

State on the other side

Supreme Court

Human rights activists often advance the claim that government is an anti-liberal establishment. During a discussion on individual liberty and state intrusion, a friend raised a counter-question: Why is the government always perceived as an institution resisting individual rights? His point was that government, after all, is a community of individuals who constitute it.

In India, however, the current trends would indicate that state seems to take an increasingly apathetic stand on fundamental rights issues in legal adjudication. Three recent examples are instructive.

On the question of criminalisation of marital rape, the [Centre made several regressive arguments](#) before the Delhi High Court. It was argued that what might appear to be marital rape to an individual wife might not appear so to others. With this argument, the government sought to make a distinction between marital rape and other kinds of rape. However, the fact that the offence is committed in a marital union does not change the character or the nature of the offence. Only non-consensual sexual acts will qualify as rape and not all sexual acts. It is consent that reverses the equation.

The second claim was that penalising marital rape would [destabilise the institution of marriage](#). Now, whatever the benefits of collective institutions are, the value of individual liberty ought to triumph them. Individuals are the ultimate bearers of rights and duties in a constitutional system. They are the morally significant units in a liberal democracy and the political authority of the state is always constrained by them.

The Supreme Court is currently examining the legality of an unusual judgment passed by the Kerala High Court of nullifying the marriage of a 24-year-old girl called Akhila/Hadiya. In the high court, Akhila's parents, who were the petitioners, argued that their daughter had been subject to indoctrination and forced conversion to Islam and that she was unable to take an independent decision in the matter. The marriage of their daughter, they submitted, was bogus and void.

On Kerala conversion case: Choice & conversion

Quite controversially, without any proper medical examination or other authentic evidence, the government argued that Akhila was unable to make an informed decision about her own life. The basic assumption that certain adults are incapable of making decisions about their own life offends individual freedom. It is important to respect the fact that individuals can also make wrong decisions. It is quite crucial that adults are able to think freely and the state is bound to protect and preserve their capacity to do so. Only when the state system ensures individual self-governance can collective democratic self-governance be meaningfully exercised. Even further, it is correctly argued by scholars that the legitimacy of the state is heavily dependent on its respect for individual autonomy.

The [Supreme Court verdict on privacy](#) was certainly momentous in Indian constitutional law. However, the stand of the Central government regarding the right to privacy was not impressive. The then Attorney General argued that privacy does not enjoy the status of a fundamental right under the Constitution. By relying on two earlier decisions of the Supreme Court, it was asserted that "Indians could claim no constitutional right of privacy".

Though the arguments are less bizarre than the first two cases, this claim is vulnerable. To put it

simply, constitutions are not to be read like commercial contracts. Constitutions talk about rights in an abstract language and the Indian Constitution is no exception. Article 21 merely states about non-deprivation of life or personal liberty. What constitutes personal liberty, for instance, is a matter of constitutional interpretation and context. Merely because a right is not expressly conferred by the Constitution, it does not cease to exist. Many unwritten rights are, after all, manifestations of written provisions.

It might be argued that these are three dissimilar incidents. But the fact remains that in such prime issues of debate, the stand taken by the executive has far-reaching repercussions on politics and law. The current pattern of governmental approach to rights shows opposition to individual rights. Perhaps, one cannot expect an executive that is politically averse to personal liberty to be a strong defender of constitutional rights in law courts.

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