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1. Introduction

The Supreme Court of India sees itself as the guardian of fundamental rights and constitutional principles, and many consider it as one of the most powerful Supreme Courts in the world. Its jurisdiction is very wide and it has strong powers over other state organs[1]. The higher judiciary as a whole, including the Supreme Court and twenty-four high courts, played a prominent role in the evolution of Indian law after Independence. Judicial activism is a well-known feature of the Indian legal system; the development of public interest litigation, promoting access to justice for the protection of fundamental rights, has further enlarged the Supreme Court's prerogatives[2]. The higher judiciary has in many cases built from scratch or entirely changed parts of Indian law, virtually writing new legislation in judgement shape[3]. The Supreme Court and the high courts have been called to judge on a number of difficult issues spanning ever more intricate and significant questions concerning Indian society and institutions – conflicts with the legislative and executive powers have arisen around specific issues and in more systemic terms when the limits of the power to amend the Constitution were involved or the independence of the judiciary was at risk[4].

* Peer reviewed.
1 On the Supreme Court's powers see, for instance, M.P. Jain, *Indian Constitutional Law*, Gurgaon, LexisNexis, 2018.
2 See S. P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, New Delhi, Oxford University Press, 2002 and S. Ahuja, People, *Law and Justice: Casebook on Public Interest Litigation*, Vols. 1 and 2, London, Sangam Books, 1997.
3 Among the many examples, one can consider the Vishaka case (Vishaka v. State of Rajasthan, Supp. 1997, 3 S.C.R. 404); see A. Mehta Sood, "Gender Justice through Public Interest Litigation: Case Studies from India", *Vanderbilt Journal of Transnational Law*, 41, 2008, pp. 833-906.
4 See M.P. Singh, "Securing the Independence of the Judiciary: The Indian Experience", *Indiana International and Comparative Law Review*, 10(2), 2000, pp. 245-292.

Even though the work of the Supreme Court of India, and generally of the higher judiciary, has been criticised[5], according to most scholars these courts have consistently moved towards the realisation of constitutional values and norms, following the "revolutionary" inspiration of the Indian Constitution, and have been successful in assuring a functioning rule of law[6]. In addition, in a country where the judiciary as a whole is often slow and ineffective[7], citizens' trust with regard to the Supreme Court is high, notwithstanding the fact that many important decisions inevitably raised discontent in some parts of Indian society[8].

Who are these judges? Do they reflect the vast diversity of Indian society? This article deals with the issue of reflective judiciary in the Indian context focusing on the higher judiciary and, particularly, on the Supreme Court. It aims to provide a description of the role diversity plays in the appointment of judges, and of the broader Indian debate about a reflective judiciary – an issue of increasing prominence both in India and other parts of the world[9].

The Constitution regulates the composition and the appointment of judges of the Supreme Court and high courts. The numeric composition of the Supreme Court has been amended several times to keep pace with the increasingly large number of cases the Court has to deal with[10]. Although constitutional norms regarding the procedure for the appointment of judges have not been amended, important changes have been introduced by way of interpretation and convention. Particularly important is a group of judgments collectively known as the *Judges Cases*. As we will see, these were principally three judgments that led the judiciary to take the main responsibility for nominating new members of the higher judiciary

[5] See B. N. Kirpal, et al. (eds), *Supreme but not Infallible: Essays in honour of the Indian Supreme Court*, New Delhi, Oxford University Press, 2000.

[6] M.P Singh ("Securing the Independence of the Judiciary: The Indian Experience", cit, p. 291): writes: "Among all the troubles and tribulations India has faced since the commencement of the constitution, the judiciary has performed its role fairly well. In its times of trouble with the executive, the judiciary has received the spontaneous and sustained support of a powerful legal community and of the people in general. Therefore, the judiciary has generally been able to maintain its independence and perform its role along the expected lines. I often wonder whether the largest democracy on earth, among all its adversities, has been able to sustain and effectively operate its constitution because of the constitution makers' vision of an independent judiciary and the sustenance of their vision by the people of India. In spite of many failings, it is no mean achievement for the people of India and their institutions that they have been able to sustain a democratic constitution where all others in similar or even more favorable circumstances have either not attempted or failed. The independence of the judiciary appears to be one of the most prominent factors in the occurrence of this phenomenon. Let us therefore, preserve, protect, and promote it".

[7] See, for instance, J.K. Krishnan, et al., "Grappling at the Grassroots: Access to Justice in India's Lower Tier", *Harvard Human Rights Journal*, 27, 2014, pp. 151-189.

[8] See B. N. Kirpal, et al. (eds), *Supreme but not Infallible*, cit.

[9] On this global debate see, among the many works on the topic, K. Malleson and Peter H. Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*, Toronto, University of Toronto Press, 2006.

[10] From the original eight judges, the *Supreme Court (Number of Judges) Amendment Act*, 2008 fixed the maximum number at thirty-one and they are currently twenty-five.

– a significant shift from the past. A fourth Judges Case was added in 2015, when the Supreme Court declared unconstitutional the 99th Constitutional Amendment Act 2014, which aimed to establish the National Judicial Appointments Commission, and the related National Judicial Appointments Commission Act 2014, regulating the working of this new body. These Acts would have resulted in limiting the dominant if not exclusive role of the judiciary, and particularly of the Chief Justice, in appointing judges of the higher courts. Both Acts came into force in 2015 but the Supreme Court declared them unconstitutional in the same year, raising much criticism from politicians and legal scholars[11].

The Judges Cases regard the relationship between the judiciary and the executive in appointing judges rather than the problem of diversity as such, but they contain some reference to diversity and are clearly helpful to frame the issue and its implications. Diversity is not an explicit criterion for the appointment of judges neither in the Constitution nor in later interpretive developments. However, informal practices exist in order to promote a judiciary that is reflective of Indian society by taking into account the vast range of diversity in India with regard to states, religions, social background, and gender. In fact, new research shows that diversity is already an important, albeit informal, criterion guiding the selection of judges. As we will see, this is particularly important with regard to federalism and geographical representation, much less so in relation to inclusiveness in terms of religion, social background and gender.

Diversity thus emerges in informal conventions in the appointment of judges. During debates in the Constituent Assembly, merit alone was the paramount criterion in appointing judges, which led to many critical voices raising attention to the under-representation of lower social classes and women, and increased the profile of the issue as a whole.

The relation between merit and diversity is a complex one. The principle of diversity may entail one judge being appointed in preference to another, setting aside seniority and prior experience. Even though in this example a conflict with merit may seem evident, the concept of merit itself is vague. Many senior judges have considerable merit if one assesses their individual expertise and legal skills; therefore, a sort of ranking of judges is a difficult and probably unsound exercise. Diversity, then, can be a factor in defining merit, taken in a broad and contextual sense, rather than the opposite of merit. To assess the merit of a judge to become a member of the Supreme Court means identifying the best possible judge for that specific position at a particular moment. From this perspective, the assessment of merit should

[11] See C. Chandrachud, "Constitutional Falsehoods: The Fourth Judges Case and the Basic Structure Doctrine in India", [in R. Albert & B. E. Oder (eds), *An Unconstitutional Constitution? Unamendability in Constitutional Democracies,* Springer, Forthcoming], (September 2, 2017), available at SSRN: https://ssrn.com/abstract=3031280

include not only legal expertise but also diversity, considering the overall context. However, in the realm of law, values and opinions need to be demonstrated as legitimate in the normative framework. In this regard, as we will see, according to Singh, diversity in the judiciary is an implicit principle that is coherent with the spirit of the Indian Constitution[12].

On the other hand, is diversity a value to be pursued on a symbolic level or as a substantive value having an effect on the quality of the decisions of the court? Even though diversity is a criterion actually used in the appointment of judges, it is difficult to draw any established conclusion about the consistency and effects of these informal practices of reflection in the composition of the Supreme Court of India and to assess if diversity improves the quality of a decision. A critical point highlighted by Chandrachud is that benches, normally including from two to five judges, are the "units" that decide cases, and it is unlikely that these benches reflect the diversity of the Court as a whole[13].

After a brief introduction to pluralism in Indian society and to the organisation of the higher judiciary, this article will analyse formal norms concerning the appointment of judges as provided for in the Constitution and case law. Secondly, it will analyse the informal practices that, in fact, influence the appointment of judges according to the principle of diversity. Thirdly, the article will consider the coherence of this principle with the Indian constitutional framework, the debate about the need to introduce explicitly and formally a reflective judiciary in India, and the issue of its symbolic and substantive value in the Indian experience.

The importance of the Supreme Court of India and the pluralism of Indian society make the Indian experience a significant one in the debate about the appointment of judges and reflective judiciary. As a country taking part in the Common Law tradition, speaking broadly, the UK and US models are certainly prominent models for India, but they are not the sole models and the Indian legal system is slowly but consistently finding its own way to balance the complex issues raised by diversity in the courts.

2. Indian pluralism and the judiciary: constitutional provisions and interpretation on the appointment of judges

The issue of judicial diversity is all the more important if a society is composite and pluralistic. In this respect, India presents characteristics of great plurality on many levels. In fact, Indian culture and society

[12] See M.P. Singh, "Merit in the Appointment of Judges", *Supreme Court Cases*, 8, 1999.
[13] See A. Chandrachud, *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court*, New Delhi, Oxford University Press, 2014.

are very complex due to the many overlaps and interactions that have taken place historically in an extremely large territory[14].

A first aspect to emphasise is religious pluralism. India is predominantly Hindu, but many other important religions are present. The Indian Muslim community, although representing only about 15% of the Indian population, is in absolute terms one of the largest in the world. Numerically smaller on a national scale but important in some areas of India, and more generally on a cultural level, are also the Buddhist, Jain, Sikh, Christian, Parsi and Jewish communities. It is also worth remembering that Hinduism itself is not a unitary phenomenon and, within it, there are religious traditions that can be very different from one another[15].

On the social level, there is the controversial issue of the social organisation of castes and of divisions following a high castes/low castes logic, including for the sake of simplicity among the latter the Untouchables (*Dalit*), who are lower than low caste Hindus in the social hierarchy. In the Indian context, social hierarchies of this kind affect also those belonging to non-Hindu communities; in addition, India has many large indigenous communities (*Adivasi*), which are marginalised by other groups. Social divisions do not follow only caste lines but also those of wealth and economic status, and the two aspects are often connected. This is particularly important, given the poverty of large parts of the Indian population[16]. Perhaps even more important is the condition of women, which in many respects remains far from satisfactory[17].

India also has a large geographical diversity and strong national identities. This includes Indian languages – India is multilingual, and linguistic diversity has had an important role in defining the character of Indian federalism[18]. At a very general level, it is also important to highlight the interweaving of different cultures and the constant interaction of indigenous and western cultural elements[19].

This extreme plurality has always represented an unavoidable question on the institutional level. The Indian Constitution is the output of a very difficult exercise in balancing the interests and needs of

[14] For a short introduction to the epochs of Indian law and its pluralistic features, see W.F. Menski, *Comparative Law in a Global Context: The Legal Systems Of Asia And Africa*, 2nd edn., Cambridge, Cambridge University Press, 2006.

[15] On this aspect, see for instance G. Flood, *An Introduction to Hinduism*, New Delhi, Cambridge University Press, 2004.

[16] Among the vast literature on caste, *dalit* and *adivasi*, see M. Galanter, *Competing Equalities: Law and the Backward Classes in India*, Berkeley, University of California Press, 1984.

[17] See, for instance, F. Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India*, New Delhi, Oxford University Press, 2001.

[18] See S. Choudhry, "Managing Linguistic Nationalism through Constitutional Design: Lessons from South Asia", *International Journal of Constitutional Law,* 7(4), 2009, pp. 577–618.

[19] For interaction of law with Indian culture, see W.F. Menski, *Comparative Law in a Global Context*, cit.

different parts of the composite Indian society[20]. The most obvious aspect of this plurality on the institutional level is the federal character of India, which is a Union of States[21]. Another systemic aspect is the coexistence of a territorial law, which applies to all Indian citizens, and of different personal laws, which apply on the basis of religious affiliation, even though only in matters of family and succession[22]. The acknowledgment of this plurality, and of the pluralistic structure of Indian democracy, was necessary. The constitutional order aims to rationalise and protect diversity. Whether plurality is territorial, linguistic, religious, social, or economic, in all cases the Indian legal system has tried to establish institutional mechanisms to pursue unity in diversity, and the judiciary has been at the forefront of dealing with the complex issues arising in a pluralistic society. The Indian Constitution includes several norms and principles to help overcome traditional social divisions based on caste and gender and, more generally, to promote an inclusive society[23].

More specifically, these aspects of Indian pluralism have had an impact on the organisation of the courts. Indian federalism has consciously chosen the path of a unitary judiciary. There are no parallel judiciaries at the state and federal levels, but a single system. The high courts are at the top of the states and the Supreme Court, which, in a limited sense, is the sole federal court, is at the apex of the whole judiciary[24]. Personal laws, differentiated on a religious basis in family and succession matters, are applied by ordinary courts where the religious affiliation of judges may be known, but is not relevant from a legal point of view[25]. This is a further illustration of how the principle of a unitary judiciary has been pursued without distinction between Union and states, and without distinctions based on religion. The Constitution found

[20] See G. Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford, Clarendon Press, 1966.

[21] For an introduction to the features of Indian federalism, see M.P. Jain, *Indian Constitutional Law*, cit. and S. Choudhry, M. Khosla and P.B. Mehta (eds), *The Oxford Handbook of the Indian Constitution*, Oxford, Oxford University Press, 2016.

[22] See F. Agnes, "Personal laws", in S. Choudhry, M. Khosla and P.B. Mehta (eds), *The Oxford Handbook of the Indian Constitution*, cit., pp. 904-920; W.F. Menski, *Comparative Law in a Global Context*, cit. and Id., *Hindu Law: Beyond Tradition and Modernity*, New Delhi, Oxford University Press, 2003.

[23] See D. Amirante, *Lo Stato multiculturale. Contributo alla teoria dello Stato dalla prospettiva dell'Unione indiana*, Bologna, Bononia University Press, 2014; on specific aspects, see, for instance, M. Galanter, "Who Are the Other Backward Classes? An Introduction to a Constitutional Puzzle", *Economic and Political Weekly*, 13(43/44), 1978, pp. 1812–28; A. Mehta Sood, "Gender Justice through Public Interest Litigation: Case Studies from India", cit.; M.P. Singh, "Jurisprudential Foundations of Affirmative Action: Some Aspects of Equality and Social Justice", *Delhi Law Review*, 10-11, 1981-82, p. 39 ff.

[24] For an introduction see N. Robinson, "Judicial Architecture and Capacity", in S. Choudhry, M. Khosla and P.B. Mehta (eds), *The Oxford Handbook of the Indian Constitution*, cit., pp. 331-348. Indian High Courts' jurisdiction may extend to more than one State or Union Territory and the Union has crucial powers as regards high courts, beginning with the appointment of judges.

[25] This basic aspect does not prevent the operation at an informal or parallel level of *shari'a* courts and other kinds of religious and traditional dispute settlement bodies.

a balance between the various components of Indian society providing institutional forms in order to assure a unitary framework for the new Indian democracy.

In this framework, however, the Constituent Assembly did not provide for any form of diversity in the rules concerning the appointment of judges. The relevant article is art. 124(2), according to which "Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty five years"; the same article states that "in the case of appointment of a Judge other than the chief Justice, the chief Justice of India shall always be consulted"[26].

The main problem with this rule is the relationship between the executive power and the judiciary, and the primacy of one over the other when a consensus is difficult to achieve. Clearly, this is a crucial matter for the independence of the judiciary.

Summarising the long and complex history of judicial developments embodied in the so-called Judges Cases, the following points are worth remembering:[27] in the first case (1982)[28], the Supreme Court held the principle of consultation and collaboration between all parties involved in the appointment process. However, the majority of judges established the primacy of the executive, which could appoint any judge to the Supreme Court or to a high court even in conflict with the Chief Justice of India or other judges taking part in the decision. This decision raised severe criticism and was overruled in the second Judges Case in 1994[29]. The Supreme Court reversed the previous position by establishing the primacy of the judiciary and namely of the Chief Justice, not as an individual but as a representative of the judiciary. The third Judges Case (1999) is peculiar, because the President of India called the Supreme Court to make a decision in order to solve a conflict between the executive and the judiciary, caused by the executive's refusal to appoint judges indicated by the Chief Justice[30]. In this case, the Supreme Court confirmed the principle of the second Judges Case and provided further guidelines to regulate the procedure for the appointment of judges. In particular, the Court stated that, considering the majority judgement in the

[26] As regards High Courts, art. 217(1) states that: "Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the chief Justice, the Chief Justice of the High court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty two years".

[27] See for details M.P. Singh, "Securing the Independence of the Judiciary: The Indian Experience", cit., and A. Chandrachud, *The Informal Constitution*, cit.

[28] S. P. Gupta v. Union of India, A.I.R. 1982 S.C. 149.

[29] Supreme Court Advocates on Record Ass'n v. Union of India, A.I.R. 1994 S.C. 268

[30] In re Presidential Reference, A.I.R. 1999 S.C. 1.

second Judges Case and the precedent set by the then Chief Justice, it is "desirable that the collegium should consist of the Chief Justice of India and the four senior most puisne Judges of the Supreme Court"[31]. The Court also identified in detail other judges that could be included in the collegium. A further important point is the outstanding role of the Chief Justice. In fact, if consensus cannot be reached, "it must be remembered that no one can be appointed to the Supreme Court unless his appointment is in conformity with the opinion of the Chief Justice of India"[32].

It is worth remembering that by convention and following a position supported by the Law Commission of India, the Chief Justice of India is appointed on the mere basis of seniority[33]. Secondly, the vast majority of judges of the Supreme Court were previously high court judges[34]. The result of the first three Judges Cases was that the collegium composed by the Chief Justice of India and the four senior judges of the Supreme Court, or other senior judges depending on the specific case, had the power to appoint the judges of the Supreme Court and of the high courts. The role of the executive was diminished and that of the senior judiciary exalted. The fourth Judges Case confirmed this position as essential to the independence of the judiciary, which is part of the basic structure of the Constitution.

Merit is confirmed as the principle to be followed. The debate on diversity is not central in these cases, but some references may be found. For instance, the third Judges Case states: "When the contenders for appointment to the Supreme Court do not possess such outstanding merit but have, nevertheless, the required merit in more or less equal degree, there may be reason to recommend one among them because, for example, the particular region of the country in which his parent High Court is situated is not represented on the Supreme Court Bench". Even more significantly, in the second Judges Case, Justice Pandian stated: "Though appointment of Judges to superior judiciary should be made purely on merit, it must be ensured that all sections of the people are duly represented so that there may not be any grievance of neglect from any section or class of society". This issue was not a matter of decision but it is significant that a tacit agreement seems to appear in the Supreme Court on this point[35].

Even if the Indian Constitution contains no rule requiring judges be appointed taking into account elements of diversity, there are informal norms and practices that must be taken into consideration.

[31] *Ibidem*, paragraph 16.
[32] *Ibidem*, paragraph 25.
[33] See for details M.P. Singh, "Securing the Independence of the Judiciary: The Indian Experience", cit.
[34] Art. 124(3) of the Constitution states that: "A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and (a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or (b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or (c) is, in the opinion of the President, a distinguished jurist". Nonetheless, very few judges who were not high court judges have been appointed as Supreme Court judges.
[35] See M.P. Singh, "Securing the Independence of the Judiciary: The Indian Experience", cit.

Actual practice and non-formalised rules are no less important than the formal rules established in the Constitution and later judgments.

3. Informal practices of diversity in the appointment of judges

In a recent book, Abhinav Chandrachud showed that diversity is indeed a criterion for the appointment of judges of the Supreme Court[36]. This is a non-explicit fact that Chandrachud has ascertained through a series of elements collected in the field. The analysis of the appointments of Supreme Court judges in the period 1950-2009 in order to identify patterns that can be interpreted in terms of judicial diversity is accompanied by data taken through interviews conducted with Supreme Court judges, including some chief justices and senior judges taking part in the collegium for the appointment of new judges. The existence of an informal but consistent practice emerges, thus projecting the issue into the normative and institutional dimension.

In particular, Chandrachud's research provides evidence that four types of diversity are taken into consideration in the process of appointing the judges of the Supreme Court. The criteria are the geographical origin of the judges, belonging to religious minorities, belonging to lower castes, and their gender. These aspects may integrate the fundamental criterion of merit, defined as seniority, previous experience, and recognised personal competence. Their influence is therefore not binding and their weight in actual appointment decisions can be variable. Nonetheless, it turns out that the issue of diversity consistently appears in the decision-making process. Not all four criteria are on the same level. The criterion of geographical origin emerges as more firm and institutionalised. The judges seem to consider this as more important than the other three, particularly gender, which only recently acquired significant importance.

3.1. Geographical diversity

The first criterion is that of representation of the different geographical areas of India. How is the territorial provenance of the judges defined? An important point is that this provenance is not given an identity value. For the purposes of the appointment of a Supreme Court judge, a judge is considered "to belong" to the state that falls under the jurisdiction of a particular high court. This means that the relevant data is not the region or state of birth, with its cultural and linguistic identity, nor even the one where the judge has lived most of his life, but the high court where he or she served[37]. Whatever the criterion of

[36] See A. Chandrachud, *The Informal Constitution,* cit., and the review by T. Deo in the *Indian Journal of Law and Society*, vol. 5, 2014, pp. 263-270.
[37] See A. Chandrachud, *The Informal Constitution*, cit., p. 258 ff.

definition of geographical belonging, the principle clearly aims at guaranteeing fair representation in the Supreme Court of judges coming from different areas of the country.

The quantitative analysis of Chandrachud is based on the classification of states and Indian macro-regions according to demographic and other criteria[38]. The demographic criterion is the main one and Chandrachud analyses the correspondence between the number of Supreme Court judges and the populations of the states. This datum has a connection with parliamentary representation and Chandrachud defines it as a criterion of political significance. Is there a correlation between population and parliamentary representation of a given state and the number of Supreme Court judges coming from that state?

To this end, we must consider that the number of states has changed several times throughout the history of independent India: from the original fourteen states and six Union Territories, today we have twenty-nine states and seven Union Territories. As anticipated, each state has its own high court and some high courts have jurisdiction over a plurality of states and Union Territories. The territory of Delhi has its own high court; in this respect, it is worth remembering that this territory has a greater population than some Indian states. A very important fact reported by Chandrachud is that as many as seventy per cent of the Indian population live in less than a third of the states. The majority of the Indian population is concentrated in only six states: Uttar Pradesh, Maharashtra, Bihar, West Bengal, Andhra Pradesh, and Tamil Nadu. The most populous state is Uttar Pradesh.

From the analysis of the composition of the Supreme Court during the period considered, an effective relevance of the criterion of geographical origin emerges. In the 1950s, when there were only fourteen states, seven dominated the Supreme Court, always having at least one judge: Madras, West Bengal, Bombay, Bihar, Punjab, Uttar Pradesh, and Madhya Pradesh. In the following decades, with the increase in the number of states of the Indian Union, and also in the number of judges of the Supreme Court, a relationship of general equilibrium between states was maintained. In fact, no state has come to have more than ten per cent of Supreme Court judges. In 2012, all states had a judge from their high court in the Supreme Court except Sikkim and the new states established in 2000. Chandrachud notes that this inclusiveness of the Court was not set aside as a result of the Judges Cases; this was not granted because the setting aside of political influence could have led to decisions involving less diversity in geographical terms. No state generally has more than two judges at the same time and therefore no state monopolises the Court. Another significant fact is that historically four states have dominated the Supreme Court: West Bengal in the East, Maharashtra in the West, Tamil Nadu in the South, Uttar Pradesh in the North.

[38] For methodological details, see A. Chandrachud, *The Informal Constitution*, cit., p. 237 ff.

Depending on the decades considered, there may have been the prevalence of an Indian macro-region, but, overall, a balance has been guaranteed. No Indian macro-region has ever had more than forty per cent of judges and no state more than two or three judges simultaneously in the Court[39].

The data should also be read considering the age of appointment of judges to the Supreme Court and the number of years of previous service as high court judges. Another aspect considered by Chandrachud is the size of a high court and therefore of the maximum number of judges, which is variable for each court. The size of the high court tends to be linked to the number of cases to be decided and, according to Chandrachud, the number of cases decided by a particular high court has an effect on the evaluation of the experience of the judges of that court. This indicator is not necessarily proportional to the population indicator. For example, the Delhi High Court has a very high maximum number of judges and decides on more cases than those of high courts of more populous states. A correlation seems to exist whereby Supreme Court judges most often appointed served in the most important high courts, irrespective of the population living in the area under their jurisdiction.

In this regard, Chandrachud also notes a significant change in the last two decades he considers, which concerns the judges of the High Court of Delhi, whose number has significantly grown. In fact, there have always been two judges, if not three, from this high court. This could be a result of the major role of the judiciary in appointments following the Judges Cases and, according to Chandrachud, an explanation may be found in the reputation of the High Court of Delhi – for the quality of decisions, the importance of Delhi on the political and economic level, and the high number of important decided cases. According to the sceptics, the truth is that the Supreme Court is located in Delhi and therefore personal relationships between judges play a significant role in the appointment.

In conclusion, according to Chandrachud there is a significant correspondence between the number of Supreme Court judges and the population of the states, their representation in Parliament, and the size of their high court. The most accurate indicator seems to be the size of the high court. The judges of the courts with more members and more cases seem to be more likely to be selected for the Supreme Court. The data collected through the interviews is also very significant. According to judges interviewed by Chandrachud, geographical diversity is regularly taken into consideration as a criterion, if not in all cases. The nuances, however, can differ. According to some, the emphasis is on trying to appoint judges who come from different Indian macro-regions; to others it is a practice for which a fairly institutionalised proportional representation system exists, according to which larger states have two judges.

[39] On geographical representation, see also G.H. Gadbois, Jr., *Judges of the Supreme Court of India: 1950-1989*, New Delhi, Oxford University Press, 2011.

On the evaluative level, the majority of judges consider it a valid system – even if they justify it from a plurality of perspectives – while even its critics believe it must be followed because there are no better alternatives. One of the judges interviewed by Chandrachud said the practice is justified by the federal character of India and is necessary for the legitimisation of the Supreme Court. According to other judges, the appointment of judges from different geographical proveniences has an important practical function, which is to assure the Supreme Court is competent about the various state laws. This observation leans in the direction of merging the criterion of diversity with merit.

When a judge retires, the tendency is to replace him or her with a judge belonging to the same state. For example, Chandrachud reports one striking case: when Balakrishnan was Chief Justice, judges from Tamil Nadu, West Bengal, Uttar Pradesh, Punjab and Haryana, Madhya Pradesh, Odisha, Assam (including Nagaland, Meghalaya, Manipur, Tripura, Mizoram, and Arunachal Pradesh), and Delhi retired and all were replaced with a judge from the same place. The criterion of geographical diversity therefore clearly exists and can favour some judges, over-riding seniority and legal reputation. One of the interviewed judges reports a case when a relatively obscure judge was appointed because of geographical diversity but, in order to be sure of his qualities, the appointing judges were obliged to study some of his judgments with great care. However, the fact that geographical origin is not understood in terms of cultural, linguistic or national identity is of fundamental importance to understand the working of this criterion in practice. The point seems to be to assure that judges sit in the Court who have a certain degree of knowledge of the contexts and problems of the different areas of India. In other words – observes Chandrachud – the criterion is not based on their national background but derives from their state expertise.

3.2. Religion, class and gender

According to the analysis of Chandrachud, belonging to a religious minority, as well as social belonging (particularly in terms of caste and gender) are considered informally when appointing judges of the Supreme Court. However, they are considerably less relevant than geographical criterion[40].

With regard to religious minorities, Chandrachud notes that in the years considered in his analysis, judges belonging to the three most numerous religious minority communities, namely the Muslim, Christian and Sikh, were represented at the Supreme Court. The question of the presence of Muslim judges is particularly relevant in the Indian context. At the beginning of the history of the Supreme Court in independent India, the presence of Muslim judges at the Court was proportional to the number of the Indian Muslim community (about sixteen per cent). With the progressive increase in the number of judges

[40] For an extensive analysis, see A. Chandrachud, *The Informal Constitution*, cit. p. 254 ff.

of the Supreme Court there has not been a corresponding increase in the number of Muslim judges and so, observes Chandrachud, in the period 2000-2009 only four per cent of the appointed judges of the Supreme Court was Muslim. In any case, from 1975 onwards two Muslim judges were usually present. As for the judges of Christian affiliation, if in the Sixties no Christian judge was part of the Court, in the preceding and following decades there was at least one. For the Sikhs, representation was even more sporadic. However, we must consider that the Christian community and the Sikh community in India, although culturally important, are numerically very small. Therefore, it is only with reference to the Muslim community that one observes a significant lack of proportionality between the composition of Indian society and the composition of the Supreme Court.

According to Chandrachud's interviews, it appears that the Indian Government pursues the representation of religious minorities more than the judiciary. Some judges point out that they have received precise guidance, both for the appointment of Supreme and high court judges. According to one of the interviewed judges, one could even speak of an "unofficial reservation" system for Muslims, Christians and Sikhs at the Supreme Court. Other judges deny there is a kind of quota system, but acknowledge religious affiliation is considered.

The criterion of social belonging defined in terms of caste is very complex. Chandrachud uses a simplified scheme by dividing judges belonging to backward castes, including all the disadvantaged categories identified by the Constitution (scheduled castes, scheduled tribes and other backward classes) and judges belonging to forward castes. This scheme lacks the nuance necessary to draw clear conclusions, but the macro-analysis still allows us to highlight some important issues. For example, in the first two decades of the Court's existence no one belonging to a backward caste was appointed as a Supreme Court judge. Now, in general, between one and three judges belong to backward castes.

From the interviews it appears that with caste, in contrast to religious minorities, there is no pressure from the government, nor is the issue explicitly discussed in the collegium. However, there is a widespread awareness of the importance of the presence of judges belonging to lower castes in the Court and this criterion is considered in the appointment process[41].

For women the question becomes even more complex[42]. The first woman appointed as a judge of the Indian Supreme Court was Fathima Beevi in 1989. Thereafter there was an appointment every decade and in 2011 for the first time there were two women. The appointment of two women in 2018 has raised

[41] Greater importance is given to this aspect for the appointments of the judges of high courts, and here we find in some cases government pressure and an informal system of quotas. The question is important because Supreme Court judges are normally first high court judges. The issue of quotas in universities is also relevant.

[42] See A. Chandrachud, *The Informal Constitution*, cit. p. 219 ff.

the number to three women contemporaneously serving as judges of the Supreme Court. Considering the progressive increase in the number of Supreme Court judges, the proportion remains low. Chandrachud notes that in the case of women, especially in the early years of the Supreme Court, there may indeed have been the absence of a sufficient number of qualified candidates, but nowadays this argument is weaker.

According to the interviewed judges, in the appointment process there is awareness of the issue and the gender criterion can overcome that of seniority. In other words, a female high court judge may be preferred to a male high court chief justice. The same can happen for judges belonging to lower castes; in some cases these "backward" judges were preferred to "forward" judges who were serving as high court chief justices and thus took precedence over older and more experienced judges.

In conclusion, if the criterion of territorial provenance seems to be well established and legitimised, the other criteria are certainly taken into consideration in the appointment process, but in a less cogent and coherent way. The criterion of seniority and prior experience seems here to prevail over other factors, and examples to the contrary are not sufficient to amount to a rule.

4. Merit and diversity in constitutional perspective

The debate on reflective judiciary is becoming increasingly important in India. At the institutional level, one may refer to a seeming controversy between the President of the Union and the Chief Justice of the Supreme Court of India in 1999[43]. In a period when there were issues in appointing new judges, the President stated: "I would like to record my views that while recommending the appointment of Supreme Court judges, it would be consonant with constitutional principles and the nation's social objectives if persons belonging to weaker sections of society like SCs and STs, who comprise 25 per cent of the population, and women are given due consideration. Eligible persons from these categories are available and their under-representation or non-representation would not be justifiable. Keeping vacancies unfilled is also not desirable given the need for representation of different sections of society and the volume of work the Supreme Court is required to handle."

The Chief Justice replied: "I would like to assert that merit alone has been the criterion for selection of Judges and no discrimination has been done while making appointments. All eligible candidates, including those belonging to the Scheduled Castes and Tribes, are considered by us while recommending names for appointment as Supreme Court Judges. Our Constitution envisages that merit alone is the criterion

[43] This debate is analysed by M.P. Singh, "Merit in the Appointment of Judges", cit., who makes reference to the statements of the President and the Chief Justice of India (reported in India Today, 25 January 1999) quoted below.

for all appointments to the Supreme Court and High Courts. And we are scrupulously adhering to these provisions. An unfilled vacancy may not cause as much harm as a wrongly filled vacancy."

According to Singh, the two positions are not in conflict: both merit and diversity are important and neither could be ignored. Analysing the developments of the Judges Cases, one could argue that if the Court had had to decide directly on the question it would have agreed on the principle of a fair representation or reflection of society. In fact, the Indian Constitution promotes an inclusive society and favours the representation of the weaker sections of society in government, understood in its widest meaning. The Constitution does not specifically refer to the diversity of the judiciary, but this could be explained by considering the high qualification level required and the limited number of places. Once the requirement of competence is satisfied, there are no arguments to deny the representation to the weaker sections of society. In constitutional terms, at the core of the Constitution's vision is social justice and the transformation of society through the emancipation of the weaker sections. From Singh's perspective, diversity is justified, if not compulsory, in terms of constitutional interpretation[44]. The factual analysis of Chandrachud showed that diversity in the judiciary is already pursued through informal practices. Singh argues that these practices are coherent with the constitutional framework and increasingly legitimised in public discourse.

As Chandrachud highlights, those who support diversity believe that it increases the legitimacy of the Court, builds public trust, and improves the quality of decisions by bringing a variety of perspectives into its opinions. A court that "fairly reflects" the diversity of a given society indicates that it is "open to all"[45]. From a theoretical point of view, diversity in the courts may have a symbolic or a substantive value. At the symbolic level, a judge can become an symbol of inclusiveness, even if he does not necessarily share the point of view of the members of the community he belongs to. At the substantive level, the mere presence in the court of a judge having a different background can eliminate the prejudices that colleagues may have, and can bring additional perspectives and attitudes. On the other hand, as Chandrachud observes: "it is arguable that diversity on the Supreme Court of India is more symbolic than substantive. Each case, after all, only reflects the diversity of the few judges who decide it, and no case embraces the diversity of the entire Court", and, as a result, "the diversity of the Court does not make its way into the Court's opinions. This is significant if one believes that diversity in a court is substantive, and not merely symbolic—that the diverse background of a judge is not merely a token which attempts to enhance the

[44] See M.P. Singh, "Merit in the Appointment of Judges", cit.

[45] See A. Chandrachud, *The Informal Constitution*, cit. p. 220; see also B.L. Graham, "Toward an Understanding of Judicial Diversity in American Courts", *Michigan Journal of Race and Law*, 10(1), 2004, pp. 153–94.

court's legitimacy, but a tool which gives the court access to different points of view, to diverse ways of thinking, and makes the opinions of the court themselves more reflective" [46].

Chandrachud also addresses another key element of the debate, that is the meritocratic principle in the selection of judges, and the so-called "merit/diversity paradox", that is to say, the conflict that would exist between selecting the best judges or the judges who best reflect the composition of the society in which the court operates. Chandrachud observes that there are at least three reasons why the principle of diversity does not conflict with that of merit. First, merit is not necessarily compromised by considering diversity. The experience of the Supreme Court of India and other Supreme Courts shows that the judges still respond to certain merit requirements. Secondly, one cannot make sense of merit in a social or contextual void, and, in this light, the diversity of a judge can well be considered an element of individual merit. Third, the same idea of merit "can be "self-reflective", "self-selecting", or "self-cloning", which means that "the definition of merit varies with the persons who judge merit – a judge of merit, consciously or unconsciously, may seek a replication of his or her own credentials in the candidate he or she seeks out. The judge of merit may seek out a candidate who is least likely to challenge the establishment. Some scholars have suggested that it is a 'myth' that merit is a neutral standard"[47].

The conflict between merit and diversity can also be considered a conflict between those who believe that the judges find and apply the law in a neutral and impartial manner and those who recognise the political role of the judges, in the sense that judging is a political process by its nature. From this perspective, diversity undermines impartiality. On the other hand, the advantage of diversity is that the presence of judges having different backgrounds ensures that there is not a sort of elite that dominates the values of the court, excluding other parts of society. The discourse here is reversed: diversity increases the "structural impartiality" of the court[48].

On the negative side, one could argue that diversity opens the door to political influence in the appointment of judges, or that geographical representation can give rise to distortions, such as "circuit effects"[49]. In fact, the Supreme Court has appellate jurisdiction and could be better disposed towards the

[46] See A. Chandrachud, *The Informal Constitution*, cit. p. 263.

[47] See A. Chandrachud, *The Informal Constitution*, cit. p. 223. In his analysis, Chandrachud makes reference to several works, including Lady Hale, "Making a Difference? Why We Need a More Diverse Judiciary", *Northern Ireland Legal Quarterly*, 56(32), 2005, pp. 281-292; G.H. Gadbois, Jr., "Judicial Appointments in India: The Perils of Non-contextual Analysis", *Asian Thought and Society*, 7, 1982, pp. 124-143; and M.P. Singh, "Merit in the Appointment of Judges", cit.

[48] See A. Chandrachud, *The Informal Constitution*, cit. p. 223, and S.A. Ifill, "Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts", *Boston College Law Review*, 39(1), 1997, pp. 95–149.

[49] See A. Chandrachud, *The Informal Constitution*, cit. p. 260, and, in general, L. Epstein et al., "Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court", *University of Pennsylvania Law Review*, 157(3), 2009, pp. 833–80

judgments of high courts in which a good number of Supreme Court judges have worked. Even more critically, reflection is not representation, and diversity cannot be assured in a consistent way. This could be seen as crucial to preserve the independent role of the judges but, on the other hand, the lack of formalisation can allow non-transparent practices or, at best, result in a Court's composition that cannot fully satisfy the expectations of society.

Today the Indian debate more explicitly deals with the issue of diversity. The 99th Constitutional Amendment Act 2014, which aimed to establish the National Judicial Appointments Commission, and the related National Judicial Appointments Commission Act 2014, did not include diversity formally in the procedure for the appointment of judges. However, those Acts were declared unconstitutional irrespective of the issue of diversity. They were deemed to affect the independence of judiciary, which is part of the basic structure of the Constitution. This fourth Judges Case was criticised because it denied that the independence of judiciary can be reached in several ways, including via the executive, in the appointment of judges, as in other constitutional experiences[50]. However, it is worth remarking that during the parliamentary debates, many voices were critical against these Acts because of insufficient attention to the representation in the judiciary of women and backward classes.

The aspect of structural impartiality seems particularly important if we consider the Shah Bano case or the recent Shayara Bano case, where the Supreme Court had to decide on important issues concerning the application of Muslim law in India. The first concerned maintenance rights, and the second one the admissibility of instant and irrevocable repudiation through triple *talaq*[51].

In the Shah Bano case the bench was Hindu and this element shook the confidence of the minority Muslim community. In the Shayara Bano case, the five-judge bench was composed of a Sikh Chief Justice, and a Muslim, Christian, Hindu, and Parsi. From the point of view of the quality of the decisions, the presence of a Muslim judge on the bench can be considered from different perspectives. One aspect could be a better knowledge of Muslim law, but this argument is weak in reality, because all Indian judges must know Muslim family law as a component of Indian official law and, in many cases, Muslim judges actually do not prove to have a better understanding of Muslim law than other judges.

A different aspect is the intricacy of the issue of representation/reflection. In the Shah Bano and the Shayara Bano cases, it is impossible to assume a single Muslim view. Even though more traditional parts of Indian Muslim communities opposed both judgements, it is worth remembering that the applicants

[50] See C. Chandrachud, "Constitutional Falsehoods: The Fourth Judges Case and the Basic Structure Doctrine in India", cit.

[51] Mohd. Ahmed Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945; Shayara Bano v. Union of India and Ors., Supreme Court of India, SCC OnLine 2017 S.C. 963.

were Muslim women and a number of Muslim associations. In the Shayara Bano case, triple *talaq* was declared contrary to the Constitution by a 3:2 majority. The Sikh chief justice and the Muslim judge wrote the minority opinion. It can be argued that, if the bench was composed by five Hindu judges, the situation would have been much worse from the point of view of perception on the part of the Islamic community. However, where is the relevance of the presence of a Muslim judge? If one considers that the Muslim judge is somehow a representative of the Muslim position, the result is that the judgement highlights the fact that the Muslim opinion is that of the minority. However, one can see the question differently. The real guarantee of diversity is to assure that judges with different backgrounds decide on a dispute, whether as a majority or a minority. Here diversity shows its strength in the Indian context, where inclusiveness remains a guiding principle from the birth of the Constitution to the present day, as powerful in principle as fragile in practice.