DISSENTING JUDGEMENTS: THE TOUCHSTONE OF DEMOCRACY

By Preethi V.P.[1]

"If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind." - John Stuart Mill

The Constitution of India guarantees to every citizen, the Right to Freedom of Speech and Expression[2] and this freedom includes the liberty to freely express one's views, opinions, and thoughts, through speech or text. This right also includes the right to think and organise one's thoughts; to not be influenced by any external views and hold a view that is completely one's own. This calls for the need to discuss the relevance of the right to freedom of speech and expression and dissenting judgements on the touchstone of democracy as anticipated in the Preamble to the Indian Constitution.

Dissenting judgements are decisions rendered by one or more judges of a particular court, who disagree with the majority opinion and therefore express their views in relation to the case, differing from the majority opinion of the bench. This may or may not be adopted, owing to the facts and circumstances of each case. Further, with the publication of such dissent, the writer can clarify his or her stance with regard to the case and the need to adopt a different view. Needless to say, a dissenting judgement paves way for different approaches and solutions to a particular dispute, initiating discussion in society. Nevertheless, it is, at this juncture, very important to profoundly delve into the relevance and rationale of dissenting judgements.

The roots of dissenting opinions may be predominantly found in common law countries. Common law countries thus began to publish dissenting opinions for improved judicial administration.[3] The origin of dissenting opinions in India can be broadly split into four categories- Judicial dissent in the Supreme Court at Calcutta and other Presidency Courts, Judicial dissent in the Federal Court of India, Judicial dissent in the Privy Council and lastly,

[1] IInd year student, School of Law, Christ University, Bengaluru.
[2] Art. 19(1)(a), Constitution of India.
[3] Morgan G Donald, *The Origin of the Supreme Court Dissent*, 10 , 3, The William and Mary Quarterly, 353-377, https://www.jstor.org/stable/1917480.

Judicial dissent in the Supreme Court of India (post-independence). In this article judicial dissent in the Supreme Court shall be discussed with special emphasis on its influence on the functioning of the Indian Democracy.[4] With the enactment of the Constitution on 26th January 1950, the Federal Court gave way for the Supreme Court of India. As was practised in the Federal Court, the trend of writing and publishing seriatim opinions became the ritual in the apex court as well.

The first instance of dissent in India was witnessed in the case of *A. K. Gopalan vs. State of Madras,*[5] Justice Fazl Ali delivered his opinion which very astonishingly came to be recognised as a law only about 27 years later in the case of *Maneka Gandhi vs. Union of India*.[6] Furthermore, the dissenting opinion of Justice Khanna in the case of *ADM Jabalpur v. S.K. Shukla (*landmark judgment for *habeas corpus* cases*)*,[7] is also a significant example. The list of dissenting opinions does not end here, as per the author, these opinions have, in some exceptional cases, helped in altering the law and doing away with redundant provisions. Most recently, the dissenting opinion of Justice Dhananjay Chandrachud in *Justice KS Puttaswamy Vs. Union of India case*[8] is highly laudable in the context of declaring the right to privacy as a fundamental right and declaring the Aadhar Act to be ultra vires of the Constitution. The dissent by Justice Indu Malhotra in the case of *Indian Young Lawyers Association v. State of Kerala*[9]sparked discussion relating to the extent to which the courts can interfere in the matters of religion. Justice Malhotra opined that issues with a deep religious connotation shouldn't be tinkered with to maintain a secular atmosphere in the country[10] and said that the notions of rationality cannot be brought into the matters of religion.

Dissenting judgements, as seen in the above-mentioned examples, advocate for free speech and judicial autonomy. The author is curious about the rate of decline in the dissenting judgements in the past half-decade. As some crucial statistics show, between 1993 and 2016, out of 216 judgments delivered by Constitution benches only 36 judgments were marked to have

[4] *Ibid.*
[5] A K Gopalan vs. State of Madras, AIR 1950 SC 27.
[6] Maneka Gandhi vs. Union of India, AIR 1978 SC 597.
[7] ADM Jabalpur vs. S K Shukla, (1976) 2 SCC 521.
[8] Justice KS Puttaswamy vs. Union of India, (2017) 10 SCC 1.
[9] Indian Young Lawyers Association vs. State of Kerala, WP (C) 373/2006.
[10] *Sabarimala Verdict: What dissenting judge Indu Malhotra said*, INDIA TODAY, (Sep 28, 2018); https://www.indiatoday.in/india/story/sabarimala-indu-malhotra-dissenting-judgment-supreme-court-1351722-2018-09-28.

dissenting opinions. During the period 2017-2018, Constitution benches of the Supreme Court of India have rendered 18 judgments. Out of these, only two judgments (the Aadhar case and the Sabarimala Case)[11]contain notable dissents. This sort of a change in the trend of dissenting judgements calls for a reality check of the democratic practice in the Indian judiciary.

Article 145(5) of the Indian Constitution provides that the majority opinion of the judges is to be taken into consideration, however, the judges are free to write their own dissenting opinions, if they feel that the majority opinion is inconsistent or requires an alternative approach to that of the majority. This gives "mental independence" to the judges to think and opine in a manner that they think is rational.[12] The importance of recognising dissenting opinions is per se linked to judicial autonomy and the exercise of democracy in its truest essence. The necessity of dissenting judgements stems from the fact that this power helps the judges to decide in a non-partisan manner such that it inculcates a sense of progressive thinking. The evolution of law and society is possible only with the recognition of such dissent. It isn't entirely wrong to think that dissent and democracy are two sides of the same coin. So long as dissent takes a backstage in a democracy, such a kind of democracy remains only a democracy in theory. A democratic rule fails (in practice) when the dissenters aren't given a voice leading to acceptance of the totalitarian opinion, and eventually giving rise to mobocracy. Dissenting opinions aid in the evolution of law by doing away with those provisions that are redundant and amending those that require to see the light of change. By suppressing dissenters, not only is the dissenter victimised[13] but it also proves highly detrimental to the practice of democracy. Dissent in a democracy must not be suppressed.[14] The need to politicise it must be discouraged.

To conclude, it is important to note that dissenting opinions form the backbone of any democracy and suppressing a dissenter would only mean to wreak havoc in the society. The

[11] *Sharma Pratap Chinmoy, The Voice of Dissent: Contribution of Dissenting Opinions in Constitutional Law Cases;* https://www.barandbench.com/columns/contribution-of-dissenting-opinions-in-constitutional-law-cases.
[12] Rajagopal Krishnadas, *Supreme Court judgments recognise dissent as a 'symbol of a vibrant democracy' THE* HINDU, (Dec 30, 2019); https://www.thehindu.com/news/national/supreme-court-judgments-recognise-dissent-as-a-symbol-of-a-vibrant-democracy/article30434644.ece.
[13] Bhatia Gautam, *Dissenting judgments ensure that the Constitution is a living, breathing document,* HINDUSTAN TIMES, (Nov 20, 2017); https://www.hindustantimes.com/opinion/dissenting-judgments-ensure-that-the-constitution-is-a-living-breathing-document/story-3STSlzaom7vqTviQthsarK.html.
[14] Dissenting opinions enrich public discourse, THE TELEGRAPH (Aug 23, 2020); https://www.telegraphindia.com/opinion/dissenting-judges/cid/1670609.

sanctity and independence provided to each judgement must and should be respected, after all, every judge in the Supreme Court is a human being and among such an intellectual conglomeration of learned stalwarts, disagreement and debate, is bound to arise. Therefore, such conflicts of interests and debates must be highly encouraged and each individual's personal opinions must be respected. Lastly, to quote Albert Einstein, "Blind belief in authority is the greatest enemy of truth", similarly blind acceptance of majority shall not always yield the truth and the floor must be open for debate and deliberation to arrive at the penultimate truth.