PRACTICING ON THE MARGINS OF MAINSTREAM LAW - A PERSONAL PERSPECTIVE ON SEXUAL VIOLENCE AGAINST WOMEN IN INDIA

By Naina Kapur

On December 16, 2012, an upwardly-mobile young woman from a lower-middle class family and her male friend saw “Life of Pi” at a theatre in New Delhi. Afterwards, they boarded a bus to head home. What would have been a common evening for young people in the city became a living nightmare for the woman even as her male companion fought bravely to save her. Knocking him unconscious, six men brutally gang-raped and tortured the woman for one hour on the moving bus. Two weeks later she died of the brutality inflicted upon her. The incident outraged citizens all over India and led to mass demonstrations, particularly in New Delhi, against ineffectual responses to sexual violence against women. Did public outrage or calls for justice change anything?

Discussions about sexual violence have never been common in law offices or law schools, let alone amongst the Indian public. Yet from birth to death, sexual violence shapes the contours of women’s everyday life in India. That is because sex and law have traditionally been awkward companions. At most, rights such as freedom of mobility, expression, equality and life, which could be claimed as human rights for others, have historically been scripted as crime-specific when it comes to women and sexual violence. Even when sex emerged from the closet in reference to offenses against women in the 1970s, it was largely in context of the “appropriate victim” where a woman’s “passive silence was deemed consent.” Tuka Ram and Anr. vs. State of Maharashtra (AIR 1979 SC 185) (also known as Mathura’s case for the name of the victim).

Through the prism of criminal law, violence of a sexual nature in India has been characterized by fixed assumptions about women. My earliest awakening to this happened post criminal law amendments on rape sentencing in the 1980s. At the time, I was a corporate lawyer with a mainstream law firm.

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V. Lakshmikumaran analyses the Novartis decision and explains why the view that it spells weak future patent protection in India is misplaced. Article at page 33.
The degree of women’s leadership and active, visible presence in a legal profession is one of the indicators of the overall fairness of a legal system and society. When women professionals are underrepresented, it is apparent to aggrieved persons, litigants, witnesses, officials and court personnel that the legal system does not ‘walk the talk’ on gender equity.

India has a proud history of illustrious women lawyers, beginning with the first woman lawyer, Miss Cornelia Sorabji, who was admitted to the High Court of Allahabad in 1921. This issue features articles about and by a few women lawyers of many out there who are recognized as significant contributors to the legal profession.

These articles convey the varied range of experiences of women in the legal profession in India – of discrimination, change and hope, success due to family support, unprecedented success solely on the basis of competence and hard work, and a lot more. Naina Kapur highlights the churning that is taking place in the context of law and sexual violence against women. Swethaa Balakrishnne presents the picture of equality and participation of women in corporate law firms. On the other hand, Swagata Raha and Sonal Makhija analyze their results from a survey of women in litigation which present the continued struggle and set backs experienced by women trying to find family-work balance. Latika Vashist reports on under representation of women in the judiciary. Sheetal Parkash writes on recent developments in combating sexual harassment in the workplace. Ajeet Singh has given a profile of Kapila Hingorani who is remembered for filing the famous habeus corpus writ petition in the Hussainara Khatoon case that declared expeditious trial as a fundamental right and discovers that behind her success is the full support of her husband and family. Amita Dhanda sees in Dr. Neeru Chadha, the first woman Legal Advisor to the Government of India, a beacon of hope that women in India can reach the top by untiring perseverance, competence and hard work when not disadvantaged on the basis of their sex at home and outside.

Associations of women lawyers play important roles in collective action to work for equity for women in the legal profession, in mentoring of new female lawyers and addressing legal issues affecting women that are neglected or require fresh perspectives. The article by Priti Suri and Krishna Jhala features organizations serving such roles, such as the Delhi-based Society of Women Lawyers, www.sowlindia.org and the Chennai-based All India Federation of Women Lawyers, http://www.indianwomenlawyers.com/index.htm. In addition, V. Lakshmikumaran presents a featured article analyzing the Novartis case and argues that it should not be interpreted to mean lax patent protection for pharmaceuticals in India. We end with a note by Amitabh Tewari and Gayatri Chadha on dicta by the Supreme Court in a case that criticizes the law of adverse possession in India as unjust to the owner, and calls upon Parliament to amend it.

In surveying the landscape for this issue of India Law News, we were struck by the gaps in discussion of gender equity in the Indian legal profession in general, the lack of readily available demographic data, and the marked under representation of women in leadership positions in the legal profession. Significant numbers of Indian women have
been graduating from law schools for many years, yet disproportionately few women lawyers reach leadership roles in traditional structures of the legal system. There are no women on the Bar Council of India and few on the state bar councils. Other seats of leadership where the numbers of women are disproportionately low are among the Supreme Court Advocates, law firm partners, law school deanships/vice chancellorships, and in the higher judiciary. Within these traditional structures, there is need for a close look at the specific impediments to equitable entry and to mechanisms to accelerate progress towards achieving gender equity in such positions.

We hope that this issue will prompt study, discussion and action within the legal profession itself and other social sciences.

Jane Schukoske and Ved Kumari
Guest Editors, Summer Issue 2013

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Welcome to the India Committee and to this edition of India Law News!

The presence of women in the legal profession in India has had a fair number of challenges, both with respect to bias and biology. The actual numbers and distribution vary regionally and are dependent on a number of factors. According to Catalyst’s specific reports on India, women hold 3% of legislative, management, and senior official positions in India and in 2009 and 2010, 4.9% of board directors were women, while only 3% to 6% of senior managers were women. There are hardly any statistics on women in the legal profession. The current issue of India Law News has a very timely focus on women in the legal profession. The range of articles demonstrates a plethora of issues that confront us and the depth of the articles show that, somehow, somewhere tiny, but definite, steps are being taken towards implementing change. Heartfelt thanks to Jane Schukoske and Ved Kumari for working long hours to guest-edit an outstanding issue, different from anything that the India Committee has done so far.

A high feature of this quarter was the participation of a delegation of Indian lawyers at the annual spring meeting of the Section of International Law, in April in Washington DC. The delegation was led by Mr. Lalit Bhasin, President of the Society of Indian Law Firms (and a past Co-Chair of the India Committee), and consisted of members of the top law firms across India. Delegation members attended a meeting with the ABA president, Ms. Laurel Bellows and the incoming president Mr. James Silkenat. The meeting was constructive with both sides committing themselves to work together on important rule of law and potential joint policy initiatives. Discussions were open and candid including an exchange of views on the liberalization of the Indian legal market. Mr. Bhasin confirmed that the India bar is not averse to foreign lawyers coming in on a fly-in-fly-out basis since Indian lawyers do the same. Both sides exchanged ideas freely on the issue of access to justice and the pace of court proceedings in India.

Those who attended the substantive programming of SIL’s annual meeting found an enormous range in the programming, coupled with multiple networking opportunities. The highlight of the evening program was a one-on-one with U.S. Supreme Court Justice Antonin Scalia, who hosted a reception within the hallowed precincts of the U.S. Supreme Court. Truly, a momentous experience!

On April 27, a stand-alone program was organized at the office of Baker & McKenzie on a range of topical issues, including defense procurement, franchising, distribution, trade regulation and dispute resolution, which also examined the impact of the recent Supreme Court of India decision in the Bharat Aluminum case. Distinguished
American and Indian lawyers participated in a very interactive and engaging debate on the varied subjects, exchanging views as well as forging new friendships and renewing old ones. The delegation then moved to New York and spent a packed day on April 29, meeting several U.S. law firms on their turf and exchanging views on the practice of law. This allowed access to several of the newer Indian members of the ABA to network with large U.S. law firms. Finally, thanks to the efforts of New York based Jaipat Jain, a program “Whither India” was organized at the New York City Bar where Mr. Bhasin and a panel of other delegation lawyers responded to questions regarding India, its direction, policies, laws and legal developments. Photographs of the SILF delegation’s visit are on page 43.

The activities of the India Committee continue to grow as evidenced by its extremely topical programs scheduled for the coming months. Two 90 minutes teleconferences on cross-border entrepreneurship are in the pipeline. The first one, focused on Indian entrepreneurs looking to access the U.S. market, titled "Raising Venture Capital in the United States: What Every Indian Entrepreneur Should Know," is set for August 6, 2013. Program details are set forth on page 45. This program will examine, among other things, trends and key considerations while forming a venture and will give tips for structuring as well as exit mechanisms. A second teleconference will be a program by Indian panelists for a U.S. audience on the same topic and should take place sometime in the early fall.

On behalf of the Co-Chairs, we also congratulate the ILN’s editorial board for producing an outstanding edition of the ILN. We particularly thank Bhali Rikhye whose personal time and effort expended is by no means a small one and we know that Bhali has unstintingly put in numerous hours of work and all with a smile, always. We value your efforts deeply, Bhali. Finally, we ask the members to expand the reach of the ILN and distribute it to as many people as you can.

In a short span of five years, the India Committee has proven to be one of the most dynamic committees of the ABA with its vast range of events and regular programming. In addition, there are frequent networking opportunities that are of interest to lawyers on both sides. Please pass the word around and help us in expanding our membership. Thank you for your continued support and participation.

Priti Suri
Sanjay Tailor
Sajai Singh
Practicing on the Margins of Mainstream Law—A Personal Perspective on Sexual Violence Against Women in India

By Naina Kapur

On a winter morning in 1989, I woke to a newspaper item reporting how the Supreme Court of India had reduced a mandatory minimum sentence awarded by the lower courts against two policemen for the custodial rape of a minor girl, from ten years to five years. The ground of the reduction in sentence was that the complainant was a girl of “easy virtue,” “used to sexual intercourse” and of “questionable character.” Prem Chand & Anr. Vs. State of Haryana (AIR 1989 SC 937). Instinctively, I scrambled to seek out women’s groups to file a review. My conservative law firm was disinclined to support my efforts until I mentioned “the firm will look good and it won’t cost anything” - a feather in the cap for any law firm.

Our review petition was heard by the Supreme Court. Standing as the only woman amongst all male counsel, I recall listening with intense discomfort to the Bench of Supreme Court Judges and others chuckle over the complainant’s “moral character” - as if to suggest the sentence reduction was well-founded. In the end, the Court upheld its earlier decision with a rider that any reference to the girl’s “conduct” was because of the 10-day delay in reporting the offense. State of Haryana & Anr. vs Prem Chand (1990 AIR SC 538).

How did such flawed logic become legitimate criteria for lesser justice to women who experienced sexual violence? The blinkers of mainstream legal practice dissolved and I entered the margins of legal activism or as I prefer to call it, “legal innovation.” I did not know it then, but my trajectory was always towards mapping women’s experience of sexual violence and bridging it with Constitutional Equality, a pursuit which led me to the value of experiential learning.

Travelling with a colleague to rural India, from Kerala to Kashmir, Assam to Maharashtra, we paused to ask women a simple question - “what does justice mean to you?” Across regions, language, class, caste and context, the reply was uniquely the same - “ensuring my sense of self remains intact.”

Equipped with that insight, we returned to Delhi to co-found Sakshi, (meaning “witness”) a non-governmental, not-for-profit centre to address issues related to sexual violence. Over the years, I continued to meet women across the spectrum trapped in the lived reality of retrograde attitudes that shaped mainstream law and the larger response of a status quo. I encountered women who had suffered a variety of sexual abuse, society’s apathy to it, and the callous attitude of the judicial system. These included a housewife who felt compelled to remain in a marriage after being subjected to electric shocks in a medical facility, because her husband claimed she was not sexually “up to the mark;” or parents who paid an abusive son-in-law vast sums of money to take their daughter back to pre-empt social ostracism; or a seven-year old girl who underwent ten days of cross-examination in a court-room packed with lawyers and offenders for complaining against her sexually abusive father. And I continued to see it in the corner offices where women endured the intangible inequality of sexual harassment. None of this was conducive to legal progress let alone supportive of “that sense of self” for women.
A significant turning point emerged in the 1990s because of a rural level change agent named “BD.” Engaged by the Rajasthan State government to prevent child marriages in Bhateri District, “BD” succeeded in preventing the marriage of a one-year old in an upper caste community. From then on, she was subjected to persistent forms of indirect sexual harassment by men of that upper caste community. “BD” complained to the local authority that did nothing. Instead, as a consequence, she was gang raped by five of those very men. The Bhateri gang rape case became a renewed possibility to connect the dots between sexual harassment, rape and women’s Constitutional equality. In a class action litigation before the Supreme Court of India, we proposed that sexual harassment be recognised as a violation of women’s equality rights and that institutions be made accountable and responsible for upholding those rights. Delivering a landmark judgment in *Vishaka vs. State of Rajasthan* (1997 SCR 3011), the then Chief Justice, J.S. Verma, declared that “each incident” of sexual harassment was a violation of women’s constitutional right to equality and dignity. In creating “legally binding” directions for all workplaces and institutions, Justice Verma took a quantum leap. Adapting the United Nations Convention to Eliminate All Forms of Discrimination Against Women, 1979 (CEDAW), into domestic law, the Court established that sexual harassment was no longer to be ghettoised by the archaic language and the limitations of criminal law. Rather, the failure to prevent sexual harassment emerged as a systemic failure of women’s equality rights. That shift in perception held immense potential to enrol every player, at every step, in every part of the system faced with addressing sexual harassment to consciously ask: “is my action enabling the equality rights” of this woman? After eight years on the margins, Constitutional Equality had finally breathed life into the lived experience of women, sexual violence and mainstream law. But to what end?

In the 16 years that followed this historical shift in perception, rather than authenticate the Vishaka vision through meaningful execution, the Government fell inexcusably silent. A silence which saw the rift between perception and reality widen along with a disturbing public indifference towards sexual violence.

It was an omission that cost us dearly on December 16, 2012, as a nation, as Indians, as men and women, across all walks of life. There was an overwhelming, and unprecedented rally from an otherwise habitually complacent public in its protest and outrage against the rape. Overnight, thanks to India’s youth who dragged it onto the front pages of newspapers, social media, public talks, protests and into our very homes, “rape” became a centerpiece of mainstream life in India. Change was evident in the droves of men who protested alongside the women—a presence unheard of 20 years ago. It was a change fuelled by an unexpected voice from the margins—that of the young man who accompanied his friend that fateful night. The power and courage of this one young man, who carried his profusely bleeding friend to the police van on his own despite a fractured leg, while two policemen simply watched; a man who never met with an iota of government support and obtained medical care at a private hospital; a man whose only goal was to see justice done and change arrive, rendered us speechless. Rising from the ashes of his own pain, loss, and enduring memories of that horrendous night, he quietly and candidly shared with us on national television, the truth of appalling insensitivity on the part of the police, bystanders, hospital services and the Magistrate along with the role of government politics. It was a classic case with an atypical witness—a young man, not only that rare witness to a rape, but one who exposed the elements of what was so deeply broken in our criminal justice system when it comes to women and sexual violence.

Then, whether by accident or fate there was a ray of hope when, as a response to the December incident, Justice J.S. Verma (of Vishaka fame) was asked to head what came to be known as the Verma Commission to review law reform on rape. With unmatched attentiveness, patience, homework and grace, the Verma Commission became a unique beacon for inclusiveness—one consistent with a visionary understanding of “Equality.” It afforded women, men,
representative of the LGBT community, women living in conflict zones, prosecutors, trafficked women and children, individual complainants, academics and activists the dignity of being heard. In a two day public hearing, there was no “us” or “them,” no margin or mainstream—there was only we, the People. Undeterred by the visible absence of representatives from key ministries, the Verma Commission produced a report which replicated the kind of paradigm shift in perception we saw in Vishaka. In a record 30 days, it cultivated a visionary approach to women’s position in India evidenced by the following extract from the Verma Commission Report.

Unless and until the State pursues a policy of avowed determination to be able to correct a historical imbalance in consciousness against women, it will not be possible for men and indeed women themselves, to view women differently and through the prism of equality.

Perhaps that had been the challenge to the government all along—the absence of a vision—one which could rise to address the adverse sexual realities of half its population. Seized with the issue of sexual violence law reform since 1983, the different arms of the government have never seemed compelled to do their homework between rapes. Obsessively focused on India’s economic growth, the government squandered a rare public awakening and the opportunity to educate itself. Such apathy rendered the government impotent in galvanizing a zero tolerance message against sexual violence, an expectation central to women’s democratic life in India. And when you are so ill-prepared and in power, power reveals.

On December 23, 2012, without warning, peaceful protests (which even the Chief Justice of India publicly “saluted”) at India Gate, New Delhi were met with police excesses. “Lathi” (police truncheon) charges, water cannons, tear gas, the targeting of women, and government dictat that all public assemblies were unlawful became the pattern of the day. It was one more instance of the politics of exclusion – only this time, the excluded formed half of the nation.

More revealing was the government’s response to the Verma Commission’s Report. While the Prime Minister termed it a “labour of love,” a hastily cobbled Criminal Law Ordinance on Sexual Assault (the Ordinance) that followed, betrayed the government’s true intent. Inserting definitions of sexual assault with a death penalty tagged on (the latter of which, the Commission had rejected after consultations and level-headed reasoning) the Ordinance became an eye wash and a mockery of democratic power. Not only did it shun the fundamental vision of Equality in the Verma Report, the Ordinance abdicated all the systemic priorities raised by it. In doing so, the Government disregarded most of the Commission’s substantive recommendations. These included election law reforms to remove political representation by those charged with sex offenses, deleting the marital rape exemption, police reform and accountability, internationalising medical protocols, sex education, the “breach of command responsibility” doctrine for the Armed Forces (holding a commanding officer responsible if a junior commits rape), preventive measures and, most significant, the proposed Women’s Bill of Rights (to name a few). Yet, with near juvenile posturing, the Law Minister went on national television to shamelessly declare that 90% of the Verma Report had been “accepted.” Passing such a critically flawed Ordinance was the only urgent act the government undertook on the issue of sexual violence after the December 2012 rape incident.

We are still in the midst of a churning. The proverbial jury is still out on whether the institutions of state will join the march with “avowed determination” to arrive at that “sense of self” necessary to purge our society of sexual violence. But the process has promise. Against 30 years of State indifference, we got 30 days of the Verma Commission Report that created, through a uniquely accessible and inclusive process, a paradigm shift in the way the public engaged with the issue of women’s equality and sexual violence. In contrast, the government’s ongoing decision-making continues to be
characterized by exclusion of women and experts on addressing sexual violence, and stalling on implementing the recommendations of the Verma Commission. So, what has changed? For the cynic, perhaps nothing. For me, aware optimism and living in the present have been hallmarks of perseverance on the margins. Today, it is how one woman’s tragedy, one heroic friend, one public awakening, one Commission’s efforts, a history of the women’s movement and one moment in time, became synonymous with the mainstream. What’s that, if not change?

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THE NEW WOMEN IN BLACK: FIRMS, FRAMES, FAMILIES AND FUTURES IN THE LEGAL PROFESSION IN INDIA

By Swethaa Ballakrishnen

Editors’ Note: This article is based upon preliminary findings of the author’s doctoral research that examines comparative advantages within the Indian legal profession for female lawyers. A more detailed analysis of this data is available from the Harvard GLEE project and a longer version of this article is forthcoming in the Indiana Journal of Global Legal Studies (2013). The author’s current projects on the legal profession include an attrition study on lawyers from large law firms, a law school survey to understand supply side dynamics better, and a study on prestige within legal process outsourcing firms (forthcoming in the International Journal of the Legal Profession).

In 2012, one of India’s most prestigious law firms promoted 13 senior associates to become partners. Seventy percent of them were women. The promotions were reported widely in the news media. Yet, most Mumbai women corporate lawyers are unlikely to find the number of women promoted here to be particularly surprising. Having followed a pattern of gender-blind admission to law school and recruitment by firms, many women find themselves in microcosms where their gender is not often considered of primary importance – at least not on the face of it. As a result, in elite corporate legal circles, being a successful female lawyer is no longer an aberration. Despite the severely male-gendered environment of the profession as a whole, top law firms in the country have managed to afford their associates gender-neutral environments where women are not only represented, but represented on par with their male counterparts in positions of power.

In general, this sort of success for women in established prestigious positions within any profession is noteworthy. It is especially significant when considered against the backdrop of the legal profession, where, globally, women have had to confront deeply hierarchical obstacles to entry and advancement. It is of even greater significance in India, a country that has one of the world’s least egalitarian legal workforces. For instance, as of 2010, less than 10 percent of the enrolled advocates in the Indian bar were women (http://120.138.244.28/advocates/num-advocates.php). As a point of comparison, there are fewer female advocates in the entire country than male advocates in the State of Uttar Pradesh, alone. This dissonance is pertinent from an organizational standpoint because the Indian legal profession is hardly the perfect environment for the emergence of a gender-egalitarian workspace.

My research investigates the dynamics of this finding, which is at odds with what we would intuitively expect. Essentially, I ask: what about these new law firms and the women who inhabit them can help us understand this recent—and seemingly anomalous—development? How do some women manage to come out ahead in a larger professional environment that is otherwise circumscribed by gender? I broadly suggest that the answer lies in evaluating a range of potential factors that I tag as FIRMS, Frames, Families and Futures.

FIRMS

While individual characteristics (such as education and family background) and interactional dynamics (the kinds of peers and mentors they have, the client relationships they are capable of forging) are central to understanding women in senior positions in large Indian law firms, the value of these characteristics works best in a supportive institutional context.
Litigation remains a stubbornly resistant male-dominated bastion. Thus, a common theme in my interviews with senior female firm lawyers was their having the opportunity to distance themselves from a traditional career in the hierarchical world of litigation. By not replicating the male-dominated hierarchical world of litigation in corporate practice, elite corporate law firms are offering a welcome and unique organizational alternative for the highly-educated female lawyer who wants to pursue a non-litigation legal career. When asked whether she felt as if she were part of a “diverse” class seeking inclusion in the profession, one senior lawyer offered: “Within the firm? Of course, not. Within the profession? (pause) I don’t think anymore. Maybe in litigation—but not in these types of corporate law firms.”

The perception of this senior lawyer that even within the profession as a whole she was just another lawyer, not a member of a “diverse” class, contrasts dramatically with the reality of a low female presence in the vast remainder of the profession. The perception reveals the power of new organizations (here, large law firms) to set prevailing norms and assumptions (gender-equalitarian professional spaces). It suggests one reason why women might be committed to doing well within these firms: there are few other places where their commitment is likely to pay off as well.

FRAMES

Law firms have distinguished themselves in the Indian legal profession by structuring themselves differently from traditional legal practices. But being a new kind of organization alone is usually not enough to dismantle persistent hierarchies. We know that in any organizational emergence story, building truly innovative workspaces is difficult because old frameworks of operation and management always attach themselves to new forms. In this case, conventional logic would assume that even new kinds of organizations would typically follow in adopting the hierarchies that reflect the environments they are embedded in. In other words, these large law firms, even as recent additions to the Indian legal landscape, should have been as deeply male-gendered as the professional framework from which they sprouted. So the question arises: how have these law firms managed to liberate themselves from the crutches of the larger, male gender-bound, profession?

A line of research by social psychologist Cecilia Ridgeway offers one explanation. Ridgeway, who studies women in technology firms, finds that, overall, women do better in start-ups (which are seen as a new, innovative types of workplaces) than in traditional workspaces that reiterate hierarchies. However, even in start-ups, women in the field of engineering have only limited advantages because, overall, the engineering field is strongly male-gendered, and gender hierarchies attach themselves to any new organizations that arise, no matter how innovative they may be. On the other hand, women in biotech startups enjoy superior advantages because the novel organizational start-up structure is embedded within a field (life sciences) that does not have a strong gender identity.

Accordingly, one explanation for the advantages inherited by women in these relatively new workplaces might be that these institutions are so new that there is no expectation or popular conception that the work being done there is “a man’s job.” These firms do new kinds of work (mostly transactional), for new clients (India’s active international transaction scene has followed the opening of markets in 1991) within organizations that have never been structured quite like this before. Unlike with male-centric assumptions that stifle litigating careers by women, large law firms in India are truly free to reorganize themselves in ways that creatively attack traditional hierarchies.

FAMILIES

The new trend in gender-equality in law firms also gets its impetus from women themselves. A majority of women – and associates in general – who work for these firms are graduates of the country’s premiere National Law Schools, that select incoming students using highly-competitive entrance examinations, and graduate as many women as they do men from their
rigorous undergraduate curricula. These graduates do not make a dent in the disparate gender ratios in the larger profession, but within these elite cliques women garner egalitarian treatment on merit alone.

The typical law school student from a national law school—and, by extension, the typical associate on the fast-track to partnership at one of these firms—is an English-speaking, private school-educated woman from an urban, educated family who finished law school at 21. She is likely to have made independent choices not just about where she would want to work, but also where she wants to live and who she would like to partner with or marry. As a result, her sense of agency when negotiating her professional interactions is not learned behavior, but comes naturally. Furthermore, because the typical law student starts at one of these firms in her early twenties, she enjoys a unique life-choice advantage that her global peers do not: she can be a partner by the time she is 30. Unlike an American associate who typically starts her first law firm job at 25 and cannot envisage a partnership position until later in her 30s, the Indian law firm trajectory—at least for now—places many women in positions of power without having to sacrifice choices regarding childbirth and family (or in many cases, choose to not do either).

If this does not paint a picture of the average Indian working professional, it is because it is not intended to. But while there is no doubt that these firms are championing an independent and evolved modern Indian woman with certain class and familial advantages, it remains that these women have not had other avenues by which to exercise these advantages in the past.

FUTURES

Much of the data I base these observations on are theoretical extensions of pilot interviews with senior female lawyers at large law firms in the country. While data suggesting the ability to negotiate gender hierarchies within these firms is no doubt promising for both women and emerging organizations alike, these findings are limited by important caveats. For one, there is no direct comparative case here, either at the individual level (i.e. male lawyers) or the organizational level (i.e. women in litigation or in companies), because these in-depth interviews were conducted only with senior women at law firms.

Secondly, these firms are mostly in Mumbai, India’s financial capital and a city whose “big firm” culture is more distinctly shaped by globalization than, for instance, Delhi, where large law firms are organized differently. Women I spoke with in Mumbai would often reference how “this would have been different in Delhi” while explaining their particular advantage in their large law firm. Or they might mention “friends from law school” who, in their words, “had it very different” in a similarly placed law firm in another city.

Third, limiting observations to people in these firms leaves an important section of the population outside of their purview: women who leave these firms. To truly understand the experience of these organizational forms and the barriers to success within them, understanding why women leave these firms is as crucial as understanding how they succeed within them.

Fourth, the entire advantage crafted by these experiences may be a function of age. And the reasons I suggest for this—the institutional novelty of these firms, the ability of these women to balance their work and family—might be short lived advantages. It is no doubt true that these women flourish because the challenges of motherhood and young children—traditional drivers of attrition—are not yet fully matured in their individual cases. But as these firms grow in size and respond to larger market requirements, more women in later stages of their lives and careers will have to make choices about balancing work and family. At this stage, it seems possible to be optimistic that gender will not be salient, but contrasting it with other evidence from the field leaves at least some room for doubt. For instance, the Rainmaker report, which focused on a more senior demographic of women (the sample had an average
age of 34 and over a third had more than ten years in practice) seemed to give the impression that most women lawyers did think that motherhood was a strong barrier to career advancement.

Finally, it could be that, given how few advantages there are for advancement within the profession, women who do succeed tend to self-report even greater advantages than they actually receive. While there is no reason to believe that these women are misstating their experiences, it is possible that there is some dissonance between their experiences and the exact career advantages rendered them. Of course, without systematic data on promotions and rewards, making absolute comparisons is difficult. But reports from the field seem to suggest a similar dissonance: over half the sample (n=150) of female lawyers in the Rainmaker Survey released in 2012 reported to having an equal work-life balance while another 42% felt that while they spent more time at work, they had some balance between work and life. Yet, at the same time, 90% of them thought that the lack of flexible hours, and home-related barriers like pressures to start a family (77%) and the lack of day care (85%) were the biggest obstacles at work. Thus, women were quick to confirm advantages in general but had to be pushed to tease out specific barriers they had to overcome to access these advantages.

The explication of these limitations does not diminish the fact that this is an important time in the history of the Indian legal profession. The women who are unlocking unprecedented success within environments that do not rely on their gender are a unique case not only in the context of the gender-hostile Indian legal world, but in the history of the legal profession more globally. Now that some sources of these advantages have been located, more research is required to truly unpack the mechanisms that can explain these optimistic aberrations. It is only then that we can begin to make a meaningful inquiry into the emergence and sustainability of the non-gender-salient professional workplaces.

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A Survey of the Challenges Faced by Indian Women Advocates in Litigation

By Swagata Raha and Sonal Makhija

The Indian legal industry has witnessed unprecedented growth post-economic liberalization in the 1990s. The deregulation and opening up of the Indian market for private investments and international trade led to growing demand for legal services. The growth in the number of law firms is directly correlated to this. In the last decade, the legal sector claims to have transformed from a family-based partnership model to an industry that is based on merit. The adoption of a “professional” hierarchal structure in law firms, international clients and an emphasis on rankings and branding has followed this trend. But how does this burgeoning legal industry retain its women lawyers? Why do women lawyers disappear as they move up the proverbial corporate food chain?

This question was a starting point for our study Challenges Faced by Indian Women Legal Professionals (Makhija & Raha, Challenges Faced by Indian Women Legal Professionals, 2012), on women lawyers in Delhi, Mumbai, and Bangalore. In the past decade, the number of women and men graduating from premier National Law Schools has been almost evenly split, but female numbers dwindle after a few years of practice.

Our nine-month study on the legal profession and interviews with 81 women lawyers of which 29 women were litigators unearthed some unsurprising and anticipated findings. Our study, found that women litigators now still cope with the same issues: lack of adequate sanitation facilities, overcrowded women’s bar rooms in courts, and in many cases lesser fees than their male colleagues. Moreover, clients often prefer male lawyers with less experience than women with more experience or skill.

Biases at Work

Women senior advocates widely acknowledge that a woman lawyer’s professional ability and soundness of advice arouses skepticism and doubt. Women lawyers are quick to be labelled aggressive, not serious, or frivolous. As per Senior Advocate Pinky Anand, “If a woman raises her voice to make a point, she is discerned to be cantankerous, not assertive. At times, this perception overshadows her merit and results in her being labelled aggressive.” The recent response by a Bangalore High Court judge asking a woman lawyer arguing a family law matter if she was married is a case in point. The judge labelled her as unfit to argue the case. “You are unfit to argue this case. You do not know real life. Why are you arguing like this? He is your (client’s) partner, not a stranger. Family matters should be argued only by married people, not spinsters. You should only watch…”

This inherent bias against women has meant that women have to constantly prove themselves. Women litigators in our survey admitted having to constantly prove their mettle and outperform their male peers in order to command equal, if not higher fees. The fact that women are not seen as primary bread winners further encourages clients to get away by paying less to women lawyers.

“When I was practicing in courts, as a woman, a certain tone in argument was often an implicit prerequisite to being given a fair hearing. When I started working part-time after my children were born, clients and colleagues outside my firm perceived me as not a ‘serious’ or a ‘real’ lawyer,” said a partner of a law firm based in Bangalore.
In litigation particularly, networking and socialising with almost entirely male clients proves tougher for women. Even the clients are, in certain circumstances, uncomfortable while working with women. In some cases, clients specifically choose women lawyers based on the assumption that they would command lesser fees than their male contemporaries. This inevitably affects women’s reputation and earnings. Not surprisingly, women lawyers have to fight hard for their rightful fees, which their male counterparts easily command.

**WORK-LIFE BALANCE**

Unlike in the corporate legal sector, litigation offers a degree of independence, flexibility and an opportunity to participate in legal maneuvering and challenging legal issues. For many it is the thrill of practice and the need for quick thinking that attracts them to litigation. Also, the absence of a structured rigid nine-to-five routine allows women to juggle professional and personal commitments with some ease. Many independent practitioners work from home or convert parts of their homes into office spaces. One Delhi lawyer who practiced at the Supreme Court moved her residence closer to the court and her office, to keep a watch on her son and to make trips home during the day. According to her, “[l]itigation is more than a job really- it is a ‘junoon’ (passion) for lack of a better word to adequately describe it- I could never opt out, but I think of it often enough!”

Not surprisingly then, four-five percent of women in our study felt confident of being able to strike a work-life balance. Thirty-one percent felt that work-life balance may be difficult and twenty-four percent shared that they had not even considered this aspect before opting for litigation.

Women who stayed the course in litigation practice eased the pressure through different creative approaches. One respondent opted to draft documents for other litigating lawyers who were short on time. Independent practitioners hired juniors and other legal support staff to assist them in meeting the demands of their work. Others have moved closer to court or converted their homes into offices, hired support staff to manage their homes, and yet some others have life-partners who are in the profession, making the family-professional tug easier to manage. For some others, it has meant limiting the areas of practice or the courts in which they practice.

**STRUCTURAL INFLEXIBILITIES**

Unlike women lawyers in law firms and companies, the majority of women lawyers in litigation do not receive any maternity benefit and thus there is often greater financial pressure to return to work. Emphasizing the need for a supportive and encouraging spouse or family, Senior Advocates Pinky Anand, Geeta Luthra, and Advocate Pratibha Singh, cited a supportive partner and family as a pre-requisite for a successful career in litigation. Conversely, the absence of family support has an adverse impact on one’s career. A reliable support system at home is a privilege that many do not enjoy.

About seventy-nine percent of respondents took a break after childbirth. The duration of the break ranged from six weeks to six years. Approximately forty-one percent took 6 weeks to 6 months off while forty-four percent took a break of 1-2 years. The reasons for the break were mostly to look after their child, nurse the child, and to avoid stress associated with litigation. Seven percent of the respondents cited the lack of understanding and flexibility on the part of senior lawyers and the absence of day-care within the court premises as reasons why they chose to delay returning to work. Fourteen percent of them mentioned that they had to delay returning to work as there was no support available at home to look after the child. Fifty-nine percent of the women found the transition from maternity leave to work difficult owing to various factors, such as travelling on work, an unaccommodating senior, pressure to leave the organization, and their commitment to work being questioned. The break between work, especially in an area like law, also made re-acquainting with work a challenge.
The impact of the pregnancy, maternity break, and motherhood is severe owing to structural inflexibilities that fail to include support measures that promote equality in employment. One respondent had to discontinue work at the onset of the fourth month of her pregnancy because of the long working hours, the lack of adequate or separate elevators, unsanitary rest rooms, and the bad conditions of roads. Respondents who were attached to a senior or a law firm complained of inflexible policies and the necessity of being present in office at all times that led them to quit during their pregnancy.

For approximately fifty-nine percent, pregnancy led to fewer clients and work, as it affected their visibility in courts. In litigation, most networking happens in courts where court gossip and trade skills are exchanged. Advocate Haripriya Padmanabhan shared her story - “I used to leave court immediately after my cases and rush to my baby. This meant that I was not ‘seen around’ in court where it mattered—namely, the coffee shop. Till date, many lawyers ask me if I am back to work full time when they run into me—largely, because they have not ‘seen me around’ too much. Unfortunately, part of the drill of being successful in our profession is the visibility factor.”

Fifty-two percent of women surveyed admitted that the maternity break had an adverse impact on their career. Those who found the return to practice after maternity break easy cited family support, child-care help, having an independent practice, and a relatively short break from work as reasons. Those who found it difficult attributed it to the absence of reliable childcare support, fatigue, concern for the well-being of the child, and having lost touch with practice.

Working mothers in litigation lost out on clients who preferred to opt for lawyers who were available. Their absence from chambers affected their earnings. In the words of one of the respondents, “…the work flow was cut as clients were not sure whether I would be able to manage work. There was a perception that I would not be regular in court, which I had to combat by simply being in court even when there was really nothing much to do.” Another respondent said, “[f]or about a year and odd after the baby, I was in court only when I was needed, due to which there was a perception that I was not serious about my practice. Lack of a proper crèche was a big problem during this period…So, I used to bring her in the car with me and the child would be in the car parking lot [with a nanny] for hours when I had to be in Court. Some of my other colleagues, who had babies, also followed the same routine.”

ROLE OF THE BAR COUNCIL OF INDIA IN PROMOTING A CONDUCIVE WORKING ENVIRONMENT

In her autobiography, titled On Balance, Justice Leila Seth described how “a musty storeroom” was passed off as the women’s washroom. More than five decades later, most High Courts and lower courts have abysmal working conditions, especially with respect to sanitation, making it impossible for women to negotiate the court halls. Women’s rest rooms in most courts not only lack in sanitation, but are too few in number.

Ninety-three percent of respondents strongly agreed that sanitary toilets for women on each floor of the court premises were necessary to make courts more accessible to women lawyers. Seventy-two percent of the respondents agreed that a crèche facility accessible to all within the court precincts would make the profession a lot more conducive for women. It would also encourage male lawyers to partake in their parental responsibilities while shuttling between courtrooms. Not only would it aid in curtailing the exodus of young women lawyers from the practice, but it would also bring about equity in parental responsibilities for most working couples.

Additional facilities, such as baby changing-rooms and a room where women could breastfeed their children, were considered important infrastructural requirements by respondents. Ninety-three percent of women lawyers felt that judges being accommodating and sensitive to pregnant women would make courts
more conducive. Seventy-nine percent of women lawyers felt that the sensitivity of their colleagues at the time of pregnancy, which could include assisting in taking adjournments or handling matters in courts, would also help.

Section 7 of the Advocates Act, 1961 mandates the Bar Council of India to safeguard the rights, privileges, and interests of lawyers. The State Bar Councils are also required to safeguard the interests of advocates on its roll and conduct seminars. Senior Advocate Pinky Anand has recommended that the Bar Council of India should extend support to young women lawyers at the start of their careers by encouraging the empanelment of women by organizations. In furtherance of their statutory mandate, the Bar Council of India and State Bar Councils should undertake measures to support the entry and growth of women in litigation.

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“He was the son of a lawyer, often born into a family where the practice of law had been a tradition for generations. He was a Hindu and, more likely than not, a Brahmin. He was born in an urban area into a wealthy or upper middle-class family...He may have met the usual criteria of merit-integrity, professional competence, incorruptibility, and neutrality towards litigants- but was not selected for that reason. His religion, seniority, state and region of origin, among other considerations, were more weighty than merit as traditionally defined.”

George H. Gadbois, Jr. (2011), Judges of the Supreme Court of India

This is the description of the archetypal judge of the Supreme Court of India that Gadbois describes in his rigorously researched and recently published work on Indian Supreme Court judges during the period 1950-1989. The dominantly pervasive He in the above account speaks widely of the crisis of under-representation of women in the Supreme Court of India. It was not until October 6, 1989, that the Indian Supreme Court had its first woman judge, M. Fathima Beevi, who was appointed at the age of 62. This appointment though historic, was far from transformative for gender diversity on the bench. Since then only four more women have been appointed to the Supreme Court of India. Justice Sujata Manohar was appointed in 1994, Justice Ruma Pal in 2000. Justice Gyan Sudha Misra and Justice Ranjana Desai, appointed in 2010 and 2011 respectively, are presently serving in the Supreme Court. The figures in the High Courts are equally skewed:

<table>
<thead>
<tr>
<th>High Court</th>
<th>Sitting Judges</th>
<th>Women Judges</th>
<th>% of Women Judges (as on Dec. 1, 2012)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allahabad High Court</td>
<td>86</td>
<td>4</td>
<td>4.6</td>
</tr>
<tr>
<td>Andhra Pradesh</td>
<td>31</td>
<td>1</td>
<td>3.2</td>
</tr>
<tr>
<td>Bombay</td>
<td>55</td>
<td>6</td>
<td>10.9</td>
</tr>
<tr>
<td>Calcutta</td>
<td>41</td>
<td>5</td>
<td>12.2</td>
</tr>
<tr>
<td>Chattisgarh</td>
<td>12</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Delhi</td>
<td>35</td>
<td>7</td>
<td>20</td>
</tr>
<tr>
<td>Gauhati</td>
<td>23</td>
<td>2</td>
<td>8.7</td>
</tr>
<tr>
<td>Gujarat</td>
<td>29</td>
<td>3</td>
<td>10.3</td>
</tr>
<tr>
<td>Himachal Pradesh</td>
<td>11</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Jammu and Kashmir</td>
<td>6</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Jharkhand</td>
<td>10</td>
<td>1</td>
<td>10</td>
</tr>
<tr>
<td>Karnataka</td>
<td>39</td>
<td>2</td>
<td>5.1</td>
</tr>
<tr>
<td>Kerala</td>
<td>30</td>
<td>2</td>
<td>6.7</td>
</tr>
<tr>
<td>Madhya Pradesh</td>
<td>32</td>
<td>2</td>
<td>6.2</td>
</tr>
<tr>
<td>Madras</td>
<td>50</td>
<td>7</td>
<td>14</td>
</tr>
<tr>
<td>Orissa</td>
<td>12</td>
<td>1</td>
<td>8.3</td>
</tr>
<tr>
<td>Patna</td>
<td>36</td>
<td>4</td>
<td>11.1</td>
</tr>
<tr>
<td>Punjab and Haryana</td>
<td>42</td>
<td>4</td>
<td>9.5</td>
</tr>
<tr>
<td>Rajasthan</td>
<td>22</td>
<td>4</td>
<td>18.2</td>
</tr>
<tr>
<td>Sikkim</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Uttarakhand</td>
<td>8</td>
<td>0</td>
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</tr>
</tbody>
</table>

It is astounding that the conspicuously dismal gender ratio of the judges in the higher judiciary (High Courts and the Supreme Court) in India has failed to generate any meaningful debate on gender diversity in the Indian judiciary. Any attempt to raise and discuss this concern is thwarted with the apprehensions that, at best, are articulations of a “trickle-up” theory (the increase in the number of women lawyers would automatically increase the number of women judges in high courts and the Supreme Court) and at worst
assume the merit argument (i.e. when women will become competent and meritorious, they would definitely be appointed as judges!). And what we are left with is an appalling, absolute silence about this issue in spite of many questions requiring serious deliberation. What are the reasons for exclusion of women from judiciary? Why is it important to make an argument for inclusion of women in the judiciary? If representation of women judges is important, then what steps should be taken in India towards this end?

This paper seeks to open up the above questions in the context of the judiciary in India. I shall draw upon a survey that was undertaken by Jindal Global Law School of O.P. Jindal Global University during May-July, 2012 to gauge the reasons behind poor representation of women in higher judiciary in India.

The survey questionnaire was circulated through email to around 1,500 advocates (in Delhi, Mumbai, Bangalore, Chennai and Allahabad) and law academicians (in law schools and faculties across India, including Delhi University, National Law Schools, Indian Law Institute). Despite repeated reminders, we (at Jindal Global Law School) received a surprisingly low response of 101 respondents who successfully managed to complete the online survey. Of those who did respond, 50.5% were law academics in India and others identified themselves as practicing advocates.

Due to the limited response, which is hardly representative of the community of practicing advocates and professors, the findings of the survey cannot be taken as conclusive in themselves. Though the findings do not furnish any substantive evidence of the “real” reason behind the under-representation, I rely on these findings as signposts- indicators for further research on this scarcely researched issue. Without making any categorical generalizations, based on a very small sample, I shall use the findings to explore the issue and locate a theoretical position on the question of gender diversity in the judiciary.

REASONS FOR THE ABSENCE OF WOMEN FROM THE BENCH

Generally the absence of women from the bench is solely connected to the absence of women in litigation and the absence of senior women advocates. This, no doubt, is an important factor that limits the pool of women from which selection has to be made. The exclusion of women from the bar is also evident from the fact that the Bar Council of India (BCI) which is a national level body regulating the bar in India, is a body which predominantly, or rather entirely, is constitutive of men as its members. Out of the 20 current members of BCI, none is a woman. No Chairperson or Vice Chairperson of BCI till date has ever been a woman.

If this were not enough, there is a complete absence of women in the Committees of BCI. Not even a single committee is constitutive of women. Still further, it was pointed out in a recent study on women legal professionals in India that women constitute less than ten per cent of the Senior Counsels or Advocates-on-Record. These figures demand an inquiry into the systemic processes and structural apparatus which restrict conferment of responsibilities of power to women in the legal profession. To attribute the exclusion of women advocates from the pool of appointments to lack of meritorious women advocates is ignoring the structural and systemic considerations that are significant to women’s entry and progress in the judiciary.

It is noteworthy that while the majority of the respondents (34.5%), of the survey, believed that lack of meritorious women lawyers is not a barrier at all for women in entering the judiciary, a much higher percentage of respondents (62.1%) identified lack of transparency in the judicial appointments to lack of meritorious women advocates is a significant barrier for women entering the higher judiciary in India.

The lack of transparency in judicial appointments became an endemic problem after the Supreme Court decision in *Supreme Court Advocates-on-Record*
Association v. Union of India (AIR 1994 SC 268). In this judgment the court decided that a collegium, constitutive of the judges of Supreme Court and the Chief Justice of India, would be instrumental in appointments to be made in the Supreme Court. This radical interpretation took away the power of appointment from the executive and vested it solely with the judiciary. This extra constitutional logic of self-serving interpretation has been critiqued by both the bar as well as Indian academia. The Indian Judiciary has been accused of being the only judiciary in a democracy which appoints its own self! However, despite the long standing criticism the system goes on and higher judicial appointments remain shrouded in secrecy and non-transparency. This has foreclosed the introduction of all possibilities of diversity that move beyond tokenism. Around 60% of the respondents believed that it is the male dominated appointment collegiums that constitute as a major hindrance for inclusion of women in the higher judiciary. These figures are further corroborated by the fact that the gender-ratio of judges in the subordinate judiciary, where appointments are based on objective criteria of open competitive examination, is considerably better than the High Courts and the Supreme Court. Trickle-up to high courts and Supreme Court does not happen since the criteria of selection and appointment at the higher echelons of judiciary remains largely a subjective issue.

It was also pointed out by 42.5% of the respondents that disproportionate family and household burdens, and lack of educational opportunities (48.2% of respondents) constituted significant barriers for women’s entry into higher judiciary in India. Interestingly, more than one-third of the respondents (35.6%) felt that gender stereotypes about women being too emotional, sentimental and irrational was not an obstruction for women (though 27.5% of them felt that it was a significant barrier for appointment to the Supreme Court). Owing to the small sample size these findings may not be sufficient to draw generalizations, but they do call for establishment of gender task forces to surface hidden forms of gender-based discrimination faced by women legal professionals.

Why Should Women Be Included in the Judiciary?

Difference Argument

Many claims for inclusion of women in the judiciary are couched in the language that women judges would speak in a different voice. One respondent remarked that women judges would “address gender specific issues” and their presence would ensure “a more humane approach towards gender related offences.” It was also said that women judges would “understand diverse emotional and social complexities.” Women judges, it is believed, would understand women related issues better than their male counterparts and thus substantially improvise and feminize the quality of justice. 62.4% (76.08% of them were women) believed that women will bring “a valuable and new perspective to the bench.” Here it is important to fully understand and unpack the expression “valuable and new perspective.” Would women judges bring a new perspective because their sex makes “women have better conflict resolution skills” (as suggested by one of the respondents)? Or, because, women are better at understanding women-related issues (as 23.8% respondents emphasized)?

The argument that differences based on sex would lead to discernible differences in rendering judgments because women think differently than men, is not based on any empirical evidence. Moreover, this simplistic connection between sex and thought-process is fraught with the dangers of essentialism, i.e., it makes an assumption of an essential quality of “womanness” shared by all women, and only women exclusively. Such an assumption imagines a universal category of “woman” without any internal divisions and disagreements. It assumes that every woman is automatically a feminist, merely based on her sex and thus obfuscates the distinction between “sex” and “gender”, the latter being a social construct that symbolizes power. Using sex/biological status as the variable for greater representation in the judiciary fails to locate the adjudicating capabilities of the judge in his
or her class, region, ethnicity, generation, educational background, judicial philosophy, etc.

The corollary to this essentialist claim—it is impossible for women to represent men, just like it is impossible for men to represent women—can potentially disadvantage women by restricting their judicial functions only to women and children-related issues like juvenile justice, divorce cases, sexual harassment, etc. Apart from pinning women judges to stereotypes about women—the ethic of care, emotions, greater sensitivity—such a rationale diverts attention from the immediate need for gender training for all judges notwithstanding their biological status or sexual orientation. Gender symbolizes power. Understanding gender would, on one hand, unmask the reality of patriarchal power being exercised by woman, on the other hand, would enable us to appreciate the fact that many “feminist decisions” in the history of Supreme Court of India have been delivered by the male judges.

**Diversity Argument**

53.6% of the respondents rejected the aforementioned difference argument and stated that “the outcome is not dependent of the sex of the judge”. A female respondent, a practicing advocate, stated that she has witnessed “shocking statements made by women judges in gender-related violence cases as well!” So, if the difference argument is rejected, should a claim for greater women in judiciary still be made? The answer is in the affirmative.

Having more women on the bench is important not because that would change or improve the decisions of the court, but because it would lead to greater diversity of views and experience which in turn would enhance the quality of judicial decision making. This gives a new meaning to the expression “valuable perspective.” Women would bring valuable perspectives not because they are women but because their presence on the bench would make judiciary more diverse, inclusive and reflective—values that would significantly contribute to the legitimacy of the institution. The legitimacy of the judiciary rests in the institution being seen and respected as an impartial and fair institution. Adequate (if not proportionate) representation of women on the bench would play a significant role in enhancing the *de facto* legitimacy of the judiciary as a democratic institution. On one level, it would deconstruct the hegemonic “social meaning” that women do not make good judges, on another level it would reconstitute the judiciary as a reflective body—reflective (and thus representative) of almost half the population of the country. The presence of women on the bench would counteract the “perception of bias” against women, even if it does not make any substantive difference to the outcome of the cases. This essentially turns the argument from difference to diversity. This shift signifies fair and equal access to justice for all, compared to the outcome-based argument based on difference. A woman judge may not decide the case differently than a male judge, but a woman litigant may perceive the outcome to be the result of a fair and impartial trial. So it is for its own credibility and effectiveness that the judiciary should be striving for gender diversity.

**AFFIRMATIVE ACTION FOR GENDER DIVERSITY IN THE JUDICIARY**

The crisis of under-representation of women in the judiciary needs to be addressed with concrete action towards inclusion. What form should such affirmative action assume? In India, affirmative action is understood in terms of reservation of a fixed number of seats. The Constitution of India mandates 33% reservation for women in the elections of lowest tier of governance—Panchayats.

There is a long pending Bill for reservation of 33% seats for women in the Parliament. There is also a provision of horizontal reservation for women in lower judicial service examinations. Should the same scheme of reserving a fixed number of seats be extended to High Courts and Supreme Court of India? 45.1% of the respondents of the survey stated that there should be affirmative action for women in the judiciary but it should not take the form of reservation of seats. 58.5% of the respondents said that reservation is not a good
strategy at all to increase women’s participation in higher judiciary. It was instead pointed out by 76.5% respondents that it is very important that the appointment process should be solely based upon merit.

This takes us back to the politics of “diversity” versus “merit” where the two are set as antagonistic and competing goals. There is no doubt that reservation may not be a workable solution because of the perception that it would compromise merit, but merit cannot be considered solely and exclusively to vest with men.

To resolve the myth of merit, it is significant to deconstruct the notion of “merit.” Are quotas/reservations inherently against merit? Or is it possible to think of gender diversity as constitutive of a meritorious judiciary. If an individual’s appointment enhances the legitimacy of the judiciary as a democratic institution—does it not qualify as an appointment based on merit? These are extremely important questions that need extensive debate and discussion amongst practitioners as well as theoreticians.

It is also very important to understand and explore the meaning(s) of affirmative action. Is affirmative action synonymous with quota/sex based reservation of particular number of seats, or does it have the potential of taking multi-faceted dimensions according to the position/office/institution in question. The survey reveals that in the higher judiciary in India, affirmative action can acquire the form of systems that make appointments to higher judiciary more transparent (as emphasized by 62.2% of the respondents).

It can also concurrently mean that the current system of appointment (of male dominated collegiums) should be changed to include more women on the appointment panel (suggested by 47.6% respondents). But the question is whether more women on the collegiums would automatically produce more women judges? Sally J. Kenney in Gender and Justice: Why Women in the Judiciary Really Matter (2012) argues that merely having a critical mass of women would not necessarily increase the number of judges in the future. She argues that concerted steps introducing qualitative changes in the judiciary should be taken to train collegiums/judges to avoid discrimination and stereotyping and to secure a gender diverse bench a priority of the appointment process. Here, it is pertinent to note that the Indian Supreme Court has maintained considerable regional diversity so that the Apex Court represents all the regions. A similar approach should be adopted for securing gender diversity. It may require setting guidelines for the appointment process (constitutional amendments making diversity an explicit goal on the lines of section 174(2) of South African Constitution; adopting new strategies (open advertising for candidates for judicial appointments) or even creating new institutions (e.g., Judicial Appointment Commission, U.K.). Immense benefit can be drawn from the experience and strategies adopted in other jurisdictions to achieve this end.

The survey, on one hand, emphasized the need to secure gender diversity, on the other hand, maintain ‘merit’, to be the most significant consideration in judicial appointments. It also opened up possibilities to think beyond quota-based reservations for women in the judiciary. Affirmative action towards gender diversity must take the form of overhauling structural changes in the process of appointments. To prevent the higher courts from turning into “old boys clubs,” the establishment of a more inclusive system of appointment, which is not limited to sitting judges, is imperative. The legitimacy of the Indian legal system is dependent on whether the judiciary reflects the total fabric of society and whether its decisions are responsive to the needs of different segments of the society.

To achieve these twin goals, we first require more women (irrespective of whether they are feminists) and then more feminists (irrespective of whether they are women) on the bench.
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India has recently grabbed the wrong kinds of headlines, mostly having to do with the prevention and prosecution of sexual assaults and rapes of Indian and foreign women. But there is another battle being fought which escapes media attention, particularly outside India. That is the fight for protection of women against sexual harassment in the workplace.

Over the years, women in and out of the workplace have been and continue to be objectified by men who take liberties with remarks laced with sexual innuendo and even go to the extent of outright demands for sexual favors. Binding guidelines to protect women from sexual harassment in the workplace have been the law of the land ever since the Supreme Court’s decision in \textit{Vishaka vs State of Rajasthan} (1997 SCR 3011). \textit{Vishaka} established that each incident of sexual harassment was a violation of a woman’s constitutional right to equality and dignity in all workplaces and institutions. Lofty sentiments expressed in the Constitution, statutes and case law, however, are often lax in the enforcement. The guidelines were never effectively implemented let alone enforced. Thus, the focus of efforts to prevent and punish acts of sexual harassment shifted to employers, requiring them to enforce mechanisms to protect their women employees from sexual harassment in the workplace. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act of 2013 (Sexual Harassment Act), effective April 22, 2013, imposes upon the employer the responsibility to prevent a hostile work atmosphere for its women employees.

Sexual harassment is a violation of the fundamental rights of a woman to equality as guaranteed under Articles 14 and 15 of the Constitution of India, her right to life and to live with dignity as per Article 21 of the Constitution and right to practice or to carry on any occupation, trade or business under Article 19(1) (g) of the Constitution, including the right to a safe working environment.

The ambit of the act is wide enough to make it applicable in the organized as well as the unorganized sectors. The definition of “workplace” includes all government bodies, private and public sector organizations, non-governmental organizations, organizations carrying on commercial, vocational, educational, entertainment, industrial, financial activities, hospitals and nursing homes, educational institutes, sports institutions and stadiums used for training individuals. “Employees” include daily wage basis laborers and contract laborers, who either directly or through an agent, work with or without the knowledge of the principal employer, whether for remuneration or on a voluntary basis, or whether the terms of employment are express or implied. The term “employee” includes co-workers, probationers, trainees, and apprentices. A woman of any age subjected to any form of sexual harassment whether at the workplace or a dwelling house is covered by the Act. Sexual harassment includes unwelcome physical or verbal contact, showing of pornography, demands for sexual favors as well as sexually colored remarks. Every offence is treated as non-cognizable. (A non-cognizable offence under Indian criminal law requires a court-ordered warrant in order for the police to make an arrest.)

Section 19 of the Act requires the employer to provide a safe working environment by displaying conspicuously at the workplace the criminal
consequences of acts constituting sexual harassment. The composition of the Internal Complaints Committee in the workplace, workshops and awareness programs at regular intervals to sensitize employees on such issues, are some of the measures required by the Act. Sexual harassment is misconduct of a serious nature and the offender risks prosecution and punishment. Where an employer fails to comply with the provisions of the Act, it imposes a penalty of up to INR 50,000 (U.S. $830 based on the official exchange rate in June/July 2013, or roughly $2,500 on a purchasing power parity basis).

The Act also requires the employer to timely address grievances of sexual harassment in the workplace and to initiate action against the complainant in case of a malicious complaint. This provision is designed to deter false allegations against co-workers.

Due to the growing awareness of the need for an enforcement mechanism, Section 354A has been added to the Indian Penal Code, 1860, which lists the acts constituting the offence of sexual harassment that are punishable with imprisonment for a term of one-to-three years, or a fine, or both. Thus, the amendment criminalizes all acts of sexual harassment against women and imposes harsh penalties upon the convicted offender.

India’s economic liberalization has continued to bring with it unprecedented social and demographic mobility for men and women. That mobility has laid bare the ostensible conflict between traditional and modern values. Paradoxically, Indian mythology and folklore typically place mothers and sisters on a pedestal, but only if they play their assigned roles as mothers and sisters within a patriarchal system. Moving from deifying women in the traditional sense to simply treating them with respect and dignity in the workplace should not be difficult. Apparently, it is, and women have had no option but to advocate for moves by Parliament to criminalize sexual harassment as the most important component of a campaign to restore civility in the workplace.

It is to be hoped that the threat of prison and fines under the legislation of 2013 will at last reduce, if not eliminate, the scourge of sexual harassment. A typical working woman may finally see herself treated with respect in the workplace, and accepted not as one with goddess-like characteristics or some mythological ideal of “woman,” but just as a woman who is an equal member of society deserving of the same respect, dignity and freedom as any man.

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India’s public interest litigation revolution started in earnest 34 years ago in 1979, when, as the Indian Express described it in a January 6, 2010, article, “a woman lawyer confidently climbed the 17 steps of the Supreme Court and walked into a cold, thick-walled courtroom without a thought for the frowns trained at her from the high priests of Indian judiciary and her male colleagues.” That solitary figure was the indomitable Pushpa Kapila Hingorani. Interviewed for this newsletter recently, she stated modestly: “I filed a habeas corpus writ petition under Article 32 of the Constitution, prepared by my husband, N.H. Hingorani.” The facts underlying the writ petition were laid out in two articles published in the Indian Express newspaper in January 1979 by K.F. Rustamji, a distinguished and highly respected senior police officer. The article shed light on the appalling suffering of accused persons all over India in jail awaiting trial (“undertrial prisoners”).

In its decision in the case (Hussainara Khatoon & Others vs. Home Secretary, State of Bihar case [(1980)] 1 SCC 81) (also known as the Undertrial Prisoners’ Case), the Supreme Court of India recognized the right of anyone arrested “to expeditious trial and legal aid” as a fundamental right under Article 21 of the Constitution of India. The Undertrial Prisoners’ case led to a flood of public interest litigation, which to this day, is one of the most effective ways to hold the executive branch of government accountable to its citizens. Ms. Hingorani was the pioneer who sparked that revolution.

The Supreme Court bench that heard Ms. Hingorani’s writ petition was so shocked by what it learned during deliberations that it ordered the immediate release of over 40,000 undertrial prisoners from various jails nationwide. Shocking facts were revealed in the case. Many prisoners were in jail for longer periods than if they had been charged, tried, convicted and given maximum sentences. People were held in jails for as long as ten to 12 years, or even longer periods of time without a trial or bail. These forgotten inmates included a man whose file had been lost, a girl of ten who had allegedly stolen something in a cinema hall. Probably the most distressing and common cases were of women who were in jail, not because they had committed crimes, but because they were victims who were needed to give evidence in cases.

The Court observed that “the offences with which some of them were charged were trivial, which even if proved, would not warrant punishment for more than a few months, perhaps for a year or two, and yet these unfortunate forgotten specimens of humanity were in jail, deprived of their freedom, for periods ranging from three-to-ten years without even as much as their trial having commenced. It is a crying shame on the judicial system which permits incarceration of men and women for such long periods of time without trial.” While there were a few public interest cases brought before 1979, public interest litigation really came into its own after the Undertrial Prisoners’ Case. What made public interest litigation different was that a case could now be brought by any non-aggrieved member of the public or even the court itself (suo motu or sua
sponte), rather than only by an aggrieved party. The petitioner could be a member of the public, a non-governmental organization (NGO), an institution or an individual. Public interest litigation is brought under the original writ jurisdiction of the higher courts, in essence the writs of habeas corpus, mandamus, and certiorari, but framed in the Constitution as Article 226 for the High Courts and Article 32 for the Supreme Court. Recent public interest litigation has focused on environmental protection, town planning, public safety and the right of the poor to food paid for by the government. Ms. Hingorani has the singular distinction of being the catalyst for the explosion of public interest litigation whereby the judiciary began issuing orders to remedy injustices that had been allowed to fester by a cobwebbed and special-interest mired executive.

In a long and distinguished career, Ms. Hingorani, a professed Gandhian, has filed and argued over 100 pro bono public interest litigation cases in the Supreme Court of India. Many have resulted in judgments providing relief to the poor and under privileged.

The now 85 year old Ms. Hingorani was born on December 27, 1927, in Nairobi, of parents who had migrated to Kenya from India. She was brought up in a spiritually observant reformist Hindu community, with a conservative social outlook. Of her education, Ms. Hingorani told this newsletter:

After completing my schooling in Nairobi, I wanted to go abroad for further study. However, it was not considered appropriate for girls in those days in our community and my mother wished to get me married at an early age. Despite the unwillingness of my mother, my father, a teacher and social reformer, encouraged me to apply to various universities in Britain. I became the first girl in our community in Nairobi to do so and to go overseas for higher studies. At the age of 19, in 1946, I left Nairobi for London to join Cardiff University to study English, Economics and History. Along with my studies at Cardiff, I also joined the Honourable Society of Lincoln’s Inn in London to be a barrister.

Over the next few years, Ms. Hingorani remained involved in different activities. These activities included working in villages in India, writing books for beginning readers, participating in a UNICEF research project on children of Asian communities in Kenya, teaching at the University of Delhi, conducting training in drama in an institute run by UNESCO and the Asian Institute of Drama, and finally becoming a barrister in 1960.

I came to settle in India in the year 1961, and started legal practice in the Supreme Court of India, where only one woman lawyer was in practice at the time. In those days women in law practice had to face several challenges. Acceptance was the greatest challenge for women lawyers when I started legal practice in India. Nobody thought we were serious about the profession. But presently, there is no such challenge for women lawyers. Now, female attorneys just need honing of their skills appropriately to achieve leading positions in the legal profession. Undoubtedly, there are immense prospects for women (today) to practice law in India, with a number of women also becoming judges.

When asked what sorts of strengths in the next generation of women lawyers/legal professionals would help them handle the challenges they will likely face, Ms. Hingorani suggested women lawyers have “the courage to face challenging circumstances, both professionally and socially. They should be equipped with adequate skills to ably compete with others…. Indomitable optimism and [a] can-do spirit would further help them while dealing with adverse situations, enabling them to succeed in the legal profession.”

Ms. Hingorani emphasized that it is essential that women lawyers practice in their areas of competency from the beginning. They should be groomed... accordingly from the very beginning [and] they should be "encourage[ed] to be independent and to have the confidence to stand alone. Imbibing such strengths and values will definitely reshape their personalities [as effective lawyers]."
Harkening to her own social activism, Ms. Hingorani added that early grooming and encouragement "would not only help women enhance the scope of their professional activities, but also to play a greater role in the society at large."

Ms. Hingorani is currently a senior Partner in a family law firm – her husband Mr. N. H. Hingorani, her son Dr. Aman Hingorani, and two daughters Ms. Priya Hingorani and Dr. Shweta Hingorani are all advocates. Her daughter-in-law, Dr. Manni Hingorani, is a surgeon. Ms. Hingorani said that she was fortunate to be able to develop her legal skills and social activism because of her own strengths and commitment but also because of the support, first of her father and then of her husband. She, in turn, supported and encouraged her own daughters. Dr. Shweta Hingorani is a corporate lawyer and gave this newsletter her perspective on women lawyers engaged in corporate law:

The development of corporate law and corporate law firms in India has essentially taken place post liberalization of the economy in the early 1990s. Accordingly, compared to the West, this has been a fairly recent phenomenon. Nonetheless, there already exists a discernible trend of greater participation by women in corporate law and, as in the case of the corporate sector, more women are occupying senior positions in corporate law firms. In my experience, firms by and large offer a level playing field for women legal professionals. However, it may sometimes be a challenge to establish one's authority and competence, at least initially, with certain clients, particularly those drawn from government and the public sector.

Ms. Priya Hingorani, active in the practice of law since 1990, has appeared in the Supreme Court of India, High Courts of Delhi, Calcutta, Bombay, Chandigarh, Orissa and Jammu & Kashmir as well as subordinate Courts and Forums. She also enjoyed the prestigious position of being the youngest advocate ever to be elected as Vice President, Supreme Court Bar Association, New Delhi (2005-2006). On being asked how the legal profession has changed for women since her mother’s beginnings in law, and what challenges women might face in the future, she commented:

Now, many more women are opting into legal professions, but most of them prefer to join the corporate sector and quite a few [are working] in litigation. As far as the biased situation against women in particular is concerned, it is still very much prevalent in the legal profession as well. However, during my mother’s time it was greater because only a few women were in the legal profession. Women have to work harder to prove themselves again and again, particularly in the litigation sector. There is a condescending kind of attitude towards women in the legal profession. That’s why [maybe] only five or six out of 600 women lawyers could have been designated as senior advocates and achieved the leading positions.... Nevertheless, women lawyers can still make a lot of difference like my mother did by becoming path-breakers. However, it is not easy to survive independently for self-made women lawyers.

Echoing her mother’s experience, Priya Hingorani added, it would have been very difficult for me also to reach my present position without my family support.

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Editors’ Note: This article is based, in part, on conversations by the author with Ms. Hingorani and her family.
Dr. Neeru Chadha

Dr. Neeru Chadha assumed charge as the head of the Legal and Treaties Division of the Ministry of External Affairs Government of India on 1st June 2012. This Division is responsible for advising the Government of India on international legal matters. The input of this low key Division is critical to all international transactions of the Government of India whether bilateral or multilateral. Dr. Neeru Chadha as the head of the Division is the highest ranking Legal Advisor to the Government of India on international law. She holds a doctorate in law from University of Delhi and is among a select group of high-ranking women in the Foreign Ministry.

Dr. Chadha’s appointment is a big achievement; with it, not just India, but South Asia, got its first woman Legal Advisor. What is significant about her appointment is that both within the Ministry and outside it was expected and assumed by all that Dr. Chadha would assume this position, an assumption which evidently stemmed from the competence and the tremendous reputation that Dr. Chadha has acquired with her work since she joined the Division in 1992.

This reputation was further enhanced by her work as Legal Adviser in the Permanent Mission of India to the United Nations in New York from 2006-2009. That this competence and not her gender drove the appointment does seem a move from the Muthumma days when a woman could be appointed to the foreign service only if she undertook not to marry. Dr. Chadha with a 30 year strong marriage joined the Division as a married woman and has undertaken her various travelling responsibilities including the three year stint in New York with a spouse who has, like her, viewed their marriage as a joint enterprise --- a relationship which helps them both grow.

Shashi Tharoor, in one of his recent writings, spoke about the qualities of a diplomat as one who can win over without seeming to do so. This goal is reached through logic and reason well oiled with charm and humour. Mr. Tharoor may well be describing Dr. Chadha. Dr. Chadha’s doctoral thesis was described as an eminently readable and convincing argument for gender non discrimination by Professor Dietrich Conrad, one of her thesis examiners and one of the leading international scholars of constitutional law. She has masters in law from both the Universities of Michigan and Delhi but she carries her learning very lightly. Even as large parts of Dr. Chadha’s writings live a cloistered and faceless existence in the various international reports of the Government of India, her published writings on equal work rights for women have been much appreciated. Her thesis, much to the regret of her supervisor and friends, remains unpublished as her multifarious official responsibilities have always prevailed over personal ambition for this officer.

Dr. Chadha in her doctoral thesis had mounted a strong argument for equality of opportunity between...
men and women. It was her view that once the legal and cultural barriers to the participation of women were lifted women will come into their own. Laws and policies which prevented such participation stemmed from prejudicial understanding and constituted deprivation and discrimination. Affirmative action may be required in the short term but paternalism would only dwarf and suppress. She advocated for a level playing field and has demonstrated with her own life and career what a woman can do when she gets that fair chance at home and work.

For Neeru Chadha evidently her achievements are achievements of a competent and hardworking human being. Having not felt the disadvantage of her gender at home and abroad she holds that the key to success lies in untiring perseverance. She sees herself as a model of what can be achieved with sincerity and hard work. Without disagreeing with her credo, it is important to add that Neeru Chadha shows what women can do when provided equality of opportunity and a fair chance. Once structural inequality is addressed the achievement is personal and Dr. Chadha’s special achievement is that she has totally neutralized the prejudicial parameter of her gender with her competence; and most significantly she has obtained this neutralization not just for herself but for all around her. Dr. Chadha’s appointment which was not coloured either by the prejudice of gender or by the desire to do affirmative action may well indicate that the level playing field is starting to arrive at least in some places for women. It is hoped that other hard working, passionate, competent women will follow on the trail blazed by Dr. Chadha.

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_Editors’ note: Noted author Shashi Tharoor, Minister of State for Human Resource Development and Member of Parliament for Thiruvananthapuram, is a former Under Secretary General of the United Nations._

_C. B. Muthamma was the first woman to join the Indian Foreign Service, in 1949. Having been denied promotion to an ambassadorship, she brought suit against the government on the ground of gender discrimination. She also challenged as discriminatory the Foreign Service’s rules against married women. The Supreme Court of India, in C.B. Muthumma v. Union of India & Ors. [1979 AIR 1868], directed the government to “overhaul all service rules to remove the stains of sex discrimination, without waiting for ad-hoc inspiration from writ petitions...” The Court dismissed the petition on grounds of mootness as the Ministry of External Affairs had promoted Ms. Muthumma to India’s Ambassador to the Hague during the pendency of the case._
Women lawyers in India have come together to form organizations which play a vital role in society. These organizations are run with the intention of bringing about a change in society. While this article concentrates on four major women lawyers’ organizations, many more exist at various local levels along with a number of loosely held affiliations.

The Society of Women Lawyers-India (“SOWL”) came into existence in 2010, as a by-product of a handful of lawyers working in different capacities such as practitioners, sole proprietors, in-house counsels, partners of law firms from various parts of India joining hands to form a platform focusing on three main topics: increasing and exercising influence, building and strengthening client relationship and client practice, and achieving and maintaining balance. SOWL, although at a very nascent stage, lays prime emphasis on mentoring young professionals. It is the only organization of its kind in all North India, and has support from lawyers around the world. SOWL has various committees formed under it such as the legislative and policy committee that addresses issues related to employment equality, domestic violence at the workplace and protection against sexual harassment. SOWL has partnered with an international organization called i-Probono. The i-Probono initiative connects civil society and non-governmental organizations with legal support from volunteer lawyers. SOWL provides training and continuing legal education, hosts seminars and legal talks, and assists in legal policy and research analysis.

A recent example of SOWL’s contribution in legal policymaking came to light after the infamous Nirbhaya rape and homicide case (the “Delhi Gang Rape Case) that took place in the capital city in December 2012. The incident led to mass outrage not only in Delhi but in cities all across India at the inability or unwillingness of the police and government to charge and prosecute such crimes instead of brushing them under the rug. The incident led to SOWL conducted legal discussions among women lawyers on issues related to safety, protection of women and prevention of crime against women. As a result of these concerted legal discussions, SOWL provided recommendations for amendments in the various criminal laws of the country including the Indian Penal Code, Code of Criminal Procedure and the Indian Evidence Act. These recommendations have been incorporated in the Criminal Law Amendments Ordinance of 2013.

The All India Federation of Women Lawyers (“AIFWL”) is another organization of women lawyers. It was established in 2007 by Ms. Sheela Anish and operates out of Bangalore. AIFWL’s objective is to uphold and safeguard the constitutional rights of the citizens of India. It promotes the rights and welfare of children and women and has done commendable work in this field. It held a seminar in Chennai on the issue of the “girl child” creating awareness about the need to protect girls and their rights. AIFWL also jointly organized with National Commission of Women a seminar focusing on the “night shift of women workers” in Bangalore, where a large number of women are employed in call centers, business process outsourcing and IT Companies. The seminar highlighted difficulties faced by women working at night including the issues of harassment and exploitation at work. The constant efforts of AIFWL have found considerable support by many in Indian. AIFWL is affiliated with the International Federation of Women Lawyers and has thus has helped in
women and makes sure that no discriminatory laws against women are passed. It initiates public interest litigation and policy level interventions. Majlis also has a project called “Fellowship to Women Lawyers in District courts of Maharashtra” which was started in 2003. It has so far awarded 100 fellowships to women and equips women lawyers with resources to defend their women clientele and implements legal interventions in rural and backward areas of Maharashtra.

While the work undertaken by these women lawyers’ organizations may not be voluminous in nature, they have definitely brought about remarkable change in their own sphere. These organizations address pressing issues in our society and provide relief to those affected. Members of these organizations work from different parts of the world with the aim of giving back to the community.

Priti Suri is the President and one of the founding members of SOWL-India. She is also the founder partner of PSA, a corporate business law firm. Her areas of expertise are corporate, commercial law, cross-border transactions and M&A. Priti is also a Co-Chair of the India Committee of the American Bar Association’s Section for International Law. She may be contacted at p.suri@psalegal.com.

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Editors’ Note: The recent patent law decision of the Supreme Court of India on April 1, 2013 (Novartis A. G. v. Union of India & Others, Civil Appeal No. 2706-2716 of 2013), involving the Novartis-manufactured cancer drug, Gleevec (to treat leukemia), made headlines around the world and heightened concerns in the international pharmaceutical industry that India would not provide adequate patent protection for innovative drugs. But when looked at closely, the court’s decision turned on the facts of this particular case, and the meaning of Section 3(d) of India’s Patent Act of 1970, as amended in 2005, under which a new form of a known substance is not patentable, unless the applicant can show that the new form significantly enhances the known efficacy of the known substance. As Mr. Lakshmikumaran, a preeminent Advocate, who has argued frequently before the Supreme Court, lays out in this article, any inference that the decision spells weak future patent protection in India is misplaced.

Novartis filed for a patent in 1998 in India for a “beta crystal” form of imatinib mesylate, a drug designed to treat leukemia. Novartis had been marketing this drug under the brand names Gleevec™ and Glivec™. Novartis claimed the “beta crystal” form was a new version of a previously patented variation of imatinib mesylate and, therefore, entitled to a patent. Twelve years later, in April 2013, the Supreme Court of India upheld the decisions of the Controller of Patents and Designs, as well as of the Intellectual Property Appellate Board, both of which had held that the new version was not patentable because Novartis had failed to demonstrate that the new version had “increased efficacy” as required Section 3(d) of the Indian Patents Act, 1970, as amended in 2005.

3. What are not inventions – the following are not inventions within the meaning of this Act...

(d) the mere discovery of a new form of a known substance which does not result in increased efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such process results in a
new product or employs at least one new reactant.

**BACKGROUND FACTS**

Novartis filed a patent application in India on July 17, 1998, claiming priority based upon a Swiss patent application dated July 18, 1997. At the time of filing of the application, Indian patent law did not allow product patents. Under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO), however, India had until 2005 to phase in product patent protection. Applications prior to that date could be filed in a “mailbox” for consideration after 2005. This is what Novartis did. As long as the application remains in the mailbox and the patent is not granted, generic manufacturers can freely produce the drug without fear of legal action. Once the patent is granted, however, generic manufacturers will either have to obtain a voluntary license from the patent-holder, or a compulsory license from the Patent Office, and pay royalties to the patent-holder. In the absence of either, generic manufacturers must stop production. Novartis had also applied for and received Exclusive Marketing Rights (EMR), for Glivec, under Section 24A of the Patent Act, pending a decision on its patent application. Notably, the increased efficacy requirement of Section 3(d) had not yet been enacted when Novartis made its mailbox filing of its patent application in 1998 for the beta crystal form of imatinib mesylate. That provision was not enacted until 2005. Whether or not the beta crystal form of imatinib mesylate was patentable turned to a large extent on the meaning of “efficacy” in Section 3(d). Did “efficacy” mean “therapeutic efficacy” or “physical efficacy?”

Novartis’s application was examined after 2005 when the Indian Patents Act was amended to fully comply with the TRIPs requirements. However, prior to examination of the patent application, five pregrant petitions opposing the application had been filed under section 25(1) of the Patents Act. In response, Novartis filed affidavits relating to the beneficial physio-chemical properties of the new form over known substances. Novartis also referred to the 30% increased bioavailability of the new form. Bioavailability is the degree to which a drug or other substance becomes available to the target tissue after the drug has been administered. Here, again, the question was whether increased bioavailability would suffice for overcoming the increased ‘efficacy’ requirement in Section 3(d).

On January 25, 2006, the Assistant Controller of Patents and Designs rejected Novartis’s application for grant of the patent on the several grounds, including anticipation by US Patent 5,521,184 (the patent that had been granted to one of the inventors, Jurg Zimmermann for imatinib derivatives), and the lack of “inventive step” in view of the Zimmermann patent and the knowledge of a person skilled in the art. The rejection was also based on Novartis’s failure to demonstrate that the beta crystalline form of imatinib mesylate satisfied the requirements of Section 3(d). The concept of anticipation in patent law disqualifies an invention from patent protection if the invention is already disclosed earlier such that they may not be considered new or novel—novelty being a requirement for patentability. Thus, “anticipated” inventions are not patentable. The “inventive step” (non-obviousness) threshold, a feature present in most patent laws, requires that an invention should be sufficiently inventive — i.e., non-obvious — in order to be patented. Under Indian law, the Applicant is also required to identify the feature that involves a technical advance or economic significance over prior art. The Assistant Controller granted the applications of those who had opposed awarding Novartis the patent.

Novartis appealed the decision of the Assistant Controller and on June 26, 2009, the Intellectual Property Appellate Board (IPAB) reversed the findings of the Assistant Controller on the issues of anticipation and lack of inventive step. The IPAB, however, affirmed the Assistant Controller’s finding that the product was non-patentable under Section 3(d).

Novartis appealed the IPAB order to the Supreme Court of India. The Supreme Court rejected the patent application holding that it did not fulfill the requirements of Section 2(j) (definition of “invention”), 2(ja) (definition of “inventive step”) and 3(d) of the Act. (Novartis should have first approached the High Court first, but the Supreme
Court exercised its discretion to hear the matter on an exceptional basis in view of certain special circumstances, including the importance of the legal issues involved. However, the Court strongly discouraged future litigants from side-stepping the High Court by appealing directly to the Supreme Court.)

QUESTIONS PRESENTED TO THE SUPREME COURT OF INDIA

The critical issue before the Supreme Court was how to interpret Section 3(d). The Court broke down its analysis into three broad questions: First, how must the terms “efficacy” and “increased efficacy” be interpreted? Second, was Section 3(d)’s “increased efficacy” something more than the recognized patent law principle of “inventive step?” Third, what was “known substance,” and “known efficacy,” and had Novartis provided sufficient evidence to prove that the new version had “increased efficacy” over the “known substance.”

“EFFICACY”

Looking at legislative intent, the Court noted that Section 3(d) was amended during the process of allowing product patents in all fields of technology. The court recited a detailed account of the parliamentary debates on Section 3(d) and the circumstances under which it was enacted. The Court even referred to the communications issued by third parties, such as the WHO to the concerned Indian Minister. The Court concluded that Parliament’s underlying legislative intent was to ensure fair access to medicines. The Court observed that Section 3(d) was amended, as it stands today, in order to allay concerns that the pharmaceutical product patent regime would undermine public health considerations. The provision was intended to prevent patent monopolies from being unfairly extended or prolonged, thereby affecting access to medicines. This led the Court to make the following finding:

“[We have] no doubt that the amendment/addition made in section 3(d) is meant especially to deal with chemical substances, and more particularly pharmaceutical products.”

After thoroughly reviewing the background behind the introduction of the provision, the Court, in accordance with recognized principles of statutory interpretation, went by the ordinary meaning of the term “efficacy,” i.e., “the ability to produce a desired or intended result.” The Court also noted that the application of the definition/meaning would vary based on the product under consideration. Having found that the provision was intended to deal with chemical substances, and more particularly pharmaceutical products, the Court held:

“Therefore, in the case of a medicine that claims to cure a disease, the test of efficacy can only be “therapeutic efficacy.””

The Court went on further to hold that “With regard to the genesis of section 3(d), and more particularly the circumstances in which section 3(d) was amended to make it even more constrictive than before, we have no doubt that the “therapeutic efficacy” of a medicine must be judged strictly and narrowly.”

Various propositions were presented to the Court, in terms of defining how exactly this can be proved. For instance, one proposition was that increased bioavailability can never be sufficient for the purposes of overcoming Section 3(d). Another proposition was that “efficacy” and proving “enhanced efficacy” were to be kept flexible, such that safety or significantly reduced toxicity should also be taken into account. However, the Court did not render a finding on these propositions since, in its view, it was not necessary to rule on them to adjudicate the matter.

SECTION 3(D) IS A DISTINCT AND INDEPENDENT CRITERIA

Novartis had argued that to the extent a ruling had already been made that the claimed product possessed an inventive step, it could not be considered as a “mere discovery of a new form of a known substance,” and hence, should not be rejected under Section 3(d). Section 3(d) was only inserted, Novartis argued, out of abundant caution to make it
legislatively clear that such mere discoveries are not to be granted patents.

The Court, however, rejected this argument. While noting that the argument made sense in terms of the existing scheme of the legislation, the Court held that it nonetheless missed an important distinction—the distinction between “invention”, which subsumes “inventive step” and “patentability.”. “Invention means new product or process involving an inventive step and capable of industrial application.” Section 2(1)(j). “Inventive step means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art.” Section 2(1)(ja). Section 3, on the other hand, defines what are not ‘inventions’.

The Court was of the view that “if clause (d) is isolated from the rest of section 3, and the legislative history behind the incorporation of Chapter II in the Patents Act, 1970, is disregarded, then it is possible to see section 3(d) as an extension of the definition of ‘invention’ and to link section 3(d) with clauses (j) and (ja) of section 2(1).” However, in a further analysis of the parliamentary history, the Court found no evidence of a legislative intent to enact Section 3(d) out of “abundant caution.” Rather, the Court was of the view that the legislative history confirms the intent to keep the requirements of ‘patentability’ under Section 3 separate from the concept of ‘invention’ under Section 2(1)(j).

The Court concluded that under the scheme of the Act, an applicant must satisfy the twin tests of “invention” and “patentability” for grant of a patent.

**THE DECISION ON FACTS**

**A. The “Known” Substance**

Section 3(d) requires comparison of known efficacy of the claimed product with a known substance. The “known” efficacy in this case was not in dispute—the molecules had anti-cancer properties. However, there was extensive debate on what the “known substance” in this case was. While Novartis was of the view that “imatinib free base” was the “known” substance, the opposition regarded “imatinib mesylate” as the known substance. To rule on this issue, the Court analyzed the coverage and disclosure of the cited prior art document - Zimmerman patent. (“Prior art” is all prior publically disclosed information about the product.)

The Zimmerman patent had a large “Markush” claim and even referred to “pharmaceutically acceptable salts” in the claim. A Markush claim, named for the U.S. Patent case of Ex parte Markush, 1925 C.D. 126 (Comm'r Pat. 1925), typically occurs in chemical patent claims and enables the protection of a class of compounds rather than a few specific structures; in other words, a single claim covers alternative chemical structures. Referring to claim scope and extracts of the Zimmerman patent, the Court noted that imatinib free base was itself disclosed and mesylate salt was disclosed as one of the salt forms in which imatinib can be used. Based on this, the Court held that the Zimmerman patent disclosed “imatinib mesylate.” The Court even referred to a finding issued by the Board of Patent Appeals in the U.S. on the corresponding U.S. application for the beta crystalline form, which had concluded that the earlier Zimmerman patent did “teach” “imatinib mesylate”, but stops short of teaching its beta crystalline form. (“Teach” in patent law means to inform and instruct using the documents making up the prior art. The teaching is done by referring to the technology disclosed or revealed by the prior art.)

Going further, the Court also referred to the conduct of the patent applicant as that conduct had a material bearing on the issue. Throughout the entire history of the F.D.A. approval process behind its drug, the applicant had consistently taken the stand that the Zimmerman patent covered “imatinib mesylate.” The patent applicant had also sought an extension of the term for the Zimmerman patent citing the regulatory approval time for Gleevec™. The Court even referred to a legal notice issued by the patent applicant in the U.K., where infringement of the Zimmerman patent was alleged against a generic drug whose active ingredient was “imatinib mesylate.” Based on these facts, the court concluded that mesylate salt was clearly disclosed and claimed in the Zimmerman patent. The patent applicant
attempted to argue that in reality, while “imatinib mesylate” was covered within the scope of the earlier claim, it was not disclosed in an enabling manner in this prior art patent. Rejecting this argument, the Court held:

“…Under the scheme of patent, a monopoly is granted to a private individual in exchange of the invention being made public so that, at the end of the patent term, the invention may belong to the people at large who may be benefited by it. To say that the coverage in a patent might go much beyond the disclosure thus seem to negate the fundamental rule underlying the grant of patents.”

“We certainly do not wish the law of patent in this country to develop on lines where there may be a vast gap between the coverage and the disclosure under the patent; where the scope of the patent is determined not on the intrinsic worth of the invention but by the artful drafting of its claims by skillful lawyers, and where patents are traded as a commodity not for production and marketing of the patented products but to search for someone who may be sued for infringement of the patent.”

B. Enhanced Efficacy:

Having found that the “known” compound in this case was “imatinib mesylate”, to overcome the barrier of Patentability under Section 3(d), it was now imperative for Novartis to prove that beta crystalline form of Imatenib mesylate had enhanced therapeutic efficacy over “imatinib mesylate”.

Novartis had relied on two factors to support its patent application vis-à-vis Section 3(d): the first being that the better physio-chemical properties of the new form (better flow properties, better thermodynamic stability, and lower hygroscopicity) made it easier to make, process and store the drug; and the second being that the new form had 30% more bioavailability as compared to previous known forms. The Supreme Court rejected the first argument since better physio-chemical properties were not shown to have anything to do with therapeutic efficacy.

In response to the argument on increased bioavailability, the Supreme Court stated:

“…the position that emerges is that just increased bioavailability alone may not necessarily lead to an enhancement of therapeutic efficacy. Whether or not an increase in bioavailability leads to an enhancement of therapeutic efficacy in any given case must be specifically claimed and established by research data.”

That was not shown in this case. The Court declined to hold that increased bioavailability can never be used for the purposes of Section 3(d).

CONCLUSION

Throughout the Novartis judgment, the Supreme Court took considerable pains to note that its decision is limited to the facts of the case. The following quote summarizes the attitude of the Court:

“We have held that the subject product...does not qualify the test of Section 3(d) of the Act but that is not to say that Section 3(d) bars patent protection for all incremental inventions of chemical and pharmaceutical substances.”

The Court made it very clear that Section 3(d) was only intended to “check any attempt at repetitive patenting or extension of the patent term on spurious grounds” and is not to be interpreted so as to “undo the fundamental change” under Indian law to allow product patents for pharmaceuticals. The rejection of the patent application in this case relates more to Novartis’s failure to produce research data connecting the increase in bioavailability to an increase in the therapeutic efficacy.
In sum, the Court’s holding in Novartis sets forth two broad principles: First, Section 3(d) was intended to apply especially for chemical substances, particularly to pharmaceutical products. Second, Section 3(d) can only be overcome by showing an enhancement of “therapeutic efficacy.” By declining to rule on how to establish increased efficacy the Court gave patent applicants sufficient flexibility. The Court’s conclusion that “[w]hether or not an increase in bioavailability leads to an enhancement of therapeutic efficacy in any given case must be specifically claimed and established by research data,” goes to show that the application of the provision is to be evaluated on a case-to-case basis, rather than taking a one-size-fits-all approach. Finally, while the Novartis decision is a reminder that patent applicants must address Section 3(d) with care and finesse, by no stretch of imagination can the decision be construed to be the death-knell of pharmaceutical patenting in India.

V. Lakshmikumaran is the Founder and Managing Partner of Lakshmikumaran & Sridharan (L&S), a full service law firm which he founded in 1985. Based in the firm’s New Delhi office, Lakshmikumaran is an Advocate and Patent Agent. He has advised several leading companies in India and abroad on managing IP portfolios in India, on licensing agreements, valuation of IP assets, and litigation strategy. He is also an authority on the TRIPS agreement and has advised on its interpretation and application. He has handled several high profile cases in the Supreme Court of India. His clients include many well known Fortune-500 companies and leading Indian corporations. He can be reached vlakshmi@lakshmisri.com.
The doctrine of adverse possession states that a person in possession of property for a certain period of time and subject to the requirements of law acquires a good title to the property, if the owner does not initiate any action within the prescribed limitation period. The Supreme Court of India, in the case of State of Haryana v. Mukesh Kumar [2011 (10) SCC 404], criticized the law of adverse possession by calling it an “archaic law” which needs to be re-examined to prevent injustice.

The State of Haryana, on behalf of Gurgaon's Superintendent of Police, filed suit in the Court of the Civil Judge for declaratory judgment granting the State adverse possession of certain property adjoining a police station. The ground of the claim was that the police had been in possession of the property for approximately 55 years. The court, on considering various precedents, revenue records of the property and other documentary evidence, dismissed the government’s suit stating that the defendants were the true owners of the property. The court held, first, that the ostensible possession by the police was not for a continuous period of 55 years. Moreover, the court found that not only had the property been acquired recently but the acquisition had been affected by forceful means. The State of Haryana appealed to the Additional District Judge and thereafter to the High Court. Both courts affirmed the decision of the Civil Judge. The State of Haryana then filed a special leave petition before the Supreme Court of India (equivalent to a petition to the U.S. Supreme Court for a writ of certiorari).

The Supreme Court dismissed the special leave petition on the grounds that it lacked merit. The Court noted that here the instrumentalities of the government, including the police, attempted to possess land adversely. “This, in our opinion, [is] a testament to the absurdity of the law and a black mark upon the justice system’s legitimacy. The Government should protect the property of a citizen - not steal it. And yet, as the law currently stands, they may do just that.”

If the protectors of law become the grabbers of the property (land and building), then, people will be left with no protection and there would be a total anarchy in the entire country.

It is indeed a very disturbing and dangerous trend. In our considered view, it must be arrested without further loss of time in the larger public interest. No Government Department, Public Undertaking, and much less the Police Department should be permitted to perfect the title of the land or building by invoking the provisions of adverse possession and grab the property of its own citizens in the manner that has been done in this case.

Noting the development of the doctrine in England and the U.S., the Court stated that the doctrine was now “baffling” and “illogical” in the Indian context because it gave sound title to persons illegally in possession of land for a period of 12 years.

The doctrine of adverse possession arose in an era where lands were vast particularly in the United States of America and documentation sparse in order to give quietus to the title of the possessor and prevent fanciful claims from erupting. The concept of adverse possession exits to cure potential or actual defects in real estate titles by putting a statute of limitation on possible litigation over ownership and possession. A landowner could be secure in title to his land; otherwise, long-lost heirs of any former owner, possessor or lien holder of centuries past could come forward with a legal claim on the property. Since independence of our country we have witnessed registered documents of
title and more proper, if not perfect, entries of title in the government records. The situation having changed, the statute calls for a change.

In order to remedy the problem, the court suggested that Parliament should increase the time period from a mere 12 to 50 years and should abolish “bad faith” adverse possession. The court also stated that the adverse possessor should compensate the owner according to the prevalent market rate of the property.

The law of adverse possession, as it exists at present, is extremely harsh on the true owner and provides a windfall to a dishonest person who is in illegal possession of the property. The Court has called upon Parliament to take a “serious re-look” at this “archaic” and inequitable law and it is hoped that proposed legislation will soon be introduced in Parliament to amend it.

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Annual Year-in-Review

Each year, ABA International requests each of its committees to submit an overview of significant legal developments of that year within each committee’s jurisdiction. These submissions are then compiled as respective committee’s Year-in-Review articles and typically published in the Spring Issue of the Section’s award-winning quarterly scholarly journal, *The International Lawyer*. Submissions are typically due in the first week of November with final manuscripts due at the end of November. Potential authors may submit articles and case notes for the India Committee’s Year-in-Review by emailing the Co-Chairs and requesting submission guidelines.

India Law News

*India Law News* is looking for articles and recent Indian case notes on significant legal or business developments in India that would be of interest to international practitioners. The Fall 2013 issue will be on civil aviation. Please read the Author Guidelines available on the India Committee website. The deadline for submissions is September 1, 2013. Note that, *India Law News* does not publish any footnotes, bibliographies or lengthy citations. Submissions will be accepted and published at the sole discretion of the Editorial Board.
The India Committee is a forum for ABA International members who have an interest in Indian legal, regulatory and policy matters, both in the private and public international law spheres. The Committee facilitates information sharing, analysis, and review on these matters, with a focus on the evolving Indo-U.S. relationship. Key objectives include facilitation of trade and investment in the private domain, while concurrently supporting democratic institutions in the public domain. The Committee believes in creating links and understanding between the legal fraternity and law students in India and the U.S., as well as other countries, in an effort to support the global Rule of Law.

**BECOME A MEMBER!**

Membership in the India Committee is free to all members of ABA International. If you are not an ABA International member, you may become one by signing up on the ABA website. We encourage active participation in the Committee’s activities and welcome your interest in joining the Steering Committee. If you are interested, please send an email to the Co-Chairs. You may also participate by volunteering for any of the Committee’s projects, including editing a future issue of the India Law News.

Membership in the India Committee will enable you to participate in an online “members only” listserv to exchange news, views or comments regarding any legal or business developments in or concerning India that may be of interest to Committee members.

We hope you will consider joining the India Committee!

**UPCOMING SECTION EVENTS**

**Raising Venture Capital in the United States: What Every Indian Entrepreneur Should Know**
August 6, 2013
Organized by the India Committee of the Section of International Law
Location: N/A
Format: Teleconference
See page 45 for details and no-fee registration for this program
VISIT OF THE DELEGATION OF THE SOCIETY OF INDIAN LAW FIRMS (SILF) TO THE ABA SECTION OF INTERNATIONAL LAW (SIL) APRIL 2013 SPRING MEETING IN WASHINGTON, D.C.

Lalit Bhasin (front row, center), leader of the SILF delegation, with ABA SIL India Committee Co-Chairs, Sanjay Tailor, Priti Suri (both to his immediate left) and Sajai Singh (second from right) and other SILF delegation and India Committee members at the United States Institute for Peace in Washington, D.C., on April 25, 2013. The SILF delegation was given formal recognition by the Section of International Law at this dinner reception.

SILF delegation members at Weil, Gotshal & Manges LLP, in New York City, on April 29, 2013, pictured here with delegation leader, Lalit Bhasin, and ABA SIL India Committee Co-Chairs, Priti Suri (to the right of Mr. Bhasin) and Sajai Singh (back row, fifth from the left).
SILF delegation members at Nixon Peabody, LLP, in New York City, on April 29, 2013, pictured here with SILF delegation leader, Lalit Bhasin (front row, third from left) and ABA SIL India Committee Co-Chairs Priti Suri (to Mr. Bhasin’s right), Sajai Singh (back row, third from left) and incoming Co-Chair, Richa Naujoks (front row, third from right)

SILF delegation and ABA SIL India Committee members at the offices of Baker & McKenzie LLP in Washington, D.C., for the Stand Alone program on April 27, 2013. The White House and Washington Monument (wrapped in scaffolding for renovation) are visible in the background
THE INDIA COMMITTEE PRESENTS:

A Teleconference on

Raising Venture Capital in the United States: What Every Indian Entrepreneur Should Know

With the growing trend for India-based start-ups and entrepreneurs looking to the US for fundraising, mentorship and a potential market, the India Committee of the ABA Section of International Law is pleased to present a timely teleconference on cross border entrepreneurship focused on Indian entrepreneurs looking to access the US financial markets. The program will examine key considerations for an Indian early-stage business looking to access US venture capital (VC) funding, including structuring, incorporation, securities laws, tax and intellectual property considerations. This 90-minute program will discuss the US startup/VC eco system, explore the opportunities and challenges for Indian businesses seeking to access this eco system, and delve into the specifics of fundraising in the US.

Date: August 6, 2013
Time: 7.30 p.m. IST/10:00 a.m. EST/7:00 a.m. PST
Duration: 90 minutes
Panel:

Andrew S. Hazen, Ruskin, Moscou & Faltischek, P.C., New York
Anirudh Suri, The India Internet Group, Mumbai
Siddharth Raja, Samvād: Partners, Bangalore
Tom C. Thomas, Pillsbury, Winthrop, LLP, San Francisco

Register: Register for this complimentary teleconference at the India Committee homepage on https://apps.americanbar.org/aba_timssnet/meetings/tnt_meetings.cfm?action=long&primary_id=IC08113&webtextid=60186&Subsystem=MTG&related_prod_flag=0 or email aba.india.committee@gmail.com.

With our unique panel consisting of US and Indian VC fund managers and lawyers, this program will provide an excellent platform for discussion and Q&A.

A second teleconference will take place in the fall of 2013 aimed at a US early-stage businesses looking to expand into India and to access Indian markets and consumers.