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Transition from Elitist to Representative Elections to Judicial Posts in the Supreme Court

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ABSTRACT

The essence of democracy lies in its representative capabilities which brings together the spirit of equality, liberty and justice together however, the adjudicators of the apex court are appointed on the basis of merit which is reflective of elitist democracy tendencies rather than representative one.

The present paper takes into account, the two theories of democracy, the representative and elitist theories and its applicability in the apex Judicial set up.

It explores the possibility of elections to the judicial posts wherein elections would be conducted for the meritorious candidates to the judicial posts in the Supreme Court of India which would factor in the true principles of democracy. In addition to this, the author has taken insights from the International Court of Justices and its means of electing its member judges.

I. INTRODUCTION

Since the beginning of idea of democracy, the essence of democracy like accountability, representativeness, general will among others were harassed by undemocratic elements that is the elites. To challenge this, the theory of representative democracy came into existence. However, these demerits were rectified by the representative theory. The Supreme Court of India which has primary role of interpretation of the Constitution and has tendencies of elitist than a representative. In the present paper, the author aims to analyse the two theories of democracies: elite and representative and review the

semblance of equality that exist in the Judicial set-up of Supreme Court of India. The author proposes that the solution to this problem is holding elections to the judicial posts of the Supreme Court, which would result in transition from elitist democratic tendencies to representative ones.

Relevance of the Study

This study is aimed at highlighting the anomaly with respect to the present Judicial System of India, especially the lack of composition of representative character. This study will help understand to understand within the system itself

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which defeats the basic tenants of Constitution of India. In addition, the author via means of study proposes that the tentative solution to representative deficiency would be conduction of elections for the posts of Supreme Court Judges.

Literature Review

The Column of Avani Bansal on Bar & Bench brings into light the lack of representative character in the highest court of India, the Supreme Court. “*Further Reflections on The Elitist Theory of Democracy*” by Robert A. Dahl helped in understanding the views of Niccolo Machiavelli with respect to leadership. Guilia Matasha’s Plato’s Argument for Rule by Philosopher aided in the understanding the concept of Philosopher King of Plato as well as provided critical analysis of the Act. Aparna and etal, provided an indepth analysis of the working of the Supreme Court which helped the author in formulation of chapter II. Uday Shankar’s and Srichetha Chowdhury’s work offered insights on gendered-representation in the Supreme Court.

Other online sources were to refine the author’s concepts which were related to the topic.

Objectives of the Study

1. To analyse the elite and representative theories of democracy
2. To critically review the lack of representativeness within the Supreme Court as a whole
3. To conclude and provide relevant suggestions.

Hypothesis

Elections to Judicial Posts of Supreme Court would result in transition from elitist democratic tendencies to representative ones.

Research Questions

1. Whether the present Judicial set-up of Supreme Court has the ssemblance of equality that it espouses to maintain?
2. Does elections to ICJ entail the theory of representative democracy?
3. Whether such elections would prove to be antithetical to independence of Judiciary?
4. Will the concept of constitutional constructionism be realized at the fullest with representative democracy?

Research Methodology

The research methodology adopted in the present study is doctrinal in nature. The scope of the study was confined to the data obtained from scholarly articles, journals and web articles.

II. THEORIES OF DEMOCRACY: ELITE AND REPRESENTATIVE THEORIES

Elite theory of democracy is one of the most debated theories of democracy because of its characteristics. To understand the theory in entirety it is very important to understand the etymological origin of the term “elite”. The word elite is derived from the French word *élite* meaning ‘a choice or select body, the best part’² which stemmed from the Latin word ‘*eligere*’ which meant choose and is one of the

² Online Etymology Dictionary. Elite. [Online]

<https://www.etymonline.com/word/elite> [2021, Aug].

etymological roots of the term election. In the late 14th Century, the Middle English borrowed the term to mean the chosen person, mostly in the sense of bishop election. Thus, the roots of the term are closely knit with the concept of election of the best possible alternative.

The elite theory presents a model of democracy wherein the elite strata i.e. the ‘a small group of socially and economically well-off’³ would handle the reins of the working of a State. The basis of this theory lies in the natural affinity the leaders of virtue and wisdom and people. It is to be noted that the ‘election to the seat process’ is democratic within this model, however the choice of candidates is not truly egalitarian which would in long run result in contrast to accountability aspect. Most of the essentials of elite theory stand in contravention to the very essence of democracy. Niccolo Machiavelli, in his work ‘Discourses’ *“he lamented, for example, that men of true merit are sought for in difficult times but in easy times it is not virtuous men who are most favored but those with riches and the proper relations; in peaceful times, other citizens who are jealous of the reputation of the virtuous want not merely to be their equals but their superiors.”*⁴

Plato in his book, Republic mentions about the

concept of philosopher kings wherein he argues that kings of the state should be philosophers who have an appetite for wisdom and knowledge.⁵ This very argument of Plato is negatable as democracy is nothing but “government ‘of the people, by the people, and for the people’”⁶ Such rulers though may possess wisdom and knowledge but they might not be in sync with the ground realities of the ignorant i.e. the common man, one such reason would be the practice of sympathy or empathy.

Thus, it is to be noted that during the inception of the notion of democracy, the essence of democracy like accountability, representativeness, general will among others were harassed by undemocratic elements that is the elites. To challenge this, the theory of representative democracy came into existence.

The Representative theory of democracy on the other hand, fill in the voids created by the elite theory as it is a model which advocates election of the rulers by voting by all eligible citizens who would be responsible for creation of policies of the state. Such a kind of system would result in good governance free from the evils of corruption.⁷

³ Khan Academy.2018. *Types of Democracy*. Khan Academy [Online] Available: <https://www.khanacademy.org/humanities/us-government-and-civics/us-gov-foundations/us-gov-types-of-democracy/a/types-of-democracy> [2021, August].

⁴ Dahl, Robert A. “Further Reflections on “The Elitist Theory of Democracy”.”*The American Political Science Review* 60, no. 2 (1966): 296-305. Accessed August 7, 2021. doi:10.2307/1953357.

⁵ GIULIA MATASSA. 2013. *Plato's Argument for Rule by Philosopher Kings* Available: [https://www.e-](https://www.e-ir.info/2013/04/17/should-philosophers-rule/)

[ir.info/2013/04/17/should-philosophers-rule/](https://www.e-ir.info/2013/04/17/should-philosophers-rule/) [2021, August].

⁶ Quoted by former U.S. President Abraham Lincoln, The Gettysburg Address, November 19, 1863)

⁷ Deininger, Klaus & Mpuga, Paul. (2005). Does Greater Accountability Improve the Quality of Public Service Delivery? Evidence from Uganda”. World Development Vol.33. World Development. 33. 171-191. Available: 10.1016/j.worlddev.2004.09.002. [2021, August]

III. INDIAN JUDICIARY: A CLASSIC CASE OF ELITIST DEMOCRATIC STRUCTURE

The French Revolution eternalised the concepts of Liberty, Equality and Fraternity which in the present times have become the “conventional characteristics of an ideal society”⁸. India, is no alien to these notions as it is enshrined within its preamble. Preamble of the Constitution is like a preface to a book, which brings into light the aims and aspirations of the people of India.⁹

India’s Preamble declares the country to be a Sovereign, Socialist, Secular and Democratic Republic.¹⁰ The Preamble has a direct or indirect bearing on the prominent features of the Constitution. Each State has three organs of the Government; the legislature, the executive and the judiciary. It is clear from the working of the legislature and executive that it has the elements of representative democracy at all its levels. However, the same cannot be said for the judiciary. Indian Judiciary, especially the Apex Court does not constitute within itself the fundamentals of a democratic system due to absence of egalitarianism and fair-play in its constitution.

Indian Judicial System is a cherished child of the English parents because of its inheritance from the legacy of the British Raj. It comprises of “Supreme Court of India, the High Courts and subordinate courts at district, municipal and village levels.”¹¹

In the present paper, the author will focus on the features of the Supreme Court of India.

Judges of Supreme Court of India

The Supreme Court of India is considered to be “the most powerful court in the world”¹² for “its wide jurisdiction, its expansive understanding of its own powers, and more than a billion people under its authority.”¹³ The Apex Court of India was constituted on 28th January 1950.

Judges are appointed by the President in “consultation” with Chief Justice of India¹⁴. For such an appointment, an eligibility criterion is given in the Constitution in Article 124. For a person to be appointed as a Judge of the Supreme Court, “a person must be a citizen of India and must have been, for atleast five years, a Judge of a High Court or of two or more such Courts in succession, or an Advocate of a High Court or of two or more such Courts in succession for at least

⁸ Sack, P. (1990). LEGAL TECHNOLOGY AND QUEST FOR FRATERNITY: REFLECTIONS ON PREAMBLE OF INDIAN CONSTITUTION. *Journal of the Indian Law Institute*, 32(3), 294-308. Available <http://www.jstor.org/stable/43952306> [2021, August]

⁹ Jawaharlal Nehru, Objective Resolution of the Constituent Assembly.

¹⁰ INDIA CONST. Preamble

¹¹ Taruni Kavuri. 2020. Introduction to Indian Judicial System. Animal Legal & Historical Centre. [Online] Available <https://www.animallaw.info/article/introduction-indian-judicial-system>[2021, August]

¹² George Gadbois. (1987). *Supreme Court Decision making*, 1 BANARAS LAW JOURNAL [2021, August]

¹³ Chandra, Aparna and Hubbard, William H. J. and Kalantry, Sital, The Supreme Court of India: An Empirical Overview of the Institution (August 31, 2018). Aparna Chandra, William H.J. Hubbard, and Sital Kalantry, 'The Supreme Court of India: An Empirical Overview of the Institution' in A Qualified Hope: The Indian Supreme Court and Progressive Social Change, Gerald N. Rosenberg and Sudhir Krishnaswamy, eds. Cambridge University Press, Forthcoming, U of Chicago, Public Law Working Paper No. 660, Available at SSRN: <https://ssrn.com/abstract=3154597> or <http://dx.doi.org/10.2139/ssrn.3154597>[2021, August].

¹⁴ INDIA CONST. art. 124.

10 years or he must be, in the opinion of the President, a distinguished jurist.”¹⁵

However, over the years as the Court has evolved because of the judicial interpretations¹⁶ on the aspect of appointment of the Judges, appointments to the Court are made by the “collegium” comprising of the senior-most judges of the Court, who is responsible for choosing the Supreme Court’s new member¹⁷.

Basis of selection

The Supreme Court of India lack of representative character in the highest court of India as majority of the judges who are appointed as Judges of Supreme Court hail from “upper class, hindus, male, bodily abled as heterosexual.”¹⁸ This poses a question, whether the apex court of India is all inclusive in its nature ? To answer the following questions, researcher would like to bring in certain instances which answers the question in negative:

- Absence of appointment of any female Chief Justice of India, till now the Supreme Court has witness appointment of 8 female judges of the Supreme Court of India.
 - Absence of any Christian or Buddhist Judge¹⁹

- No Judge of Supreme Court from LGBTQ+ Community²⁰

- Dominance of Upper Caste²¹

It is important to consider that diversity of Supreme Court with respect to all genders appointment would bring in a different perspective to the decision making factor of the Courts. It is very important that the Supreme Court of India has equal gender representation, inclusive of LGBTQ+ Community so as to inculcate the true spirit of democracy in the highest court of dispute resolution²². It will provide will be truly egalitarian as it will ensure to uphold the principles of equity, justice and good conscience. It will work upon the emancipation of women and improve their conditions as well as will aid in getting rid of ‘second sex’ treatment.

Religion plays a very pivotal role in the upbringing of an Individual, it is important to note that the absence of all-religion-inclusive composition of the Supreme Court hinders the aim of liberty, equality and fraternity. To uphold, the principles of the Constitution, it is important that representative character of the apex court is maintained.

¹⁵ INDIA CONST. art. 124.

¹⁶ Special Reference No. 1 of 1998, (1998) 7 SCC 739; Supreme Court Advocates on Record Ass’n v. Union of India, (1993) 4 SCC 441; S. P. Gupta v. Union of India, AIR 1982 SC 149.

¹⁷ supra 13

¹⁸ Avani Bansal. 2021. *Millions are waiting for a foot in the door: A case for a representative Judiciary in India Bar&Bench*. [Online] Available: <https://www.barandbench.com/columns/millions-are-waiting-for-a-foot-in-the-door-a-case-for-a-representative-judiciary-in-india> [2021, August]

¹⁹ Supreme Court of India. 2021. Chief Justice & Judges. Supreme Court of India.[Online] Available: <https://main.sci.gov.in/chief-justice-judges>

²⁰ Ibid

²¹ Ibid

²² Uday Shankar& Srichetha Chowdhury. 2019. *REPRESENTATIVE JUDICIARY IN INDIA: AN ARGUMENT FOR GENDER DIVERSITY IN THE APPOINTMENT OF JUDGES IN THE SUPREME COURT*, Indian Law Institute 2 pp. 206-209.

Moreover, the maintenance of legacy of the legal household also dominates the scene which suggests that the composition in some way be tinted with a hint of nepotism.

Precedents are an important source of Law which has its existence via realist theory of law. This theory focuses on law in working and puts the judges in the centre of law making, therefore, it is important that the decisions of the Court must have the influence from all sections of society.²³

It is to be noted that the doctrine of Constitutional Constructionism is a tool which helps in constructing the Constitution as per the changing society by judges²⁴. Judges are the engine of this train and having the element of representativeness is crucial so to guarantee an egalitarian interpretation of the Constitution. The benefits of constitutional constructionism can be realized at the fullest with the representative character of Judiciary.

IV. ELECTION TO JUDICIAL POSTS

The present system of appointment is quite synonymous to the elitist system where the meritorious and people belonging to the prejudiced classes would be appointed. To get rid of this aspect and to bring to life the representative character of democracy, the author suggests that elections should be conducted for the meritorious candidates to the judicial posts in the Supreme Court of India which would factor in the true principles of democracy.

One institution that has gracefully amalgamated the principles of democracy in Judiciary is the ICJ via means of electing the 15 judges of the Court for a term of nine years to office by the United Nations General Assembly and the Security Council. One important characteristic of the composition of ICJ as a whole is that

*“The Court as a whole must represent the main forms of civilization and the principal legal systems of the world.”*²⁵

Thereby, ensuring a global representation in the international forum of adjudication.

One of the means to leave behind the evils of discrimination, sexism and orthodoxy and to usher an era of equality and freedom is by the means of elections to the Judicial Posts in Supreme Court which will entail within itself a promise of equal representation. The author proposes the election of the meritorious candidates for the posts of Supreme Court to be akin to the electoral system chosen for the elections of the President of India.

V. CONCLUSION

The Supreme Court of India is the epitome of the justice which at its level best aids the people of India from where the power of Constitution is derived. Despite being an institution of such a stature, the lack of representativeness in composition of the apex court, results in a monochrome picture of the voices of the people rather than a composite mosaic of different and

²³ Mahajan, V.D., (2020) Jurisprudence & Legal Theory, 5th ed. Lucknow, Eastern Book Company.

²⁴ Solum, Lawrence B., “Originalism and Constitutional Construction” (2013). *Georgetown Law Faculty Publications and Other Works*. 1301.

<https://scholarship.law.georgetown.edu/facpub/1301/> [2021, August]

²⁵ International Court of Justice. *Members of Court* International Court of Justice [Online] Available: <https://www.icj-cij.org/en/members> [2021, August].

diverse voices. The solution to this problem is to have a transition in its character from elitist to representative. This is possible by conducting elections to the judicial posts at the Supreme Court of India just like ICJ. Such a step would bring to life the true spirit of the Constitution as then the apex court would entail the liberty, equality and fraternity at the foundational level. It can be concluded that the hypothesis stands true.

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