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GNLU and CAN Foundation jointly organized an online interactive session on "Dissents That Made a Difference: India & Abroad"

Gandhinagar, September 05, 2020: Gujarat National Law University, Gandhinagar (GNLU) and CAN Foundation jointly organized an online interactive session with Hon'ble Mr Justice Sanjay Kishan Kaul, Judge, Supreme Court of India and Mr Dhruv Mehta, Senior Advocate, Supreme Court of India on "Dissents That Made a Difference: India & Abroad."

Justice Kaul said that diversity exists across religions, cultures and communities. Diversity exists in thoughts and expressed in opinions. In a democratic society, dissents are the manifestation of such Diversity. In India, dissent has been a part and parcel of our Constitutional Ethos, the Foundational values which were laid down by our freedom struggle. It is in this regard that dissent is a vital feature of our Justice Delivery system. Collaboration and collective decision making are often considered to be the hallmark of any Judicial Institution, but never at the cost of disparagement of individual voices, that seek to stray from that collective thought process through an application of intellectual rigour and critical thinking.

Justice Kaul said that a Judgment is an expression of opinion and nothing more than that. So, an opinion may be good law today, a good law tomorrow. It may have been good law yesterday, and the fact that it emanates from a High Court or the highest court does not make a difference. The institution is such that it seeks to review its own judgment, it sets asides the judgments in appeal, it retakes its path. It's a very important part of the development of the legal system and the legal process.

Justice Kaul observed that the power given to the Judges to express their judicial opinion and belief stems from the fundamental freedom of speech and expression.

Justice Kaul said that a dissenting opinion is indicative of what 'could have been' and quoted Former US Supreme Court Chief Justice, Justice Charles Evan Hughes who said, "A dissent in the 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."

Justice Kaul explored several foreign and Indian judgements wherein the dissenting opinions expressed by a minority have later become the law of the land.

He referred to the case of Liversidge v. Anderson of 1941, which concerned itself with the relationship between executive and judiciary, especially during the war and national emergency. In response to growing national security concerns, the legislation enacted permitted the secretary of state to arrest people with reasonable cause that they inter alia had hostile origin or association. The petitioner was detained on the ground that there was 'reasonable cause to believe that he was a person of hostile association'. The case that reached before the Appellate Committee of House of Lords was 'reasonable cause'. The question was about the meaning of the phrase 'reasonable cause' and whether the Secretary of State's standards were to be evaluated on the objective standard of a reasonable man or based on his personal standards. Four out of five law lords being the majority held that the power conferred by the legislature was subject of the reasonable cause of belief and reliance must be placed on the secretary's beliefs and good faith and there was such a good cause and courts cannot enquire into the grounds of this belief and it would be inappropriate to deal with the confidential matters of national security as the same was the domain of the executive. Lord Atkin who penned down his famous and fiery dissent remarked, 'I Protest, even if I do it alone, against a strained construction put upon words' as he opined that the term 'reasonable cause to believe' would mean that the actions of the secretary must be evaluated by employing an objective and reasonable standard to remove any unconditional power. He unflinchingly stated that the majority on the question of liberty, 'show themselves more executive minded than the executive', a phrase which is very commonly used in public domain nowadays.

Fast-forwarding to a few decades later, we find similar unfolding of whims in the famous judgment in ADM Jabalpur v. Shivakant Shukla of 1976, which was an ignominious moment when Indian Judiciary borrowed a leaf from Liversidge. The Habeas Corpus case dealt with the challenge concerned 'non-speaking order under MISA Act'. The issue before the 5-Judges bench was whether, in the light of the suspension of the enforcement of fundamental rights, a petition of habeas corpus is maintainable in the high courts. The Majority upheld the state's power to detain people who have no right to move a writ of habeas corpus before any high court challenging the legality of such detention. Justice HR Khanna finding himself at the crossroads chose to stand alone in this dissent. His dissent revolved around the fulcrum of Article 21 and finding that the right conferred was inherent to all of us and could not merely be suspended by a declaration of emergency. Such a suspension would leave a person remedy-less against the deprivation of their life and liberty by the state especially when the same is without the authority of law. Justice Khanna fittingly laid down the power of dissent by remarking that, 'even though his view was at variance with the majority, the same had not stood in the way of expressing his views. While unanimity is desirable, unanimity which is merely formal and which is recorded at the expense of strong conflicting views is not desirable in the court of last resort.' The dissent cost Justice Khanna the Chief Justice-ship of India, and the rest of his judicial career. Justice PN Bhagwati in an interview in 2011 agreed that the majority judgment of which he was part of was incorrect. In the more recent movement of redemption, Supreme Court in KT Puttaswamy categorically overruled the Habeas Corpus and the

darkest chapter of history was buried. The celebrated dissenting opinion of Justice H.R. Khanna in that case now holds the field.

He referred to another such dissenting opinion in Kharak Singh v State of UP. The petitioner was released from the charge of robbery and being a part of an armed gang due to lack of robbery. A history sheet was opened against him under the UP Police regulations. Under these regulations, the police had wide power. In a writ petition urged before the SC by the petitioner that such surveillance violated his right to life, liberty and dignity under the constant surveillance which intruded the right to privacy. The petition also included infringement to right to freedom of movement due to police action under Art 19. A six-Judge bench was constituted. The majority held that measures like secret picketing and movement surveillance in no way infringed the guarantee under Article 19(1)(a) under art 21. Majority in succinct held that the right to privacy is not a fundamental right. Justice Subbarao held in Kharak Singh that police regulations were unconstitutional in its entirety as it infringes Art 19 and 21 of the constitution which is its very essence. He in his visionary words said that "nothing is more delirious to man's happiness than a calculated interference to his privacy." The majority decisions in Kharak Singh has since been overruled and the dissenting opinion of Justice Subbarao prevails.

Justice Kaul pointed out that the trend of judicial dissents or separate opinion is varied across the globe. Jurisdictions like France, Italy, Luxembourg have no concept of a separate opinion. On this particularity, it becomes imperative that we not only value the importance of being able to dissent but also ensure that we do our bit to preserve this practice.

Senior Advocate Dhruv Mehta referred to Justice Fazl Ali's dissent in AK Gopalan vs State of Madras (1950), one of the earliest judgments of the Supreme Court. The Gopalan majority had held Article 21 of the Constitution, which stipulated that "no person shall be deprived of his life or personal liberty except according to the procedure established by law", provided only narrow protection against lawless infractions of bodily integrity and personal freedom by the State. Justice Fazl Ali, in his dissenting judgement, argued instead that the phrase "procedure established by law" required that deprivations of life or personal liberty must conform to standards that were themselves just, fair, and reasonable. Justice Fazl Ali's dissent in AK Gopalan became law two decades later.

Mr Mehta said that Justice Subba Rao was particular about personal liberty and fundamental rights and added that he had issued as many as 116 dissents.

In his closing remarks, Justice Kaul said, "It is necessary to say that the problem is not of dissent. Every society must have opinions and point of view. The debasement, however, is in the manner of dissent……We have lost respect for each other's opinion. It isn't right or wrong, it is a question of time. Courts are faced with a situation where political matters under the guise of PILs lead to shrill discourse. We have a democratic government under the Constitution, there is a separation of

powers, hence Courts can't be unelected governments. Checks and balances are necessary. It's a very delicate balance and I think the segregation of powers must be respected. Dissent by Judges must be treated with a constructive approach and there are limitations to that criticism. Dissent has and will always have importance."

Earlier, in his welcome address, GNLU Director Dr Shanthakumar described Justice Kaul as a guardian of free speech.

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