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THE VALUE OF DISSENTS IN THE SUPREME COURT OF INDIA THROUGH THE AMERICAN JURIST ANTONIN SCALIA'S LENSES

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Abstract

As the law has evolved, a judgment is incomplete without reasoning and a judge has terribly failed to be a judge if it does not provide reasoning. Reasoning gives a great deal about the law and the statute. Justice Scalia boldly emphasizes the importance of dissenting opinions i.e., “opinions that disagree with the Court’s reasoning”¹. Some dissenting opinions happen to reach the “same disposition as the majority”² i.e., despite the disagreement in the reasoning of the judgment, the outcome can still be the same as the Court, such opinions are concurrences rather than dissents.

The Value of Dissents in the Supreme Court of India through the American Jurist Antonin Scalia’s lenses

The concept of writing a separate opinion was prevalent in English law whereas the American Law believed in pronouncing a unanimous judgment, promoting unity in the court. However, as the American Law developed, judges started to hold their offices for two responsibilities: (i) impeachment and (ii) individual reputation. For example, a bench of 10 judges gives one unanimous judgment, there is no significance given to the opinion of an individual judge and thus it is difficult to single out which one was true to his office i.e., has taken the trouble of understanding the case, of investigating it minutely, and of forming an opinion for himself and which one is pinning it on another’s sleeve. It is also certainly convenient “for the lazy, the modest and the incompetent as it saves them the trouble of developing their opinion methodically and even of making up an opinion at all”³. Scalia vehemently encouraged the use of dissenting and concurring opinions and was also one of the driving forces to introduce this

¹ Antonin Scalia, *The Dissenting Opinion*, 1994 J. Sup. CT. Hist. 33 (1994).

² *Id.*

³ *Id.*

in American law. According to him, dissenting and concurring opinions in a judgement empowers judges because the role of a judge demands it, and their office gives them the power and freedom to have an opinion and a different perspective of the law and the statute which, however, gets submerged or in a way is non-existent if the judgment pronounced is unanimous. Scalia addresses a problem that most judges sugarcoat the ancillary meaning or have slightly changed and modified the language of the judgment in order to be called as a dissenting or a concurring judge. Scalia only promotes the concept of 'genuine concurrences' i.e., "separate writings that disagree with the grounds upon which the court has rested its decision, or that disagree with the court's omission of a ground which the concurring judge considers central"⁴ and do not approve of "separate concurrences that are written only to say the same thing better than the court has done, or, worse still, to display the intensity of the concurring judge's feeling on the issue before the court"⁵ and regards such separate opinions as an "abuse, and their existence as one of the arguments against allowing any separate opinions at all".

Scalia proceeds to discuss the merits and demerits of dissent and genuine concurrence and demarcates the effects as within (inside) the court and without (outside) the court to the public, media, students etc. Scalia begins with the effects of a separate opinion outside the court and discusses the first external consequence as "to destroy the appearance of unity and solidarity"⁶. It is natural that a dissenting opinion might cause scholars, students, professors to question the strength of the court and further might lead to the criticism of the majority opinion in the judgment if the public feels that the dissenting opinion is more credible. Moreover, there are many in society who hate disagreement and demand unanimity, clarity, and certainty in the law. Early in the Supreme Court of India's history, in its judgment in *In re: Delhi Laws Act, 1912*, seven judges gave seven different verdicts on what amounted to the delegation of an 'essential legislative function'. The difficulty in discovering a ratio of this judgment was expressed by a later five-judge bench of the court in *Rajnarain Singh v. Chairman, Patna Administration Committee*⁸ wherein the bench culled out a ratio of the judgement of *In re: Delhi Laws*, stating that two out of seven judges, Justice Mukherjea and Justice Bose "swung the balance and hence, their opinions must be accepted as the decision of the Court because

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *In re: Delhi Laws Act, 1912*, (1951) SCR 747 (Mukherjea, J., & Bose, J., dissenting).

⁸ *Rajnarain Singh v. Chairman, Patna Administration Committee*, (1955) 1 SCR 290.

their opinions embody the greatest common measure of agreement among the seven judges”⁹. Similarly, in *S.R. Bommai v. Union of India*¹⁰, six different judgments were delivered, each of them containing differences as to the judicial reviewability of a Presidential Proclamation of Emergency under Article 356¹¹ of the Constitution. Since it was always the legal position that in ascertainment of the law declared by the Supreme Court, regard must be given to the judgment of the judges who are in majority. The delivery of more than one judgment can hamper the determination of the ultimate ratio of the judgment because the judges have not reached a consensus and might create a division of opinion in the public and the media wherein the majority of them favor the dissenting opinion over the majority judgment. As Scalia quotes Learned Judge Hand in his reading, a dissent “cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends”¹². However, Scalia thinks that “unlike a unanimous institutional opinion, a signed majority opinion, opposed by one or more signed dissents, makes it clear that these decisions are the product of independent and thoughtful minds, who try to persuade one another but do not simply ‘go along’ for some supposed ‘good of the institution’”¹³. And consequently, Scalia thinks that “dissents augment rather than diminish the prestige of the Court to look back and realize that at least some of the Justices saw the danger clearly, and gave voice, often eloquent voice, to their concern”¹⁴. In *Young Indian Lawyers Association v. State of Kerala* (popularly known as the Sabrimala Case)¹⁵, Justice Indu Malhotra dissented, holding that the practice of excluding women of a particular age from visiting and offering prayers in the Sabrimala temple in Kerala was constitutional as the worshippers of the Sabrimala temple constituted a religious denomination that had a constitutionally protected freedom to manage their religious affairs under Article 26¹⁶ of the Constitution. This dissent was cited in another writ petition admitted in the Supreme Court on the issue of allowing women to pray in mosques. The petitioners in this writ petition had supported their position with reference to the dissent rendered in the Sabrimala Case. Moreover, the *K.S. Puttuswamy v. Union of India* (popularly known as the Aadhaar Case)¹⁷ is widely cited for the dissent announced by Justice D.Y. Chandrachud who held that the

⁹ *Id.* at 302 and 303.

¹⁰ *S.R. Bommai v. Union of India*, (1994) 3 SCC 1.

¹¹ INDIA CONST. art. 356.

¹² *Antonin*, *supra* note 1, at 35.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Young Indian Lawyers Association v. State of Kerala (Sabrimala Case)*, (2019) 11 SCC 1 (Indu Malhotra, J., dissenting).

¹⁶ INDIA CONST. art. 26.

¹⁷ *K.S. Puttuswamy v. Union of India (Aadhaar Case)*, (2019) 1 SCC 1 (D.Y. Chandrachud, J., dissenting).

Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016¹⁸ is unconstitutional as it disproportionately impairs the fundamental right to privacy. The Supreme Court of Jamaica in the case of [Julian Robinson v. The Attorney General of Jamaica](#)¹⁹ placed reliance on Justice Chandrachud's dissent to strike down the provisions of The National Identification and Registration Act²⁰ enacted by the Parliament of Jamaica requiring citizens to provide their biometric and data as unconstitutional. Another example of such an effect of a dissent is by Justice Venkatachalaiah in the case of *A.R. Antulay v. R.S. Nayak & Anr.*²¹ and it is even more remarkable because he was the junior-most member of the bench who showed courage and did not "go along" with what the majority flouted thus, turning a massive discussion on Constitutional Law and jurisdiction powers of superior courts. In sum, Scalia explains that even though unanimous judgments bring greater public acceptance, every judgement even those that are decided by a 5-4 vote cannot have the same effect as a unanimous judgement as it promotes artificial unanimity and deprives the power of dissents or genuine unanimity.

Scalia then asserts that dissent helps to change the law in a way that it acts as a "warning flag"²² to the Supreme Court that "the losing party who seeks review can point to the dissent as evidence that the legal issue is a difficult one worthy of the Court's attention"²³. This emboldens counsel in later cases to urge an "overruling"²⁴ based on the dissent or the separate concurring opinion which might change the future discourse of the law and the statute. Moreover, a dissent "informs the public in general, and the Bar in particular, about the state of the Court's collective mind"²⁵. In *Shayara Bano v. Union of India* (popularly known as the *Triple Talaq Case*)²⁶, the dissenting judgment of Justice Khehar, accepted by Justice Nazeer, did not strike down Triple Talaq as unconstitutional and violative of Article 14²⁷ of the Constitution because the practice of Triple Talaq was part of the personal law of Sunni Muslims and there is no state action. However, Justice Khehar and Justice Nazeer enjoined the practice of Triple Talaq until an appropriate legislation was passed by the Legislature to regulate it.

¹⁸ Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, Acts of Parliament, 2016 (India).

¹⁹ *Julian Robinson v. The Attorney General of Jamaica*, [2019] JMFC Full 04.

²⁰ *The National Identification and Registration Act, Acts of Parliament, 2017 (Jamaica)*.

²¹ *A.R. Antulay v. R.S. Nayak & Anr.*, (1988) 2 SCC 602 (Venkatachalaiah, J., dissenting).

²² Antonin, *supra* note 1, at 37.

²³ *Id.*

²⁴ Antonin, *supra* note 1, at 38.

²⁵ *Id.*

²⁶ *Shayara Bano v. Union of India (Triple Talaq Case)*, (2017) 9 SCC 1 (Khehar, J., & Nazeer, J., dissenting).

²⁷ INDIA CONST. art. 14

Subsequently, Triple talaq was declared illegal in 2019 by the *Muslim Women (Protection of Rights on Marriage) Act*²⁸ imposing imprisonment up to three years. The jurisprudence of fundamental right to life and liberty under Article 21²⁹ has gone through a lot of ups and downs, starting with the case of *Kharak Singh v. State of U.P. & Ors.*³⁰ wherein Justice K Subba Rao gave a dissenting opinion taking an expansive understanding of Article 21 of the Constitution inclusive of right to privacy as an essential ingredient of personal liberty. Thereafter, in *Additional District Magistrate, Jabalpur v. Shivakant Shukla* (popularly known as the *ADM Jabalpur Case*)³¹, Justice Khanna's most celebratory and courageous dissent in the history of Supreme Court held that Article 21 was not the sole repository of the human right to life and personal liberty and the courts are not barred from issuing *habeas corpus* writs under Article 226³² of the Constitution even during emergency. The vision of the law in these dissenting judgments were expressly vindicated in *Maneka Gandhi v. Union of India & Ors.*³³ that right to life under Article 21 of the Constitution includes right to live with human dignity. It was finally advanced and endorsed unanimously by the Supreme Court in *Justice K.S. Puttaswamy (Retd.) v. Union of India* (popularly known as the *Right to Privacy Case*)³⁴. The *Puttaswamy Judgment* formed the cornerstone of privacy jurisprudence in the country and was a precursor to the newly formed *Digital Personal Data Protection Act (DPDPA), 2023*³⁵. Having looked at these judgments, Scalia rightly mentioned that "dissenting or concurring opinions can sometimes obfuscate rather than clarify"³⁶ but it is always within the power of the Court to make clear the precise scope of the holding. And these controversial yet iconic dissents not only have made an impact on the future course of the law through legislations but also have enhanced the capability of the Court to make a point to the public.

Scalia reiterates that dissents and concurring opinions has kept the Court in the "forefront of intellectual development of the law"³⁷ i.e., "the system of separate opinions has made the Supreme Court the central forum of current legal debate and, has transformed its reports from a mere record of reasoned judgments into something of a History of American Legal

²⁸ Muslim Women (Protection of Rights on Marriage) Act, Acts of Parliament, 2019 (India).

²⁹ INDIA CONST. art. 21.

³⁰ *Kharak Singh v. State of U.P. & Ors.*, (1964) 1 SCR 332 (Subba Rao, J., dissenting).

³¹ *Additional District Magistrate, Jabalpur v. Shivakant Shukla (ADM Jabalpur Case)*, (1976) 2 SCC 521 (Khanna, J., dissenting).

³² INDIA CONST. art. 226.

³³ *Maneka Gandhi v. Union of India & Ors.*, (1978) 1 SCC 248.

³⁴ *Justice K.S. Puttaswamy (Retd.) v. Union of India (Right to Privacy Case)*, (2017) 10 SCC 1.

³⁵ *Digital Personal Data Protection Act (DPDPA)*, Acts of Parliament, 2023 (India).

³⁶ Antonin, *supra* note 1, at 38.

³⁷ Antonin, *supra* note 1, at 39.

Philosophy with Commentary”³⁸. In a recent Indian Supreme Court Case of *Supriyo @ Supriya Chakraborty & Anr. v. Union of India (popularly known as the Same-Sex Marriage Case)*³⁹, Justice D.Y. Chandrachud and Justice S.K. Kaul dissented and ruled that same-sex couples are entitled to recognise their relationships as civil union and can claim consequential benefits. Their dissenting opinion explored the issue and the historical context of discrimination against queer individuals, expressing disagreement with the Central government’s assertion that courts should refrain from scrutinizing LGBTQ+ rights issues on the grounds of being anti-democratic. The majority opinion and the dissent had sparked a legal debate not only in the country but also worldwide and should be considered as one of the prime examples of what Scalia has been insinuating about the court being “not just central organ of legal judgement; it is the centre stage of significant legal debate”⁴⁰ and this is done through dissents that “convey knowledge, not only about what legal issues are current, but also about what legal controversies are timeless”⁴¹.

Scalia then shifts to discussing the internal consequences of separate opinions i.e., their effect within the Court. He starts off with clarifying that a dissent does not produce animosity and bitterness among the members of the Court and dissents are simply “normal course of things”⁴². Scalia proceeds to mention the most important internal effect of separate opinions which is to improve the majority opinions, and this is done in the following ways: (i) “renders the writer of the majority opinion more receptive to reasonable suggestions on major points”⁴³; (ii) “the first draft of a dissent often causes the majority to refine its opinion, eliminating the more vulnerable assertions and narrowing the announced legal rule”⁴⁴; and (iii) an effective dissent or concurrence facilitates to become the majority opinion by changing the outcome of the case. This effect of a separate opinion was partly incorporated in *Kesavananda Bharati v. State of Kerala*⁴⁵ through the dissenting judgment by Justice R.S. Bachawat in the celebrated case of *I.C. Golaknath & Ors. v. State of Punjab*⁴⁶. Justice Bachawat had advocated that the basic features and structure of the Constitution cannot be amended was ultimately found to be correct

³⁸ Antonin, *supra* note 1, at 40.

³⁹ *Supriyo @ Supriya Chakraborty & Anr. v. Union of India (Same-Sex Marriage Case)*, 2023 INSC 920 (D.Y. Chandrachud, J., & S.K. Kaul, J., dissenting).

⁴⁰ Antonin, *supra* note 1, at 39.

⁴¹ Antonin, *supra* note 1, at 40.

⁴² Antonin, *supra* note 1, at 41.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

⁴⁶ *I.C. Golaknath & Ors. v. State of Punjab*, (1967) 2 SCR 762 (Bachawat, J., dissenting).

in law with a majority of 7:6 in *Kesavananda Bharati*. Similarly, Justice Fazl Ali who coined an expansive and a broader understanding of ‘personal liberty’ under Article 21 of the Constitution in the case of *A.K. Gopalan v. The State of Madras*⁴⁷ was ultimately upheld twenty years later in *R.C. Cooper v. Union of India*⁴⁸ and subsequently in *Maneka Gandhi*⁴⁹ and then established as the law of the land in the *Puttaswamy Judgment*⁵⁰. Justice Fazl Ali was a visionary jurist who underscored the significance of dissenting opinions as catalysts for change, envisioning future developments and establishing legal principles that would eventually supersede those outlined in majority judgments. This is also what Scalia intends to warrant that dissenting opinions play a crucial role in upholding the integrity of the judgment process because a compelling dissent has the potential to sway a judge who initially sided with the majority even before the final verdict is rendered, effectively turning into a majority judgment itself. Therefore, Scalia thinks that a separate opinion improves not only the majority opinion but also the Court’s judges because “it forces them to think systematically and consistently about the law, because in every case their legal views are not submerged within an artificially unanimous opinion but are plainly disclosed to the world”⁵¹.

Lastly, Scalia thinks that the system of separate opinions “renders the profession of a judge and even a lawyer more enjoyable”⁵². The right to dissent influences the Judges to put in more thought into their judgments and Scalia agrees that it is an unparalleled pleasure “to be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less-differing views of one’s colleagues; to address precisely the points of law that one considers important and no others; to express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority’s disposition should engender”⁵³. It is the ultimate truth that a majority judgment becomes the law of the land, and dissents will not be cited or remembered but “how much poorer the patrimony of American Law would be without those dissents and concurrences”⁵⁴. This is the same for Indian Jurisprudence and the eloquent dissents of the Supreme Court (cited above) have become a part

⁴⁷ *A.K. Gopalan v. The State of Madras*, (1950) 1 SCR 88 (Fazl Ali, J., dissenting), Justice Fazl Ali incorporated the understanding that Article 21 is inclusive of basic principles of natural justice and human rights.

⁴⁸ *R.C. Cooper v. Union of India*, (1970) 3 SCR 530, the Supreme Court held that the word ‘personal liberty’ would not only include Article but also will come under the ambit of the six fundamental freedoms given under Article 19 (1).

⁴⁹ *Maneka Gandhi v. Union of India & Ors.*, (1978) 1 SCC 248.

⁵⁰ *Justice K.S. Puttaswamy (Retd.) v. Union of India (Right to Privacy Case)*, (2017) 10 SCC 1.

⁵¹ *Antonin*, *supra* note 1, at 42.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

of Indian legal literature and legal culture because “for great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment”⁵⁵.



⁵⁵ Antonin, *supra* note 1, at 43.