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Constitutional Courts and Judicial Independence: Conceptualising Judicial Dissent in South Asian Perspective

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Anubhav Kumar**

Abstract

Constitutions in modern democracies have become a focal point in their quest to embrace maximum realization of rights to its citizen and imposing limitations on the government. The dissenting opinions of Constitutional Courts in many jurisdictions have played a significant role in upholding aspirations of the constitution and have been a pertinent cause of change in course of nations' legal history. Although, its publication historically has not been universal but gradually even civil law countries are beginning to allow dissenting opinions. It is also because one of the key dimensions in permitting its publication is increased transparency and Judicial Independence which is pertinent in upholding the rights of the individual against the state. However, the academic enquiry on dissenting opinions by constitutional theorists and academicians has been largely confined to few countries like United States, Canada, Australia or other European countries. This paper endeavours firstly, to explore the concept of dissent and its importance in affirmation of judicial independence and autonomy; secondly, the paper also analyses the role of judicial dissent by laying down a structured understanding of how the courts in countries based on the affirmation of liberal constitutionalism aim to achieve the democratic values; and lastly, the paper deals with judicial dissent in South Asian countries specifically from the perspective of India, Pakistan, Nepal, Bangladesh and Sri Lanka. The paper aims to analyse the practice

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of judicial dissent prevalent in these countries based on their unique constitutional framework which has developed out of their deeply ingrained cultural values and social and political history.

Introduction

Constitutionalism has come up to be affirmed, in some form or the other, in almost all the parts of the world since the late twentieth century.[1] The majority of the countries have constitutional democracies in place that embrace some form of human rights, rule of law, judicial review, limited government and separation of powers.[2] Today, the notion of constitutionalism has moved beyond boundaries and we can see varieties of constitutionalism emerging in different parts of the world, like, transnational constitutionalism and regional constitutionalism, among others.[3] In the wake of social, political and economic transformation undergoing around the world, South Asian countries are also no exception . Due to rapid transformation, global attention has been directed towards the development of constitutionalism and specifically analysing the role of constitutional courts in South Asia, a region which features courts robustly committed to judicial review and often sceptical of the political process but protective of groups and attentive to recognizing and entrenching diverse group interests.[4] The developments in relation to comparative constitutional studies with a specific focus on liberal constitutional democracy in South Asian countries, has led to a vast arena of literature focusing on the discourse in the field of ideologies dominating on the understanding based on the prominence of "Asian values" on one hand and "universalistic view of democratic constitutionalism" on another.[5] Most of the developments and transitions in these South Asian countries have raised immense interest and need for analysing the role of constitutional courts in developing and maintaining the constitutional ethos and norms,

1 Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century (O.U. Press, 1993).

2 Louis Henkin, *A New Birth of Constitutionalism: Genetic Influence and Genetic Defects, In Constitutionalism, Identity, Difference, And Legitimacy: Theoretical Perspectives*, Michel Rosenfeld Ed., 39-53 (1994)*; See also,* Nevil Johnson, *Constitutionalism: Procedural Limits and Political Ends, In Constitutional Policy and Change In Europe* Joachim Jens Hesse & Nevil Johnson Eds., 46-63 (1995).

3 Mark Tushnet, *Editorial*, 14 *Int. J. Const. L.* 1-5 (Jan., 2016); *See also,* Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 Penn. State. Int'l. L. Rev. 89 (2008); *See also*, Vicki C. Jackson, *Constitutional Engagement in A Transnational Era,* 59(2) AJCL 602 (2010).

4 Jamal Greene, Madhav Khosla, *Constitutional rights in South Asia: Introduction*, 16(2) *Int. J. Const. L.* 470 (2018).

5 Karen Engle, Culture and Human Rights: *The Asian Values Debate in Context*, 32 N.Y.U. J. Int'l L. & Pol. 291 (2000)*; See also,* Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 Harv. Hum. Rts. J. 109 (1998).

and at the same time protecting and upholding the fundamental basis for the existence of constitutionalism.

In this context, the role of the constitutional courts is understood as having a principled connection with the idea of establishing rule of law.[6] The notion that democracy and fundamental human rights and values can be best safeguarded by judicial review has now worldwide come up to be firmly established.[7] The stability and effectiveness of judicial power in ensuring the implementing rule of law is guaranteed by the independent judiciary.[8] An independent judiciary is thus, considered necessary for both judicial review and protection of human rights.[9] Judicial independence is often perceived to be of paramount importance, however, in the real world, judges face all sorts of constraints.[10] Judiciary can often land up being politicised and in such cases, maintaining independence might seem to be a difficult task.[11] Maintaining the autonomy of judges require 'internal autonomy' which basically allows and accord justification for judges to maintain their 'intellectual integrity' whereby they assert their freedom by expressing their separate opinions by willingly not subscribing to the reasoning they don't believe in.[12] However, the dissenting opinions though intriguing but receive less attention because it is often perceived that dissenting opinions have less

6 Kevin M Stack, *The Practice of Dissent in the Supreme Court*, 105 The Yale L. J. 2235; *See also*, Cass R. Sunstein, *Liberal Constitutionalism and Liberal Justice Response*, 72 Tex. L. Rev. 305 (1993).

7 Richard Bellamy, *Political Constitutionalism: A Defence of the Constitutionality of Democracy*, Cambridge, CUP (2007); *See also*, Carlo Guarnieri & Patrizia Pederzoli, *The Power of Judge: A Comparative Study of Courts and Democracy*, OUP 135 (2002); *See also*, Ran Hirschl, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism*, MA: Harvard University Press 1 (2004).

8 David Boies, *Judicial Independence and the Rule of Law*, 22 Wash. U. J. L. & POL'Y 057 (2006); *See also*, Garnaas-Holmes, Daniel, *Judicial Review: Fostering Judicial Independence and Rule of Law,* 5 Law and Justice in the Americas Working Paper Series. (2007).

9 Edward A. Purcell Jr., *The Ideal of Judicial Independence: Complications And Challenges*, 47 Tulsa L. Rev. 141 (2013); *See also,* Scott Douglas Gerber, *A Distinct Judicial Power: The Origins Of An Independent Judiciary*, OUP 1606-1787 (2011).

10 Charles Gardner Geyh, *Judicial Independence As An Organizing Principle*, 10 Ann. Rev. L. & Soc. Sci. 185, 191–92 (2014); *See also,* Louis Michael Seidman, *Ambivalence And Accountability*, 61 S. Cal. L. Rev. 1571, 1571 (1988). University of Memphis, *The Fragile Fortress: Judicial Independence In The 21st Century*, 47 U. Mem. L. Rev. 999 (2017). University of Memphis, *Judicial Independence: Theory and Practice*, 47 U. Mem. L. Rev. 1249 (2017).

11 Ran Hirschl, *The Judicialization of Politics*, The Oxford Handbook of Political Science - OUP (2018); *See also*, Entin, Jonathan L., *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, Faculty Publications 367 (1990); *See also,* Bjoern Dressel, *Judicialization of Politics or Politicization of the Judiciary? Considerations from Recent Events in Thailand*, 23(5) Pac. Rev. (2010).

12 R. Bader Ginsburg, *The Role of Dissenting Opinions*, 22 Minn. L. Rev. 1-8 (2010); *See also*, Claire L'Heureux-Dube, *The Dissenting Opinion: Voice of the Future?* 38 Osgood Hall Law Journal 495-516 (2000); *See also*, W. J. Brennan, *In Defense of Dissent*, 37 Hastings L.J. 427-438 (1985); *See also*, John Alder, *Dissent in court of last resort: Tragic choices?* 2 Oxf. J. Legal Studies 233, 221-246 (2000).

authoritative legal force and precedential value.[13]

Constitutional Courts in South Asia have undergone a huge transformation in recent years and thus, this leads us to analyse the pertinent role of the judiciary specifically in relation to establishing the importance of judicial dissent in South Asian countries. This paper thereby seeks to analyse and discuss the value of dissenting opinions by constitutional courts in South Asian perspective by delving upon specific discourse in favour and against judicial dissents. Secondly, the paper analyses the value of judicial dissent in the light of the liberal constitutionalism framework and assertion of dissent as a pillar of judicial independence. Thirdly, the paper incorporates a comparative constitutional discourse in relation to judicial dissent in specific relation to South Asian countries.

Concept of Dissent and its Relevance in the Affirmation of Judicial Power

A significant expansion in Judicial power over decades can be adduced to the *sui generis* nature of its Constitutional courts. In modern constitutional democracies, it does not only adjudicate legal dispute but also deals with political questions in greater detail, different from Supreme Courts.[14] South Asian countries are also not untouched by the emergence of Constitutional courts post 1980s when many experienced a departure from authoritarian rule to a more open political structure.[15] In this context, the role of constitutional courts in different legal systems attains prominence in affirming judicial power and the privilege of publishing a dissenting opinion finds itself at the core in realising judicial independence.[16] A dissenting opinion relates to a result arrived by a judge different from majority or plurality opinion while adjudicating a dispute on principles, interpretation or applicability of a law. Charles Evans Hughes, former Chief Justice of United States famously said, *"a dissent in a court of last resort 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*

13 Goads-Roszkowski, *Communicating Dissent in Judicial Opinions: A Comparative, Genre-Based Analysis*, 33 Int J Semiot Law, 381–401 (2020). Also see Antonio Scalia, *The Dissenting opinion*, 19 J. Sup. Ct. Hist. 33 (1994); *See also*, Bernice B. Donald, *The Intrajudicial Factor in Judicial Independence: Reflections on Collegiality and Dissent in Multi-Member Courts*, 47 U. MEM. L. REV. 1123 (2017).

14 Katalin Kelemen, *Dissenting Opinions in Constitutional Courts*, 4 Ger. Law J. 1352 (2013).

15 Tom Ginsberg, *Constitutional Courts in New Democracies: Understanding Variation in East Asia*, 2 Global jurist Advances (2002).

16 David Vitale, *The Value of Dissent in Constitutional Adjudication: A Context-Specific Analysis*, 19 Rev. Const. Stud. 83-108 (2014).

judge believes the court to have been betrayed."[17] J D Heydon, former Justice at the High Court of Australia in his essay advocating for dissents, explained the threat to 'judicial independence' posed by the internal pressure in courts to conform and collaborate in single judgments.[18]

It is however important to note that the idea of publishing dissent does not find a normative acceptance in different jurisdictions. Constitutional theorists and legal academicians across the world, for long, have been involved in the perennial and tempting debate on the practice of publishing dissenting opinions by the Constitutional courts of last resort and its value in upholding constitutional framework.[19] Many believe that publication of dissent dilutes institutional legitimacy and has the potential to shake the public's faith in courts[20] whereas theorists who favour its publishing advocate for its importance in contribution to the evolution of law.[21] In this part of the paper the author endeavours to unravel the concept of dissent and its importance in affirming judicial power through some landmark dissenting opinions.

Understanding Dissent

It is no doubt that the concept of separate dissent is a common law creation. Historically the British common law tradition was premised on the idea of individual opinion of judges (seriatim) while hearing cases in appeal.[22] This had not only acceptance but also impacted major countries in publishing dissent.[23] In the civil law tradition, once controlled by continental power in Europe the emphasis was laid in 'collective judgment 'of the court, resulting in non-publication of disagreements, if any.[24] However, Katlin Kelemen argues that publication of dissenting opinion is now permitted even in Civil law countries, with

17 Charles Evans Hughes, *The Supreme Court of United States: Its Foundations, Methods and Achievements, An interpretation*, New York - CUP 68 (1936).

18 J D Heydon, *Threats to Judicial Independence: The Enemy Within* ,129 Law Q. Rev. 205 (2013); *See also,* Andrew Lynch, *Collective Decision-Making: The Current Australian Debate*, 21 European JOURNALS of Current Legal Issues (2015).

19 Vitale, *supra* note 16.

20 Carissima Mathen, *Dissent and Judicial authority in Charter Cases*, 52 UNBLJ 321 (2003).

21 Hughes, *supra* note 17 ¶ 68.

22 K. Zobell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 Cornell LQ. 187-91 (1959).

23 Claire L'Heureux-Dube, *The Dissenting Opinion: Voice of the Future?* 38 Osgood Hall Law Journal 495-516 (2000).

24 R. Bader Ginsburg, *The Role of Dissenting Opinions*, 22 Minn. L. Rev. 1-8 (2010); *See also,* Kelemen, *supra* note 14.

few exceptions.[25] In this pretext it is quintessential to understand the relevance of writing a dissenting opinion. At this stage, one may argue that a dissenting opinion does not affect the application of law in the adjudication of dispute at hand and while writing opinion is the way of communicating the decision, what does dissent do? Why do Judges dissent? What is the need for dissent? What is that they wish to achieve? Some contend dissent is a futile exercise as it "cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends."[26]

Dissents as generally understood are not only a deviation from the majority, but it entails within itself a sea of dimensions. It is a reflection of flaws in legal analysis by the majority and at times is also prophetic in nature.[27] In modern democracies, dissent is a manifestation of liberal constitutionalism and constitutional values as it encourages a discourse for a futuristic aspiration of a country in terms of social, economic or political rights.

In Defence of Dissent

Publishing a dissenting opinion has always been favoured as a "right to dissent."[28] It has been contended as great and cherished freedom and that it is "inherent in the constitution of Supreme court."[29] Elucidating on the privilege of publishing dissent Justice Antonio Scalia said. "*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 degree of quibble, or foreboding, or disbelief, or indication that one believes the majority's disposition should engender- that is indeed an unparalleled pleasure.*"[30] Dissent, therefore, is ideally located in constitutional values of free speech and Judicial Independence, it would be not an exaggeration to state that it is a prerequisite to ensure Judicial Independence.[31]

25 Kelemen, *supra note* 14 at p. 1345; *See also,* Saulle Panizza, *L'introduzione dell'opinione dissenziente nel sistema di giustizia costituzionale,* GIAPPICHELLI ED., 110–19 (1998).

26 L. HAND, THE BILL OF RIGHTS 72 (Harvard University Press 1958).

27 W. J. Brennan, *In Defense of Dissent*, 37 HASTINGS L.J. 427-438 (1985); *See also*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

28 Vitale *supra* note 16.

29 Bora Laskin, *The Supreme Court of Canada: A final court of and for Canadians,* 29 CAN. BAR REV. 1038 (1951).

30 Antonio Scalia, *The Dissenting opinion*, 19 J. SUP. CT. HIST. 33 (1994).

31 Andrew Lynch, *Is Judicial dissent constitutionally protected*, 4 MACQUARIE LAW JOURNAL 81 (2004); *See also,* Julia Laffranque, *Dissenting opinion and Judicial Independence*, 8 JURIDICA INTERNATIONAL 162 (2003); *See also,* Andrew Lynch, *Dissent: the rewards and risk of Judicial disagreement in the High court of Australia,* 27 MELBOURNE U.L REV 724 (2003).

The dissenting opinion also ensures that none of the views is suppressed[32] and many have argued the quality of judgment is improved if a dissenting opinion is allowed.[33] Many of these dissenting opinions are not rancid but in the future course either are cited in other jurisdictions or in the same country they pave way for new perception on an issue. Hence the constitutional values of free speech and the right to dissent are those roots that enable strong dissenting opinion and have affirmed its contemporary relevance in modern constitutional democracies.

It is also remarked as judicial innovation which contributes immensely to the evolution of law.[34] It is important to note that dissents do not necessarily have to live through to become tomorrow's majority but in fact, can be instrumental in swinging majority judges if circulated prior to its publication and can be used as internal corrective measures.[35] Additionally a dissenting opinion can always be revisited to enquire in the application of law from the prism of already present dissent. Dissents tend to travel across jurisdictions, which is another key argument often used to lucidly convince theorists and academicians alike of the benefits of publishing dissents. There exists various famous dissent which are a testament of its importance in not only the evolution of law in the specific country but even in other jurisdictions. It is important here to discuss how some dissents have changed the course of a country's legal system while upholding liberal constitutionalism and ensuring that the ideals of constitutions and aims are not vanquished. Justice Harlan's dissent in *Plessy v. Ferguson*[36] is one such example. The case dealt with racial segregation in private laws and while the majority upheld the constitutional of the law in "separate but equal" doctrine but Justice Harlan in the US thirteenth and fourteenth amendment took a progressive view and disagreed with the majority's legal analysis while observing "*our constitution is colour blind*" This magnanimous and liberal view is hailed as the focal point of change in United States history and its quest to end Racial discrimination. In similar nature, Justice Curtis dissent in *Dred Scott v. Stanford*[37] or Justice Holmes dissent in *Lochner v, New York*[38], Justice Stone in *Gobitis*[39]*, or* Justice Black in *Adamson*[40] have been powerful dissents of the

32 John Alder, *Dissent in court of last resort: Tragic choices?* 2 Oxf. J. Legal Studies 233, 221-246 (2000).

33 *Id.*

34 Hughes *supra* note 17; *See also,* L'Heureux-Dube *supra* note 12.

35 Ginsberg, *supra* note 12, *See also,* Cass R Sunstein, *Why Society needs dissent*, Harvard University Press 168 (2003).

36 (1883) 109 U.S. 3 (U.S.A.).

37 (1857) 60 US 393 (U.S.A).

38 (1905) 198 US 45 (U.S.A).

39 Minersville School Dist. v. Gobitis, (1940) 310 U.S. 586, 601, (U.S.A) (Stone, J., dissenting).

40 Adamson v. California, (1947) 332 U.S. 46, 68 (U.S.A) (Black, J., dissenting).

century which have changed the course of the country. These are prophetic constitutional values in form of written separate dissenting opinions which affirmed that the judiciary has a role to play in realizing liberal constitutional and progressive values of the country.

The practice of publishing dissenting opinions by constitutional courts in Asia is no different and has also been a reflection of the same ideals. Although it has received less attention in terms of academic enquiry. In Asia, prominently only India has been the subject of enquiry on dissenting opinion.

Judicial Dissent: Comparative South Asian Perspective

The field of comparative constitutional studies has been heavily dominated by western philosophical influences, however, constitutional law scholars today have accepted the existence of varieties of constitutionalism around the world heavily influenced by regional and cultural values.[41] Asia has been a subject matter of vibrant constitutional discourses for a long, with the idea of fusing western understanding with the distinct Asian legal and political traditions.[42] In the early 21st century, these countries developed vibrant constitutional structures and had written constitutions as a norm, though heavily influenced by social and political movements.[43]

In the post-World War II era, it came to be established that no political institution, even a democratic one, can suppress the basic liberties of individuals. Post-war constitutional drafting, hence, focused on two major issues: firstly, the recognition of basic rights and its protection against infringement by state and its entities; and secondly, the establishment of constitutional courts to enforce and protect these rights against possible violations.[44]

These courts were seen as protecting democracy from its own excesses and were adopted precisely because they could be counter majoritarian, able to protect the substantive values

41 Peer Zumbansen, Comparative, *Global And Transnational Constitutionalism: The Emergence Of A Transnational Legal-Pluralist Order*, 1 Global Constitutionalism 16–52 (2012); *See also* Waluchow Wil, *Constitutionalism*, *The Stanford Encyclopedia of Philosophy* (Spring 2018, Edward N. Zalta ed., Stanford University Press).

42 Lawrence Ward Beer, Ed., *Constitutionalism in Asia, Asian Views of the American Influence*, 89 Reprint Series in Contemporary Asian Studies, (1988); *See also*, Rasulov, A. *Central Asia and the Globalisation of the Contemporary Legal Consciousness,* 25 Law Critique 163–185 (2014).

43 Rosalind Dixon and Tom Ginsburg, *Comparative Constitutional Law in Asia*, Edward Elgar Publishing Limited (2014).

44 Doreen Lustig, J H H Weiler, *Judicial review in the contemporary world—Retrospective and prospective*, 16(2) *Int. J. Const. Law* 315–372 (April 2018).

of democracy from procedurally legitimate elected bodies.[45] This gave rise to the difficulty of a non-elected body (the judiciary) dictating the elected body on the conduct of its affairs that it is against the aspirations of the people.[46] In this global wave of democratization, parliamentary sovereignty is perceived as a waning idea and judicial review came to be firmly excepted and formalised.[47] Due to its peculiar legal and political traditions, specifically which is deeply rooted in the ideas based on cultural relativism, Asia has often been perceived as the most difficult regional system for establishing rule of law.[48]

In the wake of this enhanced role of the judiciary, a sign of institutionalization of a court is the practice of dissent. Dissenting opinions only make sense when a judge sees a real possibility of shifting the position of the court over time.[49] Meaningful analysis of Judicial dissent from a comparative South Asian perspective can, therefore, accord a balanced understanding of how the specialised constitutional courts, on legitimate grounds, can affirm their convictions and voice their opinions freely based on sound legal and constitutional reasoning.

India

India in South Asian Countries has been hugely influenced by the British common law system and since its Independence has permitted publishing dissenting opinions. It has identified publishing dissent as a pertinent dimension of judicial independence which is reflective in its constitutional provision which empowers the Judges in India, who do not concur with the majority opinion to deliver a separate dissenting opinion.[50] Judicial independence has been at the core of the democratic landscape of India. Dr. B. R Ambedkar considered India's constitutional architect remarked, "*There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself*

45 See, Tom Ginsburg, *Judicial Review in New Democracies Constitutional Courts in Asian Cases*, CUP, (2003).

46 Paul W. Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America*, Yale Univ. Press 215 (1997).

47 Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of American Politics (2d ed., 1986); *See also*, Neal Tate., The Global Expansion of Judicial Power (Torbjorn Vallinder ed., NYU Press 1995).

48 Donnelly, J., *The Relative Universality of Human Rights*, 29 (2) Human Rights Quarterly 281-306 (2007).

49 John Alder, *Dissent in court of last resort: Tragic choices?* 2 Oxf. J. Legal Studies 233, 221-246 (2000).

50 India Const. art. 145(5) states that "no judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion."

and the question is how these two objects could be secured."[51]

Dissenting opinions by Indian constitutional courts have had a large impact on the creation of new rights and in upholding liberal constitutionalism. The first famous dissent which opened up a debate of liberal construction of law was seen as early as 1950 in the case of *A K Gopalan v. State of Madras*[52] where the politician Gopalan was arrested under preventive detention laws and the majority upheld it as "procedure established by law".[53] Justice Fazal Ali dissented from his brother judges and held, "all the fundamental rights enshrined in the constitution do not act as separate codes unto themselves and have to be read together as they overlap." He also vehemently criticized the restrictive reading of Procedure established by law. The dissent travelled through legal history and paved the way for a liberal construction, after 28 years in *Maneka Gandhi*.[54]

Recently in *KS Puttuswamy v. Union of India*[55], while declaring the Right to Privacy as a fundamental right, the Indian Supreme Court vindicated the dissenting opinion by Justice Subba Rao in the case of *Kharak Singh v. Union of India*.[56] India's most celebrated dissent came in the case of *ADM Jabalpur v. Shivkant Shuka* when a national emergency was imposed suspending the Fundamental right of all its citizens. Justice H R Khanna spoke to his consciousness and remarked, "*A dissent in a court of last resort... 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*."

These three famous dissenting opinions have helped in the evolution of law apart from being the enquiry of academic discourse. It has upheld the aspiration of the Indian constitution and displayed the independent character of the Judiciary in India. Today the number of dissents may seem seemingly low yet the rich practice of publishing dissent in India is engraved in its constitutional values.

Pakistan

Pakistan is represented mostly, by its apparent tensions between civilian and military rule,

51 Dr. B. R. Ambedkar, VIII Constituent Assembly Debates 258 (May 24, 1949).

52 AIR 1950 S.C. 27.

53 Dr K.S Rathore, *Procedure established by law vis-à vis Due process: An overview of right to personal liberty in India*, Uttarakhand Judicial & Legal Review.

54 Maneka Gandhi v. Union of India, AIR 1978 SC 597.

55 (2017) 10 SCC

56 AIR 1976 S.C. 1207.

which has shaped the history of the country. Undergoing constitutional instability for long, the country has been defined by extra-constitutional pressures on its formal constitutional system. Pakistan's past constitutional history outlines the nature of the judicialization of politics that the country has witnessed.[57] Regime legitimization through judicial endorsement in wake of direct martial rule has been often cited as an example of judicialization of politics in Pakistan.[58] Unstable constitutionalism and an undesirable judicialization of politics have been its unavoidable outcomes.[59]

The judiciary in Pakistan has undergone huge turmoil and has seen different phases of judicial acquiescence, judicial activism and judicial restraint. The significance of judicial independence is embedded in the Constitution of Pakistan with the Preamble proclaiming "…the independence of the judiciary shall be fully secured."[60] In *Muhammad Aslam Awan v. Federation of Pakistan*, the Court stated that "*Judicial independence both of the individual Judge and of the Judiciary as an institution is essential so that those who bring their causes/ cases before the Judges and the public in general have confidence that their cases would be decided justly and in accordance with law.… The fundamental rights guaranteed under the Constitution cannot be secured unless Judiciary is independent because the enforcement of these rights has been left to Judiciary in terms of Articles 184(3) and 199 of the Constitution and the relevant law.*"[61]

Recently, the issue of judicial dissent came to the limelight when, Justice Qazi Faez Isa wrote a 28-page dissenting note, in continuation of an order passed on February 11, 2021, by the five-judge bench of the Supreme Court of Pakistan headed by Chief Justice, Gulzar Ahmed, barring Justice Isa from hearing cases involving the Prime Minister of Pakistan, Imran Khan.[62] Justice Isa in his dissent observed "most resilient and finest institutions were

57 *For more discussion see,* Osama Siddique, The Judicialization of Politics in Pakistan: The Supreme Court after the Lawyers' Movement, Unstable Constitutionalism: Law and Politics in South Asia (Mark Tushnet and Madhav Khosla, Eds. Cambridge University Press (2015)

58 Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d' Etat & Common Law*, 27 Cornell Int'l L. J. 49 (Winter) (1994).

59 Moeen H. Cheema, *The "Chaudhry Court": Deconstructing the "Judicialization of Politics" in Pakistan*, 25 Wash. L. Rev. 447 (2016); *See also*, Siddique, *supra* note 57, (However, the term "Chaudhry Court" is befitting for two reasons: (1) the most important judgments from this era always involved benches led by Justice Chaudhry and share several common characteristics in terms of ideologies, methods, arguments, and outcomes; and (2) despite the controversial and complex issues involving mega-politics adjudicated by the Court during this period, its judgments are unusual for a near absence of any dissenting notes. On major matters, the Chaudhry Court essentially operated as a monolith).

60 Islamic Republic of Pakistan const. Preamble.

61 Muhammad Aslam Awan v. Federation of Pakistan*,* (2014) SC.M.R. 1289.

62 Hasnaat Malik, *Isa writes Dissenting note to SC's Feb 11 Order*, The Express Tribune. (Feb. 21, 2021), https://tribune.com.pk/story/2285367/isa-writes-dissenting-note-to-scs-feb-11-order.

those where candour, transparency and legitimate dissent existed" adding that executive transgressions if remain unchecked, judges being restrained, then ultimately the citizens will suffer.[63] Justice Isa has been undergoing trial for misconduct on the grounds of non-declaration of offshore properties; this matter was highlighted by a journalist in 2019.[64] Shortly, thereafter, the Supreme Court of Pakistan laid down guidelines explaining how judges ought to act if they are called to review a majority judgment.[65] While dealing with the matters of constitutional importance in relation to review matters in Justice Isa case, Zulfikar Ali Bhutto case and Panama gate case, the guidelines issued provide that any judge hearing a review ought to show restraint and maintain judicial dignity, particularly when they had already expressed an opposite view in the original matter, also emphasizing on the presence of minority judges in the review petition, subject to their availability.[66]

There has been a history of dissent in Pakistan, whereby the judges have aimed at establishing a duty on the judiciary to uphold the constitutional principles, to implement principles of Islam and thus to establish liberty, equality, tolerance and social justice.[67] Justice A R Cornelius's historic dissent in *Maulvi Tamizuddin Khan v. Federation of Pakistan* stands in the face of judicial courage in the history of Pakistan, wherein he negated the applicability of the doctrine of necessity to validate military coups.[68] Similarly, Justice Munir in *Jibendra Kishore v. Province of East Pakistan*, stood in affirmation for providing relief to minorities against discriminatory practices by the government.[69]

However, even on the face of it, there are certain complex issues in relation to judicial dissent in Pakistan, firstly, lack of heterogeneity and diversity in the composition of the court, secondly, over- judicialization of politics, in addition courts are equally conscious of their image in public if they side with the political parties.

Nepal

Nation-building in Nepal has been considered really difficult because of political

63 *Id.*

64 Justice Qazi Faez Isa and others v. The President of Pakistan and others, Const. P. No.17 & 19 Of 2019 & C.M.A. No.7417.

65 Hasnaat Malik, *SC offers Guidelines for Dissenting Judges*, The Express Tribune. (Feb. 23, 2021), https://tribune.com.pk/story/2285701/sc-offers-guidelines-for-dissenting-judges.

66 *Id.*

67 Cornelius A. R., Law and Judiciary in Pakistan, 10 (S. M. Haider ed., Lahore Law Times Publication 1981).

68 Maulvi Tamizuddin Khan v. Federation of Pakistan, (1955) PLD Sindh 96 (Pak.); *See also,*, Usif Patel and Two Others v. The Crown, (1955) PLD Federal Court 387 (Pak.).

69 Jibendra Kishore v. Province of East Pakistan, 1957 PLD 9 (Pak.).

aspirations and its constitutional history post-monarchic state and complications relating to constitutionalism.[70] The Preamble of the Constitution of Nepal lays down commitment towards having an independent, impartial and competent judiciary and concept of the rule of law.[71] Supreme Court of Nepal in *Bharatmani Jungam & others v. Office of the President & others* took up the task of ordaining the formation and adoption of the new Constitution.[72] The judiciary in Nepal has played an important role in affirming economic, social and cultural rights by acknowledging the justiciability of the right to food security and food sovereignty, education, employment, health and reproductive health, Right to healthy environment amongst others.[73]

However, under the new Constitution and the political influences, the debated surrounding independence and accountability do arise.[74] In one of the notable dissenting opinions, Justice Regmi held that government should form a special investigating team in consultation with the office of the Attorney General or immediately initiate the investigation of alleged extra judicial killing by Centra Investigation Bureau as per section 12 of the penal code.[75] In November 2020, the five-judge constitutional bench refused to issue an interim order challenging the Nepal Communist Party Vice-Chair Bamdev Gautam's appointment to the National Assembly, however, one of the judges Justice Ishwar Prasad Khatiwada, gave a dissenting opinion and contested the appointment of Bamdev Gautam to the National Assembly.[76] The politicisation of court in Nepal and the transition subsequent has not been peaceful, there have been illustrations to showcase the excessive interference of executive and legislature over the judiciary, leading to a state of a constitutional crisis. When Justice Karki prosecuted three former Chiefs of Nepal Police on a corruption charge, she was

70 See generally, Zhu, G & Kouroutakis, *The Role Of The Judiciary And The Supreme Court In The Constitution-Making Process: The Case Of Nepal*, 55 (1) *Stanford Journal Of International Law* 69-82 (2009).

71 NEPAL Const. 2015, Preamble.

72 Bharatmani Jungam & others v. Office of the President & others [Supreme Court] Nov. 25, 2011, Writ No. 68- ws-0014, 4–5 (Nep.).

73 Madhav Kumar Basnet and others v. Government of Nepal, WN 069-WS-0057, 2014; See also, Suman Adhikari & others v. Office of the Prime Minister, NKP 2074 BS (2015). Prakashmani Sharma v. Nepal Government, SCN, Writ No. 064 (2009). Prem Bahadur Khadka v. Nepal Government of Nepal, WN 2064/0719 (2008). Women for Human Rights, Single-women Group and Lili Thapa v. Prime Minister and Office of Council of Ministers, NKP, 2062 BS (2005). Reena Bajracharya and Others v. Royal Nepal Corporations, Cabinet Secretariat and Others, NKP 2057 BS 376 (2002)

74 David Pimentel, *Judicial Independence at Crossroads: Grappling with Ideology and History in the New Nepali Constitution*, 21(2) Ind. Int'l & Comp. L. Rev.

75 Sunil Ranjan Singh v. Government of Nepal and others (067-wo-1043).

76 Adv Dinesh Tripathi v. Office of the President and others (077-cc-003); *See also*, Ram Kumar Kamat, *Path to NA, Cabinet Cleared for Gautam*, The Himalayan (Nov. 12, 2020) https://thehimalayantimes.com/nepal/path-to-na-cabinet-cleared-for-gautam.

charged on the grounds of biasness and an impeachment motion was brought against her, similar kinds of instances have been noted in relation to weakening the judicial system and further the interest of the elites.[77] Nepal has a long way ahead to achieve the goals of judicial independence and judicial impartiality, only then the value of judicial dissent can be fully realised without the fear of facing huge opposition from the legislature and the executive.

Bangladesh

Bangladesh is perceived as an unstable democracy, for almost the majority of its existence, it has been under military-autocratic and nearly autocratic regimes.[78] The Constitution of Bangladesh affirms a democratic form of governance and establishes constitutional supremacy, judicial review, judicial independence and enumerates certain rights.[79] In Bangladesh, judicialization of politics has recently embraced the phase of unprincipled and unpragmatic judicial intrusion into "mega-politics".[80] There are various illustrations of judicial involvement in political issues.[81] However, in one of the dissenting opinions with regard to the validity of the Thirteenth Amendment, Justice Ali held it to be valid and not violative of the basic structure of the Constitution of Bangladesh on the grounds of republican and democratic structures of the state.[82] Dissenting opinions depending upon the political climate of the country is generally not a norm, there has been high intolerance in the country for those who dissent, including the judiciary, civil society and bureaucracy.[83] Thus, in light of such constitutional instability, there is a need for structured augmentation and institutional freedom in relation to the judicial role in Bangladesh.

Sri-Lanka

The Government of Sri Lanka has undertaken the task of transforming the civic space,

77 Ram Kumar Bhandari, *Nepal: Politicisation of the Supreme Court and its Impact on Justice Process in Transition*, JUSTICEINFO.NET (May 22, 2017) https://www.justiceinfo.net/en/33394-nepal-politicisation-of-the-supreme-court-and-its-impact-on-justice-process-in-transition.html.

78 Tushnet, *supra* note 57.

79 PEOPLE'S REPUBLIC OF BANGLADESH. CONST.

80 Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANNUAL REVIEW OF POLITICAL SCIENCE 93–118 (2008).

81 Mosharraf Hossain v. Bangladesh, (2004) 56 DLR (AD) 13; *See also,* Dr. Mohiuddin Farooque v. Bangladesh, (1998) 50 DLR (HCD) 84, 97; *See also,* Siddique Ahmed v. Government of Bangladesh and others*,* (2013) 65 DLR (AD), Abdul Mannan Khan v. Bangladesh, (2012) 64 DLR (AD) 1, Saleem Ullah v. Bangladesh*,* (2005) 57 DLR (HCD) 171.

82 Abdul Manan Khan v. Government of Bangladesh, (2012) 64 DLR (AD) 1, 472.

83 Md. Rizwanul Islam, *The Lack of Dissent in Judgments*, THE DAILY STAR (Oct. 12, 2017) https://www.thedailystar.net/law-our-rights/the-lack-dissent-judgments-1474249.

leading to curtailment in freedom of speech and expression.[84] Even the judiciary has been targeted in government sanctioned abuses. International human rights watchdogs like Amnesty International have also expressed their concern on the status of rule of law and "political victimisation" undertaken by the government under the leadership of Gotabaya Rajapaksa.[85] There has also been huge political interference against those charged with the prosecution of serious human rights violations, due to which the courts in Sri Lanka have been struggling to maintain their independence.[86] There are various factors that emerge in relation to judicial independence and judicial dissent in Sri Lanka, firstly, the appointment process is highly political and manipulated, in 1988, a seven year junior judge was preferred as a Chief Justice, only because the President was not in favour of the senior-most judge because of his dissenting opinions.[87] Secondly, such influenced and manipulated appointments of Chief Justice leads to curtailment and control of the exercise of judicial power by other judges.[88] As remarked during the tenure of Chief Justice Silva, there were far fewer dissenting opinions.[89] Also, the impeachment of Chief Justice Shirani Bandaranayake, accord support to eroding democratic institution in Sri Lanka.[90] Failing judicial standards in Sri Lanka is a result of institutional breakdown and failure of political will, until the political influences are minimised, the role of the judiciary in the sphere of constitutional structure will remain disputed.

Conclusion

Judicial independence can be threatened by external and well as internal biases. Impartiality and independence of judges have been firmly established, rooted and deeply engrained in the idea of constitutionalism. With the global wave of democratization sweeping the world, the South Asian countries specifically because of their long-standing history of

84 M.J.A. Cooray, *Judicial Role under the Constitutions of Ceylon/Sri Lanka*, Colombo (1982).

85 Lakshman Marasinghe, *The Evolution of Constitutional Governance in Sri Lanka*, 8 Colombo (2007); *See also*, L.J.M. Cooray, *Constitutional Government in Sri Lanka* Colombo 1796-1977.

86 Marasinghe, *Constitutionalism: A Broader Perspective*, Colombo 33 (2004); *See also*, H.L. de Silva, *Sri Lanka: A Nation in Conflict: Threats to Sovereignty, Territorial Integrity, Democratic Governance and Peace*, Op. Cit. 412.

87 Wickramaratne, *Fundamental Rights in Sri Lanka*, Op. Cit. 81.

88 Victor Ivan, *An Unfinished Struggle: An Investigative Exposure of Sri Lanka's Judiciary and the Chief Justice* 3 Maharagama 221 (2007).

89 Kishali Pinto-Jayawardena and Lisa Kois, *Sri Lanka: The Right Not to be Tortured: A Critical Analysis of the Judicial Response,* 9 Columbo (2009); *See also,* Weerawansha v. Attorney General, (2000) 1 LRC 407.

90 Hensman, Rohini, *Independent Judiciary and Rule of Law: Demolished in Sri Lanka*, 48 (9) Economic and Political Weekly 16-19 (2013).

colonization and distinct cultural, political and social values, have been often perceived to be structured on differing forms of constitutionalism. Each of these countries, India, Pakistan, Bangladesh, Nepal and Sri Lanka, in some form or the other, have established judicial independence within their own constitutional framework, but often the role of the judiciary has been analysed with much caution and attention. Recently, the role of the courts in almost all these countries have been the subject matter of concern due to various reasons, over-judicialization of politics has been a major element that has emerged in this context and has brought back the attention and the need to re-visit the role of dissenting judgments in these jurisdictions.

Though the notion of having separate judgment is widespread in the European Union, it often has a more deeply seated justification to it, depending on the "internal-autonomy" and "independence" of individual judges. As history has been evident that courts can readily be used as a tool for furthering maligned interests of the political elites as well as bureaucrats, the idea of judicial dissent can be overlooked. Judicial dissents undeniably in certain cases have been accepted in future by larger benches as a correct interpretation or standing on a principle of law. In addition, a lack of judicial dissent can also lead a person to question the independence and vibrancy of judicial institutions in a country. In certain jurisdictions, lack of judicial dissent can be reflective of extraneous pressures or internal pressures by senior most judges or can also be because of deeply engrained deference or judicial practice of concurrence. However, even in such cases, it cannot be denied that even judiciary is fallible, therefore, it becomes important, that the judges retain their impartiality and individualistic understanding of what the Constitution actually stands for, and also to further the aspirational goals of the Constitution.

In this context, the political upheaval and unrest which the South Asian countries have been facing, the presence of judicial dissent can showcase the robust existence of judicial institutions to balance the extremities of governmental powers and to protect the citizens against such excesses. In India, judicial dissents though have been in existence but the issue of political and bureaucratic dominance over judiciary cannot be denied altogether, with instances of suppression of dissent being apparent even in the judicial sphere, all that is concerning in such cases, is maintaining the sanctity of constitutional values and morals in terms of democratic ethos. In Pakistan, the judiciary has been involved heavily in political matters, which has led to a tussle of war between the judiciary, on one hand and the legislative and executive wing on another. Though one can find traces of judicial dissents in Pakistan, yet, the judiciary has been often over-shadowed and tossed aside whenever it has vehemently opposed or been in complete disregard of the interests of the elites. In

Nepal, due to huge political upheaval and constitutional difficulties, the judiciary has yet to emerge as a strong institution on the face of constitutional developments which needs to be undertaken currently. However, there are dissenting opinions in the constitutional history of Nepal, but often the judges who decide against the interests of the governing parties remain unprotected and are either impeached or corruption charges are levied against them. In Bangladesh and Sri Lanka, due to suppression of dissent, the judiciary has always suffered due to political excesses, and because of politically motivated judicial appointments, lack of structured institutional mechanism, the judiciary remains in the shadows of the governing elites. In light of this, there is a need to enhance the identity of judicial institutions in South Asian countries to further the process of democratization, however, having said that, it would require first hand, to establish a stagnant constitutional mechanism in place for the judiciary to work independently within its constitutional boundaries; for much of these South Asian countries, this yet remains to be realised in practica.