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**INTRODUCTION OF A JURY-LIKE SYSTEM TO ACHIEVE JUDICIAL
DIVERSITY IN INDIA - HARMONIZATION OF MERIT AND
REPRESENTATION**- Aditi Gupta & Pabitra Mohan Panda¹**ABSTRACT -**

A democratic nation demands a diverse judiciary to represent all democratic characteristics of its population in the process of judicial decision making. Though the ways to achieve judicial diversity are many, each way comes with its own pros and cons. This research paper aims to suggest a judicial reform to achieve judicial diversity while explaining how it can even be helpful in harmonizing 'merit vs representation' debate. It further goes on to critically analyze the advantages and disadvantages of the proposed reform and how the disadvantages can be mitigated to make the proposed reform worth considering. Utilizing auxiliary examination of hypothetical texts, this research paper aims to explore the utility of a Jury-Like system in India in achieving judicial diversity, by pointing out defects in existing approaches and policies which is divided into three halves. This research will also put forward some theories which may be employed to enhance judicial diversity and minimize merit-representation dichotomy.

KEYWORDS- Judicial Diversity, Merit vs. Representation, Jury-Like System

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I. INTRODUCTION

A working justice system requires a more diverse judiciary. There is hardly any contestation over this view. There are a number of benefits of having a diverse judiciary. Studies prove that a diverse judiciary is more representative in nature and thus enhances public confidence and trust in the justice system². The logic of this seems obvious, a judiciary that represents a community as a whole, is more likely to evoke their confidence as opposed to the judiciary that is formed out of a privileged class. In total there is likely a greater legitimacy for such a diverse judiciary as well as greater respect for law among people. Moreover, a judiciary which is composed of different and diverse people is likely to be stronger as it is likely to possess a greater range of perspectives and insights. This is because decision making is likely to improve considerably by greater exposure and by taking into account different ideas and sometimes by even coming at a common ground out of conflicting ideas³.

Our task does not end here after highlighting the need and benefits of a diverse judiciary but it begins from here. There is a fair amount of agreement on the benefits of a diverse judiciary but the real and daunting task is to come up with an idea that is helpful in solving the question "what is the better or best way of ensuring judicial diversity?"

A. RESEARCH QUESTION

Whether the introduction of a jury-like system in India can actually solve the first issue in the way of achieving judicial diversity, i.e., merit OR representation.

B. HYPOTHESIS

Introduction of a Jury-like system is not the solution to merit vs representation debate in the path to achieve judicial diversity in India.

Independent Variable- Introduction of Jury-Like system

Dependent Variable- Resolution to Merit vs Representation tussle for achieving judicial diversity.

²"House of Lords Media Notices – February 2022 - UK Parliament" (Parliament.UK)
<<https://www.parliament.uk/business/lords/media-centre/house-of-lords-media-notices/2022/february-2022/>>
accessed July 31, 2022

³Rackly E and Webb C, "Three Models of Diversity: Debating Judicial Appointments in An" (Taylor & Francis September 11, 2017) <<https://www.taylorfrancis.com/chapters/edit/10.4324/9781315400068-19/three-models-diversity-erika-rackley-charlie-webb>>> accessed July 31, 2022

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C. RESEARCH METHODOLOGY

The researcher has followed a doctrinal style of research and has based his research paper on a personalized analysis of the secondary data collected from research articles, Law Commission reports, books, journals, and web sources. The answer arrived at for the hypothesis is primarily based on secondary data and the researcher's own arguments substantiated by provisions of law.

II. MERIT VS REPRESENTATION TUSSLE IN WAY TO ACHIEVE JUDICIAL DIVERSITY

A. CONCEPT OF MERIT

The term 'Merit Selection' literally means choosing the best and most deserving candidate among the available candidate pool.⁴ However, in a legal sense, it simply means the absence of any affirmative action policies in the selection procedure. Merit selection theory advocates against the selection of a less qualified candidate over a comparatively more qualified candidate just because of the under-representation of the class of the less qualified candidate.⁵

However, there are certain issues involved with the concept of merit, the first being the construction of merit. The term 'merit' can be construed differently in different situations. The most accepted and currently followed definition involves defining merit in terms of skills, career paths, experience, interests, life choices etc. But this turned out to be more of an inclusive definition of merit rather than an exhaustive definition. The ambit of the term 'merit' can be and should be expanded way beyond the aforementioned criteria to achieve the true goal of merit selection procedures.

Some pertinent issues with the merit selection procedure reflect in the consequences and the outcomes of merit selection principles. It focuses more on the quality of judicial decisions rather than the impact, enforceability and reception of the same by the general public. To ensure the public faith in the sanctity of judiciary and judicial decisions, maintaining judicial diversity

⁴“Definition of Merit” (Oxford Advanced American Dictionary at OxfordLearnersDictionaries.com) <[https://www.oxfordlearnersdictionaries.com/definition/american_english/merit_1#:~:text=1%5Buncountable%5D%20\(formal\),plan%20is%20entirely%20without%20merit.>](https://www.oxfordlearnersdictionaries.com/definition/american_english/merit_1#:~:text=1%5Buncountable%5D%20(formal),plan%20is%20entirely%20without%20merit.>) accessed March 4, 2022

⁵Malleson K, “Rethinking the Merit Principle in Judicial Selection” (2006) 33 Journal of Law and Society 126
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is a sine qua non. However, the merit selection procedure neither encourages nor acknowledges the need for the same. It focuses more on fair selection procedures on the presumption that every aspirant in the candidate pool has the same opportunities and chances of selection at the commencement of the competition.⁶

B. CONCEPT OF REPRESENTATION

It is relatively easy to mainstream the definition of 'representation' than to define merit. It can be defined in terms of the concept of judicial diversity. A diverse judiciary represents all the demographic components of the population it intends to serve, in terms of gender, religious faith, race and ethnicity, sexual orientation, caste, descent etc.⁷

There are various ways to ensure judicial diversity, which may vary from state to state. The most common approach to achieving judicial diversity where all portions of the population are adequately represented is by way of facilitating affirmative action policies for the unprivileged and under-represented. Affirmative action policies can be approached prohibitively or proactively.⁸ Both the approaches have their own merits and limitations.

A diverse judiciary proportionally diverse to its demography gains the faith of the population, which is a must for a democracy to survive. To put it into perspective, the famous quote by Dr B.R. Ambedkar is worth mentioning where he stressed the importance of public faith in the third organ of the Government. He considered that day a black day for the Republic of India when the masses lose confidence in the Judiciary. A diverse bench can ensure that such a day shall never come. The compelling reason behind having a diverse bench is that non-traditional judges tend to include traditionally excluded perspectives while making decisions.⁹ A 2008 study correctly mentioned that diversity in the bench is vital for the judiciary to provide equal justice for all.

However, this theory is also not free from drawbacks. The major controversy with this theory is about its very need. Some argue that its existence is deeply rooted in political pressures rather

⁶Malleson, Supra Note at 2

⁷Myers KO, "Merit Selection and Diversity on the Bench" (heinonline.org2013)

<https://heinonline.org/HOL/Page?handle=hein.journals%2Findilr46&div=7&g_sent=1&casa_token=&collection=jou> accessed March 4, 2022

⁸Malleson, Supra Note at 2

⁹Ibid.

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than actual problem-solving. Ensuring representation is seen as more of a political perspective than a social need nowadays. Another issue with this theory is the absence of a qualified and deserving candidate pool composed of aspirants from all under-represented groups.¹⁰

C. JUDICIAL DIVERSITY - TUSSELE BETWEEN MERIT AND REPRESENTATION

The tussle between merit selection theory and judicial diversity theory is quite evident as both approaches have their own pros and cons; apparently, one seems to bridge the limitations of the other. Both the theories are incomplete and ineffective on their own. However, as it is apparent on its face, one bridges the gaps of the other, a solution can be found in the fusion of the both theories and formulating a new theory which has merits of both the theories while mitigating and harmonizing demerits of the both.

III. INTRODUCTION OF JURY-LIKE SYSTEM - A WAY OUT

A. WHAT A JURY-LIKE SYSTEM WILL LOOK LIKE?

This research paper proposes the introduction of a jury-like system to solve the tussle between the merit and representation in a way to ensure judicial diversity in India. By the expression "jury-like system," we mean a multi-member advisory group consisting of people belonging to the classes of different stakeholders in the case. Along with interested members representing both the parties in the case, there can be some respectable members of that locality, some expert members in that field with which the case deals, and some legal scholars. It is to be a part of the decision-making process with an advisory role to arrive at better conclusions by presenting different perspectives on the same bundle of facts.

It is to be formed for each case on its own merits, taking into account all parties and their respective backgrounds. Generally, a five-to seven-member body will suffice for the task of putting forward all the perspectives from all the sides in the court. It is to be constituted in such a way that the body must reflect representation from all the interested parties involved in the case. The task of constituting the body may be vested with the executive under the supervision

¹⁰ Arrington NB, "Judicial Merit Selection: Beliefs about Fairness and the ..." (Sagepub2020)

<<https://journals.sagepub.com/doi/full/10.1177/1065912920971712>> accessed March 3, 2022

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of the judicial body in order to maintain the sanctity of the selected body. All members may be chosen based on their influence over the relevant class of the parties.

B. WHAT PROBLEM IT WILL SOLVE?

It ensures representation while giving due regard to merit. The Jury-Like system is the result of combining the benefits of both merit selection theory and representation theory, while also bridging the gaps between them. On the one hand, while the sanctity of judicial selection on merit is maintained on one hand, all due regard is being given to ensure adequate representation of the demographic equation; on the other hand.

It brings in all the perspectives on a case that even a judge belonging to that class may not come up with single-handedly. One of the primary reasons leading to the tussle between merit and representation is that merit seemed to fall short in accumulating all the perspectives on facts which can only be gained through first-hand experiences. However, this multi-member advisory group can fill that gap.

It brings public confidence in the judiciary while making more informed and inclusive judicial decisions. It is a fact that a diverse judiciary enjoys greater public confidence, though some may not receive it positively due to ignorance of merit in selection procedures. However, introducing such a jury-like system may serve the needs of both those who want greater representation without offending the supporters and advocates of the merit approach.

It is helpful in the case of double possibilities in representation. The concept of double possibility may be illustrated by a black woman who is underrepresented in racial and gender backgrounds. It may be hard to find such judges to represent such a class of people. This is where the jury-like system comes into the picture, as it permits taking members from both the possibilities separately in case a fusion sample is unavailable.

A diverse judiciary, which also takes care of merit, ultimately results in elevated judicial impartiality and judicial accountability. At the same time, as the jury-like body consists of multiple members from different backgrounds, it will not be easy to influence all of them simultaneously. But, at the same time, it will increase accountability by incorporating all non-traditional perspectives into the decision-making process.

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C. ARGUMENTS ADVANCED AGAINST IT -**Appointment Procedures:**

A jury-like system without a suitable appointing authority will not serve its purpose effectively. Like the body itself, the appointing body must be impartial and employ all fair procedures to select jury members. The significant issue with this is that the establishment of the Appointment Committee needs to be competent and free from any biases while appointing jury members. Hence, the proposed idea requires due attention in both stages, namely appointing of jury members and appointment of Appointing Authority.

Possibility of Deadlocks:

In such a system, the probability of deadlock cannot be ignored when a jury representing different classes refuses to make any accommodations to reach a mutually acceptable disposition and instead tries to make the other party submit to their demands unconditionally. Though the judge keeps the given suggestions confidential, he unanimously presents the perspectives for discussion in open court to purge it from any hidden intents and criticisms. Still, the possibility of adamant juries not being open to appreciate contradictory perspectives might delay the judicial proceedings.

The possibility of influence by society and parties:

One of the main reasons for the abolition of the jury system in India, as recommended by the Fourteenth Law Commission Report, was the apparent biases of the jury members. The proposed jury-like system is also vulnerable to such biases, and it cannot survive with such biases. Because jury members are chosen from the community in which the case is being tried, the possibility of influence by their immediate society cannot be overlooked. In a small town, it may also happen that jury members know the parties personally, which may either result in bias by the jury or threats coming from the parties to the jury members.

Chances of selecting the wrong candidate:

One person's identity does not show his ideology. Hence it cannot always be safely presumed that a person coming from a particular background shall always be sympathetic and sensible to that background. This can be further illustrated in cases of SatishRagde v. State of

Maharashtra¹¹ i.e. the skin to skin judgment where the presiding judge PushpaGenediwala pronounced a controversial verdict. Despite being a woman herself, she did not take a sensible view of the term modesty, and her interpretations appear to be narrow and inconsiderate.

Jury in advisory role and not in decision making roles:

As the proposed body's role is limited to giving advice and presenting different perspectives, it may be argued as a toothless tiger who can roar but cannot bite. This was one of the reasons that more influential political and social figures shy away from becoming a jury.

Costly and Time-taking Process:

The appointment of jury members and ensuring their availability at each hearing date requires an additional expense to the already expensive court trials. Similarly appointment of jury members will take considerable time to ensure the right candidates are included. Hence, in an already expensive legal set up with a huge backlog, this idea will only burden the judiciary and may give unfavorable data in judicial impact assessment.

D. LIMITATIONS MITIGATION MECHANISM

Impartial Appointment Committee and Fair procedure:

There shall be an impartial and elected appointment committee for the selection of Jury members, and that body shall employ fair and transparent procedures while appointing the members. The Constitution of the Appointment Committee is responsible for making this idea a success. Selecting unsuitable and non-deserving candidates may result in economic losses and social consequences while undermining judicial trustworthiness. Therefore, qualifications and eligibility criteria for selection or election to the jury members must be made by the combined contributions of all three forms of Government while giving judicial primacy utmost importance.

Final Judge Decision on Deadlocks:

In a deadlock between jury members, it shall be left to the judge's wise discretion to decide by passing a reasoned order. As discussed earlier, jury members, like expert witnesses, depose and

¹¹Satish S/O BanduRagdevs State Of Mah., Thr. P.S.O. ... on 19 January, 2021<
<https://indiankanoon.org/doc/158325618/>>

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not decide. Hence, in deadlock conditions among fellow jury members, the judge must give the final judgment after considering all the perspectives put forward by the jury members.

Jury's response to be anonymous:

To protect the jury from any act of reprisal and to ensure their impartiality, the responses and perspectives put forward by the jury members shall be mentioned in the judgment anonymously, though the participation of jury members can be made public to build public confidence. Keeping written records of testimonies and suggestions enhances both judicial productivity and privacy of jury members inducing them to give the correct perspective without any biases and without the feeling of being tracked down.

To be inferred from history:

While selecting jury members, a thorough analysis of their previous behaviour and immediate surroundings shall be done to assess their identity and ideology gap. It is correctly said that a person's identity doesn't always align with their ideology. Hence, the mere fact that one belongs to a certain class of citizen must not ipso facto be the eligibility criteria for selection to the jury post. It must be established that he is ready and willing to help the court with factual and unbiased perspectives beforehand. As the term 'ready and willing' is very subjective and can be interpreted in a number of ways, all due regard must be given in analyzing his past contributions to his class of citizens, past experiences and balanced moral and intellectual abilities.

Mandatory for the judge to record the advice and reasons for accepting or rejecting the perspective:

As the judge holds the final say in a matter, it shall be made mandatory for him to record each perspective suggested to him and the reasons for accepting or rejecting the same. The judge must register his reasons in writing and ensure all the views are appropriately appreciated. All viewpoints recording must happen anonymously, giving strict regard to privacy and confidentiality to the suggestions made by each jury member.

IV. CONCLUSION - THE WAY FORWARD

A. ANSWER TO RESEARCH QUESTION AND HYPOTHESIS TESTING

The answer to the research question of this paper is whether the introduction of a jury-like

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system in India can solve the first question in the way to achieve judicial diversity, i.e., merit OR representation, can be answered in the affirmative. The null hypothesis taken for this research that the introduction of a jury-like system is not the solution to the merit vs representation debate in the path to achieving judicial diversity in India, is hence rejected. The alternative hypothesis that a jury-like system may bring the merit vs. representation debate to achieve judicial diversity is accepted.

B. SUGGESTIONS AND POSSIBILITY OF IMPLEMENTATION

The proposed mitigation mechanisms must be thoroughly discussed and address all the disadvantages. All public views on the same must be welcomed and worked upon before the idea can be implemented. Then, it can be introduced on a trial basis in a smaller geographical area before nationwide implementation. This introduction as a pilot programme helps analyse the future issues it might suffer from and overcome any adverse consequences, just like the Indian Penal Code was put on trial in the Province of Bengal before being enforced at the national level.

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