

Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern?

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Gender and ethnic inequalities in the workplace have been the norm for decades with no effective measures been taken to address them, despite mounting evidence of discrimination and disadvantage faced by women and ethnic minorities across the world. Globally, most corporations, law-firms, government agencies, public offices recognize the need for diversity to enhance decision-making and innovation. Research and reports have suggested that 87% of times teams with age, gender and geographic diversity and inclusive approach achieve the best results. Like any other profession, the legal fraternity is no different and is still trying to overcome the inherent biases and challenges. Till date, whether it is a board-room or in courts/tribunals, it continues to be a systematic domination by the male fraternity. The irony in the whole situation is that of all professions, law is personified by Lady Justice and its blind-fold.

Diversity in international arbitration can be classified under different groups, such as gender and age or geography, culture and ethnicity. Interestingly, in one of the sessions during the London International Disputes Week last year, a new term '**RAGE**' [fn]RAGE: Race, age, gender and ethnicity; Vyapak Desai mentioned this term in the session organized by Herbert Smith dedicated to International Commercial Arbitration during London International Disputes Week on May 9, 2019.[/fn] was coined, while addressing the diversity issue in international arbitration highlighting the significance of all factors that contribute to a proper adjudication of a dispute.

The international arbitration fraternity has no dearth of top-tier practitioners and new-comer female lawyers or competent and qualified individuals from different ethnic backgrounds but getting rid of the age-old traditions and infiltrating the male dominated society has been a challenge. The world of international arbitration is still dominated by "*pale, stale, and male*" decision makers mostly from the western world and is a relatively homogenous group.[fn]Susan D. Franck, James Freda, Kellen Lavin, Tobias A. Lehmann and Anne van Aaken, *The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration*, Columbia Journal of Transnational Law, Vol. 53, Page 429, 2015.[/fn] The arbitral community has somehow chosen to be extremely narrow, therefore the need to increase gender and ethnic diversity has developed as a valid concern.

We have tried to look at the reasons on why gender and ethnic diversity need to be encouraged in arbitral appointments, without enforcing them as a matter of right or entitlement. This automatically would answer the need for rigid support of the arbitral institutions in making it a reality.

Need for ethnic and gender diversity

As rightly said by Mr. Toby Landau in the YSIAC organized debate on Women in Arbitration- “*Gender diversity is a fact of the modern world, and the composition of tribunals should reflect this.*”

Increasing gender and ethnic diversity in arbitral tribunals is not just a valid concern but need of the hour! Arbitration or any form of dispute resolution boils down to dealing with people and human emotions. The need for empathy, ‘*solution oriented*’ approach and keeping in mind the human element holds the key to dispute resolution. Therefore, the need to have not just gender but both ethnic and geographical diversity addressed in arbitration is critical. The objective of diversity is to ensure a well-thought through decision, taking into consideration various socio-political factors, ground realities and different perspectives and cultural backgrounds.

Men and women differ in all areas of their lives. Not only do men and women communicate differently but *they think, feel, perceive, react, respond and appreciate differently, which is exactly what is needed for a fair and a balanced decision.*[fn]John Gray, *Men are from Mars and women are from Venus*, Harper Collins, 1992.[/fn] The opaque nature of appointment of arbitrators and implicit bias have been the key factors contributing to reduced diversity in the arbitration sphere internationally. Women are still underrepresented, despite knowledge that gender-balanced leadership will aid in improving corporate governance and taking well thought decisions. There is no centralized public repository providing information about individuals who have served as arbitrators, though arbitral institutions over the last decade have started maintaining records and statistics to identify gender and ethnic diversity practiced by them while making arbitral appointments.[fn]Catherine Rogers recommends providing publicly available information about arbitrators, or what she refers to as “Arbitrator Intelligence.” Catherine A. Rogers & Alex Wiker, *Piloting Arbitrator Intelligence*, Kluwer Arbitration Blog.[/fn] It’s often portrayed to be a ‘*pipe-line*’ issue with no good women in arbitration, underlying cause is anyone’s guess.

The launch of Pledge in 2016 with more than 4000 signatories as of today was well-intended to bring about equal representation in the arbitration fraternity and more to do with providing equal opportunity. It acts as a launch pad for arbitral institutions to understand the significance of this issue and reach out to more and more talented female arbitration specialists and increase their appointments, ensuring equal opportunities are granted based purely on their qualifications and not on the basis of any reservations. This goes a long way in selecting arbitrators basis fulfilling the eligibility criterion and not as a matter of entitlement.

In the last decade, we have seen several steps been taken to increase awareness. A notable addition has been the start of Arbitrator Intelligence (AI), promoting use of the Arbitrator Intelligence Questionnaire (AIQ). This novel concept relies heavily on arbitral institutions urging them to consider and address this critical aspect for its actual implementation. In an ideal world, arbitral appointments should not be based on gender or ethnicity but on expertise, efficiency and competency of an individual. Women and individuals from other ethnic backgrounds do not need to be sympathized and given nominations on a token basis, but on an equal opportunity basis. However, this ideology is seldom practiced!

There are one too many surveys already conducted across the globe. Several factors contribute to women not progressing in this field, social connections made, mode of networking done, closeness and inherent bias of the decision-makers. Surveys have been conducted to reflect that significant differences remain both in how appointments are secured, and in the type of appointments that are secured.

While gender diversity still seems to be talked about and addressed, non-white and non-male arbitration experts from certain jurisdictions face an additional hurdle. Ethnic imbalance has not even been recognized as a problem, leave alone finding a solution. Arbitrators from ethnic backgrounds can add value in understanding certain aspects critical to a dispute deeply rooted in a region, which an old male white arbitrator could not have foreseen.

Role of Arbitral Institutions

Most developed jurisdictions are walking towards a regime of having arbitral institutions appoint the Tribunal, moving away from the age-old ad-hoc system. This shift plays significant importance on the role of arbitral institutions thereby placing immense powers with them to address the diversity issue. The recently released statistics of Stockholm Chamber of Commerce (“**SCC**”) reflect that 27% of appointed arbitrators were women, up from 18% in 2017. Notably, 24% of the party-appointed arbitrators were women, compared to 8% in 2017. The International Chamber of Commerce in 2018, – 32% women appointed or confirmed as arbitrators acted as and 30% as sole arbitrators with minor increases from 2017.[fn]The International Chamber of Commerce (“ICC”) statistics reflect the improvement from 136 in 2015 to 273 in 2018. When parties’ requests for lists to nominate arbitrators, ICC has attempted to provide lists including women, and on a few occasions, even a balanced list.[/fn] Singapore International Arbitration Centre has reported for 2017 a 7% increase from 2016 in women arbitral appointments but has not published complete statistics as to the number of female appointments by the parties or the co-arbitrators, or the total proportion of cases which feature at least one woman on the tribunal and the same is highly awaited. These statistics depict a clear imbalance between genders in international arbitration, leaving a very small proportion of female appointees.

Arbitral institutions account for only a fraction of all arbitrator appointments. While selecting arbitrators, the last thing on anyone’s mind is promoting gender and ethnic diversity rather appointing the best person for the job whom they deem fit or as recommended by the small pool of male arbitration specialists. Concerns about lack of diversity remain unaddressed even in ad-hoc arbitrations, with lawyers and parties recommending mostly male arbitrators depending on the social connections. Therefore, the need to shift to institutional framework in arbitration is paramount.

If not the statute, the institutional rules can definitely provide an option, (*keeping in mind party-autonomy*), to have an arbitrator on a three-member panel or even in cases of sole arbitrator appointments, in accordance with the “*RAGE*” concept, to ensure diversity is addressed, albeit the selection been done purely through an objective criterion. This would go a long way in encouraging not just women arbitrators come up in the arbitral fraternity but also at least one of the aspects, region, age, gender or ethnicity addressed while constituting a Tribunal. One of the solutions to address this problem, could be through keeping the name, ethnicity and age of arbitrators, blank in the curriculum vitae so that nomination/appointment is done solely based on qualifications, and meeting other eligibility requirements of independence and impartiality.

Conclusion

Considering the current scenario, Gary Benton’s proposal of setting a new norm/standard that *all panels should include at least one woman or other diverse practitioner and panels that do not are “Defective Panels”* seems plausible. The idea and thought of absence of women or other diverse practitioners on the panel being termed defective is quite an ambitious and utopian concept. Efforts towards its implementation would go a long way in encouraging diversity in international arbitration. Various scholars and arbitration experts have raised a valid issue concerning gender and ethnic diversity- questioning not who the power vests with but how is the same exercised. Levelling the playing field and increasing the gender and ethnic diversity holds the key to growth and success of international arbitration and lesser challenges and enforcement actions across the globe.