

# RIGHT TO DISSENT- MAJORITARIANISM IS THE ANTITHESIS OF DEMOCRACY

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## ABSTRACT

*The theme of this article revolves around the idea of progressive law and exchange of dissenting thoughts not only in the manner of political ideology but also as a part of fundamental right and its impact on Judiciary. Dissenting any opinion do not come from the judges or government alone rather it can arrive from other various sources of any particular community, political group or from mass of people of the State. The right to dissent has always played as a path breaking role in the constitutional jurisprudence of India. The article also focuses on how dissent plays important role in shaping the democracy of India. In a nutshell freedom of speech is not only about one's ability to speak anything but also about the ability to listen to others. A free and democratic society can only exist when there is freedom of speech. The atmosphere of totalitarian and rising threats of pluralistic opinions have become a debatable issue in the country. The judiciary, executive and the legislature should always open themselves to criticism, dissent and peaceful protect.*

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## INTRODUCTION

*“The right of dissent, or, if you prefer, the right to be wrong, is surely fundamental to the existence of a democratic society. That’s the right that went first in every nation that stumbled down the trail toward totalitarianism”. –*

Edward R. Murrow<sup>1</sup>

Nobel laureate, Indian poet Rabindranath Tagore in his poem, ‘where is mind without fear’, has represented a new awakened India of his dreams. He wants that the Indian citizens should possess a rational and scientific outlook towards the life. There should be plurality of thoughts and anxiety to question the accountability of the societal systems. According to the Cambridge dictionary, ‘dissent’ means a strong difference of opinion on a particular subject, especially about an official suggestion or plan or a popular belief. Disagreeing and dis-approval is a part of basic human trait. India is a constitutional democracy. Each citizen is given freedom of speech and expression under reasonable restriction. Right to dissent is a mandate for proper function of a democratic state. In the recent celebrated case of Prashant Bhushan<sup>2</sup>, concerns were rose with respect to the receptivity of criticism by the Apex Court. The majoritarian democracy is lethal for the constitutionalism. For a better functioning of Rule of Law, right to dissent is an absolute necessity. Criticism to the executive, legislative and the judiciary is always required for better and improved functioning and exercise of powers, hence cannot be termed as sedition.

## RIGHT TO DISSENT- FREEDOM OF SPEECH AND EXPRESSION

The Indian constitution in its Article 19 clauses (a) to (c) has guaranteed freedom of speech and expression; freedom to assemble peaceably and without arms; and the freedom to form associations or unions. This liberty has been guaranteed to each and every Indian citizen residing in India. India is a democracy so the philosophy behind Article 19 lies in the Preamble of the Indian Constitution, where a solemn resolve is made to secure to all its citizen, liberty of thought, expression, belief, faith and worship. These all freedoms play the role of a vehicle for the right to dissent. Right to dissent plays a pivotal role in the freedom of speech and expression. It is the biggest and the most important right guaranteed under the Indian constitution. The citizens are guaranteed that they can criticise the government acts, laws

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<sup>1</sup> Edward R. Murrow, Democracy quotes, ME.ME (Jan, 29, 2021, 23:27 PM). <https://me.me/i/edward-r-murrow-the-right-of-dissent-or-if-you-prefer-quote-cc02ea62dca04f9f97eb192b13358135>

<sup>2</sup> Re Prashant Bhushan v. Court, (2020) S.C.C. 698.

passed by the parliament, decisions of judiciary etc. While delivering at the 15th PD Desai Memorial Lecture at the Gujarat High Court auditorium in Ahmedabad, Justice DY Chandrachud stated that right to dissent is the safety valve of the democracy. The laws, bills, acts, bills, president, ministers and prime ministers elected, constitution drafted etc are for the better running of the Indian democracy; most importantly are for the people of India. The right to disagree, the right to dissent and the right to make another subjective point of view is inherently given to each and every citizen of the country. Much similar to dissent, right to protest is also a fundamental right granted under article 19 of the constitution. In order to show their dissent, the citizens can protect in a peaceful manner and criticise the government policies, judicial judgements etc. The freedom and liberty to question, challenge, verify and ask for accountability from the government regarding any law passed is the right of every citizen under the Constitution. For democracy, right to dissent is necessary; and both of them go hand by hand for a better functioning of rule of law in the country. But if people were given absolute liberty without any social control, then the essence of drafting the constitution would be destroyed. Liberty has got to be limited in order to be effectively possessed<sup>3</sup>. In A.K Gopalan's case<sup>4</sup>, it was observed by the honourable court that "man as a rational being desires to do many things, but in a civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals". Thus, each of the freedom is subjected to reasonable restrictions in order to protect the greater interest of the community and the security of the state. The reasonable restrictions imposed are mentioned in the Article 19 clause (2)-(6) of the Indian constitution.

## **RIGHT TO DISSENT IS ESSENTIAL FOR THE DEMOCRACY**

History of mankind is progressed through the history of dissent and today in democracy dissent is one of the most favored and embraced form of government because every citizen of a state has the right to dissent without any fear of getting victimized in their mind- "where the mind is without fear and the head is held high, where the knowledge is free. In contrast to this, dissent in other authoritarian countries was subject to severe punishment as we can see in the Colonial British India where loss of life was a major reason and in the reign of Hitler's Germany or Stalin's USSR where humanity was stripped. The right to dissent should not be taken away, otherwise it would lead to the emergence of unquestioning moribund society and would create hindrances for further development. Society is made of its own rules and regulations

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<sup>3</sup> Dr J.N Pandey, Constitutional Law of India 208 (56<sup>th</sup> ed. 2019).

<sup>4</sup> A.K. Gopalan v. State of Madras, A.I.R 1951 S.C. 21 (India).

accordingly to which man function and behave in its sphere. Now sometimes these rules and regulations go outdated when people stick to it over a period of time. These age-old customs and conventions pulls backward by degenerating the society. So, in order to have a smooth well attached society, one has to raise question to have an expanded form of mindset and a new inculcated horizon mind. A democratic country should have the element of dissent. To have a holistic state, where not only economic rights but also civil rights of every human should be realized and to achieve this, dissent, disagreement and protection should be encouraged. Dissent in a democratic country serves to run a better way.

Right to dissent is the most important right guaranteed by Indian Constitution, where the shape of democracy depends upon multiple dissent, it sprouts into protection of liberty, consent and property rights. These adds more value to the right of dissent and makes it more flexible in forming it. Indian Constitution adds fuel to dissent which in turn gives birth to a state of plurality and diversity that helps the nation to cross over every obstacle in its way.

## MAJORITISM

Majoritarianism basically means numerical number presenting majority of population, who have a final word to which ever decision is determined. Around 18<sup>th</sup> century, during the period of Greek philosophers including founders of the United States, such as- James Madison, they gave majoritism totally a different outlook, they emphasized majoritism in negative way and states that it generally belittles and provides gap. According to these great scholars, they opined majoritism as “tyranny of majority”, which means if power is handed over to the majority it may lead to stagnancy of administration devoid of fair and just rules. They further went on clarifying that flowing knowledge and aspirations may get overshadowed by the poor and narrower thoughts of majoritism. In India, dissent has various forms and aspects of applications. India is country who follows the Rule of Law, not Rule of Majority. The Supreme Court while ruling in the petition of the Speaker of the Rajasthan Assembly pronounced that dissent cannot be subjugated in a democratic country and also stated that dissent in democracy should be of full impact and of neutrality with free flowing disagreement which could be appreciated otherwise it loses its clarity.<sup>5</sup>

But today in Narendra Modi’s reign, right to dissent has turned into curse for those section of people, who showed disagreement were labelled as ‘anti-national’ and were charged under

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<sup>5</sup> Speaking up : Dissent in India ,The Telegraph Online, (29 Jan 2021,6:48)  
<https://www.telegraphindia.com/opinion/how-dissent-in-india-is-dealt-with/cid/1787450> .

conspiracy, against incitement through speeches or the instigation of violence. They were also booked for conspiracy to assassinate the Prime Minister in the outrageous Bhima-Koregaon violence and were sent to jail for two years. The two actions of the Parliament that is the CAA granting of citizenship to refugees and the other one was NRC, where all the citizens are required to produce proofs of their citizenship with documents. Citizens of the State dissented this Act that the State action is too arbitrary, as it posed threat to fundamental values of fraternity, equality and secularism of the land. The Act acted as a tool to exclude the Muslim population of the country, where many students and sections of young people were arrested for causing violence in Northeast Delhi. Just as heart has valves, similarly dissent is the valve of democracy and Justice D Y Chandrachud in his speech in a very systematic manner stated that giving dissenters the label of 'antinational' stands as violative of the Natural Justice and the Rule of Law. State should be concerned for the welfare of the people and should destroy the structure of pluralistic state. Right to dissent comes under Freedom of speech and the monopoly over one values and opinion. State is responsible in protecting its citizen personal liberty instead of encroaching them



## **ROLE OF DISSENT IN DECISION MAKING POWER OF JUDICIARY**

India is a democratic republican country, who follows the principles of Rule of Law. Every citizen in the country is guaranteed equal protection of fundamental rights. Court plays a major role in protecting these rights and exercising the law. The Supreme Court of India was established on 1951, after that many dissenting opinions came into the surface. These dissenting opinions mostly came in cases of disapprobation to executive actions and curtailment or abrogation of fundamental role. The apex of India does not follow the procedure of *en banc*, while hearing a case. It always sits in a bench, constituted with affirmation of the chief justice. Law is not an exact science like mathematics, that's why the result varies from person to person. Interpretation of law requires deep analytical study, with regard to this everybody has a different opinion and judgement regarding a same case. Interpretation of laws should always be dynamic and progressive. It does not matter how many judges are sitting in a bench, the senior most judge always has an upper hand in influencing the judgement. It can be prominently noted that, presence of the CJI in a bench has reduced the chances of dissent. This practice of giving *per curium* can be cited violating to Article 145(5) of the Indian Constitution, which empowers a Judge, who does not concur with the majority opinion, to

deliver a dissenting judgment or opinion. It is ascertaining that dissent does not play an important role in deciding the judgement, but the dissenting opinions reflects the judge's individuality and his endearment to his' views. This dissent can be crucial for the evolution of law and the jurisprudence. A dissenting judgement always sows the seeds for new progressive radical thoughts and new approach towards the law.

In the celebrated case of *Brown vs. Board of Education*<sup>6</sup>, Justice John Marshall Harlan's dissenting and futurist views about the law of segregation in case of *Plessy v. Ferguson*<sup>7</sup> were affirmed with a unanimous 9–0 verdict. Justice Marshall has stated in the segregation policy case<sup>8</sup> that the constitution is colour-blind, and don't know nor tolerate classes among citizens.

Moving to the most enshrined example of dissent that is the case of *ADM Jabalpur v Shivkant Shukla*<sup>9</sup>. In this case dissenting opinion was pronounced by Justice H.R. Khanna, he mainly relied on the case of *Makkhan Singh v State of Punjab*<sup>10</sup>, he stated that State has no power or authority to deprive any person of their right to life and liberty without the authority of the law, even in the absence of Article 21. This dissenting statement costed him his' seat of the CJI. The judgement was passed in the favour of the majority stating that liberty is a gift of law and it should not be challenged in the time emergency as government is under the circumstance of safeguarding the nation. Moreover, they stated that no person has any *locus standi* to move any writ petition under Article 226 before a High Court for Habeas Corpus, or any other writ or order or direction<sup>11</sup>. However, this judgement was withheld in the judgment of *Maneka Gandhi case*<sup>12</sup> and *Justice K.S. Puttawswamy case*<sup>13</sup>.

In the case of *A.K. Gopalan v. State of Madras*<sup>14</sup>, a dissent opinion was given by Justice Fazl Ali stating that personal liberty of a citizen is not to be found in Article 21 alone but should be widely found in scope of all fundamental rights. The judgement was delivered by Chief Justice of India Justice Hiralal Kania, penned that the "law" used in Article 21 meant to be procedural due process and hence the detention of Gopalan was valid one, even if it violates some of his fundamental rights. Later on the dissented opinion of Justice Fazl Ali was affirmed in the case

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<sup>6</sup> *Brown v. Board of Education*, 347 U.S. 483, 490 (1954).

<sup>7</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>8</sup> *Id.* At 3.

<sup>9</sup> *ADM Jabalpur v. Shivkant Shukla*, 1976 A.I.R. 1207.

<sup>10</sup> *Makkhan Singh v. State of Punjab (and connected Appeals)*, 1964 A.I.R 381.

<sup>11</sup> Fali S. Nariman, Fifty years of human rights protection in India- the record of 50 years of constitutional practice, NLSI. Rev., 2013 at 13-26.

<sup>12</sup> *Maneka Gandhi v. Union of India*, 1978 A.I.R 597.

<sup>13</sup> *Justice K.S. Puttawamy v Union of India*, (2017) 10 S.C.C. 1 (India).

<sup>14</sup> *A.K. Gopalan v. State of Madras*, 1950 A.I.R 27.

of *R.C. Cooper v. Union of India*<sup>15</sup> (*Bank Nationalisation case*). However, the *A.K. Gopalan case*<sup>16</sup> was withheld in the *Maneka Gandhi's case*<sup>17</sup>.

Strong and courageous dissenting opinions of Justice Khanna and Justice Fazl Ali has led to the adoption of a procedure of “just, fair and reasonable”. In case of *Maneka Gandhi v. Union of India*<sup>18</sup>, the Court overruled *A.K. Gopalan case*<sup>19</sup> and *ADM Jabalpur case*<sup>20</sup> and finally adopted the dissenting opinion of Justice Fazl Ali by declaring that law of the land should be established on the basis of reasonable, just and fair and it should be free from scrutiny and arbitrariness.

In the infamous case of *Kharak Singh vs State of UP and ors*<sup>21</sup>, majority passed the judgement that right to privacy is not the part of fundamental right under Article 21. But in this case, however Justice K Subba Rao gave a dissenting judgement stating that right to privacy is not expressly declared as part of our fundamental right but is indeed an essential part of personal liberty under the Indian constitution. This dissent view was later affirmed by the honourable court in the case of *Justice K.S. Puttaswamy vs. Union of India*<sup>22</sup> by a nine judges bench. The ambit of fundamental rights guaranteed under article 21 was broaden. It is quite remarkable that while delivering the right to privacy case's judgement, Justice R Nariman stated that the dissent by Justice Rao was one of the ‘three great dissents’. The other two were Justice Khanna's dissenting opinion in the *ADM Jabalpur Case*<sup>23</sup> and Justice Fazl Ali's dissent in the case of *AK Gopalan's case*<sup>24</sup>.

In the case of *Zee Telefilms Ltd. and Ors. vs. Union of India (UOI) and Ors*<sup>25</sup>, it was held by the honourable court by the majority that the Cricket Control Board is not coming within the definition of state and so not amendable to writ petitions since it is not of statutory origin. But Justice S.B. Sinha gave the much obliged dissenting opinion that Board of Control for Cricket in India (BCCI) falls within “Other Authorities” within the meaning of Article 12 of the Indian Constitution<sup>26</sup>. It was later affirmed in the case of *BCCI vs. Cricket Association of Bihar &*

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<sup>15</sup> *R.C. Cooper v. Union of India*, 1970 A.I.R. 564.

<sup>16</sup> *Id.* at 10.

<sup>17</sup> *Supra* at 9.

<sup>18</sup> *Id.* at 13.

<sup>19</sup> *id.* at 12.

<sup>20</sup> *Supra* note 6.

<sup>21</sup> *Kharak Singh v State of UP & ors*, 1964 S.C.R (1) 332.

<sup>22</sup> *Supra* at 10.

<sup>23</sup> *Supra* at 6.

<sup>24</sup> *Supra* at 11.

<sup>25</sup> *Zee Telefilms Ltd. V. Union of India*, (2005) 4 S.C.C. 649.

<sup>26</sup> V.D. Sebastian & Kyvalya Garikapati. An introduction to administrative law 09 (1<sup>st</sup> ed. 2016).

*Ors.*<sup>27</sup>, where the bench held that though BCCI is not ‘State’ within the scope of meaning of Article 12 of the Constitution, but it is amenable under Article 226.

In the historic case of *Indian Young Lawyers Association & Ors vs. The State of Kerala & Ors*<sup>28</sup>, famously known as the *Sabrimala case*, the hon’ble court pronounced the verdict that restricting the entry of woman into temple complex is a gender discrimination and the said practice is violating the rights of Hindu women under the Indian constitution. This judgement was passed by a 5 judges constitutional bench head by the then Chief Justice of India, Justice Dipak Misra. However, Justice Indu Malhotra gave a dissenting opinion stating that the limited restriction on the entry of women into the temple complex does not fall under the scope of Article 17 of the Indian Constitution. It is notable that while hearing the review petition of the Sabrimala case, Justice Nariman and Justice D Y Chandrachud dissented from the majority verdict and accordingly dismissed the petition. They Termed the denial of entry to “unarmed women” into the Sabarimala temple as a “sad spectacle”, further they stated that the judgment passed is non-negotiable and there is no error apparent.

In the case of *Beghar Foundation v. K.S. Puttuswamy (Retd.)*<sup>29</sup>, following the verdict Of *Justice KS Puttuswamy case*<sup>30</sup>, 7 parties filed review petitions praying to strike down the Aadhar Act, as they contended that the judgement was erroneous in its part by providing contradictory reasoning and to this petition where the majority judges hold the opinion that the State can restrict the right to privacy, if this restriction is proportional to legitimate State aim. Right to privacy can be restricted during the distribution of benefits and services to the marginalized society and the Court concluded that the Act was not violating any fundamental right to privacy. Here, Justice DY Chandrachud dissented from this opinion and stated that it would be constitutional error, if the reviewed petition is dismissed and law declared would be unconstitutional.

In the recent case of *Central vistas redevelopment case*<sup>31</sup>, which aims to redevelop and renovate 86 acres of lutyen’s Delhi, Justice Sanjeev Khanna gave a dissenting judgement stating the aspects of public participation on interpretation of the statutory provisions. He expressed his dissent in 7 major issues. He further implied that public participation is not to be a mere

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<sup>27</sup> B.C.C.I. v. Cricket Association of Bihar, (2015) 3 S.C.C. 251.

<sup>28</sup> Indian Young Lawyers Association & ors v. The state of Kerala & ors, (2019) 11 S.C.C. 11.

<sup>29</sup> Beghar Foundation v. Justice K.S Puttuswamy (Retd.), (Jan,29,2021,4:57) <https://www.scobserver.in/court-case/aadhaar-review>

<sup>30</sup> Supra at 13.

<sup>31</sup> Rajeev Suri v. Delhi Development Authority & ors, (2021) S.C.C. 7.

mechanical exercise or formality and it must comply with the least and basic requirements so that it is fruitful and constructive.

## CONCLUSION

Right to dissent is the most important aspect of today's democracy, it plays vital role in the structure of republican country. Right to dissent is subjected to criticism of the government and moreover we can say that neither the government nor the judiciary stands prior to criticism. Criticism is the most welcomed form of improving the functioning of the government. In fact, if there is a raised question, challenging factor in the government policy comes up then the accountability and responsiveness becomes stronger and rigid. We can say that this is the essential right of every citizen of a country guaranteed by constitution and this right should not be encroached by any of the organs of the government otherwise it will lead to a more anarchical and chaos state. Right to dissent any opinion or governmental policy or any Act established is a grass root level to form a well systematic democratic country it amounts to questioning of the laws formed by the legislature in this way the mala fide intention of the executives is controlled and instead of having more Police governing state it would be a country of the people, by the people and for the people. As right to peaceful protest is guaranteed under the constitution, it is an identity of free and democratic society. This act as a watchdog upon the functioning of the government. Any arbitrary restraint or control on this fundamental right, for example imposing of section 144 IPC: depicts the inability on the part of the government to tolerate dissent. In the Indian Constitution, everybody is given right to express their personal opinion, to criticize the function of the legislature in order to enjoy broader aspect of democracy, which is active not passive citizenship. A dissent is an instrumental factor for the development of a law, in any case when a dissenting judge presents an opinion it gives birth to new law and brings change to the age-old jurisprudence, along with it forms new precedent. Majorities consent lays the foundation of every law but one dissenting opinion may lead to a new path towards a new law which adds fuel to the system of democratic form of government. In India, right to dissent has been given to the citizens to express their opinion and the right to freedom of speech which is a fundamental right exercised by the people of the country protected and guaranteed by the constitution. Dissent is basically derived from the freedom movement, which inspires us to impart our own opinion and knowledge, gives opportunity to the suppressed and marginalized people to raise their voice for the own individualistic and collective needs. Thus, all these leads to a way of full involvement of the people in the

democratic system and emerges a ray of light to the youth section. Dissent establishes tight connection between the people and the government. Rejecting and giving disagreement to any discussion relating to the formulation of policy leads to better and effective government system. It is rightly said by the honorable Apex Court judge, Justice Deepak Gupta while delivering a lecture on “Democracy and Dissent”, that majoritarianism is anti-thesis to democracy. He further added that criticizing or dissenting from the government does not mean that person is anti-national and is against the country. The recent enactment of 3 farm bills, have triggered massive protests in many parts of the country. Everyone is granted freedom to protest peacefully unless and until it is harming the national order and security. The government has no right to censor the criticism it is being made subjected to. Everybody has their respective fundamental right to be critic and protest against the government policies etc. It is rightfully written in Rabindranath Tagore’s poem *“Where the clear stream of reason has not lost its way into the dreary desert sand of dead habit; Where the mind is led forward by thee into ever-widening thought and action into heaven of freedom, my Father, let my country awake.”*



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