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# The Feminisation of the Judiciary in the Asia-Pacific

## The Challenges of Formal and Substantive Equality

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In 2018, senior advocate Indira Jaising appeared before the Supreme Court of India on behalf of petitioners to challenge a ban against women between the ages of ten and fifty (the ages of menstruation) entering the Sabarimala temple as unconstitutional (Jain 2019). The Sabarimala temple in Kerala is a site of worship for the Hindu deity Lord Ayyappa and attracts millions of pilgrims each year, making it one of the world's largest sites of annual pilgrimage. The traditional view is that young women are not permitted to offer worship in the temple because the deity must not be tempted to deviate from their vow of celibacy.<sup>1</sup> In 1991, in an earlier legal challenge, the Kerala High Court had upheld the restriction on women entering the temple.

Prior to the hearing of the case, the petitioners in the Sabarimala case submitted a plea requesting a judicial bench with equal numbers of male and female judges. Instead, only one female judge was appointed to the five-judge bench (PTI 2018), although this is not for a lack of women judges who could have sat on the case. Nevertheless, the majority judgment ruled in favour of the petitioners and held that the ban on women entering the temple was unconstitutional because it infringed the right to equality. This landmark decision paved the way for women to enter and worship at the temple.

Yet the sole dissent in the court case was issued by the female judge, Justice Indu Malhotra. Justice Malhotra held that the ban on women was not unconstitutional as the temple had a right to manage its own internal affairs. On this basis, Justice Malhotra would have dismissed the case.

The decision in the Sabarimala temple case raises a number of complex questions about women judges in India and in the Asia-Pacific at

<sup>1</sup> *Sabarimala* [10] (Misra CJ).

large. What role do courts play in promoting gender equality? What difference, if any, do women judges make? When and why do women judges advance gender equality? How do we hold in tension both the promise and paradox of women judges, as embodied in the dissent of women judges like Justice Malhotra?

While women judges may be champions for gender equality, in reality judicial figures like Justice Indu Malhotra demonstrate that some women judges may also be barriers to equality. Justice Indu Malhotra is herself the only female to have been appointed to the bench from the bar and only the second woman to be appointed as senior advocate by the Supreme Court of India. Yet in the Sabarimala decision, a complex set of factors intersect with gender, including religion.

Controversies like this reveal the contemporary struggles of the women's movement and the role that courts play in the Asia-Pacific. The incident highlights the central role that judges can potentially play in the struggle for gender equality. In this case, the petitioners deliberately sought a gender equal bench, although this was not granted. The outcome of the case shows that advances in gender equality through the courts is possible, although translating that decision into accepted social practice remains difficult.

This case raises questions about the position and influence of women judges across the Asia-Pacific that have been underexplored to date. To what extent are women able to enter the judiciary and under what conditions? How do women fare in terms of mobility within the judiciary? To what extent can we identify the feminisation of the judiciary in the Asia-Pacific and what does this look like? Does the place of women in the judiciary in the Asia-Pacific depart from, or mirror, the place of women within society? Are experiences of judging in Asia gendered? What is distinctive about professional identity formation for women in the judiciary in the Asia-Pacific?

The purpose of this book is to offer in-depth reflections on the feminisation of the judiciary in the Asia-Pacific, grounded in original empirical studies. This volume aims to capture the historical trajectory and contemporary impact of the role of women in the judiciary in the Asia-Pacific.<sup>2</sup> Our study of women judges in the Asia-Pacific acknowledges the diversity and complexity of the region – including the differences between civil law, socialist and common law systems; differences

<sup>2</sup> The regional coverage in this book is intended to be illustrative rather than comprehensive.

between liberal democracies and illiberal authoritarian regimes that affect the independence of the courts and the relative distance of the legal profession from the regime in power; differences in conceptions of work and family that affect the role of women in the workplace; and differences in the social, economic and historical trajectories of the state, particularly the growing inequality between the rich and the poor worldwide.

In this chapter, we identify and explore core themes that emerge from the literature through the lens of thick and thin conceptions of the feminisation of the judiciary. We define the feminisation of the judiciary as the growing presence and influence of women judges in the courts in support of gender equality. This view of the feminisation of the judiciary does not presume all women judges support an agenda for equality, but rather that women judges have a potentially significant role to play in support of gender equality. We suggest that a thin conception of the feminisation of the judiciary is concerned with the entrance of women into the judiciary and their career progression. This view of feminisation focuses on trailblazing women, the barriers women face to enter the judiciary, and the factors that explain when, how and why women enter the judiciary. These histories and stories are important and deserve greater recognition. Yet a focus on the feminisation of the judiciary must go far beyond the issue of entrance to the profession.

A thicker, and more contested, concept of the feminisation of the judiciary focuses on the diverse range of challenges women judges face in the judiciary. This includes issues with career progression and substantive aspects of judicial practice, such as how women judges decide cases and whether they do so in ways that advance gender equality.

This volume takes up the call to chart an agenda for the study of women in the judiciary in the Global South.<sup>3</sup> In this chapter we consider debates over the feminisation of the judiciary and the findings of studies that consider both its thin and thick meanings in the Global North and beyond to the Asia-Pacific. This volume extends the geographic scope of studies on women judges beyond the geographic focus of the existing literature on East Asia, particularly China, Korea and Japan.

Entrance to the judiciary is clearly a preliminary first step, and many of the chapters in this volume tell this story. We highlight the ongoing historic milestones achieved in terms of women's appointments to positions of high judicial office and the resulting political tensions across the

<sup>3</sup> Ulrike Schultz (2003: xxv) notes that a study of women in the judiciary in 'underdeveloped or in developing countries' remains to be written.

Asia-Pacific. We also capture the growth in professional organisations for women in the law across the past two decades, which we suggest is one demonstration of the feminisation of the legal and judicial profession in the Asia-Pacific.

### **Thin Feminisation: Entrance to the Judiciary**

A major area of scholarly debate centres on what constitutes the feminisation of the judiciary and how, or to what extent, feminisation has in fact occurred. Some scholars have adopted a thin version of feminisation akin to entrance to the judiciary or legal profession. It is now well established that feminist assumptions of the need for a critical mass of women on the bench alone is not sufficient to guarantee gender equality. The literature is clear that adding women to a male-dominated judiciary does not necessarily ensure substantive equality. However, the entrance of women into the judiciary across the Asia-Pacific remains a necessary and symbolic first step in the struggle for substantive equality.

Given the relationship between the courts and the wider legal profession, studying women judges needs to begin with studies of women, although these studies primarily focus on the Global North. The literature offers a conceptual starting point for studies of women in the legal sector in the Asia-Pacific, but it is also a necessary point of departure given the social, economic and historical differences of the judiciary and society in the Global South.

The first major and ongoing preoccupation of studies of women in law is when, how and under what conditions women have entered the profession. Studies of women in the legal profession in the United States and the Global North more broadly were brought to the fore with Cynthia Epstein's landmark book, *Women in Law* (1981). Epstein's pioneering study traces the increase in the entry of women into the legal profession from the mid-1960s to the late 1970s. This trend was enabled by the dramatic increase in the number of women entering law school, affirming the interconnected nature of entrance to legal education and the legal profession. Epstein's work has in turn led to studies on the extent to which female graduates enter the legal profession or judiciary in similar numbers to male graduates, often identifying the additional barriers that women face to gaining entry to the legal sector. Kay and Gorman (2008, 302) suggest that in the Global North, women are more likely than men to be recruited into less remunerative or prestigious practice areas (Kay and Gorman 2008, 302). Women law graduates

report taking their first jobs outside the legal sector more frequently than male graduates, and women are less likely to hold prestigious judicial clerkships (Kay and Gorman 2008, 303).

This has led to a debate about whether the entrance of women into the legal profession and judiciary displaces the position of men. In the context of the United States, this has not occurred because, from the 1970s–80s, major growth in the size of the legal profession occurred at the same time as women entered the profession in increasing numbers (Menkel-Meadow 1989). This may also be true in some jurisdictions in the Asia-Pacific that have seen an expansion of the judiciary in the late twentieth and early twenty-first century. Countries such as Indonesia have gone through a process of democratisation that has included major judicial reform (Crouch 2019b) and therefore an expansion in the number of judicial positions available.

The literature specifically on women and judicial appointments is concerned with the first women judges, the challenges they faced in entering the profession and the extent to which they were ‘trailblazers’ and role models for other women to follow (Norgren 2018). Studies of judicial appointments identify and explain the increase in the number of female judges in the profession over time (Valdini and Shortell 2016). The concern with identifying and overcoming barriers to career entry for women in the courts resonates in some countries in the Asia-Pacific that have low numbers of women in the profession and need to address issues of entry to the judiciary, such as India and South Korea.

However, the existing literature has yet to pay sufficient attention to women in the legal sector in the Asia-Pacific, where women may constitute the majority of legal professionals. For example, in Myanmar, the majority of judges, lawyers, legal academics and public prosecutors are women (Crouch 2020). In such contexts, an important preliminary question to ask is why and how women constitute the majority of the profession in the first place. Historically, under colonial rule and the early decades of independence, the legal profession was entirely male. In Myanmar, the shift to law as a women’s profession began during the socialist era of the 1960s, as the legal profession began to diminish in political importance, public status and influence.<sup>4</sup> During the socialist regime, law as a profession was co-opted by the regime, depoliticised and suffered a decline in prestige as it came to be closely associated with the socialist-military

<sup>4</sup> This is like other socialist contexts such as East Germany, where Markovits (1995) notes that 50 per cent of the legal profession were women.

administration (Crouch 2019b). Given a range of countries in the region that are either socialist or formerly socialist (including China, Vietnam, North Korea, Laos, Myanmar and Cambodia), we need studies of women in the judiciary in the Asia-Pacific that appropriately acknowledge and consider the influence of the wider political and social context.

Further, rethinking what the literature means by a 'profession' when we study the judiciary is crucial. We need to remain open to alternative conceptions of the judiciary and ways the role of the judicial branch may perform different roles in illiberal regimes. For example, in contexts like Myanmar the judiciary is better understood as an administrative body that is part of the bureaucracy (Crouch 2019a). The high numbers of women in the legal profession in Myanmar contrasts with the relative absence of women from positions of leadership in the highest courts, such as the Supreme Court. There has never been a female judge on the Supreme Court of Myanmar since it began operation in 1948. There have been women on the Constitutional Tribunal, although this court was only established in 2011; it is a marginal institution because it hears very few cases (Crouch 2018). There is a need to interrogate the social and cultural factors that influence how the minority of men within the judicial system come to occupy the most important positions. This compels us to consider the relationship between the judiciary and other institutions such as the military, because for many decades entry into the military was a more secure and potentially lucrative profession for men (Crouch 2019a), and was not a pathway generally open to women.

The question of how women gain entrance to the judiciary is also related to access to the legal profession and legal education in the Asia-Pacific. There is an emerging scholarly focus on gender composition in legal education, corporate firms, the bar and the judiciary in the Asia-Pacific, with studies of Korea, India, Japan and Pakistan. A first point of inquiry regarding entrance to the legal profession and judiciary has been legal education (see Steele and Taylor 2010). While legal education is one important step towards women entering the judiciary, it constitutes only one of the challenges for women to enter the profession. For example, since the 1980s in Taiwan, women have studied law in roughly equal numbers to male students, although access to the legal profession remains exclusive in part due to difficult entrance exams (Tay Sheng-Wang 2010). In Chapter 3 of this volume, Dinesha Samararatne explains that 80 per cent of law graduates are women, and this growth corresponds with increasing numbers of women at the bar and in the Attorney General's department. Likewise, in Myanmar, one of the reasons that women are a

significant percent of all aspects of the legal professions is that women make up an estimated 90 per cent of undergraduates studying law.

Likewise, there is emerging literature on the entry of women to the bar in the Asia-Pacific. For example, in Japan, while the entry of women to the profession has increased, a glass ceiling on gender balance at the bar exists, with women representing no more than 18.5 per cent of the bar (Levin 2019). In the context of Thailand, in 2007, Siampukdee (n.d.) documents that women make up just over 5 per cent of the police force; 17 per cent of prosecutors; and 22 per cent of judges. While this represents an increase in women's representation since the 1980s, Siampukdee notes the ongoing challenges for women in terms of promotion and aspiring to higher office and positions of leadership.

The path to enter the judiciary diverges between jurisdictions with career judges and non-career judges, which generally corresponds to the difference between civil law and common law systems. Across the Asia-Pacific, common law jurisdictions usually require graduates to first become lawyers and build a successful career as a lawyer before potentially being appointed as a judge. In contrast, civil law and socialist or former socialist countries usually offer law graduates the choice of taking an entrance exam in order to become a career judge. These judges may be classified as civil servants.

Some jurisdictions in the Asia-Pacific, however, have mixed approaches to judicial appointments. For example, even though the government in Myanmar claims its legal system is based on the common law, entrance to the judiciary is similar to a career-based civil law style path, with graduates able to take an entrance exam to become a judge (Crouch 2020). In another mixed setting, Indonesia's remarkable strategy of specialised courts since 1998 has led to the proliferation of ad hoc judicial positions, usually for a set term of five years (Crouch 2019b). This is even though civil law systems usually have career judges. Another point of difference is the representation of women in constitutional courts as these institutions have emerged around the world in the past three decades. Again in Indonesia, appointments to the Constitutional Court are direct and do not require a candidate to have a background as a judge, with candidates often coming from academia. In this regard, the study of women in the judiciary often depends upon whether the focus is on the lower courts or the apex court. Susan Silbey (1981) has pointed out that studies of law and courts often focus on the apex courts and overlook the lower courts, which is where people are more likely to come into contact with judicial institutions. Many of the chapters in this volume take up Silbey's call

and consider women's representation and influence in both the apex courts and the lower courts.

Statistics on the numbers of women across the legal sector and particularly in the judiciary are documented in the chapters in this volume. One point of distinction from studies of the Global North is that the authors in this volume do not necessarily assume the validity of official statistics, and in fact in some cases are quick to question them (see Chapter 8). Official statistics are not necessarily accurate and may be open to interpretation. Further, for other jurisdictions, the size and scale of the population and the relationship between judges and society, including the relative importance or lack of importance of the courts, need to be kept in mind. For example, Cambodia has a population of 16 million and a judiciary of only 258 judges. Of these judges, only 37 are women, which means that 6 of the 24 first instance courts have no female judges at all.<sup>5</sup>

In some jurisdictions, the entrance of women has increased in certain areas of legal practice; this is the case in Pakistan, where the increase of women in the family courts from 2009 now means women constitute more than a third of these judges (Holden 2018). In India, despite the stagnation of female representation in the legal sector at just 5 per cent, some parts of the legal profession break with this pattern, such as commercial law firms. Ballakrishnen's (2017, 2021) important empirical work on Indian commercial law firms since the 1990s considers the large numbers of women in these workspaces, in comparison to other areas of legal work. She suggests that these commercial law firms, as a new institutional type in that context, do not carry the same structural barriers to entry that is evident in other legal institutions in India.

The literature specifically on women judges in the Asia-Pacific is also concerned with judicial appointments because the appointment of women judges is still a historic development in many jurisdictions. In their study of judges in China, Zheng, Ai and Liu (2017, 174) identify that the literature on judicial appointments in the Global North does not pay sufficient attention to the 'social processes by which women's judicial careers are structured, particularly in terms of promotion and attrition'. They examine why judicial career paths for women stagnate at the mid-career level. To explain both the mobility and glass ceiling for women judges, they identify two processes: reverse attrition, where men can leave

<sup>5</sup> I would like to thank Chhunvoleak Srun, judge of the Appellate Court of Cambodia, for this information.



for more prestigious positions and women take their place; and dual-track promotion, in which women judges are promoted in their 'professional track' based on an evaluation of their expertise and work performance but not in their 'political track' based on their social capital and political connections, or lack thereof. This process limits the promotion of women judges to mid-level positions. This is an important example of theory-building from the Global South.

The entrance of women to the judiciary has been illuminated by biographies of key pioneering women in the field, often using oral history to explore how women enter the profession. Some scholars have explored how and why judicial appointments are made by focusing on rich life biographies of the first woman lawyers and judges, such as Kim's (2003) study of Lee Tai-young, the first woman lawyer in Korea and Mossman et al.'s (2006) study of Cornelia Sorabji, the first woman lawyer in India. The interest in the lives of the first women lawyers and judges is instructive for understanding the challenges women face to entering the judiciary, and the role of pioneers in paving a way for other women. The chapters in this volume expand on and offer new accounts. The histories of women in the judiciary in some parts of the Asia-Pacific upend standard assumptions in the literature on the Global North about when and where women first gained entry to the judiciary. We need to reconsider the assertion that countries in Asia fail to exhibit feminisation at a rate comparable to the global average (e.g. Michelson 2013, 1075), and also to challenge the relevance of this comparison as a meaningful indicator of feminisation of the legal sector more broadly. For example, Indonesia had a female judge in its apex court many years before the United States did. In the 1960s, the first female judge, Sri Widodojati Notoprojo, was appointed to the Indonesian Supreme Court. However, it was not until two decades later in 1981 that the US Supreme Court had its first female judge, Sandra Day O'Connor (Lev 1996, 191). These alternative stories challenge the assumption that women in the Asia-Pacific entered the profession at a later point in time than women in the Global North.

### **Thick Feminisation: What Difference Do Women Judges Make?**

The literature has debated whether the profession can be considered feminised simply by the increased number of women or whether the profession is feminised when changed or influenced by women within the profession (Menkel-Meadow 1986, 898). It is essential to consider a

thicker definition of feminisation of the judiciary beyond the entrance of women in the courts. The chapters in this volume are concerned with how feminisation is defined and contested, and how it can be measured or studied.

In the 1980s, Menkel-Meadow energised the debate on feminisation by arguing that the profession could not be considered feminised simply by the increase in the number of women in legal education. An increased number of women studying the law did not necessarily equate with feminisation of the study and practice of law or of the legal profession. Instead, a thicker conception of feminisation of the profession calls for inquiries such as whether or how the profession has been changed or influenced by women. This is more difficult to identify and study but provides a wide opportunity for future empirical research. This thicker conception of feminisation of the judiciary and legal profession more broadly in the Asia-Pacific is one the chapters in this volume take up.

Studies of women judges are often concerned with the relationship between women judges and judicial decision-making. Kay and Gorman (2008, 320) identify that the literature on judicial decision-making by women is grounded in certain assumptions of female judging: 'that women lawyers and judges have a stronger feminist consciousness or that they think about legal issues using a different moral voice'. Menkel-Meadow (1985, 59) argues that women judges may pay more attention to mercy than male judges and suggests that this may affect the process of judging.

Empirical research provides some support for the feminist consciousness view. Martin (1990) suggests that lawyers draw on their background experiences differently as women and men in approaching their role as a lawyer. For example, Martin (1990) found that women judges in the United States were more likely to have experienced sex discrimination than men and suggested that this might influence the 'decisional output' of a woman judge in a case involving sex discrimination. In a survey of Florida attorneys and judges, Martin et al. (2002) found that women more frequently reported gender disparagement and sexual harassment than men. Some scholars suggest that women judges may be more likely to reject stereotypes of women and legal presumptions in favour of men, for example when hearing cases involving domestic violence or the allocation of property during divorce (Kay and Gorman 2008, 321). Studies conflict as to whether women judges are more likely to make decisions that favour women; however, some studies suggest that women judges are more likely to support the woman's position in cases including

discrimination, child support, property settlement and sexual assault (Kay and Gorman 2008, 321). The issue of whether women judges decide differently is underexplored in the literature on the Asia-Pacific.

The entry of women into the judiciary has prompted a related set of debates into whether female judges have a unique approach to decision-making, or whether they change the nature of substantive law or the practice of the law. Why is it important to increase the number of women judges in courts around the world? That is, is female judging distinctive in some way and, if so, how? These questions have not yet been a major focus of inquiry in the Asia-Pacific.

There is a small but growing scholarly interest in how, or to what extent, women in the profession or the judiciary influence the profession itself. In China, Shui Wei and Xin Xin (2013) find that women judges reject stereotypical female characteristics and follow settlement strategies in divorce mediations to show that they do not differ between genders. In Pakistan, Mehdi (2017) concludes that women judges are more inclined to pay attention to local customs and the way local customs can adversely affect women. However, this does not mean that women judges readily side with the female litigant. Indeed, Mehdi (2017, 219) reports that women judges would often 'do their utmost' to prevent the end of a marriage in divorce proceedings brought by a female litigant. In a separate study of Pakistan, Livia Holden (2017) explores the correlation between women judges and feminist judging concerning the protection of women's rights. Holden (2017, 766) concludes that women judges tend to recognise a significant role of Islam as 'infusing' an awareness of women's rights. The literature on women in the legal profession and the judiciary serves as a starting point for analysis, but studies of women lawyers and judges in Asia will need to go beyond the limits of these theories. There is significant scope to consider how women judges approach their role and use their powers of interpretation and decision-making, and whether there is a distinctly female approach to judging in the Asia-Pacific.

As women have entered the judiciary, the literature has turned to focus on the structural and cultural barriers that women face within the profession. The income gap between male and female lawyers, and the prevalence of sexual harassment in the workplace is well documented (Kay and Gorman 2008, 308–312). The literature also shows concern with the different opportunities that women have compared to men in promotion and attrition during career development. For example, studies have demonstrated that women are severely under-represented as

partners in law firms and that having children has a positive impact on promotion chances for men but not for women (Kay and Gorman 2008, 308–311). Scholars have also pointed out the reality of occupational segregation (Menkel-Meadow 1989, 218), for example, women in the legal profession tend to work in areas such as family law, government law and public interest work rather than corporate law (Epstein 1981, 380–386).

Scholars have taken interest in the challenges that women face being promoted to higher ranking positions within the judiciary, especially to the office of the chief justice (or equivalent) (Valdini and Shortell 2016). However, there are limited studies of structural and cultural barriers that women in the legal profession in the Asia-Pacific face, except for China. Xiaonan Liu identifies multiple challenges that women lawyers and judges face specific to the Chinese context, which affects promotion opportunities (see also Liu 2013, 2015; Zheng, Ai and Liu 2017). For example, Xionan Liu (2013) discusses how women in Chinese legal education are still not perceived as ‘true legal practitioners’ and Xionan Liu (2015) explores how women judges in China are still subject to harmful gendered stereotypes. The privatisation of the bar in China raises a particular set of challenges for women lawyers, for example, Michelson (2009, 364–365) finds that it has had a negative impact on women’s opportunities to practice law. Women lawyers earned less than their male counterparts and had fewer chances at making partner. This culminated in a significant career longevity gap identified by Michelson, where women lawyers left the profession without accumulating the work experience needed for greater professional rewards. In Anqui Shen’s (2017) work on women lawyers and judges in China, she argues that Chinese women have never been expressly excluded from the legal world, nor has the Chinese judiciary ever been considered a male occupation. Therefore, in her view, feminisation is not an accurate depiction of the changing composition of the Chinese judiciary. Further, Shen argues that what women judges do in court differs little from what men do and that their position as men’s equal in the judicial system is recognised and promoted. However, Shen finds that women do face barriers in reaching the upper echelons of judgeship. In Korea, Kim argues that family responsibilities and a male-oriented workplace structure will continue to present obstacles for women in the profession (Kim 2015).

Local legal contexts are inevitably intertwined with global developments and the literature on gender and the judiciary reflects a focus on the extent of compliance with international commitments and treaties,

such as the Convention on the Elimination of Discrimination against Women (CEDAW), as well as compliance with domestic laws and constitutional commitments to gender equality.

One way in which the struggles of women in the judiciary in the Asia-Pacific have been studied is through the intersection of gender and religion. In two majority-Muslim countries, Indonesia and Pakistan, Rubya Mehdi (2017) and Euis Nurlaelawati and Arskal Salim (2017) explore the way that religion shapes and influences the experiences of woman judges, as well as how the emergence of women judges signifies a shift away from the idea in Islam that women cannot be judges. In Malaysia, Najibah Mohd Zin (2017) demonstrates the conflict between gendered and legal interpretations of whether women should be allowed to judge in Shari'a courts according to Shari'a law.

Although there has been a focus on the relationship between gender and religion in Muslim countries, there has not yet been studies of women in the judiciary in relation to other religions such as Buddhism, Hinduism and Catholicism in the Asia-Pacific. There is one study of Myanmar that demonstrates how male legal professionals created a system of Burmese Buddhist law favourable to men but with exceptions and considerations for second wives and their children in polygamous arrangements (Crouch 2016). There is also the possibility for studies on Islam and women in non-state judicial forums (Redding 2020), as well as the need to consider women in the law among Muslim-minority communities in countries such as India or Sri Lanka. To return to the story with which we began this chapter, the judgment of Justice Malhotra in the Sabarimala case, where devotees who worshipped at the temple belonged to a Hindu sect, demonstrates the need to consider how gender and religion also intersect beyond majority-Muslim countries in the Asia-Pacific.

### **Women Judges in High Office and Professional Associations**

The feminisation of the judiciary has been furthered by the establishment of professional associations that advocate for women within the profession and within the legal system more broadly. This includes the formation and growth of women's bar associations and women's judicial associations. As mentioned, some jurisdictions, such as Indonesia, had female judicial appointments to the highest court well before some jurisdictions of the Global North such as the United States. But overall, there are still many contemporary milestones in terms of trailblazing

women who have not only entered the profession but progressed to leadership positions in various tiers of the judicial profession in the Asia-Pacific.

There continues to be progress on the appointment of women to high-level positions of leadership within the judiciary across the region. In 1999, Nazhat Shameem was appointed as the first woman judge to the High Court of Fiji (see Chapter 2). In Pakistan, in 2013, Mrs Ashraf Jehan, was appointed the first female judge in the Federal Shariat Court, although five years later there were still no women judges at the higher level of the judiciary in the Supreme Court (Holden 2018). In Thailand, in October 2018, Ubonrat Luiwikkai became the first woman to be appointed to the position of president of the Thai Court of Appeal (see Chapter 4). In Malaysia, in 2019, a Muslim Malay woman, Tengku Maimun, was appointed as the first female chief justice of the Federal Court (Yi 2019), which is the highest court in the Malaysian legal system. These examples of historic judicial appointments for women, pioneers in female leadership within the judiciary, are symbolically significant.

Yet women judges in positions of high office and influence have come under attack in the region due to political opposition and the rise of populism. One example is the backlash and legal consequences faced by former Chief Justice Maria Lourdes Sereno of the Philippines. Sereno is a vocal critic of President Rodrigo Duterte's war on drugs and questioned the validity of his list of public officials deemed to be drug suspects. She also disagrees with other aspects of Duterte's policies, such as the imposition of martial law in the southern Philippines (Villamor 2018). In April 2018, Duterte publicly named Sereno as an 'enemy' (Curato 2019, 265). Just a month later, Sereno was put on trial based on a quo warranto petition, although many claim this petition was politically motivated (Mogato 2018; Chapter 6). The Supreme Court voted eight against six to remove Sereno from office on allegations that she had failed to fully disclose her wealth (Curato 2019, 265). The quo warranto trial was a means of removing Sereno from office despite the failure to initiate impeachment proceedings, as many suggest would have been the more appropriate response.

While individual women in high-level positions can shape public debate and perceptions on the role of women in law, the collectivisation of women and advocacy efforts are also important. One indication of the emergence of collective action by women in the legal sector is the proliferation of women lawyers and judges' associations in the Asia-Pacific over the past two decades. The formation of professional

Table 1.1 *Women lawyers' associations in Asia*

Association	Established
National Women Lawyers Society, Pakistan	2018
Women in Law Japan	2017
Korean Women Lawyers Association	2017
Women in Law Hong Kong	2015
Supreme Court Women's Lawyers Association, India	2013
Society of Women Lawyers, India	2010
All India Federation of Women Lawyers	2007
Singapore Association of Women Lawyers	2005
Association of Asian Women Lawyers	2001
Association of Women Lawyers, Malaysia	1983
Bangladesh National Women Lawyers Association	1979
Hong Kong Federation of Women Lawyers Limited	1975
Women Lawyers Forum, Bar Association of India	1960
Sri Lanka Women Lawyers' Association	1960
Japan Women's Bar Association	1950
Women Lawyers Association of Thailand	Unknown

associations and societies specifically for women focuses attention on their presence within the profession. It adds collective strength to demands women have within the profession to be treated without discrimination and ensures that there is advocacy within the profession for issues concerning gender and women.

There are at least twenty-four lawyers and judges' associations specifically for women in the Asia-Pacific (see Table 1.1). Of these twenty-four associations, sixteen are women lawyers' associations and the remaining eight are women judges' associations. Many of the women judges' associations were originally established as country-specific chapters of the International Association of Women Judges (IAWJ) and later developed into autonomous associations. The IAWJ was established in the early 1990s to support and foster the role of women in the judiciary and address issues of discrimination against women in the law more broadly. Another regional-level association is the Association of Asian Women Lawyers, established in 2001 with the primary goals of promoting equality, encouraging entrants to the legal profession from all backgrounds and offering support and guidance. The formation of country-specific women's judicial organisations suggests that collective action at the

international level can be a significant catalyst and support for collective professional solidarity at the domestic level.

The emergence of different kinds of women's professional organisations suggests a widening conception of professional solidarity. For example, in 1950 the Japan Women's Bar Association was established as a network for women practising at Japan's bar. Almost seventy years later, in 2017, a group known as Women in Law Japan was established as a networking platform for women in the law in Japan inclusive of counsel, judges, prosecutors, paralegals and law students.

Of the sixteen women lawyers' associations in the Asia-Pacific, nine were established between 2000 and 2020. The other six associations were established periodically between 1950 and 1999, a much slower rate of establishment compared to the proliferation post 2000.<sup>6</sup> One reason that not all countries in the region have a separate women's organisation could be that some established bar associations or legal or judicial institutes may have a women's division or representative within the association.

The main aims of these women lawyers' associations can be grouped into three broad themes. First, these associations provide a network for support of women lawyers through networking activities, online platforms and mentoring programs. In recent times, associations such as Women in Law Hong Kong and Women in Law Japan have created innovative online platforms for women lawyers to connect. Second, the associations advocate for gender equality within the legal profession. For example, the National Women Lawyers Society in Pakistan aims to promote the advancement of women in the legal profession through conferences and practitioner training courses. The Sri Lanka Women Lawyers' Association advances similar aims through conferences, trips and meetings. Third, these associations advocate for and contribute to law reform and policy changes on issues to do with gender. For example, the Bangladesh National Women Lawyers Association and the All India Federation of Women Lawyers hold annual conferences and workshops on, as well as engage in, forms of activism such as initiating public interest litigation on issues of gender equality. One such example is the public interest litigation initiated by the Bangladesh National Women Lawyers Association demanding anti-workplace harassment legislation, which we discuss shortly.

<sup>6</sup> The date of establishment of one lawyers' association was unknown.



Table 1.2 *Women judges' associations in Asia*

Association	Established
Nepalese Women Judges Forum	2014
Korean Chapter of the IAWJ	2006
Korean Association of Women Judges	2000
China Women Judges Association	1994
Japanese National Association of Women Judges	1992
Bangladesh Women Judges Association	1989
Philippine Women Judges Association	1987
Chinese Taipei Chapter of the IAWJ, Taiwan	Unknown

Compared to women lawyers' associations, there are fewer women judges' associations. All of the women judges' associations in the Asia-Pacific have emerged since the late 1980s (see Table 1.2) and are primarily concentrated in East Asia and South Asia. Some of the countries that have a judges' association have strong ties to the United States, including South Korea, Japan, Taiwan and the Philippines. However, there are also women judges' associations in Nepal and Bangladesh. At the international level, the International Association of Women Judges has a chapter in Taiwan, Taipei and South Korea. The Association is also represented outside the Asia-Pacific with chapters in Canada, South Africa, Haiti and beyond.

The main aims and activities of these women judges' associations can also be grouped thematically. First, the women judges' associations are active in promoting gender equality. For example, the Nepalese Women Judges Forum conducted an awareness training on sexual harassment for high school girls in 2014. The Philippine Women Judges Association similarly conducts a variety of outreach programs. A notable point of departure from the women lawyers' associations is that the judges' associations do not advocate for law reform on issues relating to gender to the same degree, likely because of the requirement of impartiality imposed on judges. Second, women judges' associations provide a network of support and solidarity among women in the judiciary. For example, in June 2020, the Chinese Taipei Chapter of the IAWJ hosted a discussion on their experiences of remote hearings during the COVID-19 pandemic. Third, women judges' associations advocate for gender equality and reform within the judiciary itself. For example, the Bangladesh Women Judges Association holds discussions and round

tables seeking to improve and advance the position of women in the judicial system.

Women judges are also active in countries yet to establish a discreet women judges' association. For example, following a two-day workshop hosted by the International Commission of Jurists and UN Women about applying a gendered perspective to cases, women judges in Indonesia took the lead in establishing guidance on gender and judging under the direction of Justice Teresita de Castro (chief justice of the Supreme Court of the Philippines 2008–18). This culminated in the publication of the Bangkok General Guidance for Judges on Applying a Gender Perspective in Southeast Asia (2016). The guidance promotes a gendered approach to judging and offers recommendations to courts on how they can be more gender sensitive

Where generalist bar or judicial associations exist, one challenge lies in mainstreaming women into the generalist associations, including opening positions of leadership to women. For example, in Malaysia, while the Bar Council's 18,000 strong membership is over 50 per cent female, there have only been two female presidents since the Bar Council was established in 1947 (Koshy 2018). In the 2018 Bar Council elections, only six women stood for election to the thirty-eight-member council, and all were from the Kuala Lumpur Bar, representing a highly urbanised context.

These women's lawyers and judges' associations play a range of roles, but some initiatives have been particularly prominent through the use of online platforms in the wake of the #MeToo movement. The #MeToo movement has had a profound impact on the legal profession and judiciary globally as allegations have emerged against leading lawyers and judges. One such example are the allegations against Dyson Heydon, former justice of the High Court of Australia. An internal inquiry at the High Court of Australia resulted in a statement by Chief Justice Susan Kiefel that the accounts of the complainants 'have been believed' (Kiefel 2020). In India, the first allegations of sexual harassment emerged against Junior Foreign Minister MJ Akbar. Lawyer Rutuja Shinde offered pro bono support to the victims of sexual harassment via Twitter and other women lawyers were quick to join the offer. A petition to provide pro bono support to survivors gained the support of over eighty women lawyers (Hemery and Singh 2019).

Similarly, in Bangladesh, the courts became the forum for cases of sexual discrimination and harassment in light of the #MeToo movement. The Bangladesh National Women Lawyers' Association filed a public

interest litigation case requesting the High Court to order the government to pass legislation aimed at preventing sexual harassment in the workplace. This case resulted in the court issuing guidelines against sexual harassment in places of work and academic institutions across the country, in the absence of a formal law (Hemery and Singh 2019). Also in the region, in Pakistan, women lawyers have mobilised through an online platform launched by the Digital Rights Foundation. Lawyers can register to provide pro bono legal support for cases concerning the sexual harassment of women (Hemery and Singh 2019). Here the power of technology is harnessed to advance the #MeToo movement and address concerns to end sexual harassment more broadly.

Despite developments in these places, the #MeToo movement has had mixed reactions or little impact in other countries in the Asia-Pacific. Indonesia has seen a backlash against women who report cases of sexual harassment. In 2018, for example, an administrator at a high school in Mataram, Baiq Nuril Maknun, found herself subject to sexual harassment from the principal of the school (Cahaya 2018; see Chapter 5). She decided to record one of his lurid telephone calls about his sex life as evidence of his behaviour. Instead, the principal was successful in a case against Baiq Nuril Maknun, who was charged under the Information Technology and Electronic Transactions Law 2008. While the court case against her was not successful at first instance, in 2018 the Supreme Court agreed with the appeal by the principal and convicted the woman.<sup>7</sup> This caused significant social outcry particularly from women's rights groups in Indonesia, and it was only at that point that the president pardoned the woman. Defamation cases have also been brought against women who speak out about sexual harassment in India and China.

The growth of associations for women in the legal sector is important and deserves further study to better understand how and to what extent these groups influence their profession and work towards broader goals of women's empowerment and equality. Overall, as one indicator of a thick feminisation of the judiciary, progress on women judges in leadership and the impact of women's professional associations is clearly mixed across the region.

<sup>7</sup> District Court of Mataram Decision No 265/Pid.Sus/2017/PN Mtr, 26 Juli 2017; Supreme Court Decision No 574/Pid.Sus/2018.

## Women in the Judiciary in an Era of Anti-elitism

The chapters in this volume consider whether and to what extent we can speak of the feminisation of the judiciary in the Asia-Pacific. These chapters are united in offering rich, empirical findings that open a path for distinct theoretical and empirical studies of women in the judiciary in the Asia-Pacific. The chapters navigate the twin difficulties of offering contextual description and empirical newness, with the challenge of applying and adapting approaches to understanding the feminisation of the judiciary in the Global South. The authors do not presume that women judges make a difference, but rather seek to open critical debate on the role women judges can and do play. The chapters are alert to the intersectionality of women judges, and that entrance to the judiciary for some women is influenced by their family connections in the profession, their ethnicity, religion or socio-economic status.

In Chapter 2, Anna Dzeidzic provides a historical and comparative analysis of the appointment of women judges in the Pacific with a focus on nine independent Commonwealth states: Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. Dzeidzic presents empirical data on the composition of the superior courts in these states, including judges' gender and professional background. She also examines how the criteria and processes of judicial appointment affect the appointment of women to the judiciary. She offers two main reasons why women are under-represented in the Pacific judiciaries: historical and continuing gender stereotyping which prevents women being regarded as of equal merit to men; and how the processes for judicial appointment, including the distinctive practice of appointing foreign judges, affects the appointment of women. Dzeidzic considers why it matters whether women are included in Pacific judiciaries. Adopting a thicker conception of feminisation of the judiciary, she identifies ways that women judges in the Pacific have contributed to gender equality and explores how women judges on the superior courts of the Pacific can be a powerful expression of gender equality. At the same time, she is critical of the claim that women judges can contribute to substantive gender justice from the confines of their role as judges. While drawing parallels to the other Asian contexts discussed throughout the volume, Dzeidzic also identifies key features that distinguish the Pacific Islands context, for example by noting that the distinctive use of foreign judges in Pacific Island judiciaries also affects the appointment of women to the judiciary.

In Chapter 3, Dinesha Samararatne undertakes a jurisprudential analysis of nine cases before the courts in Sri Lanka to ask the 'woman question' of judicial decision-making in Sri Lanka. That is, through the jurisprudence, she examines the question of whether woman judges speak in a different voice. In doing so, Samararatne implicitly rejects a thinner conception of feminisation of the judiciary and instead seeks to challenge assumptions inherent to a thicker conception of feminisation – that women judges speak with a different voice. She embeds Sri Lanka's experience in its context, characterised as one of patriarchy, ethnic overdetermination, executive overreach, politicisation of public institutions and corruption. Samararatne's thoughtful analysis arrives at the conclusion that a feminist consciousness of law must go beyond the goal of increasing the number of women on the bench, as a thinner conception of feminisation would suggest. Instead, she advocates for the development of a feminist consciousness that demands reform to laws that discriminate against women, and the development of a legal culture in which there is recognition and sensitivity to the discrimination and exclusion experienced by women.

In Chapter 4, Sarah Bishop traces the shift in Thailand where women were not able to become judges, to the appointment of Ubonrat Luiwikkai, the first woman in Thailand to be appointed to the position of president of the Thai Court of Appeal. Bishop examines the trends in employment of women in the judiciary in Thailand more broadly and considers the remaining obstacles to women's progression in the judiciary. Among them, she finds that women judges are prevented from entering the judiciary due to family responsibilities, gender stereotypes and scrutiny over how women judges conduct themselves. Her examination of women judges entering the judiciary in Thailand resonates with those of Steiner, Dhakal and Dzedzic (Chapters 2, 7 and 8) who also examine the challenges and obstacles facing women's entry into the judiciary. Together they provide a rich comparative context to consider the success and challenges of women entering the judiciary in the Asia-Pacific and the future for women in the judiciary in the Asia-Pacific at large.

Chapter 5 by Melissa Crouch considers to what extent we can speak of the feminisation of the judiciary in Indonesia. She identifies that the literature on law in Indonesia is largely silent on the existence, role and challenges female judges face. Crouch offers an analysis of the one female judge on the Indonesian Constitutional Court, Ibu Maria Farida Indrati, and argues that she was a 'model minority judge' for both her legal formalism and her professional ethics. Crouch suggests that a model minority judge is one who is perceived to be part of a minority

community (whether religious, ethnic, cultural or otherwise) and whose conduct while in judicial office is considered to be exemplary in terms of ethics, integrity, intellect and professionalism. Crouch offers a brief outline of the entrance of women judges to the Supreme Court and lower courts, profiling Justice Albertina Ho as another model minority judge. While these model minority women judges were clearly trailblazers and role models, the paradox is that other women who have entered the judiciary have perpetuated gender inequality. Crouch concludes by suggesting that an agenda for research on the feminisation of the legal profession in Indonesia needs to hold in tension this paradox.

Turning to the Philippines, Chapter 6 by Imelda Deinla asks how women judges perceive their role in protecting judicial independence. In this way, Deinla seeks to test theoretic propositions about a thicker conception of feminisation in a real-world context. Deinla asks whether women judges in the Philippines see and act differently in terms of their appreciation of the role, in comparison to men judges. Are there experiences peculiar to women judges in the issues and challenges of judicial independence? How do women judges in the Philippines handle or manage external political pressures as well as influences from their peers, particularly from higher courts? In asking these questions, Deinla considers the extent to which Philippine women judges advance judicial independence and the way they overcome political and institutional challenges. In undertaking this enquiry, she takes as a case study the value of judicial independence and asks whether there is a feminist method of judging and what that would entail. This grounds some of the conceptual discussion on feminist judging from the surrounding chapters in the real-world context.

Chapter 7 by Kerstin Steiner builds a narrative of the long and rocky road for women judges in the Malaysian judiciary. She complements the existing literature on women judges in Syariah courts by detailing the significant challenges women have overcome to enter the bench in the face of a national fatwa (Islamic legal opinion) that prohibits women from being appointed as judges. Steiner's analysis considers the intersection between gender and religion for women judges in the Asia-Pacific. Steiner's account connects with the key themes of women's access to the judiciary and the barriers that women face in entering the judiciary. In particular, her analysis of the extent to which the fatwa prevents women from being appointed as judges is illustrative of the influence religious leaders may have over legal practice and the challenges women judges face given the confluence of gender, law and religion in the Asia-Pacific.

In Chapter 8, on the situation for women judges in Nepal, Subas Dhakal, together with Justice Gauri Dhakal and Justice Sharada Shrestha, take as

their starting point the nexus between women's empowerment and sustainable development to pose the question: what policy and practice insights can be generated from the current state of women in the judiciary in post-conflict and post-disaster Nepal? They first seek to answer this question through the theoretic framework of motility capital, that is, the capacity of actors to be mobile in social settings based on three factors of access, ability and appropriation. Second, their exploratory research approach utilises statistics on higher education enrolment and interviews with aspiring, sitting and retired judges as well as other stakeholders in judicial services. In doing so, they find that while student enrolment in legal education is encouraging, four specific systemic problems exist in advancing the prospect for women in the judiciary in Nepal: governance; the glass wall; the path of broken glass; and the glass ceiling. In other words, corruption, entry barriers, career hurdles and policy misappropriation have an adverse impact on the motility of women judges in Nepal. They conclude with two main policy and practice insights. First, if women's representation in the judiciary is to be increased, the relevance of legal education and the employability of graduates from various law schools needs serious attention. Second, it is vital to implement good governance within the judiciary by setting up independent institutional mechanisms to keep it free from political interference.

In Chapter 9, also focused on South Asia, Simashree Bora takes as her starting point the immobility of women in India's Supreme Court and High Courts and examines the hierarchy, representation and institutional processes involved in the judiciary in India. Bora also looks at the idea of gendered objectivity and its interconnectedness with changes in gender discourse within the system. Importantly, Bora interrogates gender objectivity in Indian Supreme Court jurisprudence. In doing so, she finds that the idea of an objective judgment is predetermined by a gendered interpretation that is biased against women and is deeply rooted in a patriarchal system. Bora concludes that women judges can bring to the bench a perspective that is not dominated by patriarchal attitudes, which is essential for the protection of constitutional rights and to support an approach to legal interpretation that is unbiased by gender norms.

## Conclusion

While women's entrance to the judiciary remains a key preliminary step in the feminisation of the judiciary, the chapters in this volume differ in what might constitute the feminisation of the judiciary in their respective jurisdiction. What the chapters share in common is that the feminisation

of the judiciary in the Asia-Pacific is connected to wider issues of recognition, equality and non-discrimination for women in society. The chapters are realistic, avoiding essentialist views of women in the judiciary, and do not assume that the mere presence of women in the judiciary will lead to substantive equality. The role of women in the judiciary in the Asia-Pacific, as in much of the Global South, is influenced by religious, traditional and customary values and practices, as well as postcolonial realities of corruption, inequality and violence.

To return to the story with which we began this chapter, the Sabarimala temple decision should have paved the way for women to enter and worship at the temple. Yet the decision was met with protests and resistance. Women who attempted to enter the temple after the Supreme Court decision were physically blocked and assaulted. In January 2019, five months after the decision was handed down, two women managed to enter the temple. Yet after that the temple was closed and a cleansing ritual conducted. Debate remains over the decision and women still cannot easily enter the temple. In light of Justice Malhotra's dissent, the enduring debate and tension further agitates the questions raised in this chapter about the influence and role of women judges in the Asia-Pacific.

The Asia-Pacific offers a compelling place from which to interrogate the role and status of women judges in society more broadly. To take these contexts seriously often requires us to start with a different set of questions and assumptions than is present in the existing literature on the Global North, whether it is the small island context of the Pacific, the post-conflict context of Nepal or the post-socialist legal profession of Myanmar. Our questions must acknowledge and embrace the diversity and complexity of the Asia-Pacific region and the challenges that women face in the judiciary in postcolonial contexts.

Many of the chapters in this volume illustrate the bravery and tenacity of women judges in the region. The chapters differ in whether the presence of women judges is an expression of gender equality, with Dziedzic arguing that this is the case in the Pacific, while Bishop problematises this idea and suggests the presence of women may be more tokenistic in Thailand.

The chapters also draw attention to the need to account for the differences between liberal democracies and illiberal authoritarian regimes; the differences in the career pathways of judges in civil and common law systems; and the differences in social and historical trajectories of the state, which have not necessarily been made explicit in



studies of women in the judiciary. This volume serves as a starting point for future scholars to examine. The rich comparative analysis and original empirical research is an invitation for readers to consider the role of women in the judiciary and the challenge of gender equality in the Global South more broadly.

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