International Journal of Law
ISSN: 2455-2194; Impact Factor: RJIF 5.12
Received: 30-04-2020; Accepted: 20-05-2020; Published: 30-05-2020
www.lawjournals.org
Volume 6; Issue 3; 2020; Page No. 152-155

Exploring The Role of Dissenting Opinions in Human Rights Jurisprudence: Indian Perspective

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Abstract
The judiciary being the organ of the government administers justice in accordance with law. In fact, the prime duty of the judiciary is to protect the life and limb of an individual, at the same time, the judiciary also settles a dispute by punishing the one who breaks law. When the judges make a pronouncement on a disputed subject, many a times, they do not have unanimity of opinion amongst them and some of the judges write their own opinion which is, by and large, opposite to the view taken by other judges. The present research paper examines the role of dissenting opinion in human rights jurisprudence in the light of different judicial rulings. The paper also traces the history of judicial dissents in India. An attempt has also been made to justify as to how a dissenting opinions, once negated, have been accepted later on and have also become the opinion of the court, particularly in the field of human rights jurisprudence. A comparative analysis has also been made in this regard.

Keywords: life and liberty, judicial rulings, dissenting opinion, majority views, human rights jurisprudence

1. Introduction

"The dissenter speaks to the future, and his voice is pitched to a key that will carry through the year"

Justice Benjamin Cardozo

Law is to a large extent what the judges say as it is [1] and there are various factors such as background of the judge, the ideology of the judges etc. that influence the judges, to a very large extent, while they do interpret the law. Generally, the judges do speak largely in a single voice and in rare cases they don't. At times, separate dissents are delivered by the judges who are in minority in the same bench, sometimes separate but concurrent opinions are given by the judges. But, due to the logic of arithmetic, majority always wins the battle as the majority judgment is binding and minority loses the same. In the words of Soli Sorabji, "One critical test to adjudge the claim of any country being democratic is its tolerance of dissent and the protection afforded to the dissenter [2]. Moreover, when protection is afforded to the dissenter then only he will be in a better position to express himself and thereby contributing in the growth and development of democratic society.

In common parlance dissent means difference of opinion that does not agree with others. The very notion of dissent carries different meanings in different contexts. In politics, dissent is akin to a political opposition to the ruling government or its policies and decisions on different fronts. In legal parlance, when an opposite opinion is given by the judge who disagrees with the majority this is called as judicial dissent or sometime it is also referred as minority opinion and the judge who gives dissenting opinion is called as dissenter. I firmly believe that judicial dissents are the prescription in order to keep the judiciary healthy and sound since dissent is the expression of the individuality.

Soli J Sorabji called the dissent as the very heart and very soul of democracy and he has also stated that whenever a dissenting opinion is prohibited and the one who dissents is penalized, totalitarianism, and not genuine democracy, prevails in the country [3]. In fact, dissenting opinion is inseparable part of a well-functioning democracy and the view of minority opinion must be appreciated.

Realizing the importance of dissenting opinion justice D V Chandrachud in his dissenting against majority opinion stated, "Dissent is a symbol of vibrant democracy [4]. In fact, dissent protects the very notion of democracy. If dissent is muzzled the survival of the democracy would be at stake and it would jeopardize the interest of the individual in the society. There have been instances where dissents have become the view of the court over a period of time. Sometimes the impact of the dissenting opinion is such that the Legislature recognizes the same by enacting suitable legislation.

2. Judicial Dissents in India

The constitution of India protects the rights of an individual under part III [5]. In India, the judiciary has always been very proactive in protecting the life and liberty of the individuals. The judges of the Supreme Court have been giving dissenting opinion differing from majority view since the inception of the Indian Constitution. Article 145 (5) [6] of the

[1] H.L.A. Hart, *The Concept of Law* (Oxford University Press, 3rd Edition, 2012)

[2] Soli J Sorabji, "Protect The Dissenter", *The Indian Express*, September 9, 2017, *available at* https://indianexpress.com/article/opinion/columns/protect-the-dissenter-gauri-lankesh-murder-tolerance-freedom-of-expression-4834875/ (last visited May 6, 2020)

[3] Soli J Sorabji, "The Noble Dissenters", *The Indian Express*, October 6, 2018, *available at* https://indianexpress.com/article/opinion/columns/supreme-court-sabarimala-bhima-koregaon-dissent-judgments-5389012/ (last visited on May 8, 2020)

[4] *Romila Thapar* v. *Union of India*, Writ Petition (Criminal) No. 260 of 2018 (Justice D Y Chandrachud, dissenting)

[5] The Constitution of India, 1950. Part III deals with the Fundamental Rights.

[6] The Constitution of India, 1950, article 145 (5) "No judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion."

Indian Constitution does not prevent a judge to express his own views and has given him liberty to write his own opinion if he does not concur with the majority views. In fact, this provision encourages the judges to dissent and express their individual views. In India, the judges have been very vocal in expressing their views independently and the trend of dissenting opinion has also occupied a prominent place in the Indian Judiciary since early 1950s.

The roots of judicial dissent in India lies much before the constitution came into existence. Justice Syed Mahmood who was the first Indian to be appointed as High Court judge is also famous for his dissenting opinions. In fact, the seeds of judicial activism in India were sown by Justice Syed Mahmood. It was his genius to apply the principles of natural justice i.e. *audi alteram partem* in the famous judgment in *Queen Empress* v. *Phopi* [7] where he dissented from the majority opinion and opined that mere notice on the prisoner is not enough and that it was imperative that the he must be heard in person or through his defense counsel. The precondition for the disposal of appeal is that the accused must be heard and the right being inherent in nature cannot be denied. It is very unfortunate that the majority failed to acknowledge his viewpoint.

Justice Fazal Ali in *A K Gopalan Case* [8] has dissented from majority opinion and declared that the word "procedure" under article 21 [9] of the Indian Constitution includes principles of natural justice i.e. that the procedure must be just, fair and reasonable. His dissent stood vindicated and the same has become the view of the majority in *Maneka Gandhi Case* [10] where the Apex Court pronounced the judgment by completely relying upon his dissent. The Parliament of India has also recognized principles of natural justice by enacting various laws and the citizens of the country are at liberty to challenge any law on the grounds of violation of principles of natural justice. Hence the outspoken dissent of Justice Fazal Ali has been accepted.

Justice Subba Rao (also known as dissenting judge) in *Kharak Singh Case* [11] recognized privacy under article 21 of the Indian Constitution and, while differing from majority opinion, he observed that privacy is essential to personal liberty under article 21 of the constitution [12]. Recently, the Supreme Court in a landmark judgment in *K. S. Puttaswamy Case* [13] has unanimously declared that privacy is protected under article 21 of the Indian Constitution and the Supreme Court has overruled the majority views in *Kharak Singh Case* [14] but the Court completely relied upon the dissent given by Justice Justice Subba Rao.

Justice H R Khanna in *ADM Jabalpur Case* [15] has given the most celebrated dissenting opinion in the history of the Supreme Court of India. He has completely differed from majority view and protected life and liberty of the citizens saying that article 21 of the Indian Constitution cannot be suspended even during emergency period. He further observed, "Sanctity of life and liberty was not something new when the Constitution was drafted. The principle that no one shall be deprived of his liberty without the authority of law was not the gift of the Constitution." Although the majority opinion held that the citizen cannot approach the Court during emergency period even if their right to life or liberty is violated. In fact, it was the darkest period in the history of Supreme Court of India, striking at the very heart of the fundamental rights and the constitutional values. The Parliament of India through 44th Amendment [16] of the Indian Constitution recognized the minority opinion to a very large extent and now article 21 of the Constitution cannot be suspended even during emergency period. The Supreme Court in *K. S. Puttaswamy Case* [17] has overruled the majority judgment of *ADM Jabalpur Case* [18] and hence Justice H R Khanna trumped once again. The Court has also observed that *ADM Jabalpur Case* [19] was an aberration in the constitutional jurisprudence of the country and the same must be buried "ten fathoms deep with no chance of resurrection [20].

In *Bachan Singh Case* [21] reference was made to the constitution bench raising a question as to the constitutionality of death sentence under section 302 [22] of the Indian Penal Code, 1860. The constitution bench has imposed important restrictions on death sentence by setting the 'rarest of rare' doctrine. The Apex Court further opined that awarding death penalty in rarest of rare category is not unconstitutional and does not violate article 21 of the Indian constitution. Justice P N Bhagwati in his dissenting opinion has struck down section 302 of the Indian Penal Code, 1860 as unconstitutional and void in so far as it provides for imposition of death penalty as an alternative to imprisonment for life. He reasoned that this form of inhuman practice in its actual operation is discriminatory, for it strikes mostly against the poor and deprived strata of the society and the upper class usually escape, from its clutches. These circumstances result in arbitrary and capricious nature of death penalty and render it constitutionally invalid and at the same time violates article 21 of the Indian Constitution [23]. His dissent holds more relevance in today's era of human right jurisprudence where demands for abolition of death penalty are being raised from all quarters of society. In fact, more than two third of all countries in the world have already abolished death penalty in law or in the practice [24]. Law Commission in its 262nd report [25] has also recommended abolition of death penalty for all offences other than terrorism related crimes.

In *Shayara Bano Case* [26] the Constitution Bench of the Supreme Court has declared that the practice of instant talaq (talaq-e-biddat) is unconstitutional and violates fundamental rights of women. Justice J S Kehar and Justice A Nazeer have dissented from majority views and opined that religion

[7] *Queen Empress* v. *Phopi*, ILR XIII All. 171
[8] *A K Gopalan* v. *The State of Madras*, AIR 1950 SC 27
[9] The Constitution of India, 1950, article 21 "No person shall be deprived of his life or personal liberty except according to procedure established by law".
[10] *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597
[11] *Kharak Singh* v. *State of Uttar Pradesh*, AIR 1963 SC 1295
[12] *Ibid.*
[13] *K S Puttaswamy* v. *Union of India*, (2017) 10 SCC 1
[14] *Supra* note. 11
[15] *ADM Jabalpur* v. *Shivkant Shukla*, (1976) 2 SCC 521
[16] The Constitution (Forty-Fourth Amendment) Act, 1978
[17] *Supra* note. 13
[18] *Supra* note.15
[19] *Ibid.*
[20] *Supra* note. 15
[21] *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898
[22] The Indian Penal Code, 1860, section 302, "Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine"
[23] *Supra* note. 21
[24] Amnesty International, "Report on Death Sentence and Executions" (2014)
[25] Law Commission of India, "262nd Report on The Death Penalty" (Ministry of Law and Justice Government of India, 2015)
[26] *Shayara Bano* v. *Union of India*, Writ Petition (Civil) No. 118 of 2016

and personal laws must be perceived as it is accepted by the followers of the religion and any sort of interference in the matters of religious affairs is clearly beyond judicial scrutiny [27]. Article 25 [28] of the Constitution also protects the personal laws and therefore it is not correct to interfere in the religious matters otherwise pandora's box would open and more and more petitions would be brought to the court challenging religious practices on grounds of violation of fundamental rights.

Another emphatic dissent came from Justice D Y Chandrachud in *Bhima Koregaon Case* [29] pertaining to the arrest of human right activists in which the petitioner was seeking for the appointment of Special Investigation Team (SIT) comprising with senior police officer to probe the arrest of the activists related to the Bhima Koregaon violence, but the same was rejected by the court. Justice Chandrachud dissented against majority views and opined as, "Voices in opposition cannot be muzzled by persecuting those who take up unpopular causes". He further stated that the fair investigation is seminal facet of right to life and liberty under article 21 of the Indian Constitution and the Court must stand by the principles which it has formulated. [30] Therefore, considering the dynamics of misuse of police power while making arrest and investigating a case, Justice Chandrachud, through his comprehensive dissent, has spoken in favor of the political rights and civil liberties of the arrested human rights activists.

The Constitution Bench led by Justice Dipak Mishra in *Justice K S Puttaswami* v. *Union of India* [31] has upheld the constitutional validity of Aadhaar Act [32] but section 57 [33] of the Aadhaar Act was struck down. Justice D Y Chandrachud had dissented from the majority views and opined that the Adhaar Program is suffering from constitutional infirmities and the Aadhaar Act is unconstitutional *in toto* encroaching upon the individual privacy, dignity and autonomy. He has also observed that the very act of passing the Aadhaar Act as money bill is unlawful and fraud upon the Indian Constitution [34]. "Constitutional guarantees cannot be compromised by vicissitudes of technology" [35], Justice Chandrachud further observed. His dissent is more relevant at a time when data protection laws are not appropriate and thereby posing threat to the privacy of an individual.

3. Dissents in the United States of America

Article III Section 1[36] of the Constitution of the United States of America deals with the power, functions of the judiciary. The Judiciary in the United States is supreme and the judges are at liberty to express their majority as well as minority views. In the United States, dissent is relatively a dissent phenomenon. During the term of Chief Justice John Marshall (1801-1835), no dissenting was recorder since he believed in unanimity of the court and demonstrated that its opinion were the last word. In his first judgment as the Chief Justice of the United States, he used the term 'in the opinion of the court' and therefore restricted the scope of dissenting opinion [37]. The practice of dissents in the United States started later on and minority opinion have become the majority views over a period of time.

In *Dred Scott Case* [38] the majority opinion had stated that the black people have no *locus standi* before the Court and only the citizens of the United States are entitled to the fundamental rights. The views of the majority opinion were criticized and the former Chief justice Charles Evans has described the ruling as, "the court's greatest self-inflicted wound". But Justice Benjamin Robbins Curtis had dissented against the majority views and recognized the right of black people in the United States and stated that they are also the citizens of the United States of America. The humanitarian approach of Justice Benjamin Robbins Curtis is worth acknowledging.

In *Plessy* v. *Ferguson* [39] the Supreme Court through majority opinion has upheld the constitutional validity of *racial segregation laws* [40] which have recognized for racial segregation and required the railway authorities carrying passengers in the coaches to provide equal, but separate, accommodations for white and black races and not violative of 14th Amendment [41] of the United States Constitution. But, Justice John Marshall Harlan also known as, "The Great Dissenter" has dissented from the majority opinions and stated that "our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before law." He finally declared racial segregation laws as unconstitutional. The Supreme Court of United States in *Brown* v. *Board of Education* [42] through majority opinion has declared racial segregation laws in public school as unconstitutional and violative of equal protection clause of the Fourteenth Amendment of the United States constitution. In fact, the Court has partially overruled its earlier ruling in *Plessy* v. *Ferguson* but the dissenting opinion of Justice John

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[27] *Ibid.*

[28] The Constitution of India, article 25 "(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. *Explanation I.*—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion. *Explanation II.*—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."

[29] *Romila Thapar* v. *Union of India*, Writ Petition (Criminal) No. 260 of 2018 (Justice D Y Chandrachud dissentiong)

[30] *Ibid.*

[31] *Justice K S Puttaswamy* v. *Union of India*, Writ Petition (Civil) 494 of 2012

[32] The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016

[33] The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016. Section 57 "Nothing contained in this Act shall prevent the use of Aadhaar Number for establishing the identity of an individual for any purpose, whether by state or any corporate body or person, pursuant to any law, for the time being in force, or any contract to that effect."

[34] *Supra* note. 31

[35] *Ibid.*

[36] The judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their offices during their good behavior, and shall at stated Times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

[37] *Talbot* v. *Seeman*, 5 U.S. 1 (1801)

[38] *Dred Scott* v. *Sandford*, 60 U.S. 393 (1857)

[39] *Plessy* v. *Ferguson*, 163 U.S. 537 (1896)

[40] The Louisiana Separate Car Act, 1890

[41] *The Fourteenth Amendment of the Constitution of the United States of America provides for Equal Protection Clause.*

[42] *Brown* v. *Board of Education*, 347 U.S. 483 (1954)

Marshall Harlan in the same case has accepted.

4. Judicial Dissent in the United Kingdom

Since common law is not a codified law and therefore major part of it has evolved through judicial rulings. Dissent has been a long practice adopted by the judiciary in common law countries particularly in England.

In *Liversidge* v. *Anderson* [43] the House of Lords (the highest court of appeal in England before 2009) in majority opinion stated that the Judiciary should not interfere in the matters related to the internal security, and the appellant was already committed to the jail without any sound reason. But, Lord Atkin has disassociated with the majority views and held that even if a person is detained by executive on the grounds of being a threat to internal security it would come within the ambit of the court to determine the reasonableness of actions [44]. His powerful dissent still holds the ground and is found to be more relevant than the majority views.

The U. K. Supreme Court in *H M Treasury* v. *Ahmed* [45] has also relied upon the dissent of Lord Atkin while declaring the Terrorism Order [46] as *ultra vires* giving absolute authority to the executive. Therefore, the minority opinion of Lord Atkin has become the norm against the arbitrary and unchecked powers of the executive and thereby protecting the life and liberty of the individuals in the United Kingdom.

5. Conclusion

Since dissent is the expression of individuality, it is the prescription to keep the judiciary healthy and sound. In India, the judges have been dissenting against the majority views since the inception of the Indian Constitution and, many a times, the dissents have stood vindicated and became the majority opinion. The effect of judicial dissent is also reflected in the process of law making as the same is recognized by the legislature through the amendments of various laws including the constitution. The dissenting opinion may also play legitimate role in appellate Court in convincing the judges. Although, the dissents are not binding and authoritative in nature but still they have persuasive value and if any member of the bench dissents then the legal weight of the ruling is diminished to a very large extent in the eyes of legal fraternity, and the judgment is called as a weak judgment. In fact, the judges must be at liberty to express themselves individually and independently, without regard to unanimity of opinion.

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