

# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

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Volume 7 | Issue 2

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2024

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# Unraveling Judicial Perspectives on Fundamental Rights: A Critical Analysis of Supreme Court Dissent Opinions

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## ABSTRACT

*The research paper provides an exhaustive and retrospective overview of the Supreme Court dissenting opinions on fundamental rights, their significance, and the historic evolution. It highlights that dissent is a catalyst for legal change and explains different approaches within judicial opinions. The paper then moves to the Indian context, citing the functionality of dissent in shaping constitutional governance and guaranteeing fundamental rights. In addition, it outlines the challenges and limitations that dissenting opinions often face, including their effect on judicial decisions, their acceptance in the judiciary, and how they fare in the face of national crises. However, the author contend that even amidst such challenges, the dissenting justices carry on with the enrichment of the legal debate and, as they have always been doing, to keep up with the duty of the judiciary in upholding the fundamental rights and the rule of law. Finally, it highlights creating an environment conducive to dissent and ensuring that all views are given the chance for justice and equality.*

**Keywords:** *Dissent Voice, Judiciary, Freedom, Landmark Judgement.*

## I. INTRODUCTION

The Supreme Court is, after all, the ultimate interpreter of a nation's constitution and an ultimate protector of the fundamental rights of its citizens. It doesn't matter where these rights may come from but they exist as the very pillar upon which a free society can be built on.<sup>3</sup> However, the interpreting of these rights is not a single-lane process. The majority opinion delivers the legal precedent, but dissenting voices from the court provide a critical counterpoint, enriched within the legal tapestry and sparking vital debate.<sup>4</sup> This essay takes a critical route at the Supreme Court dissenting opinions on fundamental rights, unraveling various threads within the judicial

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<sup>3</sup> Deepak Gupta, The Right to Dissent is the Most Important Right Granted by the Constitution: Justice Gupta, <https://thewire.in/law/right-to-dissent-constitution-justice-deepak-gupta>

<sup>4</sup> ArunK. Thiruvengadam, Tribunals, in THE OXFORD HANDBOOK OF THE INDAN CONSTITUTION 413 (Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta eds., 2015).

tapestry shaping the understanding and application of these core principles.<sup>5</sup>

The essence of dissentation should be defined from the very beginning. In essence, it is not simply an expression of disagreement, but the most powerful tool for the scrutiny of the majority's reasoning. In making use of this, dissenting justices are at the frontline, highlighting any weaknesses perceived within the majority's interpretation.<sup>6</sup> Expansion of the majority's interpretation has been stated as being too narrow by some dissenters who have been purporting to encompass the wide implications that these rights are meant to have for the individual and society at large.<sup>7</sup> Critical examination drives to wide the boundaries of legal understanding, leading to a more precise framework for protecting fundamental rights.

Moreover, dissenting opinions signify a kind of catalyst for future legal change. Dissenting done with conviction and conviction, with clear and convincing arguments, can earn an acceptance from the public and scholars of the law.<sup>8</sup> Over time, these opposing views have the potential to take root, perhaps in future court decisions, ultimately to become the majority. This change occurs over time from well-challenged dissents, underlined by the transformative power of dissent. For instance, what were once **Justice Thurgood Marshall's** fervent dissents on affirmative action programs, portrayed as outliers in their time, were later adopted by later rulings.<sup>9</sup> This example underlines the power dissent holds in shaping the path followed in fundamental rights jurisprudence.

## II. LABYRINTH OF DISSENTING OPINIONS AND JUDICIAL REVIEW

The spectrum of dissenting opinions should also be looked into more closely. There can be no uniform approach because dissents do vary significantly in their strategies. Some of the justices may lean toward strict interpretations of the law, arguing that the majority is blatantly deviating from the original intent of the framers of the constitution.<sup>10</sup> Others might take a more philosophical approach, emphasizing more the wider implications that the court's decisions have on society and how much it might set the tone for the future public space.

At the same time, the substance of the principle of judicial review is also important. A dissent in and of itself doesn't automatically raise the importance of the opposition; it is what is said

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<sup>5</sup> Subhajt Basu, *Silenced voices: unravelling India's dissent crisis through historical and contemporary analysis of free speech and suppression*, Info. and Comm. Tech. L. 42, 56 (2024).

<sup>6</sup> Raeesa Vakil, *Constitutionalizing Administrative Law in the Indian Supreme Court: Natural Justice and Fundamental Rights*, 16 INT'L J. CONST. L. 475 (2018).

<sup>7</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

<sup>8</sup> Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

<sup>9</sup> William N. Eskridge Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002).

<sup>10</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

within the dissent that is important. The soundness of legal arguments used by a dissenter and his ability to persuade both the public and future courts have to be reasonable.<sup>11</sup> More so, the case may also be affected by national crises or public unrest such that the interpretations of fundamental rights are tempered by considerations of national security. Dissenting voices in these circumstances may still prove extremely valuable even when they fail to sway the court as they may have been trying to do.<sup>12</sup>

### (A) Understanding Dissent in Judicial Opinions

#### a. Concept and Significance

Dissent plays a crucial role that serves to play the very base that establishes legal research and the interpretation of the notion of basic rights. This section will examine the vast concept of dissent within Supreme Court judgments, the significance of the same, the historical context, and the changing scenario in which the concept of legal jurisprudence manifests itself.

Dissent differs from mere disagreement in that it represents a powerful tool of critical analysis and searching of majority reason. It constitutes an extremely important aspect of judicial deliberation, enriching legal discourse with various alternative perspectives, which besides critiquing prevailing norms also challenge them. Speaking to the dissent, Justice Harlan said, "It may not always win the day, but it carries the future." This highlights the transformative role that dissent might assume in influencing the development of law.<sup>13</sup>

The historical significance of dissenting opinions in Supreme Court judgments on defining fundamental rights has contributed to the growth of these same rights. For example, the establishment of *Plessy v. Ferguson*<sup>14</sup> and *Brown v. Board of Education*<sup>15</sup> cases, which case landmarks regarding issues of racial segregation and equality, has shown the impact of dissenting opinions. In the case of *Plessy*<sup>16</sup>, Justice Harlan's dissenting opinion questions the concept of 'separate but equal' and sets out a series of establishments that would future decisions in overturning segregationist policies. The similarity of this with the case of Brown, where Chief Justice Earl Warren's majority opinion, supported unanimously by the court, overturned the precedent set by Plessy, affirmed that equality under the law should be a guiding principle.

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<sup>11</sup> Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

<sup>12</sup> R. P. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, 14 INT'L & COMP. L.Q. 788 (1965).

<sup>13</sup> Thomas Jefferson Knight, *The Dissenting Opinions of Justice Harlan*, 51 AM. L. REV. 481 (1917).

<sup>14</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>15</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>16</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

## (B) Evolution of approach of dissenting opinions

Precedents substantiate the significance of dissent in clarifying and expanding the scope of fundamental rights. In *Roe v. Wade*<sup>17</sup>, for instance, Justice Byron White's dissenting opinion questioned the majority's interpretation of the right to privacy, foreshadowing ongoing debates surrounding reproductive rights.<sup>18</sup> On the other hand, in *Lawrence v. Texas*<sup>19</sup>, Justice Antonin Scalia's dissent addressed concerns about court intervention in consensual homosexual conduct and the broader implications for traditional values. These two cases, representing opposite paths in legal reasoning at the Supreme Court, highlight how dissenting opinions can shape societal norms.

Dissent finds resonance in other authorities, such as legal scholars and international tribunals. For instance, scholars like Ronald Dworkin and Cass Sunstein have explored dissent's theoretical underpinnings and its role in fostering democratic dialogue and holding courts accountable.<sup>20</sup> Similarly, international human rights tribunals, such as the European Court of Human Rights and the Inter-American Court of Human Rights<sup>21</sup>, have grappled with dissenting opinions in landmark cases concerning issues of torture, freedom of expression, and minority rights.<sup>22</sup>

Similarly, in the Indian context, the case of *Golak Nath v. State of Punjab*<sup>23</sup> has seen a sharp division among the judges regarding the amending power of Parliament with respect to fundamental rights. Justice Hidayatullah, in his dissenting opinion, advocated the supremacy of the Constitution and limited the amending power of the Parliament, challenging the notion of parliamentary sovereignty.<sup>24</sup> Looking beyond reproductive rights, dissenting opinions have shaped the discourse on freedom of expression and privacy rights. In the case of *New York Times Co. v. United States*<sup>25</sup>, broadly known as the Pentagon Papers case, Justice Hugo Black, in his dissent, emphasized the primacy of the First Amendment's protection to freedom of the press and issues of national security. It was thus equal to the decision of *K.S. Puttaswamy v.*

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<sup>17</sup> *Roe v. Wade*, 410 U.S. 113 (1973)

<sup>18</sup> Linda Greenhouse, Reva B. Siegel, "Before (and After) *Roe v. Wade*: New Questions about Backlash", 120 YLJ 2034 (2011).

<sup>19</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>20</sup> Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

<sup>21</sup> Utkarsh Tripathi, *Supreme Court of United States on Abortion Law*, 3 INDIAN J. INTEGRATED RSCH. L. 1 (2023).

<sup>22</sup> Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

<sup>23</sup> *Golak Nath v. State of Punjab*, AIR 1967 SC 1643.

<sup>24</sup> Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 BERKELEY J. INT'L L. 216 (2010).

<sup>25</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971).

*Union of India*<sup>26</sup>, also known as the Aadhaar case, where Justice D.Y. Chandrachud in his dissenting opinion charted a strong course of privacy rights, focusing upon individual autonomy and protection of data.<sup>27</sup> Although the majority held the constitutionality of the Aadhaar scheme, it was Justice Chandrachud's principled dissent that paved the way for subsequent judgments that would enlarge privacy protections in India.

Moreover, dissenting opinions within Supreme Court judgments have extended beyond traditional notions of civil liberties to include socio-economic rights and environmental protection. In the US case of *Lochner v. New York*<sup>28</sup>, Justice Oliver Wendell Holmes Jr.'s dissent challenged the court's deference to economic liberty over legislative regulations, advocating for a more interventionist approach to protect the rights of workers. Similarly, in the Indian case of *Olga Tellis v. Bombay Municipal Corporation*<sup>29</sup>, Justice P.N. Bhagwati's dissent expanded the scope of the right to livelihood, affirming the state's responsibility to social and economic justice to marginalized communities.

### III. INDIAN CONTEXT

#### (A) Shaping constitutional governance through dissenting opinions in India

Significant cases, such as *Kesavananda Bharati v. State of Kerala*<sup>30</sup>, highlight the value of dissent in shaping the course of constitutional governance. In *Kesavananda Bharati*, a 13-judge bench issued a fractured verdict on the scope of parliamentary sovereignty and the amending power of the Indian Constitution. Justice H.R. Khanna's dissent, which argued for a limited amending power and the supremacy of the Constitution, established the principle of the basic structure that is now part of Indian constitutional law. Similar to this, dissenting voices within the Indian Supreme Court have, on the whole, challenged the prevailing norms and expanded the scope of fundamental rights<sup>31</sup>. In the case of *Navtej Singh Johar v. Union of India*<sup>32</sup>, which decriminalized consensual homosexual conduct, Justice Indu Malhotra's concurring opinion, although aligning with the majority, offered a nuanced perspective on the interplay between constitutional morality and individual autonomy. This plurality of views within the judiciary mirrors the varied socio-cultural fabric of India and, by extension, the dynamic nature of

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<sup>26</sup>K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

<sup>27</sup> Nupur Chowdhury, *Privacy and Citizenship in India: Exploring Constitutional Morality and Data Privacy*, 11 NUJS L. REV. 421 (2018).

<sup>28</sup> *Lochner v. New York*, 198 U.S. 45 (1905); Yosaf Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 3 (1962).

<sup>29</sup> *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545.

<sup>30</sup> *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

<sup>31</sup> Jagat Narain, *The Indian Supreme Court on Property Rights and the Economic Objectives of the Indian Constitution*, 3 J.L. & ECON. DEV. 147 (1968).

<sup>32</sup> *Supra* Note 26.

constitutional interpretation.<sup>33</sup> Drawing parallels from American jurisprudence, Indian case law reveals the transformative power that dissent has in the protection of fundamental rights. In the case of *Maneka Gandhi v. Union of India*<sup>34</sup>, the dissent by Justice H.R. Khanna was against the prevailing doctrine of executive supremacy, affirming that due process was the guiding principle in administrative actions. This dissenting opinion, though initially in the minority, laid the groundwork for subsequent judgments expanding the scope of procedural fairness and individual liberty.<sup>35</sup>

In this view, dissent within judicial opinions has played a vast role in shaping legal discourse and expanding constitutional protections in India. Several landmark cases in Indian jurisprudence illustrate the importance of dissenting opinions in safeguarding fundamental rights:

### **(B) Safeguarding fundamental rights through dissent**

Few of the landmark cases wherein the dissenting opinions had an impact on the decisions relating to fundamental rights are discussed in this paper.

The case of *ADM Jabalpur v. Shiv Kant Shukla (1976)*<sup>36</sup> occurred during the Emergency declared by the Indian government in 1975. The majority of the Supreme Court upheld the government's power to suspend the right to habeas corpus, permitting indefinite detention without trial. Justice H.R. Khanna dissented vehemently, arguing that even during a state of Emergency, fundamental rights cannot be suspended. His principled stand against executive authoritarianism upheld the sanctity of individual liberty and the rule of law.

*Naz Foundation v. Government of NCT of Delhi (2009)*<sup>37</sup> concerned the constitutional validity of Section 377 of the Indian Penal Code, which criminalized consensual homosexual activities. While the Delhi High Court unanimously struck down Section 377 as violative of fundamental rights, including the right to equality and the right to privacy, Justice Ajit Prakash Shah's concurring opinion went further. Justice Shah's opinion expanded the scope of fundamental rights to include sexual orientation, emphasizing the need for inclusivity and non-discrimination in Indian society.

*Puttaswamy v. Union of India (2017)*<sup>38</sup> is a landmark judgment addressed the constitutionality

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<sup>33</sup> Michael Odden, *Biometric Crisis: Legal Challenges to Biometric Identification Initiatives*, 39 WIS. INT'L L.J. 365 (2022).

<sup>34</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

<sup>35</sup> Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703 (1980).

<sup>36</sup> ADM Jabalpur v. Shiv Kant Shukla, AIR 1976 SC 1207.

<sup>37</sup> Naz Foundation v. Government of NCT of Delhi, (2010) 2 SCC 1.

<sup>38</sup> *Supra* Note 26.

of the Aadhaar biometric identification program. While the majority held up the program with some safeguards, Justice D.Y. Chandrachud's dissenting opinion laid a strong framework for the protection of the rights to privacy under the Indian Constitution.<sup>39</sup> Justice Chandrachud argued that privacy was an intrinsic aspect of individual autonomy and dignity, essential for the exercise of other fundamental rights. His dissent laid the foundation for recognizing privacy as a fundamental right in India and established comprehensive safeguards against state intrusion into personal data.<sup>40</sup>

In *Navtej Singh Johar v. Union of India (2018)*<sup>41</sup> the Supreme Court decriminalized consensual homosexual acts between adults, overturning its earlier decision in *Suresh Kumar Koushal v. Naz Foundation*<sup>42</sup>. While the judgment upheld the rights of LGBTQ+ individuals, Justice Indu Malhotra's separate concurring opinion added depth to the discourse. Justice Malhotra emphasized the importance of constitutional morality and the evolving nature of fundamental rights, advocating for judicial intervention to protect minority rights against majoritarian prejudices.<sup>43</sup>

In *Vishaka v. State of Rajasthan (1997)*<sup>44</sup> the Supreme Court addressed the issue of sexual harassment in the workplace and laid down guidelines to protect the fundamental rights of women. While the majority judgment recognized the need for legislation to address the issue, Justice Sujata V. Manohar's separate concurring opinion broadened the scope of fundamental rights to include the right to a safe and dignified work environment. Justice Manohar emphasized that sexual harassment violated the fundamental rights of gender equality and the right to life and personal liberty under Articles 14, 19, and 21 of the Constitution.<sup>45</sup> Her opinion not only influenced subsequent judicial pronouncements but also inspired societal change and progress towards a more inclusive and rights-respecting democracy.

#### IV. CHALLENGES AND LIMITATIONS OF DISSENTING OPINIONS

Dissenting opinions within the context of fundamental rights jurisprudence in the Supreme Court contribute essential perspectives towards the formation of legal discourse and advocacy of principles. However, despite their position, dissenting views come along with various

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<sup>39</sup> J. Angelo Corlett, *The Nature and Value of the Moral Right to Privacy* 16(4) PUBLIC AFFAIRS QUARTERLY 329-350 (2002). J

<sup>40</sup> Faqir Hussain, *Indian Supreme Court on Personal Liberty*, 8 J.L. & SOC'y 13 (1989).

<sup>41</sup> *Supra* Note 32.

<sup>42</sup> *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.

<sup>43</sup> Sek Keong Chan, *Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken*, 31 SAJLJ 773 (2019).

<sup>44</sup> *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

<sup>45</sup> Namita Wahi, *Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability*, 12 U. C. DAVIS J. INT'L L. & POL'y 331 (2006).



challenges and limits that could impair their performance and influence on judicial decisions.<sup>46</sup> Assessing the effectiveness of dissent in controlling judicial outcomes creates a big challenge. While dissenting justices strive to present strong arguments that can persuade their colleagues, the decision at the end of the day rests upon the majority.<sup>47</sup> The success of dissenting opinions in influencing outcomes depends on several factors: the strength of legal reasoning, persuasive advocacy, and the receptiveness of fellow justices. In some cases, dissenting views can succeed in swaying future interpretations of the law and winning public acceptance, and eventually changing judicial doctrine.<sup>48</sup>

Another of the challenges presented by the acceptance and adoption of dissenting views by the judiciary can be the one stemming from its very nature. It's with such grounds that judicial traditions and norms tend to value consensus-building and collegiality, which may sometimes marginalize dissenting voices. Justices may either be constrained to conform or hesitant to dissent from the prevailing judicial trends or institutional practices.<sup>49</sup> The hierarchical nature of the judiciary can make it hard for dissenters to challenge the opinion of those above them. Moreover, the systems of judicial appointment and tenure may change the dynamics of the judiciary, hence changing the willingness of justices to express dissenting views, in that they would see the possibility of some form of backlash against their judicial careers.<sup>50</sup>

However, more challenges related to dissenting views include the critical effects of national crises and public unrest. In times of high political or social tensions, dissenting justices are subject to much greater scrutiny and criticism, such as being designated a traitor to prevailing sentiments or government agendas.<sup>51</sup> For instance, national security concerns or public outrage might lead to decisions by the judiciary marginalizing dissenting views that may present challenges to popular sentiment or government policies. In addition, under the guise of seeking stability and consensus during a national crisis, it can also tread fearfully on the effects of dissent in the landscape. In conclusion, opinions dissenting in some manner help in defining fundamental rights jurisprudence, but they have also faced numerous obstacles and restrictions. In this respect, performance in results, handling roadblocks to acceptance and application, and dealing with crises in the country and public disquiet are central considerations in the analysis of the dissent's role within the judiciary. In spite of these challenges, dissenting justices help

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<sup>46</sup> Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

<sup>47</sup> Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

<sup>48</sup> Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

<sup>49</sup> *Supra* Note 5.

<sup>50</sup> Deepal Gupta, *The Right to Dissent is the Most Important Right Granted by the Constitution: Justice Gupta*, The Wire (Apr. 11, 2024, 6:49 AM), <https://thewire.in/law/right-to-dissent-constitution-justice-deepak-gupta>.

<sup>51</sup> *Ibid.*

enrich the legal debate with diversity and hence highlight the continued commitment of the judiciary to promote fundamental rights and the rule of law.

## **V. CONCLUSION AND WAY FORWARD**

Judicial views regarding fundamental rights, though not entirely, can be read from critically scrutinizing Supreme Court dissent opinions. The significance of dissent in the actual shaping of judicial discourse and the constitutional provisions, to question and extend the scope of rights itself, is paramount. The comparative analysis of dissent within the Indian and United States Supreme Courts highlighted the way dissent plays a powerful role in advancing ideas of justice, equality, and democracy. Dissident voices challenge entrenched norms, expand legal understanding, and, therefore, put that it will eventually lead to some form of change that would positively influence constitutional principles. Challenges to dissenting opinions on issues that come up under fundamental rights include the type of influence on outcome, impeding acceptance and adoption, and the fact that dissenting justices often grapple with the impact of national crises and public unrest. While propounding their views, they are wrestled with conformity to existing judicial trends, institutional norms, and the polity sentiments. The dissent may be ignored or marginalized in a hierarchical judicial system, thus adding to the complications in influencing judicial decisions.

Despite these challenges, dissenting justices continue to inspire interest in a rich and diverse conversation about the rule of law and the protection of fundamental rights. It is going to be important to create an environment that is conducive for strong dissent and ensures all perspectives are heard and considered within justice and equality. This continued scholarship and judicial activism will continue to ensure a continuing influence of dissent in shaping the trajectory of fundamental rights jurisprudence, to bring about social change and progress towards a more inclusive and rights-respecting democracy.

In conclusion, through the analysis of dissenting opinions with regards to the very fundamental rights of the people, it can be cogently put forth that the same plays a pertinent role in shaping the jurisprudence in judicial domain. Though limited in its effect due to minority share, it definitely lays an impact on the outcomes of any case. It provides a different view to look at the existing paradigm and provides a base to start with for the future cases concerning challenging of existing principles in fundamental rights. Even though such opinions has its own fair share of challenges, yet it contributes in enriching the legal debate. It also invites interest from different sets of people who want to critically analyse any given case and have a fresh viewpoint altogether irrespective of the decisions given. By embracing dissent as a catalyst for legal

change, the judiciary can further strengthen its role as the ultimate protector of fundamental rights.

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