THE HIDDEN PULSE OF DEMOCRACY

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Introduction

The right to dissent is the *sine qua non* of a true democracy. As much importance it holds for the citizenry of a nation, for the representatives of the people, it holds similar or possibly more importance for the custodians of a constitutional court. Judicial dissents that are not revived, often remain etched in memory more than the loudly pronounced verdicts.

Dissent undoubtedly, for the ones who choose it, must be a lonely enterprise, however, dissent provides hope. A hope of judicial independence, a reflection of the diversity of our society, that our institution values debate and discussion. Dissents emanating from the confines of a courtroom may not be binding but they exude immense soft power.

This article intends to explore how dissent energizes law and what role does judicial dissent play in producing equitable and fair decisions by a court of law in a liberal democracy. The article will base its analysis on landmark judgments which serve as examples to dissent inspiring law- in spirit or in letter.

Hon'ble Justice H.R. Khanna's dissent in the case of *ADM Jabalpur* v. *Shivkant Shukla* in the year 1976, exists as the most landmark dissenting judgements in history. Justice Subba Rao's dissent in *Kharak Singh* v. *State of Uttar Pradesh*, had to wait fifty- five years to be revived and, finally in 2018, in *K.S. Puttaswamy* v. *Union of India*, his view was brought to life and the right to privacy was recognized as a fundamental right under the Indian Constitution.

Justice H.R. Khanna in his admirable verdict in *ADM Jabalpur* v. *Shivkant Shukla*, opined that, "*A dissent in a 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*." Justice Khanna's dissent relating to *habeas corpus* was later acknowledged as a fundamental rule of law governing our nation, after forty five long years, in the case of *Justice K.S. Puttaswamy* v. *Union of India*, which set aside the majority opinion of the infamous *ADM Jabalpur* judgement.

Free India respects dissent.

For almost a hundred years, the Britishers viewed dissent as a threat to their position in India and suppressed it in every way feasible. The Anarchial and Revolutionary Crimes Act, 1919 ["The Rowlatt Act"], is one such example which gave unmeasured powers of arrest and detention of individuals to the Britishers. A strong constitution is one with a strong right to dissent. Article 19(1) of the Indian Constitution protects the right to dissent in India as a fundamental right and an essential part of democracy. As demonstrated in *kharak singh* and subsequently, *Puttaswamy.*

The significant minority

"Sometimes it is a vote of the conscience and vote of constitution", said Hon'ble Justice Dhananjay Yeshwant Chandrachud, the fiftieth Chief Justice of India, when asked about his dissent in the recent same sex marriage case. While the apex court refused to recognize the right of two people of the same sex/ homosexuals to form civil unions, in delivering a minority opinion, Justice DY Chandrachud and Justice SK Kaul, stood by their opinion that same sex couples are entitled to recognize their relationships as civil unions and claim consequential benefits. Not enough time has lapsed to see whether this minority opinion will become tomorrow's majority view.

Judicial Dissent finds its roots in post-independence India, starting from *A.K Gopalan* v. *State of Madras*, 1950, Justice Fazl Ali's dissenting view on personal liberty shaped the later interpretations of Article 21 to become as we now know it. In the 1951 case on the limits to which Indian legislature can delegate its legislative power, dissenting from his seven competent colleagues, then Chief justice, Hon'ble Justice Harilal J Kania, placed his emphasis on conditional legislation. In 2017, the minority dissenting opinion was the longest of the three decisions propounded by a bench of five justices in the case of *Shayara Bano* v. *Union of India*. Hon'ble Chief Justice Khehar dissented and took the view that the practice of triple talaq was "*bad in theology but good in law*". He further directed the central government to enact a law to govern it.

Justice Khehar's dissent, while not being directly binding, sparked significant debate and discussion about the judiciary's role in personal law matters and potentially influenced the enactment of the Muslim Women (Protection of Rights on Divorce), 2017, by the legislature

which effectively criminalized the practice of instant divorce under Muslim personal law. This served as an example of when dissent may shape law.

How dissent shapes law

Dissenting judgements, though minority perspectives, are seldom overshadowed by the loud consensus in India, rather act as a catalyst for debates in the legal community, highlighting the potential flaws in reasoning relied upon by the majority and becoming harbingers to future legal reforms.

First, a case with a lone woman dissenter which had far reaching socio economic consequences especially for women, and still stands unresolved. A legal battle was initiated by a petition filed by the Indian Young Lawyers Association. The petition challenged the exclusion of women from entry into the Sabarimala Temple dedicated to Lord Ayyappa on grounds of right to equality and religious freedom. This case is an example of how dissent is just as powerful as the consensus. In the 2018, the five judge bench, Justice Indu Malhotra was the only woman and the lone dissenter. The bench comprised of Hon'ble Chief Justice Misra, Justice Nariman, Justice Chandrachud, Justice Khanwilkar and Justice Malhotra. The court delivered four separate opinions with an odd one out written by Justice Indu Malhotra. By a 4:1 majority, the exclusionary practise was held to be unconstitutional. The majority opinion held that the practise was against the right to freely practise and profess one's religion under Article 25(1) of the Indian Constitution. Additionally, that the devotees of Lord Ayyappa's did not pass the constitutional test to fall under the definition of a separate religious identity and that, they were Hindus. Article 25(2)(b) provides the state with the power to make laws to reform Hindu denominations. Justice Nariman concurred with Justice Misra and Justice Khanwilkar however, Justice Chandrachud in separate and concurring opinion said that the exclusion of women between ten to fifty years of age was contrary to constitutional morality and that the physiological characteristic of menstruation did not have any significant entitlements or bearing under the constitution. He further added that the exclusion was a form of untouchability under Article 17 of the Indian Constitution.

In a starkly dissenting opinion, Hon'ble Justice Indu Malhotra offered contrary reasoning and viewed the exclusion as constitutional. She held that the right to equality under Article 14 cannot override the religious rights under Article 25. The Sabarimala Temple passes the test to be a separate religious denomination and is, subsequently, not covered under the social reform

mandate of Article 25(2)(b). Justice Malhotra further dismissed the contention of violation of Article 17and held that untouchability does not extend to gender.

The case, by the majority opinion, held the exclusion of women from entry to the Sabarimala temple as unconstitutional.

However, more than fifty review petitions were subsequently filed and in November, 2019, the five judge bench delivered a judgement, referring certain overarching constitutional questions to a larger bench. In 2020, the nine judge bench upheld the validity of the referral order however, made no observations referring to the stay on the 2018 verdict. Implicit in these observations is the assumption that these benches may disagree with the Sabarimala judgment of 2018.

Therefore, it was the lone dissenting voice of Hon'ble Justice Indu Malhotra, which opened the floodgates for review and revision. Justice Indu's opinion of dissent demonstrated the democratic and diverse nature of the Indian Judicial process- there can exist no democracy without dissent.

Second, the case of *Aishat Sifha* v. *State of Karnataka*, popularised as the "*hijab ban*" case, saw a two judge bench of the Supreme Court produce a split verdict, providing a reasoned dissent between the two justices- Hon'ble Justice Sudhanshu Dhulia and Hon'ble Justice Hemant Gupta. This 2022 split verdict was a result of a ban on wearing hijabs in classrooms by a university in Udupi, Karnataka.

The case raised three major concerns to be answered- a) is the wearing of hijab an essential religious practise protected by Article 25, b) Whether the requirement for students to wear uniforms is legitimate when it violates their fundamental rights, and c) is the government order of instructing schools in Karnataka to adhere to prescribed uniforms, a violation of Article 14 and Article 15 of the Indian Constitution.

Justice Gupta and Justice Dhulia had opposing views, while Justice Gupta affirmed the decision of the High Court and favoured the ban of the hijab, Justice Dhulia sided with the appellants.

Justice Gupta, while recognising that secularism in the Indian Constitution is different from the western idea, states that, "*Secularism, as adopted under our Constitution, is that religion cannot be intertwined with any of the secular activities of the State. Any encroachment of*

religion in the secular activities is not permissible." He, further opined that the intent of the state to promote parity and uniformity amongst the students was well placed and thus, is in tune with Article 14 of the constitution. The rights to freedom of religion has to be read with other rights of Part III as laid down under Article 25(1).

Furthermore, the word "discipline" appears twenty two times in Justice Gupta's narration, he often pairs it with "uniform" to emphasize how uniformity breeds discipline. An observation which is in stark opposition from that made by his learned colleague, Hon'ble Justice Dhulia. This may serve as proof of how dissent may be sometimes, in reason, and not always of rule.

Moving on, Justice Dhulia favoured the appellants for the reason of violation of Article 19(1)(a) and the Essential Religious Practise Test ["ERP"]. He contends that the test is inapplicable in the present case, the courts should slow down in determination of ERP and that the courts are not forums to solve theological questions. Hon'ble Justice Dhulia, further relied on the Bijoe Emmanuel Case, to contextualise the idea of "*reasonable accommodation*".

"*We are making the life of a girl child any better by denying her education, merely because she wears a hijab*!"

In his eightieth paragraph, he pens that "*Under our Constitutional scheme, wearing a hijab should be simply a matter of Choice*."

This stark dissent gave way to an appeal to a larger bench of the Supreme Court- the decision in which is still pending. Producing and publishing dissents improves the reasoning of the majority. The split decision in the Hijab Ban case is indeed an appreciable and welcome verdict as it gives evidence of the freedom of speech embodied in dissent.

Safeguarding the dissent

A number of safeguards against the right to dissent are either expressly rooted in constitutional provisions or have been customised over time by judicial pronouncements. The Supreme Court collegium which is in charge of appointment and transfer of High Court and Supreme Court justices, is one such measure. The primacy of the collegium system does not explicitly stem from the Indian constitution, but has developed over time with the aid of various landmark verdicts. In a recent example, in January, 2023, the Supreme Court called out the executive's iffy justifications for delaying to decide upon the appointment of five advocates, especially of,

Mr. Saurabh Kirpal, India's first openly gay judge. According to the Memorandum of procedure of appointment of High Court Judges and by virtue of the landmark judgement of the Supreme Court in the *second judges case*, the central government is bound to approve the appointment of names, reiterated by the collegium of the Supreme Court. In responding to the objections raised by the executive to the appointment of Mr. Kirpal, the Supreme Court tore down the façade of 'national security' used by the government and implemented, in considerable length, the judgement of *Navtej Singh Johar*, to judicial appointments. The collegium highlighted his overall merit and the value addition to the bench, by his extensive experience. Further, in defending the appointments of Mr. Somasekhar Sundaresan and Mr. John Satyan, the collegium resisted the attempt by the central government in creating a chilling impact on free speech by protecting the right to dissent, which was, by Hon'ble Justice DY Chandrachud, remarked as the "*safety valve of democracy*". Thus, the collegium system of appointment of judges in India provides for an insulation from direct political influence thus, allowing for broader range of judicial dissents, unlike many nations, including the United States, wherein appointment to benches are on the whims and fancies of the executive.

Another effective safeguard, propounded in the landmark case of *Kesavananda Bharati v. State of Kerala*, the basic structure doctrine. The doctrine safeguards judicial dissent by limiting the parliament's amending power, maintaining a balance of power and ensuring judicial review.

Additionally, the separation of power, security of tenure of the judiciary and the right to freedom of speech and expression under Article 19, further add to constitutional security of judicial dissents.

Conclusion

In a nation of 1.4 billion people, there are 1.4 billion opinions, 1.4 billion beliefs and views and thus, 1.4 billion dissenters live and breathe. Judicial Dissent is the backbone of our democracy. Article 145(5) of the Indian Constitution empowers the Judges to dissent and places equal value on a dissenting opinion as much as one of the majority. The constitution by way of Article 145(5) attempts to encourage an inclusive and independent judiciary. It recognises the intertwined existence of democracy and dissent and the importance of respecting opposing views. Dissents play a transformative role by challenging the common consensus and opening doors to alternative opinions and inclusive law making. Thus, democracy fails when dissenters are made mute.

India stands tall as an exemplary example that dissent is not ambiguity or confusion or weakness, it is proof. It is proof of a living legal system that grows with time and accommodates with need.