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Women in International Courts and the Need for Action

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ABSTRACT

The infamous Simon Commission had arrived in Bombay (now Mumbai) with the intent of reviewing the administrative practices and providing potential reforms towards British India in the year 1928. Among the many issues of such a commission, one pertinent and significant issue caused severe backlash from the Indians and boycotted by the Indian National Congress, the commission was even met with black flags and chants of "Simon Go Back" due to the very issue that has oppressed individuals through centuries and eons, the issue of representation. The commission simply consisted of seven Members of Parliament under the authority of Sir John Simon. A stark sense of historical irony can be realized with the aid of this case, but what has it taught us. We see that at the heart of any form of governance, administration or judgement, there is a need for proper representation to enable better and more importantly just outcomes. This paper extrapolates this very thread, by examining the question of representation in the context of women in international courts. The above historical account of the commission finds its place in this paper as a well-known account of clear-cut injustice in relations to a lack of representation and may form an inclination in the readers mind towards the premises and conclusions of this paper and an overall angle in which this paper navigates.

The paper essentially portrays the trends of international courts in appointing female judges, the stark under-representation of women in this field, the negative effects that this would thereby cause and finally methods to remedy this dearth of female judges. The need for affirmative action is especially highlighted with a clear demarcation in the differences of election between the International Criminal Court and the International Court of Justice. The striking gender-parity in the former gives rise to a possible model document that may be referred to, so as to attain the ideal of proper representation.

Keywords: *International Law, Affirmative Action, Judicial Selection, Representation.*

I. INTRODUCTION

The infamous Simon Commission had arrived in Bombay (now Mumbai) with the intent of reviewing the administrative practices and providing potential reforms towards British India in

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the year 1928. Among the many issues of such a commission, one pertinent and significant issue caused severe backlash from the Indians and boycotted by the Indian National Congress, the commission was even met with black flags and chants of "Simon Go Back" due to the very issue that has oppressed individuals through centuries and eons, the issue of representation. The commission simply consisted of seven Members of Parliament under the authority of Sir John Simon.[2] A stark sense of historical irony can be realized with the aid of this case, but what has it taught us. We see that at the heart of any form of governance, administration or judgement, there is a need for proper representation to enable better and more importantly just outcomes. This paper extrapolates this very thread, by examining the question of representation in the context of women in international courts. The above historical account of the commission finds its place in this paper as a well-known account of clear-cut injustice in relations to a lack of representation and may form an inclination in the readers mind towards the premises and conclusions of this paper and an overall angle in which this paper navigates.

II. WHY INTERNATIONAL COURTS AND THE INFLUENCE OF WOMEN IN INTERNATIONAL COURTS?

The primary question that I would like to address in the initial sections of this paper is that of why international courts or rather where the motivation comes to make this inquiry.

The response, although it would seem to be pretty intuitive, carries with it a more densely packed level of reasoning and it would be worth elaborating on the importance, the philosophy towards this importance and the notable progress that we have witnessed in international court through the 20th and 21st centuries.

Josephy Raz, an Israeli moral, legal and political philosopher discusses the role of international courts as one that facilitates states to attain their goals and specified objectives more effectively and properly. By exercising a certain level of legitimate authority over these states, these international courts offer a level of "impartial adjudication of disputes" on the basis of the established legal principles that exist. A key statement to focus on is the use of the term "legitimate". International courts, due to their consensual jurisdiction and lack of sanctions attain their powers from the state party's acknowledgment of the court's legitimacy. This claim to legitimacy is hindered in the absence of proper gender representation. A unidimensional judgement provided by homogenous bench would be in itself inherently biased if one is to assume that the two genders adjudicate cases in a different way. Studies relating to international

[2] Simon Commission, Encyclopaedia Britannica. Encyclopaedia Britannica, inc. Available at: https://www.britannica.com/topic/Simon-Commission (Accessed: November 13, 2022).

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tribunals such as the ICTY has shown that the rate of conviction of defendants in cases of assault has resulted in judges providing more severe sanctions for assaults on their respective genders. Whereas a striking difference can be seen in the conviction of sex discrimination, wherein plaintiffs are voted for in their favour in a panel bearing more female judges. Further, the insight and the varied lens that female judges provide can also be highlighted with the help of various case laws.

For example, and most notably, the contributions of Judge Navanethem Pillay in her pivotal contribution in the Akeyasu case[3], by method of including charges of sexual violence to the charges against Akayesu. The judgement further went on to convict Akeyasu of a crime against humanity in rape and rape as genocide. This judgement aided in the jurisprudence of conceiving rape as genocide and more significantly as an inclusion to the Rome Statute. Further cases of Elizabeth Odio Benito and Gabrielle Kirk McDonald in the cases of Nikolic and Tadic respectively had heavily influenced the perception of sexual violence and for effectively prosecuting rape.

The absence of women has led to a dearth or nearly no progress in jurisprudence relating to sexual violence and feminist issues through the centuries.

(A) The Issue at Hand

While a significant number of female lawyers and law school students continue to come about in large parts of the world, we see that the number does not correlate to the number of female judges present in the benches of international courts and tribunals. This brings us the presentation of the pertinent issue at hand and the relevant statistics that establish this issue.

Women are concerningly underrepresented in international law, and as presented in the previous section that is cause for concern not simply for the perceived legitimacy of international law but progress and justice in itself.

Our primary concern presents itself as the International Court of Justice, wherein only three (Judge Donoghue, Judge Sebutinde and Judge Hangin) out of the 15 judges are currently female and out of the 108 judges the court has had in total, there have been only 4 women.

The European Court of Human Rights (ECHR) present a similar case wherein 15 out of the 47 are women. Whereas the IACHR has one out of 6 judges as female and a sole female president in the last 15 in Cecila Medina from Chile. The ITLOS has 3 out of 21 judges as female, while the ILC another notable international body has had only 7 members out of 229 as female in their

[3] ICTR-96-4-A

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prolonged history.

Nine women have served as judges at the ICTY, out of the total of forty-three judges who have sat on the tribunal's bench. The eight ICTY judges who are still sitting are all men at this time. Only two of the 10 surviving judges of the ICTR are female.

Six of the twenty-four judges on the present roster of the International Residual Mechanism for Criminal Tribunals (IRMCT), an organisation created to carry out crucial duties previously handled by the ICTY and the ICTR, are female.

While the ICC (9 out of 18) and the African court of Human and People's Rights (6 out of 11 judges) showcase a more egalitarian outcome. We look into the possible reasons that may have caused such a disheartening scenario at the heart of international law in the next section.[4]

III. THE LIMITED POOL ARGUMENT

A common argument that seems to have surfaced is the limited pool argument. The limited pool argument states that the dearth of female judges can be accounted by the fact that there is a lesser number of competent women to choose from as compared to competent men at the highest level of international law.

The limited pool argument may be used to either explain the absence of women in the international court or to falsely highlight the sensational move towards change by portraying the acceleration of the rate of women filling up judicial positions in international law. The limited pool argument is plainly unpersuasive for a series of reasons that this paper investigates. The sheer absence in certain courts highlights the historical patriarchy that lurks even in modern day courts and the absolute ineffectiveness of this argument. The examples of the IACHR, the economic community of West Africa's Court, the ITLOS or the WTO's Appellate body provide shocking numbers of female representation. It would constitute an appalling conclusion if one were to believe that there was only one woman, in respect to the latter two courts, that was qualified to sit in these courts out of the number of female judges in the entirety of the recognised states. Further, taking into consideration the growing number of females in the legal discipline and in the judicial profession it seems counter-intuitive that the number of women on the bench would initially increase and subsequently decrease as is the case in the ICTY and ICTR as highlighted in the statistics above and similarly in the courts mentioned in the preceding paragraph. The World Trade Organisation Appellate Body and the IACHR both have had an increase and subsequently a decrease in constituent female members. Further, we see

[4] Grey R, McLoughlin K and Chappell L, "Gender and Judging at the International Criminal Court: Lessons from 'Feminist Judgment Projects'" (2021) 34 Leiden Journal of International Law 247

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that the ICC as compared to the ICTY and the ICTR would be similar in terms of the judicial functions, jurisprudence and composition and still differs so starkly in composition. While the ICTR and ICTY have a combined number of two women out of 18, the ICC by itself has 9 out of 18 judges, thereby attaining gender parity. This trend persisted through the past decade and through 2015 and therefore does not warrant any form of responses in terms of activity of the courts.[5]

Further we find that the number of female judges sitting on the benches in international court does not directly correlate with the number of female attorneys or judges in a particular state. France constitutes about 50% female attorneys and does not provide for a single permanent judge in a majority of the international courts.

We can therefore conclude that the reasons for the above trends may circle back to multiple reasons such as the structural incompatibility of work environments with private firms across the world. The disproportionate levels of burdens that women have to face in relations to domestic work and jobs. The deviation from career paths due to lack of family friendly provisions and blatant political discrimination by means of discrimination.[6]

IV. COMPARATIVE ANALYSIS OF METHOD OF APPOINTING JUDGES IN ICJ & ICC

The International court of Justice elects its judges by means of voting from a list of candidates. This list of candidates is provided by national groups that nominate their candidates, and is subject to political influence, 3 months prior to the actual date of the election. The United Nations General Assembly along with the Security Council peruse the list of candidates and elect the judges of the ICJ. If we are to examine the document of the ICJ Statute. We see the most notable Article 6 & Article 9 of this Statute.[7] Article 6 talks about the list of candidates that are recommended and states that higher courts and faculties are to be consulted whilst drawing up the nominations. Whereas Article 9 of the of the ICJ Statute gives an overarching guide to the electing parties to keep in mind whilst electing that representation is assured. Further the Statute states that the national groups that provide the nominations nominate less than 5 individuals and no other effective guidance.

The election of judges in the international criminal court is governed by Article 36 of the Rome Statute and is enabled by a voting system in the Assembly of State Parties. The voting system

[5] Grossman, Nienke, Shattering the Glass Ceiling in International Adjudication (September 7, 2015). Virginia Journal of International Law Vol. 56.2 2016, Forthcoming, University of Baltimore School of Law .
[6] Sterio, Milena, "Women as Judges at International Criminal Tribunals" (2020). Law Faculty Articles and Essays. 1172
[7] ICJ Statute 33 UNTS 993

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provides for a method to empower the marginalized community by formulating a method wherein a certain number of judges from a particular gender and other marginalized parameters have to be on the bench. The system is known as the minimum voting requirement. This system provides for an equal bench as the ballot system would only be valid in the event that there is a "fair" representation of two genders in accordance with Article 36 (8) (a) (iii). The use of the word fair in this provision has also been a cause for debate among feminist scholars as it leaves room for interpretation of what may constitute fair as opposed to the word "equal" which may be employed. At the time of the inception of the provision, 6 out of the 18 judges were women although that number has increased to 18 currently. The minimum voting requirements also choose across two pools so as to get more qualified judges in the fields of criminal law and international law independently so as to formulate a more effective harmonious interpretation of international criminal law.

V. METHODS OF ATTAINING GENDER PARITY

There may be many methods by which gender-parity may be achieved by a series of dedicated and targeted methods towards a particular cause. In particular the mandate of inclusion the call for affirmative action and strong quotas being made for better representation, as in the case of the ICC and African court of Human and People's Rights. The nomination procedures as in the case of the international court of Justice must include some sort of filtered process whereby there is more representation while formulating the electoral choices to the UN assembly and security council. This position does not limit itself simply to judges but also to other areas of judicial functioning like in the case of office of the prosecutor like in the case of the ICC. Every country that participates in an international criminal tribunal or appoints its citizens as judges on such courts should review its selection procedures, practises, and policies. Every State needs to make sure that it regularly supports lists of judicial candidates that are varied in terms of gender. If regional organisations are used to propose judicial candidates, they should have the same commitment to advancing gender diversity.

Further, this issue has to be the attention of both academics and NGOs, especially male academics and NGOs that are not feminist the role of education is pivotal in the understanding of the intersection of representation and law, the feminist judgement. While the research of female academics like Nienke Grossman and the support of feminist NGOs have had a significant impact on raising awareness of the issue at hand. Due to the underrepresentation of women in ICTs, their contributions need to be reinforced. This lack of representation of women in international criminal law generally and on the international criminal bench should not be

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viewed as a women's issue, thus male researchers and non-feminist NGOs should take up this subject. Our whole profession, including its illustrious institutions, suffers from the underrepresentation of women on the international criminal bench.

Fourth, female judges seeking employment with international criminal tribunals should be supported by professional women's associations. Such network and campaigning would help put female names on the agenda ensuring that female applicants are properly taken into account.[8]

VI. SIGNIFICANCE OF THE FEMINIST JUDGEMENT PROJECTS TO INTERNATIONAL LAW

Feminist Judgement Projects are essentially an association of various feminist academics, practitioners, and activists that have come together in various parts of the world to rewrite historical judgements with the temporal constraints that the courts had while employing a feminist lens while adjudicating these cases. The feminist lens whilst also bring to the purview the likes of race, class and any form of disability and not simply restricting the review to a gender-based judgement. Although that seems to be the case, this paper engages with the gender-based proclamations that those judgements make and the process that is used to typically arrive at such judgments. The main aim of these projects from a gendered perspective is portray the trajectory of thought that gender-sensitised judges bring to the courtroom. Gender-sensitised judges by no means points strictly to female judges, it would also imply other gendered judges that are sensitised to the role international law plays in providing a valuable articulation of the intersection of gender and justice. Those individuals that are guided by the spirits of international human rights law and in the empowerment of marginalised sections. The international law version termed as the “feminist judgements in international law” had a rather delayed birth as compared to its domestic counterpart.

By appointing gender-sensitised judges into their courts, instead of simply asking the “woman question” we find that these learned judges that are experts at feminist analysis can apply this philosophy to judgements.

The feminist ruling in the Lubanga case[9], authored by Y. Brunger, Emma Irving, and Diana Sankey, serves as an example of this concept. According to Article 8(2)(e)(vii) of the Rome Statute, the Lubanga case gave the International Criminal Court its first chance to examine the war crime during an international armed conflict of "using minors [aged 15 or younger] to

[8] Nienke Grossman, Achieving Sex-Representative International Court Benches, 110 Am. J. Int'l L. 82 (2016).
[9] ICC-01/04-01/06

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participate actively in hostilities." Thomas Lubanga Dyilo, the defendant, was the leader of an armed organisation in the Democratic Republic of the Congo. Prior to the confirmation of charges procedures in this particular case, reports that female child soldiers in Lubanga's group had been sexually assaulted by their superiors were forwarded to the (then) ICC Prosecutor, Luis Moreno-Ocampo. However, not only did this matter not be adjudicated upon, but the Prosecutor had not addressed this matter in the document that had enlisted the charges against Lubanga.

Nevertheless, the prosecution in this case had started presenting sexual assault evidence as soon as the trial got underway by clearly outlining the blatant evidence of rape of child soldiers. The prosecution had further stated that the evidence presented pertaining to sexual assault had to fall within the purview of one of the charges that Lubanga was to face , namely, "using minors to participate in hostilities," and claimed that female child soldiers within the accused organisations were time and again raped, sexually assaulted, and used as domestic slaves by their commanders.

Judges René Blattman and Adrian Fulford, who made up the Trial Chamber's majority, rejected the defence. They stated that a kid has actively participated in hostilities if the assistance they offered to the fighters "exposed him or her to genuine danger as a possible target," but they declined to comment on whether the rape of child soldiers by their leaders would meet that standard as the question was outside the scope of the charges levied against the accused. To understand the term "using children to participate in conflicts," Brunger et al feminist 's judgement gives an alternate perspective. Essentially, we see that Judges in this particular case of feminist understanding are to view the children’s traumatising experiences in totality linked with the domestic or international armed conflict. All the children that are involved in the organisation are subject to violence and threat from the enemy forces let alone their own forces and are to be safeguarded in times of war. Therefore, a wholistic ban in the employment of children in such a scenario would encompass those crimes committed by Lubanga’s army in relation to the sexual violence and rape.

It additionally emphasizes that "it is vital to note that the experiences of young soldiers are not gender-neutral when studying their experiences." A necessary distinction between male soldiers and female soldiers was necessary for the progress of understanding sexual violence during wartimes in that case, but the sheer inability of the Judges Rene Blattman and Adrian Fulford to encompass the feminist comprehension of such a case led to an unfortunate outcome.

By employing this interpretation, the feminist judgement comes to the conclusion that utilising

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minors for forced domestic labour and sexual abuse are both within the legal scope of the phrase "to participate actively in hostilities."

The feminist ruling basically agrees with Judge Odio Benito's actual dissenting decision in the Lubanga case. In her opinion, Judge Odio had dissented by stating that there would be a clear discrimination against female soldiers, who are by means of evidence more likely to experience sexual abuse from the forces than their male counterparts.[10]

VII. CONCLUSION

The paper essentially portrays the trends of international courts in appointing female judges, the stark under-representation of women in this field, the negative effects that this would thereby cause and finally methods to remedy this dearth of female judges. The need for affirmative action is especially highlighted with a clear demarcation in the differences of election between the International Criminal Court and the International Court of Justice. The striking gender-parity in the former gives rise to a possible model document that may be referred to, so as to attain the ideal of proper representation.

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