Voicing Dissent: A Functional Analysis

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Abstract

This paper discusses the functional importance of dissenting judgments. Various impactful dissents in the history of the Indian Supreme Court have been cited to emphasize this point. Of particular significance are the "*three great dissents*" referred to by Justice Nariman in the *Right to Privacy* judgment. The dissenters' intellectual foresight and bravery in these cases upheld not only the correct legal position, but also the integrity of the Judiciary. Accordingly, the researcher discusses the various important functions performed by dissents, like challenging the legitimacy of the majority judgment, offering a different legal perspective, facilitating the progressive development of law and keeping the legal question in a case alive. Further, their function as a reminder of value of free speech, an opportunity for more dynamic interpretations of the law and a stimulus for better judgment-writing are also discussed. The paper then goes on to give more examples of path-breaking dissents which performed the described functions in the Indian as well as international context. In this light, a call is made to judges to not blindly confirm to the conventional or accepted wisdom of the majority view, and to take strong dissenting views in face of disagreements or need for change.

Keywords: Dissenting Opinion, Functions, Non-binding, Judgement of Supreme Court of India, Majority view, Judicial System, Substantive value, New legal perspective.

Introduction - What is a Dissent?

A dissenting opinion (dissent) is an opinion in a legal case written by one or more judges expressing disagreement with the majority opinion of the court, which forms the final judgment. They are normally written at the same time as the majority opinion and any concurring opinions, and are also delivered and published at the same time. The dissenting judge may disagree with the majority opinion for various reasons - a different interpretation of the existing case law, the application of different principles, or a different interpretation of the facts.

Place in the Constitution of India

Article 145(5) of the Indian Constitution clearly provides the judges the power to differ from the majority and deliver their own judgment (Bakshi 191).In light of this provision and recognizing the general importance of dissenting

judgements, the Supreme Court held in the *In Re Delhi Laws Case* that, "*While it is regrettable that judges may not always agree, it is better that their independence should be maintained and recognized, than that unanimity should be secured through sacrifice*" (332). All the judges delivered differing opinions in this case, and thus no principle could be deduced from it. However, if only a pattern is also identifiable from such cases, that alone would be binding in subsequent cases.

Moreover, although a number of cases through the years have established that such dissenting judgments are not binding upon the court, they do have great persuasive value in subsequent cases. In some cases, a previous dissent may also be used to spur a change in the law. Further, a later case may result in a majority opinion adopting a particular rule of law formerly advocated in dissent. In line with this, Justice HR Khanna wrote, quoting the great American judge Charles Evan Hughes, that "*A dissent in the court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.*"(*In Re Delhi Laws Case* 332). Acknowledging this very spirit of dissenting judgments, the Supreme Court also recently lauded "*three great dissents*" (Press Trust of India, New Delhi) in its history, which went on to become bulwarks of Indian Constitutional law.

The "Three Great Dissents" of the Indian Supreme Court

Justice RF Nariman, a member of the nine-judge constitution bench, which recently held 'Right to Privacy' as an intrinsic part of Article 21 of the Indian Constitution, recalled the "*Three Great Dissents*" which changed the landscape of fundamental rights very early in the day(*Justice K.S.Puttaswamy (Retd.)* v. *Union of India and Ors.*18). Specifically talking about Article 21, he observed how previous judgments gave a narrow construction for this intrinsic right, but these dissents broke away from such interpretations in the right direction. He wrote, "*Article 21, with which we are directly concerned, was couched in negative form in order to interdict State action that fell afoul of its contours. Article 21, which houses two great human rights, the right to life and the right to personal liberty, was construed rather narrowly by the early Supreme Court of India.*"(*Puttaswamy* 18).

These trail-blazing dissenting opinions also sent out a strong message for not blindly conforming to the majority, and building one's own opinions in light of the new and changing circumstances of the country. Accordingly, in his 122-page judgment, Justice Nariman lauded Justices SaiyidFazl Ali, SubbaRao and H R Khanna for their "*vision*" and "*dissents*" from their colleagues to protect the basic rights of individuals.

Justice Fazl Ali in *AK Gopalan*v. *State of Madras*

The first great dissent referred to by Justice Nariman was by Justice Fazl Ali in the case of *A K Gopalan*v. *State of Madras*, 1950 (27). The point of contention in the case was the validity of certain provisions of the Preventive Detention Act, 1950, which deprived people of their liberty without actually committing a crime. Such provisions were held to be constitutional by the majority, as according to them, Article 21 of the Constitution provided only a *narrow* protection against lawless infractions of bodily integrity and personal freedom by the State. Contrary to this, Justice Fazl Ali argued instead that the phrase "*procedure established by law*" in the Article required that deprivations of life or personal liberty *must* confirm to standards that were *themselves* just, fair, and reasonable.

Although this dissenting view was a cry in the wilderness in 1950, the Court *did* realize how correct Justice Ali was after twenty years. In *Maneka Gandhi* v. *Union of India* (597), the majority opinion of *Gopalan* was overruled, as it was held that a law depriving a person of his personal liberty should satisfy the requirement of Article 19. The Court also acknowledged the influence of the due process doctrine in Indian constitutional jurisprudence, and held that procedure established by law must be "*fair, just and reasonable*," thereby directly recognizing the dissenting view of Justice Ali as being the correct view. Accordingly, Justice Nariman wrote how the foresight of Justice Fazl Ali "*simply takes our breath away*". The learned jurist Fali Nariman also observed in his autobiography how Judge Ali's dissent in this case shows his strength and courage as a judge (Nariman 86).

Justice SubbaRao in *Kharak Singh* v. *State of Uttar Pradesh*

Justice SubbaRao's dissenting opinion in *Kharak Singh* v. *State of UP* (1295),was referred to as the second great dissent. Regulation 236 of the U.P. Police Regulations was challenged in the case as violating fundamental rights under Article 19(1) (d) and Article 21. The majority decision invalidated domiciliary visits at night authorised by Regulation 236(b), finding them to be an unauthorised intrusion into the home of a person and a violation of the fundamental right to personal liberty. However, Justice Rao in his dissenting views said that the rights conferred by Part III have overlapping areas. He therefore observed that, "*Where a law is challenged as infringing the right to freedom of movement under Article 19(1) (d) and the liberty of the individual under Article 21, it must satisfy the tests laid down in Article 19(2) as well as the requirements of Article 21*". Hence, Justice Rao, joined by Justice Shah, struck down the entire Regulation, and not just its sub-paragraph (b), as violating the individual's right to privacy.

This dissenting opinion had a direct bearing on the question of right to privacy as a fundamental right, which was finally decided by the Supreme Court in the *Puttaswamy* case. In that case, the Court overruled the majority view in *Kharak Singh*, and relied on this dissenting judgment along with the landmark judgments of *Maneka Gandhi* v. *Union of India*(248)and *Gobind* v. *State of Madhya Pradesh*(148) to rule that right to privacy forms part of the fundamental rights. Again, a foresighted dissent turned into the majority view after some years.

Justice HR Khanna in *ADM Jabalpur* v. *SS Shukla*

The third great dissent referred to by Justice Nariman was the dissenting judgement by Justice HR Khanna in *ADM Jabalpur* v.*SS Shukla*, 1976 (566). The case arose in the political context of the Emergency, whereby the Preventive Detention laws were being misused to suppress any opposition to the government rule. Deprivation of people's liberty in such a manner was thus challenged in this case. A five-judge bench by a majority verdict of 4:1 arrived at the conclusion that Article 21 is the *sole* repository of all rights to life and personal liberty. Consequently, when it is suspended during an Emergency, these rights are also altogether suspended.

However, Justice HR Khanna, the lone dissenting judge observed that right to life and personal liberty are basic human rights, which are not *provided* by Article 21, rather just *recognized* by it. Therefore, he took a strong stand that Article 21 is not the *sole* repository of these rights and "*the suspension of the right to move any Court for the enforcement of the right under Article 21, upon a proclamation of emergency, would not affect the*

enforcement of the basic right to life and liberty" (761). Dissenting from the majority, he supported the position that imposition of Emergency and the maintainability of *habeas corpus* petitions work on different planes, with one not affecting the other. Thus, legality of detention orders could be questioned as right to life and liberty could not be automatically suspended under any circumstances without the authority of the law in a judicial system governed by *rule of law*. Forty-one years later, this intelligence of Justice Khanna of a future day finally prevailed, when the Court in the *Puttaswamy* judgment finally held that his dissent is the correct version of law. It thus explicitly overruled the *ADM Jabalpur* judgment.

Functional Importance of Dissenting Opinions

In light of these great dissents and the huge impact they had on the nature and scope of the Indian judicial landscape, the researcher contends that dissenting opinions have substantive value as they perform various important functions. Broadly, the form and function of dissents highlight the importance of diversity of perspectives to our political system and to judicial decision-making. Ability to dissent ensures that the Judiciary enjoys some key capabilities associated with a democratic government, which are in line with the tenets of political settlements (Lynch 725). Further, as observed by Justice William Brennan, "*dissents contribute to the integrity of the judicial process not only by directing attention to perceived difficulties with the majority's opinion, but also by contributing to the marketplace of competing ideas.*"(MvIntosh and Cates 1). Some of the most important functions of dissents are thus as follows -

Challenging the institutionalism of the majority opinion

Majority opinions create the fiction that their judicial decision and legal reasoning flow naturally from the legal question posed. Dissents prove *otherwise* by publicly challenging the arguments upon which the majority stands, pointing up the fallibility in law and thus encouraging doubts about its decision's legitimacy (Bennett 74).If a majority opinion is handed down unopposed, the rhetorical significance of such a unanimous decision is that the Court decided the question in the *only* manner possible, and thus the decision is correct (Langford 1). However, dissents encourage debates within the Court about other and better possible ways of interpreting and deciding, and therefore call for a different response (Langford 8). They also hold the majority accountable for the legal quality of their analysis and final decision (Singh 142). Consequently, by presenting the position of "*the Other*", dissents are believed to actually strengthen and clarify majority opinions (Carson 50).

Offering more choices for future courses of action

Dissents offer other means by which laws can be interpreted and cases can be decided, by offering a different legal perspective. They not only provide more arguments for petitioners to use when contesting the law at a later time, but also establish a precedent through its persuasive effort for later justices, or the original dissenter, to follow. Accordingly, as noted by Judge Frankfurter of the United States Supreme Court, dissents are valued by judges as opportunities to "*record prophecy and shape history.*"(Frankfurter 162).

Keeping the legal question in a case alive

While unanimous opinions resolve legal issues, divided courts provide for the *opportunity* for looking beyond the specific circumstances of the case and its impact on the future. Dissents open up the possibility of a shift in the ideological

make-up of the Court in the future, which may result in a different outcome. They establish the groundwork for future judicial decisions, diminish the power of the majority's holding, and politicize the Court in the public sphere (Langford 12). Dissents thus work as mediums for advocating higher values, alternative judicial ideologies or interpretational scheme, and overturning earlier cases. They open a dialogue among the judges, jurists, commentators of court judgments and the legislators (Singh 144), therefore continuing the conversation that a legal question begins.

Facilitating development of law

Dissenting opinions facilitate the development and advancement of law itself, as they enable admission of new ideas and adaptation of old doctrines by exposing them to scrutiny and consideration both inside and outside court. They thus help in correcting the legislator's mistakes and drawing attention to the circumstances which can be taken into consideration during future law-making or in the amendment and revision of laws (Laffranque164).

Demonstrating Judges' Freedom of Expression

Dissenting opinions open the way for judges to be individually free in expressing their views (Lynch 725). A majority opinion opposed by one or more dissents indicates that the Court's decision is the product of independent and thoughtful minds (Scalia 41). As noted by Richard Stephens, dissents then "*....help to preserve the necessary independence of judges,*" (Stephens 410) and serve as important institutional reminders about the value of free speech (Kolsky 2069).

Making the Constitution more dynamic

With the freedom to express dissenting opinion, the judges also get an opportunity to interpret the Constitution and other laws in a dynamic fashion, leaving them open for future interpretations (Singh 145). By offering an outlet for independence, individuality and idiosyncrasy, dissents afford a way for the judges to diverge from the official, accepted, or conventional forms of wisdom, and thus make progressive interpretations of law (Jaggi). Hence, at one polarity is the need for certainty-expectancy in the law, on the other end is the acknowledgement that the law, like societal needs and political realities, is dynamic (Voss 643).

Helping in comprehending the majority opinion

Judicial dissents help in better understanding or clarifying the majority judgment and raising the legal consciousness of the society, by throwing the majority view into sharper relief. They also provide a stimulus to write clearer and better judgments generally (Laffranque 726). Moreover, dissents form a guarantee to civil rights, with an added psychological value: a published dissenting opinion gives hope to the losing side that there *are* judges in the bench who share their views and took their arguments into consideration.

Other Impactful Dissents in Indian Judicial History

Apart from the three great dissents lauded by Justice Nariman in the *Right to Privacy* judgment, the history of Indian judicial history presents many other prime examples of impactful dissents which performed the aforementioned functions. These path-breaking dissenting judgments either went on to become the law of the land or were successful in stirring up debates in light of national or global developments. Some of the most important examples are -

Disagreement by Justice Hidayatullah and Justice J.S. Mudholar in *Sajjan Singh* v. *State of Rajasthan*

The dissenting view by Justice Hidayatullah and Justice Mudholkar in the famous *Sajjan Singh* case (845) is considered as the most successful disagreement in the history of Indian Supreme Court, as it finally culminated into one of the biggest landmark judgments in India. They raised serious doubts on the majority decision which conferred the Parliament the power to amend the Constitution in relation to fundamental rights. They argued that if this decision is accepted *in toto*, fundamental rights would become just a play-thing in the hands of the majority in the Parliament, without any checks and balances. While raising this apprehension regarding such contortion of the Constitution, Justice Mudholkar used the phrase "*basic features*" of the Constitution for the first time. Consequent to this disagreement by these learned jurists, the issue of the constitutional validity of the 17th amendment was referred to a greater bench of 11 judges in the famous *Golaknath* v. *State of Punjab* case (1643).

The Court in *Golaknath* brought the amending power of the Parliament under the category of ordinary legislative power, meaning that it could not ament the fundamental rights at all. It thus overturned the majority judgment of *Sajjan Singh*, and minority view of Justices Hidayatullah and Mudholkar prevailed. To nullify the effects of this strong judgment, the Parliament was compelled to amend the Constitution again in form of the 24th amendment. The constitutional validity of this amendment was again challenged before the Supreme Court in the *Kesavananda Bharati* v. *State of Kerala* case (1461).

In its landmark judgment, the largest ever bench of 13 judges finally settled the matter. In a sharply divided verdict of 7:6, the majority held that while the Parliament has wide–ranging powers, its power to amend the Constitution was limited as it could not emasculate or destroy the basic elements or fundamental features of the Constitution. Therefore, in the exercise of its constituent power under Article 368, the Parliament *could* change, amend, or modify the Constitution, including the chapter on fundamental rights, as long as the "*basic structure*" of the Constitution is not destroyed or changed.

This idea of a *basic structure* of the Constitution, which finally curtailed the power of the government to amend the Constitution, was first suggested by Justice Mudholkar in his dissenting opinion in *Sajjan Singh* case. Hence, it can be stated beyond any doubt that the development of the famous basic structure principle in India is the result of the disagreement which arose in the *Sajjan Singh* case (Singh 408).

Dissenting opinion of Justice Bhagwati in *Bachan Singh* v. *State of Punjab*

The dissenting judgement of Justice Bhagwati in the *Bachan Singh* case (898) of 1980 regarding arbitrariness of imposition of death penalty got significantly addressed by the Supreme Court in *Sangeet & Anr* v. *State of Haryana*(452) in 2013. After 32 years, the Court rightly held that "*by giving a sentence in a capital offence of 20 years or 30 years imprisonment without remission is to effectively injunct the appropriate Government from exercising its power of remission for the specified period...we are of the opinion that this is not permissible. The appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence, whatever the reason.*" (470). This was in line with Justice Bhagwati's observations in the *Bachan Singh* case.

Minority judgment of Justice SubbaRao in *Radheshyam Khare* v. *State of MP*

The dissenting opinion of Justice Rao in this case (107) laid down the basis of laws in cases of administrative bodies to be consistent with principles of natural justice. Contradicting the majority view, he observed that the concept of a judicial act has been conceived and developed to keep administrative tribunals and authorities within reasonable bounds. Thus, unless this concept is broadly interpreted, the object would be defeated as the power of judicial review would become ineffective and innocuous (Singh et al. 4).

This fore-sighted view was subsequently recognized by the Supreme Court in the case of *AK Kraipak* v. *Union of India*(150). In this case, the Court recognized that the distinguishing line between administrative and quasi-judicial functions has become quite thin and is being constantly obliterated. Accordingly, it was held that if the action of an administrative authority affects the rights or interests of a citizen, he must be heard. Therefore, Justice SubbaRao had anticipated the correct view of law in his dissent in *Radheshyam* case a decade before the Court recognized it.

Dissenting view of Justice SubbaRao in *ManeckChowk Spinning* v.*The Textile Labour*

In this case, Justice SubbaRao contended for the payment of a minimum bonus to the employees, regardless of the profit or loss of the employer in his dissenting judgment (867). This opinion received legal recognition, as it laid the foundation for the Payment of Bonus Act, 1965.

Besides these dissents which have formally received legal recognition, there are various other dissenting judgments as well which have been successful in provoking thoughts in the legal fraternity. As submitted earlier, they keep the doors for differing interpretations in the future open and stir up legal thought on the correctness of the majority judgments. Prime examples of such minority judgments are – Justice Hidayatullah's dissent in *Naresh Shridhar Mirajkar* v. *State of Maharashtra*(744), where he observed that fundamental rights may be violated by the Judiciary as well, and thus judicial actions must also be amenable to writ jurisdiction. This is a step in the right direction towards judicial accountability and transparency.

Similarly, Justice Chelameshwar contradicted the majority in *Supreme Court Advocates-on-record Association* v. *Union of India*(13) in holding the NJAC Act and 99th amendment as constitutionally valid. He concluded that Judiciary is not the only institution which can safeguard the independence of Judiciary, and thus the Act cannot be deemed unconstitutional on mere suspicions that the Executive's involvement in judicial appointments would compromise Judiciary's independence. This dissenting opinion provoked various debates and discussions on the separation of powers between the Executive and Judiciary, and the validity of the majority view in the judgment.

Further, in *Abhiram Singh* v. *CD Comachen*(629), the majority held that the word "*his*"in Section 123(3) of the Representation of People's Act includes only the contesting candidate, but also the voters. Resultantly, no appeals can be made by any candidate on religious or caste grounds. Justices Chandrachud, AK Goel and UU Lalit dissented from this view and noted that from this stand-point, even marginalized communities would not be able to use their identity to galvanise votes in solidarity. They thus held that the statute itself does not prohibit debate, discussion and dialogue on issues of religion, caste, community race or language during an election campaign. This view has also raised doubts on the legitimacy

of the majority judgment, and provides strong arguments to litigants fighting for a change in the same.

Landmark Dissent in the International Context

Internationally as well, various dissenting judgments continue to be relevant as they facilitate development of law in a markedly different direction (Geachet et al. 35). Two of the most important examples areJustice Oliver Wendell Holmes' dissent in the landmark case *Lochner* v. *New York*(45), and Justice Antonin Scalia's dissent in *Planned Parenthood* v. *Casey*(833). While *Lochner* overturned New York's labour law and limited the working hours of bakers to ten hours a day, *Casey* upheld a woman's right to have an abortion. These two dissenting judgments, which went on to become the law of the land, illuminate how judicial dissents function rhetorically.

Conclusion

Through the course of this paper, the researcher has aimed to highlight the huge functional importance of dissenting judgments through various examples. The crux is very well put by the former Attorney General of India, Soli J Sorabjee:

> "*Human tendency generally is not to disagree with the views of others. Conformity is the rule, dissent is an exception. Dissent among judges is not unusual. This is inevitable in an independent judiciary whose judges decide objectively according to their conscience and their legal understanding and without any pressure. If all judgments were unanimous, one would suspect that the judgments were delivered according to the dictates of the executive or some external agency. When the dissenting judge strongly feels about the issues of civil liberties involved in the case the dissenter speaks to the future and his voice is pitched to a key that will carry through the years.*"

In light of such great importance of dissents, the researcher humbly urges judges to boldly dissent in face of disagreements with their colleagues on the outcome of a case or the legal reasoning in reaching an outcome. Such an ability to dissent not only enables law to admit new ideas, but also to adapt old doctrines by exposing them to scrutiny and consideration both inside and outside courts (Lynch 724). By not blindly submitting to the majority view in an effort to form artificial unanimity, judges truly fulfil their roles of facilitating progress in the Judiciary and development of the law in new directions in line with changing needs and standards of the society.

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