DIMENSIONS OF A JUDICIAL DISSENT

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I. INTRODUCTION

A viewpoint recorded by single or more judges on a bench showing difference of opinions with the viewpoint of majority of judges is known as minority view or a 'dissenting opinion'. Majority judgement, dissenting opinion and concurring opinion are normally written simultaneously and even delivered and published alongside each other. If all the three opinions are the part of the same judgment, it is read and understood cumulatively.

Article 145(5) of the Constitution of India states, "No judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of 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." Basically, Article 145(5) empowers the Judges to differ from the majority and deliver their own judgment.[1]

II. SOMERECENTDISSENTINGJUDGEMENTS

Though the dissenting judgments do not have authority parallel to precedents, they have a great persuasive value. Through the course of time, it has been found that a previous dissent encourages to bring about better changes in law.

A. Christian Medical College v.*Union of India and Ors.*[2]

On validity of National Eligibility Entrance Test (NEET) for MBBS aspirants, the Supreme Court, in May 2013, with 2:1 split verdict, struck down the common entrance test taking the plea that Medical Council of India and Dental Council of India cannot conduct the test. Justice Anil Dave dissented. Subsequently, in 2016, this dissent was followed as the majority view by the Constitution Bench in *Medical Council of India* v. *Christian Medical College, Velloreand Others*[3] reviving the conduct of NEET for medical aspirants of India. This majority judgement was authored by Justice Anil Dave itself, who had dissented in 2013. Justice Dave said that NEET is a boon to aspiring medical students. National Eligibility Entrance Test will attract merit and do away with money-minded businessmen operating in educational field.

B. Supreme Court Advocates-on-record Association v. *Union of India*[4]

Justice Chelameshwar contradicted the majority in *Supreme Court Advocates-on-record Association* v. *Union of India* in holding the National Judicial Appointment Commission Act and 99th amendment as constitutionally valid. He concluded that Judiciary is

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[1] M.P. Jain, *Indian Constitutional Law* 477(Lexis Nexis Publications, 7thedn., 2014).

[2] (2014) 2 SCC 305.

[3] (2016) 4 SCC 342.

[4] (2016) 5 SCC 1.

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 judgement.

C. Abhiram Singh v. *CD Comachen*[5]

In *Abhiram Singh* v. *CD Comachen*, the majority held that the word '*his*'in section 123(3) of the Representation of People's Act 1951, includes not only the contesting candidate, but also the voters. No political leader will give reference to religion, race, caste, community, or language of the candidate or of his rivals or of the voters to secure votes. Such conduct will be declared 'corrupt practice'. In a nutshell, the majority judgement banned religion in politics. Therefore, 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 the statute does not prohibit discussion, debate, or dialogue during the course of an election campaign. They commented that, from this stand-point of majority, even marginalized communities would not be able to use their identity to galvanise votes. In contrast, the dissent gave broader interpretation to section 123(3) which shows Judges's deeper understanding of the interface between law and society and provides strong argument to litigants fighting for the transformation.

D. Indian Young Lawyers Association v. *State of Kerala & Ors.*[6]

In the case of *Indian Young Lawyers Association* v. *State of Kerala*, the question before the Apex Court was whether the Sabarimala Temple's customary religious practice, which prohibits the entry of women, violates fundamental rights guaranteed to women by the Indian Constitution.

The 5-judge Constitutional bench did not give a unanimous decision in 2018, whereby 4:1 majority judgement held that this prohibitory practice is not within the spirits of Constitution. Disagreement came from Justice Indu Malhotra.

In Kerala, the Sabarimala temple rules prohibits the entry of women in their 'menstruating years', its being place of worship. Indian Young Lawyers Association filed a PIL before the Supreme Court in 2006. They challenged the temple's custom of prohibiting women, on the ground that the exclusion infringes women's right to equality and right to freedom of religion. In a 4:1 majority, the court ruled that Sabarimala's prohibition rule for women violated their basic fundamental rights. Justice Indu Malhotra dissented. She argued that Courts should restrain itself in intruding in religious practices and beliefs of citizens in a secular nation. Justice Malhotra suggested, it should be left to those practicing the religion. J. Malhotra banked upon rights of religious denominationsunder Article 26 to establish and maintain institutions for religious and charitable purposes. Denominations are free to manage its own activities in terms of religion. This daring dissenting judgement surely needs to be applauded.

E. Justice K.S. Puttaswamy (Retd.) v. *Union of India and Others*[7]

[5](2017) 2 SCC 629.
[6]Writ Petition (Civil) No. 373 of 2006; 2018 SCC OnLine SC 1690.

The constitutionality of Aadhaar Act, 2016 was on stake in this case. Through petition, it was alleged that the Aadhaar act violates privacy. The majority upheld the constitutional validity of Aadhaar Act on the plea that Aadhaar does not tend to develop India into a surveillance nation. The final judgement ruled that all matters pertaining to an individual do not qualify as being an inherent part of right to privacy. Only those matters over which there would be a reasonable expectation of privacy are protected by Article 21. Majority decision declared only section 57 of the Aadhaar Act as unconstitutional as it enables individuals and corporate bodies search for authentication.

The dissenting judgement of Justice J. Chandrachud held the Aadhaar project wholly unconstitutional. The dissenting judgement states that Aadhaar Act violates informational privacy, data protection as foreign company has source code of Aadhaar project. It has access to citizen's information. Therefore, there is potential for surveillance. The Act poses risk on the potential violation of leakage of the database. Justice J. Chandrachud said, "If a constitution has to survive, the political leaders, notions of power and authority must give compliance to rule of law". The dissenting judgement of Justice Chandrachud is strong and appealing. He has upheld the Constitutional values of integrity, individual dignity, privacy, and the sanctity of individual rights against the State.

Justice R F Nariman, a member of nine Judges Bench recalled the 'Three Great Dissents'which changed the landscape of fundamental rights.[8]Justice Nariman lauded Justice Fazl Ali, Justice Subba Rao and Justice H. R. Khanna in their Judgments in celebrated cases[9] for their judicial opinions, views and 'dissent'for protecting the basic rights of individuals. 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.

In *A.K.Gopalan* v. *State of Madras*[10],the constitutional validity of detention under the Preventive Detention Act, 1950 was challenged as they pleaded that it was encroaching upon Article 19(1)(d)[11] promising the right to freedom of movement. Since Article 19(1)(d) gives power of 'personal liberty' under Article 21, therefore, hence the Preventive Detention Act, 1950 must also satisfy the requirement of Article 19(5). In addition to this, the petitioner argued that Article 19(1) and Article 21 must be read together because Article 19(1) deals with substantive rights and Article 21 deals with procedural rights. The two articles cannot be understood in isolation of each other.[12]

The majority held that preventive detention could not be deemed unconstitutional in itself, since the Constitution has expressly authorized legislation providing for it. They flatly denied the possibility of admitting into Article 21 any ingredient of the reasonableness concept from Article 19 of our Constitution to arrive at the proposition that whatever was laid

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[7]2017 (10) SCALE 1.
[8]*Ibid*.
[9]*A.K.Gopalan* v. *State of Madras*, AIR 1950 SC 27;*Kharak Singh* v. *State of UP*, AIR 1963 SCR 1295; *ADM Jabalpur* v. *Shivkant Shukla*, AIR 1976 SC 1207.
[10]AIR 1950 SC 27.*A.K. Gopalan, Ibid.*
[11]The Constitution of India, art. 19(1)(d).
[12]A.V. Dicey, *Introduction to The Law of Constitution* 207-208, 263 (Macmillan, 9[th]edn., 1939).

down by the legislature in a penal law would satisfy Article 21 and the court could not intervene.

Dissenting viewpoint of Justice Fazl Ali, demanded that the Constitution of India should be given a deeper interpretation whereby Article 19 should be read with Article 21 and Article 22, the basic fundamental rights, which provide for processes established by law and provisions for preventive detention respectively. The minority opinion of Justice Fazl Ali's suggested a broader interpretation of the term in Article 21, 'procedure established by law 'to include higher principles of natural justice, and not just statutory law. Finally, the bench followed the dissent of Justice Fazl Ali after twenty years in *Maneka Gandhi* v. *Union of India*[13]. The judgement in *Maneka* case stated that, "any law depriving a person of his personal liberty should fulfil the conditions listed under Article 19" and the 'procedure established by law 'must be 'fair, just and reasonable'.

In *Kharak Singh* v. *State of U.P.*[14], Regulation 236 of the U.P. Police Regulations was challenged as found to be violative of the fundamental rights under Article 19(1)(d) and Article 21, because it authorised the visit to private house for search at night. The majority view found regulation 236 to be in contravention with right to personal liberty as they found the entry interrupting the privacy of the subject.

In the dissenting view Justice Subba Rao stated, "Since 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."

Thus, in *Aadhar* case[15], the Court overruled the majority view in *Kharak Singh*[16], and relied on Justice Subba's dissent to rule that right to privacy is also enshrined in the fundamental rights. Again, a foresighted dissent turned into the majority view after some years.

ADM Jabalpur v. *Shivkant Shukla*[17] 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 challenged in this case. The majority opinion of 4:1 held that Article 21 is an exclusive depository for all rights to life and personal liberty. Consequently, these rights are also altogether suspended when Article 21 is suspended during Emergency.

However, Justice HR Khanna, in his dissent, took a strong stand that Article 21 is not the sole repository of these rights and contended that the basic right to life and liberty is not suspended by proclamation of Emergency. He supported the position that imposition of Emergency and the maintainability of *habeus 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 in a judicial system governed by rule of law.

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[13] AIR 1978 SC 597.
[14] *Kharak Singh*, *supra* note 9.
[15] *Supra* note 7.
[16] *Supra* note 14.
[17] *ADM Jabalpur*, *supra* note 9.

This bold dissent of Justice Khanna was later widely applauded. This dissent became the majority judgment in the *Maneka* case[18]. Finally, this dissent caused the 44th Amendment Act in 1978. The foresighted view of Justice Khanna was recognized after long forty-one years in the *Aadhaar*judgement[19].

In a recent discussion in Rajya Sabha regarding a bill proposing to allow voluntary use of Aadhar as identification proof for opening bank accounts and sim cards for cell phones, a group of opposition leaders, who were the petitioners in *Aadhar* case quoted the dissenting view of J. Chandrachud to bring to the notice that the government was trying to overreach the Supreme Court judgement, which had questioned at Aadhar being the basis for opening bank accounts and cell connections.[20]

In light of these great dissents and the huge impact they had on the nature and scope of the Indian judicial landscape, the author contends that dissenting opinions have substantive value.

III. IMPACTFUL DIMENSIONS OF DISSENT

Broadly, the form and function of dissents highlight the importance of diversity of perspectives to our 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.[21]Some of the strongest impacts of dissents are thus as follows:

i. Majority opinions create the fiction that their 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.[22] Consequently, dissents are believed to actually strengthen and clarify majority opinions.[23]
ii. 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, to follow.
iii. 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. Dissent opens a debate among the Judges, jurists, and the legislators. Thus, dissents work as mediums for advocating higher values, alternative judicial ideologies, and overturning earlier cases.[24]

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[18]*Supra* note 13.
[19]*Justice K.S. Puttaswamy (Retd.)* v. *Union of India and Ors.*, 2017 (10) SCALE 1.
[20] Dhananjay Mahapatra, "Significance of SC's Minority judgements and their place in Polity"*Times of India*,July 15, 2019.
[21]Andrew Lynch, "Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia" 27 *Melbourne University Law Review* 724,725(2003).
[22] Robert W. Bennett,"A Dissent on Dissent" 74 *Judicature* 256(1991).
[23]Hampton L. Carson, "Great Dissenting Opinions" 50 *Albany Law Journal*126 (1894).
[24]Refer Dissent Magazine, *available at*: https://www.dissentmagazine.org/ (last visited on May 20, 2019).

iv. Dissenting opinions facilitate the advancement of law itself, as they introduce new legal proposals and suggest amendments by exposing the flaws in the old doctrines and principles. They, thus, help in correcting the legislator's mistakes.[25]

v. A majority opinion opposed by one or more dissents indicates that the Court's decision is the product of independent and thoughtful minds.[26] With this, the independence of Judges gets strengthened.

vi. Judicial dissent increases the scope and ambit of the interpretation of constitutional provisions. By offering an outlet for individuality, dissent support Judges to diverge from the accepted precedent, and thus giving progressive direction to social transformation.

vii. Judicial dissents help in raising the legal consciousness of the society. Dissents also provide a stimulus to write well researched judgments. The losing party feels that the adjudicating Judges understand their position, thus carries a psychological value too.

IV. BEHAVIOURAL ASPECT OF JUDGES

The researcher peeped into the Judge's behavioural aspect and found that their individual decision-making pattern is due to solidified habits over long years of experience. Their perception of problems and their outlooks are fully matured due to diverse exposure and family background. A distinctive elite class might differ on how certain issues confronting the society should be resolved. Such differences would normally be reflected in non-unanimous decisions in the form of dissenting votes as overt manifestations of their individuality. But because of several constraints, such overt manifestations seem to have been very few in number. This may not mean that the Judges are one in outlook and hence they rarely dissent. It is more likely that the behavioural differences of the Judges in their day-to-day decision-making activity get institutionally accommodated as a result of the fragmented Bench structure adopted by the Indian Supreme Court. Accordingly, this kind of institutional accommodation may sometimes result in bringing together Judges with similar outlook on the same panel which minimises the possibility of a split in the decisions.[27]

V. CONCLUSIVE FINDINGS

When an area of law is at its infancy stage, dissents are bound to increase and subsequently decrease with the crystallization of its jurisprudence. The presence of authoritarian government, ideology of Judges, heavy workload, size of benches are some causative factors for the no-dissent culture. We cherish dissent but it should be meaningful. Soli J Sorabjee had stated that, "Dissenting judge speaks to the future and his voice is pitched to a key that will carry through the years."[28]

Through the course of writing this paper, the researcher has aimed to highlight the power and impact of dissenting judgments through cases. The researcher humbly urges judges to boldly face the disagreements with their colleagues on the legal reasoning in reaching an outcome. By not blindly submitting to the majority view in an effort to form

[25]Julia Laffranque, "Dissenting opinion and Judicial independence" 8 *JuridicaInternational*162,165(2003).
[26]Antonin Scalia, "The Dissenting Opinion"19(1) *Journal of Supreme Court History* 33-44 (1994), *available at*:https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-5818.1994.tb00019.x (last visited on May 20, 2019).
[27]In Re TheDelhi LawsAct case, AIR 1951 SC 332.
[28] Soli J Sorabjee,"Dissenting judges are the future of law", *available at*:http://www.newindianexpress.com/columns/article445645.ece. (last visited on May 20, 2019).

artificial unanimity, judges demonstrate their role in the development of the law and transformation with changing needs of the society.