] Deconstructing legislation may be a difficult task because it is difficult to separate the "text" from the original intent of the legislature.[135] When faced with a quandary, **we** tend to turn to the drafters' intent rather than taking the "text" alone and interpreting it in the present. This paper's argument is aligned with the understanding that women should have an equal standing in the negotiation process for what best accommodates them, and they should keep questioning the system. Considering deconstruction, it is necessary to examine the judicial thought process. Academics have vigorously debated the NJAC judgment's critique of comparative reference.[136] The court could have tapped the comparative understanding by analysing policies that have worked with foreign jurisdictions instead of maintaining its independence through a non-representative mechanism. The universal concern of female legal professionals worldwide is adequate substantive representation.[137] Given the similarities noted in the preceding sections, the judiciary perhaps could have examined the South African experience, which ushered in a new era of judicial legitimacy and women's right to workplace equality.

VI. CONCLUSION

Keeping up with the global trend of creating inclusive workplace environments, the judiciaries of both countries face several challenges. Fitting women into a system that does not accommodate their needs is a horrible tale of fitting a square peg into a round hole. In a nutshell, South Africa has been able to identify policies that take an inclusive approach to closing the gender gap in decision-making positions in a post-democratic

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[134] Catherine Turner, "Jacques Derrida: Deconstruction, Critical Legal Thinking", *Critical Legal Thinking* (27 May 2016), online: <https://criticallegalthinking.com/2016/05/27/jacques-derrida-deconstruction/>.

[135] *Ibid*.

[136] Arghya Sengupta, *Independence and Accountability of the Indian Higher Judiciary* Oxford University, 2014); Gautam Bhatia, "The sole route to an independent judiciary? the primacy of judges in appointment" in Arghya Sengupta & Ritwika Sharma, eds, *Appointment of Judges To The Supreme Court of India: Transparency, Accountability and Independence* (Oxford: Oxford University Press, 2018) 135 publisher-place: India; Arghya Sengupta, *supra* note 41.

[137] Rachel E. Johnson, *supra* note 10; Maria C Escobar-Lemmon et al, "Breaking the Judicial Glass Ceiling: The Appointment of Women to High Courts Worldwide" (2021) 83:2 The Journal of Politics, online: <https://www.journals.uchicago.edu/doi/10.1086/710017>.

setting. To begin with, the South African constitution is critical in giving concrete shape to the demand for a "demographically representative" judiciary. Furthermore, pro-women policies in seniority, maternity leave, and other infrastructural support make the workplace accommodating to their needs. Among these measures, challenges to racial predominance in judicial appointments play a significant role in opposing gender representation.

In India, there is a significant lack of female members at all levels of the judiciary as well as the legal profession. Furthermore, in the absence of any women-related policies bringing visible change is difficult. As previously discussed, the lack of women lawyers in bar councils' administrative roles is currently a major source of concern, prompting calls for the reservation of seats for women at all levels.[138] Even as **we** write this article, senior advocates in the Supreme Court and high courts across the country have shown a consistent gender imbalance. [139] Representativeness of the judiciary (geographical, religious, and caste) has always been an 'informal' non-written selection criteria, but gender has never been central to that debate. The lack of a transparent appointment system makes it even more difficult to understand what is preventing women from climbing up the ladder of success. There is a need to re-examine the way India selects its judges and must enter the international debate to understand where intervention is required to make the judiciary more diverse and inclusive. It is up to the selection body to elevate or degrade the demand for gender representativeness. A dedicated research body like that of South Africa's Democratic Governance & Rights Unit or task forces like the UK[140] and

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[138] Sharmeen Hakim, "Allow Women Reservation In Bar Councils : Women Lawyers Write To Law Minister Kiren Rijiju", *Livelaw* (15 July 2021), online: <https://www.livelaw.in/news-updates/allow-women-reservation-in-bar-councils-women-lawyers-write-to-law-minister-kiren-rijiju-177546>.

139 Narsi Benwal, "Women's Day 2023: Only 3 per cent of Senior Advocates in the Supreme Court and High Courts are women", *Bar and Bench* (8 March 2023), online: <https://www.barandbench.com/columns/womens-day-2023-only-101-of-2982-senior-advocates-high-courts-supreme-court-women>.

[140] *Improving judicial diversity, Progress towards delivery of the 'Report of the Advisory Panel on Judicial Diversity 2010*, by Ministry of Justice UK & Judicial Diversity Taskforce (Ministry of Justice of United Kingdom, 2012); *Improving judicial diversity, Progress towards delivery of the 'Report of the Advisory Panel on Judicial Diversity 2010*, by Ministry of Justice UK & Judicial Diversity Taskforce, Final Annual Report (2014) (The Judicial Diversity Taskforce, 2015); *Judicial Diversity and Inclusion Strategy Update 2022*, by Judiciary of England and Wales (Judiciary of England and Wales, 2022).

USA[141] could set up a culture focusing on finding possible solutions. Making structural changes in legal practice is what India needs today to change the established narratives of a moribund judiciary before serious legitimacy concerns arise, which undoubtedly will not be without resistance. Comparative legal analysis must be included to study the distinct realities of the two countries to integrate the realities of a representative judiciary. South Africa's constitution is relatively new, it has the advantage of drawing from both the past and future generations of laws. Mutual borrowing and policy adoption will be a rational solution in an increasingly global world if **we** can balance the peculiarities of our legal systems.

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[141] *SUMMARY REPORT NEW YORK TASK FORCE women in the courts* (Unified Court System Office of Court Administration, 1986); Marilyn Loftus, Lynn H Schafran, & Norma Wikler, "Establishing a Gender Bias Task Force" (1986) 4:1 Minnesota Journal of Law & Inequality; Procter Hug Jr, Marilyn L Huff, & John C Coughenour, "Ninth Circuit: The Gender Bias Task Force" (1998) 32:3 Richmond Law Review.

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