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BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

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With this thought, we hereby present to you

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# **AN ANALYSIS ON THE DISSENTING OPINION IN INDIA**

AUTHORED BY - BHARGAVI P

LLM II YEAR

(New Law College, Bharatiya Vidyapeeth Deemed University, Pune)

## **ABSTRACT**

The dissent of today can become the law of tomorrow. The word dissent is always looked from a negative perspective. People always appreciate and tend to follow the voices of the majority. Judges play an important role in articulating these voices. The dissenting opinion should be strenuously persuasive to suppress the voice of majority and accept the minority. It is necessary to understand the Nature of Judicial Process by Cardozo, Judicial Process in India, meaning of Dissenting Judgement, its ancient roots and importance with few landmark case laws in India.

## **Introduction**

Dissenting opinions have a distinct and significant function in influencing legal discourse within the intricate framework of Indian law. As the protectors of justice, the courts frequently debate hot-button matters, leading justices to voice dissenting opinions. When a judge expresses a different judgment that contradicts the accepted legal understanding in a case, they are said to be dissenting opinions. This essay explores the significance of differing viewpoints in India, their role in intellectual diversity, legal progress, and the development of a strong judicial system. Judges are not merely an overwatcher, and they hold a fiduciary position in society as their role is to interpret the law by applying their creativity. It is difficult to determine each case as the facts and circumstances differs from one to another, and the court must apply governing rules and principles to arrive at the decision which becomes the Ratio decidendi that is the rule of majority of the case, and it holds a Constitutional validity unless there is an overruling effect. The minority rule, though at that time might not be admissible due to the prevailing socio, cultural and economic condition later becomes acceptable with

the changing needs of the society. This minority rule supersedes the majority rules and becomes the Law of Land which can also be called the Dissenting Judgement or Opinion of the court.

## **Legal Framework:**

The Indian legal system functions under a framework that respects the judiciary's independence. As the highest court in the land, the Supreme Court has seen several occasions where judges have written opposing opinions that have permanently altered the legal history of the nation. Dissents are more than just disagreements expressed in writing; they are effective tools that help legal ideas develop and become more refined.

## **Nature of Judicial Process**

In 1921 the concept of 'The Nature of Judicial Process' emerged when "Benjamin Cardozo" was offering lectures to students at Yale Law School. He later developed it and some of its features includes the following:

- According to him, "Choice" along with its consideration and motives must be determined, and the judges should not submit themselves to fate even if their analysis results in uncertainty. In determining such choices, the judges must apply a uniform governing principle which are at times consciously chosen or subconsciously driven but inherently personal and the same cannot be applied by all jurists to a case or a single judge cannot apply a standard principle for all the cases<sup>1</sup>.
- Most of the legal questions are answered by constitutional, statutory or common law as judges follow realistic approach but there are certain gaps which was left unanswered by the legislators as they are unforeseeable and in absence of any existing law the judges had to determine by adhering to the restraint's appropriate legal rules, principles and the procedure to fill those vacuums.
- According to him judges used four methods: Philosophy, Evolution, Tradition and Sociology. These methods operated together at times. In case of philosophical method, it is observed that there is a faithful consideration of consistency, fairness and impartiality and in case of any

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<sup>1</sup> Benjamin N. Cardozo, The Nature of Judicial Process, Lecture I. Introduction. The method of philosophy, (Apr. 24, 2023, 07:14 PM), Journal of Law, v1n2



departures the judges must look in another direction or logically choose between or accommodate competing legal principles to protect the legitimacy of the court. History and Customs helped in shaping the law. It acted as a futuristic guiding path by throwing a light on past and present. He further added that the ultimate aim is the social welfare of people, so he associated the method of sociology with “utility”. The judges should not apply subjective predilection and scrutinize law from the perspective of ordinary prudence and do not have the license to stick their conception of morality and if the justice did not serve the purpose of social welfare, it should be altered or abandoned. Precedents should be applied as long as they serve the purpose of social welfare<sup>2</sup>.

### **Judicial Process in India:**

In the ancient era the Rule of King was followed, and he acceded to the will of the people. Later in the medieval period during the rule of Mughal, administration of justice was considered a prestigious religious duty and adhering to it is better than any devotional Muslim men who keeps fast for 60 years every night. India, after attaining independence did not follow a federal jurisdiction like that of United States. Each state is governed by both the Union and State and in case there is any conflict the Union prevails over the other. The Supreme Court of India was established which was considered the apex court. According to Article 141 of the Constitution the law declared by Supreme Court is declared to have a binding force on all the courts in India and subordinate to it is the High Court. There is Independence in Judiciary and one of its features includes doctrine of security of tenure which states that a judge of High court or Supreme Court can be removed by two third majority of parliament on the ground of proven misconduct or behavior. Another aspect includes a special jurisdiction by way of issuing writ of habeas corpus, quo warranto, prohibition, certiorari, mandamus and any other legal orders or directions under Article 32 and 226 of the Constitution where it can be declared that if any law passed by parliament or state legislature is violative of the fundamental rights of the citizen then it is invalid. There is Separation of powers between the three wings and no authority has the power to encroach upon the right of others. The role of judges was limited to following what the law is but when there is a necessity it ought to follow what law could be without ignorance of social objective or any defiance. India is rich in its cultural heritage there is unity in diversity. Every Judge has a

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<sup>2</sup> Joel K. Goldstein, The Nature of the Judicial Process: The Enduring Significance of a Legal Classic, (Apr. 24, 2023, 07:18 PM), The Nature of the Judicial Process: The Enduring Significance of a Legal Classic (tourolaw.edu)

different mindset and there might be personal bias and prejudices he must follow the principle of Natural Justice and emphasize on impartiality by adhering to the maxim of “Fiat iusticia et peret mundes” which means that “Justice must be done though the beams may fall”<sup>3</sup>.

### **Dissenting Opinion:**

Dissenting opinion arises when a judge disagrees or shows his disagreement with the majority by stating his reasons for arriving at the same. This is to showcase to the parties that all judgements do not end unanimously and if the court follows the judgment of minority, then there is chance of losing party to have won the case. The dissenting opinion will not change the validity of judgement and the majority ruling will be considered final even though it will be recorded in a written form. This written recording will become a bare text of precedent and act as a guiding force for the future litigants to know, understand the extent of the law and change it according to the needs and interests of society. At times the judges can accept the rule of majority, but he will not be ready to accept the reasoning for arriving at that rule<sup>4</sup>.

### **The Development of the Law:**

The development of legal concepts depends heavily on dissenting views. Dissenting judges add to the on-going process of legal growth by questioning accepted standards. In landmark cases in India, opposing viewpoints have sparked legislative changes and societal transformations by serving as the cornerstone for ensuing legal reforms. Legal academics are frequently prompted to participate in academic conversation and contribute to the on-going development of jurisprudence by such dissents.

### **Significance of Dissenting Opinion**

- An impressive dissent has the authority to refine and clarify the majority opinion to change their initial circulation. On the one hand it is so persuasive that it gains the choice of majority which becomes the opinion of the court. On the other hand, it is said that at times after writing the dissent the judges bury it without showcasing it to the public.

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<sup>3</sup> Mr. Justice S. S. Dhavan, The Indian Judicial System A Historical Survey, (Apr. 24, 2023, 07:20 PM) Microsoft Word - TheIndianJudicialSystem\_SSDhavan.doc (allahabadhighcourt.in)

<sup>4</sup> Emlin McClain, Dissenting Opinions, (Apr. 24, 2023, 07:32 PM), Dissenting Opinions (jstor.org)

- According to Chief Justice Huges, the dissenting opinion has the power to possibly correct the error which the courts have betrayed to deliver and can act in future as a last resort for appeal in case of injustice.
- According to Justice Scalia, dissenting opinions can act as an eloquent and comforting voice in case of any horrendous mistake in past and raise their concern in case of jeopardy<sup>5</sup>.
- Judge Brennan stated that “A healthy society must necessitate dissenting judgement as a protection to democracy and uncertainty in the legal system. There can be no democracy without a dissenting opinion.” He further added that the constitutional principles must not be bound to certain policies and principles and in case of any dispute there should be feasibility of change ensuing consensus within the cultural context by ensuring a lawful system for signaling and managing disagreement without allowing it to disrupt.

### **Diversity of Thought and Independent Judgment:**

The existence of opposing viewpoints highlights the judiciary's intellectual diversity. Dissenting voices illustrate the range of beliefs that are common in society in a democratic country like India, where different viewpoints coexist. Due to the variety of the court, rulings are rigorously scrutinized rather than just being rubberstamped, which promotes justice and fairness. The notion of judicial independence is strengthened by judges' freedom to voice disagreement, reassuring the public that the court is a dynamic institution that values discussion and dissent rather than a single, inert body.

### **Checks and Balances:**

Dissenting opinions function as a natural check on the potential abuse of judicial power. They remind both the legal community and society at large that the judiciary is not immune to disagreement and debate. This inherent self-correcting mechanism ensures that decisions are thoroughly examined, reducing the risk of arbitrary or biased judgments. Dissenting opinions, therefore, contribute to the maintenance of a balanced and accountable judicial system.

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<sup>5</sup> Hon. Ruth Bader Ginsburg, The Role of Dissenting Opinions, (Apr. 24, 2023, 07:34 PM), Microsoft Word - Ginsburg\_4fmt\_Final\_ (minnesotalawreview.org)

## **Dissenting Opinion in the Indian Legal System:**

Article 19(1) of the Constitution states that it is the ability of the person to express by way of text or speech his ideas or opinion which is envisaged under the right to freedom of speech and expression. It also involves the ability to analyze and organize a standpoint, to have a liberated view without any interference from a third party. According to the preamble we follow democratic polity and the “mental independence” of the judges should be adhered to in its purest form. Article 145(5) of the Constitution considers the majority opinion that if any judge(s) find the judgement inconsistent or have a different opinion they are at the liberty to write their own. In case their voices are silenced or ignored there will be failure in democracy which will result in ‘Mobocracy’. It should contribute to a progressive attitude by eliminating and amending unwarranted sections and thereby encouraging nonpartisan and rational judgement<sup>6</sup>.

In *Additional District Magistrate Jabalpur v. Shivkanth Shukla*<sup>7</sup> the majority rule was from justice A. N. Ray, M. H. Beg, Y. V. Chandrachud, P. N. Bhagwati with a dissenting judgement from H. N. Khanna. One of the aspects of the judgement stated that “Article 21 is sole repository of right to life and personal liberty” which was denied by Justice Khanna by stating that even if Article 21 was not part of the fundamental right in the constitution the state has no right to deprive a person without the authority of law of his life and liberty. The procedural power of Article 21 was curtailed, and substantive power should remain intact in order to protect the sanctity of life and liberty during emergency as it is important to recognize the difference between a lawful society and lawless one<sup>8</sup>. These cases were overruled in *K.S. Puttaswamy v. Union Of India*<sup>9</sup> upholding the dissenting judgements from the above cases where Right to Privacy was reaffirmed as a constitutional right unanimously by a nine judge bench and emphasized that the right to life has existed even before the advent of the Constitution and the state without express or implied authority of law cannot create bounties nor does the constitution confer these rights<sup>10</sup>.

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<sup>6</sup> Daksh Gai, Importance of dissenting judgments, (Apr. 24, 2023, 07:36 PM),

<sup>7</sup> *Additional District Magistrate Jabalpur v. Shivkanth Shukla*, A.I.R. 1976 S.C. 1207 (India).

<sup>8</sup> Kritika Singh, *The Habeas Corpus (ADM Jabalpur) Case*, (Apr. 24, 2023, 07:48 PM), *The Habeas Corpus (ADM Jabalpur) Case* (alec.co.in)

<sup>9</sup> *K.S. Puttaswamy v. Union of India*, A.I.R. 2017 S.C. 4161

<sup>10</sup> *The Leaflet, ADM Jabalpur: The Case that was but should never have been!*, (Apr. 24, 2023, 09:49 PM), *ADM Jabalpur: The Case that was but should never have been! – The Leaflet*

In *Aishat Shifa v. State of Karnataka*, popularly known as a “Hijab Ban” case. It was a split verdict by two judges where Justice Hemant Gupta upheld the Karnataka’s prohibitive government order and stated that defiance to rules by wearing uniform is a reasonable restriction and discipline is one of their attributes which every student should adhere. Encouraging religious symbol of one religion will result in antithesis of secularism. Justice Sudhanshu Dhulia provide a divergent opinion by stating that Courts are not suited to solve theological questions. If there is no harm caused to others by such practice and the faith is sincere then there is no reasonable justification to ban Hijab in a classroom. Especially for a girl from a conservative family if wearing Hijab is her ticket to education then it is ultimately her choice and there should be no forced homogeneity. This case is pending appeal for a higher number of benches in Supreme Court of India<sup>11</sup>.

In *Sardar Syedna Taher Saifuddin v. The State of Bombay*<sup>12</sup>, the bench comprised of Sinha, Bhuvneshwar P. (Cj), Sarkar, A.K., Gupta, K.C. Das, Ayyangar, N. Rajagopala, Mudholkar, J.R which challenged the validity of the Bombay Prevention of Excommunication Act, 1949. In this case there was 4:1 ruling which prioritized group rights over individual rights as it affected the freedom and integrity of Individual. This was considered as an essential practice according to the Dawoodi Bohra Muslim Community and it cannot be overlooked by the court. Justice B.P. Sinha the then Chief Justice of India offered a dissenting opinion that prioritized on Individual rights. He stated that it violated Article 17 of the constitution and no religious practice, howsoever essential to religion can hinder the individual dignity to fulfill collective desires. The concept of Constitutional Morality and the question of how to weigh the rights between religious groups and their followers was retested after considering this dissent. The aspect relating to protection of liberty, fraternity, equality and dignity and to solve the conflict between personal right and denominational right in the Central Board of Dawoodi Bohra Community v. The State of Maharashtra the question was reconsidered by a five-judge bench of Supreme Court where justice S.K. Kaul, Sanjiv Khanna, Abhay S. Oka, Vikram Nath, J.K. Maheshwari tagged it along with Sabrimala Case which is Nine Judge Bench. Therefore, the judgement of this case is reserved<sup>13</sup>.

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<sup>11</sup> [Burning issue] Issue over Hijab Ban, (Apr. 24, 2023, 09:51 PM), [Burning issue] Issue over Hijab Ban - Civildaily

<sup>12</sup> *Sardar Syedna Taher Saifuddin v. The State of Bombay*, 1962 A.I.R. 853, 1962 S.C.R Supl. (2) 496

<sup>13</sup> The Spirit of the Law Lies in this Dissenting Judgment: Daily Current Affairs, (Apr. 24, 2023, 10:11 PM), The Spirit of the Law Lies in this Dissenting Judgment (dhyeyaias.com)

## **Problems and Rebuttals:**

Dissenting views are necessary for a functioning legal system, but they are not without difficulties and objections. While some worry about the possible deterioration of judicial unity, others contend that frequent dissents might cause uncertainty in legal concepts. For the Indian judiciary, finding the ideal balance between dissent and consensus continues to be a difficulty.

## **Conclusion**

Indian judiciary has evolved to a larger extent. Generally, the law in the constitution and statutes were strictly adhered to, there was no aspect of creativity involved in Judicial Law Making. In case there is any discrepancy or void the precedents are looked over and only after finding a vacuum in the precedents do the judges use their capacity to interpret and fill in the those. In the case of Interpretation, the dissenting opinion plays a major role. It raises questions on the unanswered or ill answered concepts of law. The decision of the Majority at the time of pronouncement might seem reasonable considering the facts and circumstance of the case but as time passes and situations changes it becomes irrelevant. In India, dissenting views are essential to determining the direction legal theory takes and to maintaining a lively, active, and transparent court. The dissenting opinion though not accepted during that period might become accepted in the future. Not all dissenting opinion forms part of the future, some of them might become irrelevant but it is important because it encompasses the animosity of the Judges towards the decision and protects his individual right to freedom of speech and expression. Accepting dissent as a necessary element of the legal system is vital for maintaining judicial independence, stimulating intellectual variety, and ultimately advancing justice in a pluralistic society. Dissenting views will surely continue to be a pillar of India's rich and intricate jurisprudential legacy as the judicial system develops.