INAUGURAL LECTURE DELIVERED BY HON'BLE MR. JUSTICE DEEPAK GUPTA, JUDGE, SUPREME COURT OF INDIA ON 'DEMOCRACY AND DISSENT' ORGANISED BY THE SUPREME COURT BAR ASSOCIATION ON 24.02.2020 AT THE MAIN AUDITORIUM, INDIAN SOCIETY OF INTERNATIONAL LAW, V.K. KRISHNA MENON BHAWAN, BHAGWANDAS ROAD, OPPOSITE, SUPREME COURT OF INDIA, NEW DELHI

I. INTRODUCTION

Talking to the Bar about dissent is like taking coal to Newcastle. The Bar room is the most unholy place where nothing is sacred, no reputation so unimpeachable that it cannot be blown to smithereens, no personality so towering that it cannot be brought crashing down, no character so pure that it cannot be torn to shreds, no idea so holy, that it cannot be disagreed with. That is the essence of dissent. If anything, the Bar is a shrine for dissent.

We all know how any contrarian opinion can be taken into Bar room and discussions can be fast and furious, heated and at times aggressive but always ending in a shared cup of coffee or tea.

II. Dissent in Democracy

A. Article 19-Dissent

The Preamble to the Constitution of India promises liberty of thought, expression, belief, faith and worship. Clauses (a) to (c) of Article 19(1) promise:-

- freedom of speech and expression;
- Freedom to assemble peaceably and without arms;
- And the freedom to form associations or unions;

These three freedoms are vehicles through which dissent can be expressed. The right of freedom of opinion and the right of freedom of conscience by themselves include the extremely important right to disagree. The right to disagree, the right to dissent and the right to take another point of view would inhere inherently in each and every citizen of the country.

When we view all these together, it is more than obvious that the right to dissent is the biggest right and, in my opinion, the most important right granted by the Constitution.

Those of us who are married and have children see various expressions of this right day in and day out. More often than not I am on the losing end. Even so, I love dissent because even in families there must be discussion and exchange of views. Every decision should be of the family and not only of the patriarch.

I chose this topic because I am troubled with certain recent events especially concerning lawyers and Bar Associations where forgetting the duty cast upon the lawyers under the Advocates Act, 1961 and the right of every person to have free legal aid, some Bar Associations in different parts of the country are passing resolutions that none of their members will appear in certain causes. This is something which worries me immensely. The community of lawyers was at the forefront of freedom movement. It is the lawyers who led the movements for civil rights. For me it is very saddening that today lawyers have to be told about the importance of dissent. I may add that I am not talking about the lawyers who are members of this Bar Association but through you I want to address various lawyers' bodies that they cannot close their minds and they cannot refuse to appear in certain matters and they should not obstruct the justice delivery system.

Every society has its own rules and over a period of time when people only stick to the age-old rules and conventions, society degenerates. New thinkers are born when they disagree with well accepted norms of society. If everybody follows the well-trodden path, no new paths will be created, no new explorations will be done and no new vistas will be found. If a person does not ask questions and does not raise doubts questioning age old systems, no new systems would develop and the horizons of the mind will not expand. Whether it be Buddha, Mahavira, Jesus Christ, Prophet Mohammad, Guru Nanak Dev, Martin Luther, Kabir, Raja Ram Mohan Roy, Swami Dayanand Saraswati, Karl Marx or Mahatma Gandhi, new thoughts and practices would not have been established, if they had quietly submitted to the views of their forefathers and had not questioned the existing practices, beliefs and rituals.

B. Importance of Dissent in a Democracy

Dissent is essential in a democracy. If a country has to grow in a holistic manner where not only the economic rights but also the civil rights of the citizen are to be protected, dissent and

disagreement have to be permitted, and in fact, should be encouraged. It is only if there is discussion, disagreement and dialogue that we can arrive at better ways to run the country.

There can be no democracy without dissent. Recently, my brother Justice D.Y. Chandrachud in his speech put the matter very succinctly. He said:

"The blanket labelling of dissent as anti-national or anti-democratic strikes at the heart of our commitment to protect constitutional values and the promotion of deliberative democracy".

C. Majoritarianism

Rule of majority is an integral part of democracy but majoritarianism is the antithesis of democracy. In a democracy like ours where we have elections based on the first past the post principle, the Government in most cases does not represent the majority of the population, and often not even the voting electorate. Therefore, when those in power claim that they represent the will of all the people that is more often than not a totally baseless claim. They may be the elected Government

voted on the first past the post system by a large number of voters, but it cannot be said that they represent the entire will of the people. Even assuming they represent more than 50% of the electorate, can it be said that the remaining 49% of the population has no voice in running the country? Can it be urged that the remaining 49% cannot speak for the next 5 years till next elections are held? Should these 49% be totally ignored if they oppose what is said by the Government? In my view, the answer has to be a big 'NO'.

D. Dissent-Rationalism-Respect

The right to dissent is one of the most important rights guaranteed by our Constitution. As long as a person does not break the law or encourage strife, he has a right to differ from every other citizen and those in power and propagate what he believes is his belief.

The superior courts as protectors of the rights of the people have a duty to ensure that the powers that be do not supress dissent because that will have, to use the words of brother Justice Nariman "a chilling effect" on the freedom of speech. I can

do no better than to quote the following observations from **Shreya Singhal's case**[1]

> "In point of fact, Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total."

The very essence of democracy is that every citizen has a right to participate not only in the electoral process but also in the way in which our country is run. This right becomes meaningless if that person cannot criticize the actions of the Government. The citizen, is not only a participant in the democratic process, he is an integral part of the country and has a right express his views even if they be totally contrary to the views of those in power. No doubt, these views must be expressed in a peaceful manner but citizens have a right to get together and protest when they feel that actions taken by the

---

[1] Shreya Singhal vs. Union of India (UOI)[1]; (2015) 5 SCC 1.

Government are not proper. Their cause may not always be right. At the same time, the Government may also not be right. Merely because certain groups oppose those in power cannot take away their right to oppose what is proposed by the Government or to oppose any actions of the Government as long as the protest is peaceful. The Government has no right to stifle or quell protest as long as the protests are peaceful. Protest also means expressing dissent which is part of the legacy left by the father of the country in the form of Civil Disobedience Movement, following the path of *Ahimsa.*

Since a lot has been said on the importance of dissent in recent days, I do not want to add anything more to what has been said by brother Chandrachud, J. in his P.D. Desai Memorial Lecture. Since that left me with some time in hand, I thought I would talk about the role of dissent in the decision-making process of the Judiciary. This is the second part of my address.

In the opening portion, I had referred to the Bar Association as an unholy place. That was in the context of the manner in which the Bar Associations are totally irreverent to many issues but the one concept which binds all of us in the legal fraternity is

the Rule of Law. In my opinion, the Bar Associations are shrines to the concept of Rule of Law.

As a principle of governance, the rule of law, like democracy, and the separation of powers is an integral part of our body politic. It is the golden thread which runs through our Constitution. Anywhere, anytime, when ordinary people are given the chance to choose, the choice is the same: freedom, not tyranny; democracy, not dictatorship; the rule of law not the rule of men. The bedrock of our democracy is the rule of law and this necessitates that we must have an independent fearless judiciary. There can be rule of law only when we have judges who can take decisions independent of political influence, totally uninfluenced by media or any other extraneous considerations. A free country is one where there is freedom of expression and governance by the rule of law. When there is no sharing of power, no rule of law, no accountability, here is abuse, corruption, subjugation and indignation. When the rule of law disappears, we are ruled by the idiosyncrasies and whims of a few.

III. Dissent in Judgments

It is a well-settled principle of jurisprudence that law should be certain, but in this fast-changing world can laws remain stagnant? In my view the **interpretation of the laws has to be dynamic** and change with times and therefore it is not necessary that all of us agree with each other. That is why dissent plays an important role in the decision-making process.

A. KNOWING WHEN TO DISSENT

Laws must be stable and certain. A litigant must have a reasonable expectation of the way which laws move. Frequent changes in views lead to many problems. Judicial discipline is extremely important. Merely because I do not agree with another view does not mean that I must either refer the judgment to larger bench or find ways and means to somehow get over the judgment. That in my view causes more problems. However, when important issues arise merely because the majority of the brethren are taking different view one should not feel stifled or in any way hesitate to take contrary view even if one is the sole voice. As Tagore said:

"जोदी तोर डाक शुने केउ ना आशे

तोबे एकला चोलो रे"

Translation: Open Thy Mind, Walk Alone

We Are Not Afraid, Walk Alone

Dissent is a powerful tool in the hands of a judge and it must be used responsibly. Dissenting for the sake of dissent will make the dissent lose its value, and not dissenting when our oath to this office calls for it, only to 'manufacture' a majority opinion makes the opinion a dishonest one. Hence, where one does not agree with the majority view, a judge must be free to voice his dissent.

A dissenting judgment sows the seed, which develops a new thought, which may at a later stage develop into a totally new approach to the law.

B. Plessy vs. **Ferguson**[2]

The issue in this case was whether there should be separate compartments for white persons and persons of coloured races in trains. The use of a compartment meant for another race could entail imposition of fine or punishment.

The majority upheld this policy of segregation.

Justice John Marshall Harlan dissented alone. He wrote:

"…in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. . .The arbitrary separation of citizens on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds."

This view of Justice Marshall was later upheld in **Brown** vs. **Board of Education**[3] by a unanimous 9–0 verdict.

---

[2] 163 U.S. 537 (1896)

C. Dred Scott vs. **John F. A. Sandford**[4]

Facts: In this case the question to be decided was whether a slave, who had lived in a territory where slavery had been abolished, on return to the territory where slavery still existed was a freeman or remained a slave?

Majority: By 7–2 the U.S. Supreme Court held that "a negro, whose ancestors were imported into this country and sold as slaves," whether enslaved or free, could not be an American citizen and therefore did not have standing to sue in federal court.

Justice McLean wrote the dissenting opinion and held:

"He is averred to have had a negro ancestry, but this does not show that he is not a citizen of Missouri, within the meaning of the act of Congress authorizing him to sue in the Circuit Court. It has never been held necessary, to constitute a citizen within the act, that he should have the qualifications of an elector. Females and minors may sue in the Federal courts, and so may any individual who has a permanent domicil in the State under

---

[3] 347 U.S. 483 (1954)
[4] 60 U.S. 393(1856)

whose laws his rights are protected, and to which he owes allegiance.

Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term citizen is 'a freeman' Being a freeman, and having his domicil in a State different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him."

D. Liversidge vs. **Anderson**[5]

While talking about dissenting judgments one has to start with Lord Atkin's opinion in **Liversidge** vs. **Anderson** where he said:-

> "**I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister**."

He was not scared to be alone a time when England was virtually on the losing side and was facing regular air raids from Germany. It is in this atmosphere that Lord Atkin had the courage to say:-

[5] [1941] UKHL 1.

"**In England, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace**. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons, and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law."

This is one of the most powerful and courageous dissents

E. A.K. Gopalan vs. **The State of Madras**[6]

As far as India is concerned the 1st most important dissent was by Justice Fazal Ali in ***A.K. Gopalan's case.***

The question to be decided in this case is whether the Preventive Detention Act, 1950 (Act IV of 1950), is wholly or in part invalid and whether the petitioner who had been detained under that Act was entitled to a writ in the nature of habeas corpus on the ground that his detention is illegal.

Majority:- If the procedure mentioned in those articles is followed the arrest and detention contemplated by article 22(1) and (2),

[6] [1950] 1 SCR 88.

although they infringe the personal liberty of the individual, will be legal, because that becomes the established legal procedure in respect of arrest and detention.

Fazl Ali, J.- Procedure must be **reasonable and fair.**

"The question is whether the principle that no person can be condemned without a hearing by an impartial tribunal which is well-recognized in all modern civilized systems of law and which Halsbury puts on a par with well-recognized fundamental rights cannot be regarded as part of the law of this country..... If that is so, then 'procedure established by law' must include this principle, whatever else it may or may not include"

This view was later ***accepted in R.C. Cooper's case (Bank Nationalisation Case).***[7]

For many in the audience who joined practice in the 80s or thereafter, these observations would seem almost redundant, however at the time when they were made, these were path-breaking.

[7] Rustom Cavasjee Cooper and Ors. vs. Union of India (UOI); (1970) 1 SCC 248.

F. <u>Kharak Singh</u> vs. **<u>The State of U.P. and Ors.</u>** [8]

<u>Question:-</u> Whether right to privacy is a fundamental right?

<u>Majority</u>:- Right to privacy is not a fundamental right.

"As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."

<u>Subba Rao, J</u>:- Right to Privacy is a fundamental right.

"It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty."

This view-that right to privacy is a fundamental right has been affirmed almost 55 years later by a 9 Judges Bench in **Justice K.S. Puttaswamy** vs. **Union of India (UOI)**[9].

[8] (1964) 1 SCR 332.
[9] (2017) 10 SCC 1.

G. Naresh Shridhar Mirajkar and Ors. vs. **State of Maharashtra and Ors.** [10]

Facts: The witness in a case had made a request to the presiding Judge (Mr. Justice Tarkunde) to withhold his evidence from newspaper reporters since publication of reports of his earlier deposition had caused loss to him in his business. Mr. Justice Tarkunde orally ordered that his deposition should not be reported in newspapers. Writ Petitions under Article 32 of the Constitution were filed to question the order on the ground that the fundamental rights under Art. 19(1)(a) of the Constitution of have been violated by the said order.

Hidayatullah J.,- "These provisions show that it cannot be claimed as a general proposition that no action of a Judge can ever be questioned on the ground of breach of fundamental rights. The Judge no doubt functions, most of the time, to decide controversies between the parties in which controversies the Judge does not figure but occasion may arise collaterally where the matter may be between the Judge and the fundamental rights

[10] AIR 1967 SC 1.

of any person by reason of the Judge's action. It is true that Judges, as the upholders of the Constitution and the laws, are least likely to err but the possibility of their acting contrary to the Constitution cannot be completely excluded. In the context of Arts. 14, 15(1)(b) and (19)(a) and (d) it is easy to visualize breaches by almost any one including a Judge... I am, therefore, of opinion that Judges cannot be said to be entirely out of the reach of fundamental rights."

This is still a dissenting view and time alone will tell whether this will one day become a majority view.

H. **Zee Telefilms Ltd. and Ors.** vs. **Union of India (UOI) and Ors.**[11]

Question: Whether BCCI is 'State' under Article 12?

Majority: BCCI cannot be held to be a State for the purpose of Article 12.

S.B. Sinha, J.: Board of Control for Cricket in India (Board) falls within "Other Authorities" within the meaning of Article 12 of the Constitution of India.

[11] (2005) 4 SCC 649.

Almost a decade later, in **BCCI** vs. **Cricket Association of Bihar & Ors.**[12] a Division Bench of the Supreme Court held that even though BCCI is not 'State' within the meaning of Article 12 of the Constitution, since it is discharging important public functions it is amenable to writ jurisdiction under Article 226.

I. Two Recent Dissents-

Justice Chandrachud in the Aadhar Judgment[13]**-** Aadhar Act Unconstitutional

"Our Constitution does not provide absolute power to any institution. It sets the limits for each institution. Our constitutional scheme envisages a system of checks and balances.

This dissent was relied upon by the Jamaican SC when they struck down the National Identification System which was to provide a "comprehensive and secure structure to enable the capture and storage of personal identity information for citizens and persons ordinarily resident in Jamaica."

[12] 2015 (3) SCC 251.
[13] Justice K.S. Puttaswamy (Retd.) & Anr. vs. UOI & Ors; WP(C) 494/2012.

Justice Indu Malhotra in Sabarimala[14]**-** The limited restriction on the entry of women during the notified age-group does not fall within the purview of Article 17 of the Constitution."

J. **Additional District Magistrate, Jabalpur** vs. **Shivakant Shukla**[15]

The most shining example of a dissent is that courageous judgment of **Justice H.R. Khanna** when during the emergency he held in **ADM Jabalpur** vs. **Shivkant Shukla** that the fundamental rights of a citizen cannot be taken away. He knew that he was putting his future as Chief Justice of India at stake. Knowing the past history when 3 senior Judges have been overlooked to appoint Justice A.N. Ray as Chief Justice of the Supreme Court of India, he knew that in all probability he would meet the same fate. That did not deter him in doing his duty and delivering a judgment which even today has been acknowledged to be the correct position of law. Nine High Courts had the courage to hold that Fundamental Rights are not abrogated.

[14] Indian Young Lawyers Association and Ors. vs. The State of Kerala and Ors.; 2018 (13) SCALE 75.
[15] (1976) 2 SCC 521.

From his important dissent, I would like to quote the following paragraphs:

"Law of preventive detention, of detention without trial is an anathema to all those who love personal liberty. Such a law makes deep inroads into basic human freedoms which we all cherish and which occupy prime position among the higher values of life. It is, therefore, not surprising that those who have an abiding faith in the rule of law and sanctity of personal liberty do not easily reconcile themselves with a law under which persons can be detained for long periods without trial. The proper forum for bringing to book those alleged to be guilty of the infraction of law and commission of crime, according to them, is the court of law where the correctness of the allegations can be gone into in the light of the evidence adduced at the trial. The vesting of power of detention without trial in the Executive, they assert, has the effect of making the same authority both the prosecutor as well as the judge and is bound to result in arbitrariness."

"Before I part with the case, I may observe that the conscious ness that the view expressed by me is at variance with that of the

majority of my learned brethren has not stood in the way of my expressing the same. I am aware of the desirability of unanimity, if possible. Unanimity obtained without sacrifice of conviction commends the decision to public confidence. Unanimity which is merely formal and which is recorded at the expense of strong conflicting views is not desirable in a court of last resort. As observed by Chief Justice Hughes (Prophets with Honor by Alan Barth, 1974 Ed. pp. 3-6.) judges are not there simply to decide cases, but to decide them as they think they should be decided, and while if may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice, A dissent in a court of last resort to use his words, 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."

IV. CONCLUSION

The right to dissent includes the right to criticize. We all must be open to criticism. The judiciary is not above criticism. If Judges of the superior courts were to take note of all the contemptuous communications received by them, there would be no work other than the contempt proceedings. In fact, I welcome criticism of the judiciary because only if there is criticism, will there be improvement. Not only should there be criticism but there must be introspection. When we introspect, we will find that many decisions taken by us need to be corrected. Criticism of the executive, the judiciary, the bureaucracy or the Armed Forces cannot be termed 'anti-national'. In case we attempt to stifle criticism of the institutions whether it be the legislature, the executive or the judiciary or other bodies of the State, we shall become a police State instead of a democracy and this the founding fathers never expected this country to be.

To question, to challenge, to verify, to ask for accountability from the government is the right of every citizen under the Constitution. These rights should never be taken away otherwise

we will become an unquestioning moribund society, which will not be able to develop any further.

I end with a poem from my favourite poet Guru Rabindranath Tagore. This poem adorns my office and is close to my heart.

> Where the mind is without fear and the head is held high;
> Where knowledge is free;
> Where the world has not been broken up into fragments by narrow domestic walls;
> Where words come out from the depth of truth;
> Where tireless striving stretches its arms towards perfection;
> 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 that heaven of freedom, my Father, let my country awake.

***