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IMPACTING A WOMAN'S FREEDOM TO REPRODUCTIVE CHOICES

Relevant for: Indian Society | Topic: Women Issues

November 02, 2023 12:16 am | Updated 09:09 am IST

"The judgment places the rights of a foetus at a pedestal, above that of the rights of a pregnant woman to her privacy and dignity' | Photo Credit: Getty Images/iStockphoto

On October 16, in *X vs Union of India*, the Supreme Court of India declined permission to a woman who was seeking to terminate a 26 week-long pregnancy. A Bench presided over by the Chief Justice of India (CJI), D.Y. Chandrachud, held that the woman's case fell outside the scope of the Medical Termination of Pregnancy (MTP) Act, 1971

The Court said the statute permitted the termination of pregnancy beyond 24 weeks only in cases where the foetus exhibited substantial abnormality, or where the woman's life was under direct threat. Here, since doctors would have to terminate a "viable foetus", the Court rejected the plea to exercise its extraordinary powers.

The judgment falls short of bestowing any explicit rights to the unborn. But the upshot of its conclusion is just that: when a foetus becomes viable, and is capable of surviving outside the mother's uterus, the woman's right to choose stands extinguished, barring circumstances where the specific conditions outlined in the MTP Act are met.

In so holding, the judgment suffers from at least two errors. The first stems from the Court's failure to ask itself what ought to be seen as central questions to resolving the dispute: Does a foetus enjoy an autonomous moral status? Does it have legal standing? Is it capable of exercising constitutional rights? The judgment does not engage with these questions and, as a result, places the rights of a foetus at a pedestal, above that of the rights of a pregnant woman to her privacy and dignity.

Second, the Court fails to examine whether the MTP Act is merely an enabling legislation. Does the statute facilitate the exercise of a fundamental right? Or, do its exemptions constitute a conferral of rights in and by themselves? Had these questions been posed and answered, the Court may well have considered whether a woman ought to be allowed to terminate her pregnancy outside the terms spelled out in the legislation. If the right to freely make reproductive choices is fundamental, flowing from the Constitution, the Court ought to scarcely feel injuncted from issuing directions beyond the MTP Act's remit.

Consider the facts. The petitioner, a 27-year-old married woman, X, with two children, the

youngest barely a year old, wants her pregnancy terminated. She became aware of her pregnancy only 20 weeks in, as she had lactational amenorrhea — a condition in which women who are breastfeeding are also amenorrhoeic, that is not menstruating. The petitioner submitted before the Court that when she ultimately underwent an ultrasound scan (owing to symptoms of nausea and abdominal discomfort), she was found to be 24 weeks pregnant.

X made two chief pleas: one, she submitted, that she was suffering from post-partum depression and her mental condition did not allow her to raise another child; and two, her husband, she said, was the only earning member of the family and they could ill-afford to care for a third child.

At the first instance, on October 9, the Court, on examining a report submitted by a medical board constituted by the All India Institute of Medical Sciences ruled in her favour. To allow the pregnancy to continue, a Bench comprising Justices Hima Kohli and B.V. Nagarathna held, could have a serious bearing on the petitioner's mental health. But, on the following day, the Union government went back to Court and said that one of the members on the medical board had written in, asking for a clarification on whether the termination could go ahead, given the viable status of the foetus.

When the Bench reassembled, on October 11, the petitioner remained resolute in her plea. But the two judges found themselves disagreeing with each other. Justice Kohli said her "judicial conscience" did not allow her to permit an abortion. Justice Nagarathna held that the petitioner's decision must be respected. The woman's choice, she ruled, was paramount, and her right to reproductive health included a right to an abortion. What is more, a foetus, she found, is "dependant on the mother and cannot be recognised as an individual personality from that of its mother as its very existence is owed to the mother".

This impasse between the two judges led to the constitution of a separate Bench presided over by the CJI. A new report from the medical board confirmed that the foetus was viable and had no abnormalities, and that the medication that the petitioner was on would not in any way endanger the pregnancy. Given that neither of the exemptions available under the MTP Act were met, the Court now ruled that its earlier order had to be recalled.

But in ruling this way, the verdict runs athwart the Court's recent jurisprudence on the fundamental rights to privacy and dignity. Indeed, it was only last year, in *X vs The Govt. of Delhi*, that the Court, relying on its nine-judge Bench ruling in *Puttaswamy*, held that the right to privacy — implicit in Article 21 of the Constitution —enabled individuals to exercise autonomy over their body and mind, and allowed women complete freedom to make reproductive choices.

There, Justice Chandrachud wrote, "…In case of an unwanted or incidental pregnancy, the burden invariably falls on the pregnant woman affecting her mental and physical health. Article 21 of the Constitution recognizes and protects the right of a woman to undergo termination of pregnancy if her mental or physical health is at stake. Importantly, it is the woman alone who has the right over her body and is the ultimate decision-maker on the question of whether she wants to undergo an abortion." The judgment further found that a woman's right to make reproductive choices without undue interference from the State sprang out of the very idea of human dignity.

If this is the correct position of law, surely the MTP Act must be seen as an enabling legislation, not as a law that confers a liberty as much as a law that seeks to provide a means to enforcing a fundamental right. Viewed thus, wherever the statute's mandate is found inadequate by a court of law, it would only be imperative that directions are issued to further the exercise of a woman's right to choose. But the ruling in *X vs Union of India* fails to do this.

Even more damaging, though, is the judgment's implicit assertion that foetuses have constitutional rights. Our jurisprudence on abortion has been built on a converse premise. The guarantees of Articles 14 and 21 of the Constitution — the rights to equal protection and life — are conferred on persons, and the Constitution decidedly does not award personhood to a foetus. As it happens, even the MTP Act makes no such assertion. For if it did, it could not plausibly create an exception from the timelines it stipulates to cases where a pregnant woman's life is under immediate and direct threat.

As Justice Nagarathna held, there is no place within our constitutional structure to see a foetus as anything but dependent on the mother. To see it as a separate, distinct personality would be tantamount to conferring a set of rights on it that the Constitution grants to no other class of person. Such a reading would efface altogether a jurisprudence that grants primacy to a woman's freedom to make reproductive choices — a right that is intrinsic in Articles 14 and 21 of the Constitution.

Suhrith Parthasarathy is an advocate practising in the Madras High Court

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GIVING THE URBAN INDIAN A BETTER LIFE

Relevant for: Indian Society | Topic: Urbanization, their problems and their remedies incl. Migration & Smart Cities

November 06, 2023 01:30 am | Updated 01:30 am IST

“The need now is to turn to sustainable and ‘ecological urbanization’.” | Photo Credit: SUSHIL KUMAR VERMA

The theme of World Cities Day (October 31) this year was “Financing Sustainable Urban Future for All.” Finances must be channelled in the right direction such that urban futures which are being cut short on account of flawed urbanisation are checked, and, in turn, cities made liveable and safe. It is atrocious that air pollution is taking away over 10% of our life expectancy.

A report released by The Energy Policy Institute at Chicago (EPIC) shows that out of the 50 most polluted cities in the world, 39 are in India. Pollution directly affects the health of people, and an average Indian loses 5.3 years of his life expectancy due to this; for the residents of Delhi, it is 11.9 years. This data only highlights the need for policy shifts to ensure better and liveable futures.

Pollution results in burning eyes, irritation of the nose and throat, coughing, choked breath, and asthma apart from causing cardiovascular diseases. Recently, a media report labelled air pollution in Mumbai as “Death by Breath” due to very unsatisfactory Air Quality Index levels. Bad air is not limited to the Indo-Gangetic plains anymore where the argument of inversion of temperature and slowing down of wind speeds was considered as a factor for poor air quality. The situation is getting to be bad even in India’s coastal cities.

Why is the problem so acute in Indian cities? The overall development strategy of urban development in India — apart from proper execution of enforcement by agencies — needs a paradigm shift. The need now is to turn to sustainable and “ecological urbanization”. The trajectory of urban development, where the focus is more on real estate development, a widening of roads, allowing large fuel guzzling vehicles on them, in turn squeezing the space meant for pedestrians, and redevelopment are the major reasons for increased pollution in Indian cities. Road dust, concrete batching, polluting industrial units and their extension in the cities, and vehicular emissions are key factors too. It is estimated that motorised transport alone is the cause for 60% of urban pollution. The green lungs of the cities, water bodies, urban forests, and green cover on urban commons, and urban agriculture have all reported shrinkage, even as “grey” infrastructure has seen rapid expansion. Hence, the priorities need to be set right.

During winter in North India, there is a hullabaloo over the burning of paddy straw (called Parali)

as being the cause for smog (smoke and particulate matter). This is partially true. The burning of paddy, primarily in Haryana and Punjab, only escalates the problem. But this is only a small and seasonal part of the problem. India's automobile market has risen in value from $100 billion and is expected to touch almost $160 billion by 2027, registering a growth of 8.1%. Between July 2023 to September 2023, passenger and commercial vehicles sales touched 13,22,818 units. While this figure is not only limited to urban India, it is clear that such growth must serve as an impetus to the new design of and direction to urban development. Widening roads, in turn inducing people to buy more cars, while ignoring the fact that traffic snarls are increasing each day, thus leading to more pollution levels, is not the way to go. Construction activities, which are on the rise in almost every Indian city, contribute to roughly 10% of air pollution in the National Capital Region region. There are hardly any steps being taken to monitor and control construction activities with formulated standard operating procedures.

City residents, unfortunately, have hardly any participatory role and are forced to become passive bystanders in the urbanisation process.

There is a compelling need to have an alternative strategy of city building, where the focus is on more public transport, having secure pedestrian paths and bicycle lanes with the creation of a post of bicycle officers, and regulating construction activities through standard operating procedures.

There needs to be good public transport, with investment in buses for towns and cities. It is estimated that nearly 10 lakh buses would need to be added to the existing bus fleet in cities to meet the demands of urban mobility. There must be firm initiatives that emulate the Jawaharlal Nehru National Urban Renewal Mission. Public transport must be made accessible and affordable to people, 85% of whom are in the informal sector.

Strong steps need to be taken to control private motorised vehicular movement in the cities. A congestion tax being levied on private car owners driving during peak hours can be thought of. Likewise, an odd number-even number plate formula can be another important intervention. Some cities have a no car day on certain days — an example that should be put into practice by those in power and with influence. City leaders, the elite as well State Chief Ministers should use public transport at least once a day as an example of token motivation. Transitioning to green vehicles is important.

Delhi has a Graded Response Action Plan, or GRAP (a set of anti-air pollution measures), the moment air quality deteriorates. There are four different sets that get activated based on the quality of air. Such a mechanism must be adopted in other Indian cities as well.

There should be zero acceptance of industrial pollution and real-time monitoring must become a reality. There must be street supervision by residents instead of waiting for the statutory bodies to react, which urban local bodies can ensure.

Urban commons (ponds, water bodies, urban forests, parks, playgrounds) are another major area that should not at all be allowed to be taken over by either public or private bodies for private gains. Urban communities must protect, nurture and expand them.

Ian McHarg's influential book, written in the 1960s, Designing with Nature, synthesised and generalised ecological wisdom shaping landscape planning and design as a way to build our cities. However, our urban development strategy has been the inverse of that. Massive land use changes and the handing over of open spaces to real estate developers do not look to be ending anytime soon. Redevelopment across the country has resulted in pollution. A city's ecology is one of the first casualties and there is hardly any meaningful afforestation within a

city. Planting trees 50 kilometres away from the city does not help in curtailing pollution in the city.

So-called solutions such as smog towers or even watering roads are just cosmetic. People's empowerment through the city's governance architecture is a firm step forward. Pollution guides and standard operating procedures for various line departments and agencies must not only be made readily available to the people but should also become a part of the way of life in the city. When certain standard operating procedures were enforced without being challenged during the COVID-19 pandemic period, should not people come forward now and support implementation of the odd number-even number plate formula or even a 'no-car day' every week? For this to happen, there must be a strong GRAP-like standard operating procedure. Likewise, the medical fraternity must support the putting out of a public health advisory.

We cannot afford to let our lives be shortened by reasons such as air pollution. The poor and the marginalised are the least contributors to pollution but are the segment who are most exposed to it and who pay a heavy price. They need a better life.

Sandeep Chachra is Executive Director of Action Aid India. Tikender Singh Panwar is a former Deputy Mayor of Shimla

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WOMEN IN RED: THE HINDU EDITORIAL ON AN OPTIMUM MENSTRUAL HYGIENE POLICY

Relevant for: Developmental Issues | Topic: Health & Sanitation and related issues

November 10, 2023 12:10 am | Updated 12:10 am IST

Only in an ‘unseeing’ world would the judiciary need to set the government a deadline to do the obvious. The Supreme Court of India gave the Centre four weeks to finalise an optimum menstrual hygiene policy with focus on the distribution of sanitary napkins. The Chief Justice of India, D.Y. Chandrachud, further directed the government to set down a national model for the number of girls toilets per female population across government-aided and residential schools in the country. Menstruation is the reality for women of a particular age demographic, naturally involving a substantial percentage of half the population in the country. It is only now, over three quarters of a century after Independence, that India has come closest to even drawing up a menstrual hygiene policy. While advancements over the years, and expanding urbanisation, have brought menstrual hygiene products within reach of a larger group of young women, affordability is still an issue; access hurdles stand in the way of a wide swathe of women in semi-urban and rural areas. The evidence for this is apodictic: as per the latest National Family Health Survey-5 (NFHS), 73% of rural women and 90% of urban women use a hygienic method of menstrual protection. There was a significant improvement in the percentage of women aged 15-24 who use a hygienic method of protection during their menstrual cycle, this rose from 58% in NFHS-4 to 78% in NFHS-5, primarily sanitary napkins, cloth and locally prepared napkins. The survey also revealed the close link between education and preference for hygiene — women who have received 12 or more years of schooling are more than twice as likely to use a hygienic method compared to those with no schooling. An irrefutable link has been established between menstruation and dropping out of school, because of stigma, and patchy or no access to sanitation (in terms of access to products, toilets and water). That little has been done to address this all these years reeks of callousness.

The Centre told the Court that a draft policy had been circulated for comments from various stakeholders and that it would be ready in four weeks. A policy is only half a revolution; to complete the circle, it is crucial the government ensures access to affordable menstrual hygiene products for all menstruating girls, but also clean toilets and water wherever the women may need them. Besides, the policy should also cater to the entire lifecycle of menstruation, providing for the entire range of health and social sequelae that result from it. The government must see, cognise, and commit to serve India’s women.

judiciary (system of justice) / government / health and hygiene / demography / health / survey / education / school

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THE BIHAR CASTE SURVEY AND THE SOCIAL JUSTICE AGENDA

Relevant for: Indian Society | Topic: Salient Features of Indian Society

November 15, 2023 12:16 am | Updated 01:59 am IST

An enumerator meeting residents in Patna during the caste-based census in Bihar | Photo Credit: PTI

The government of Bihar has taken two historic steps that move it ahead of all other States in the country as well as the central government on the long road to social justice. It has conducted what amounts to a caste census (despite the legal nomenclature of a survey) and made public the population numbers associated with different caste groups. Even more important, it has now revealed, at least partially, the additional data that tell us something about the broad socio-economic status of castes.

However, the Rashtriya Janata Dal-Janata Dal (United) combine may squander its well-earned lead if it falters in the crucial third step — of using the caste survey data to rejuvenate the social justice agenda. Going by the measures announced so far – expansion of reservations to 65% — Bihar Chief Minister Nitish Kumar seems intent on pouring new wine into old bottles.

The new context that frames the social justice agenda in the third decade of the 21st century demands a response that goes beyond the strategies of the 20th century. This new context has four main dimensions.

First, there is the global economic situation, where neoliberal policies have re-positioned States as market-enablers while severely constraining their social welfare capabilities. The hard fact is that despite — or because of? — four decades of market-friendly policies, the formal sector of the Indian economy offers less than 8% of all jobs. While reservation remains relevant as a mode of providing representation to marginalised groups, it is hopelessly inadequate as a means for reducing caste inequalities. The challenge — and it is a formidable one — is to imagine new ways of providing on a mass scale what the International Labour Organization (ILO) calls “decent work”.

Also read | Poverty highest among Scheduled Castes, lowest among Kayasths

Second, like many other countries in the world, India today is ruled by an authoritarian regime built around a personality cult focused on a single leader. The important point is that the hegemonic power of this regime is being used to alter the shape of the Indian state like never before in the history of our republic. Core constitutional norms such as the system of checks and

balances between different organs of state; or the distinction between government, party and individual leader; or the basic federal structure of the Indian union are being undermined in ways that are already hard to reverse and may soon become irreversible.

Unlike the first two dimensions of the current context, the last two are explicitly related to caste. The third and most visible aspect of our society and polity today is the arrival of an overt and aggressive north-Indian Hindu upper-caste hegemony in the guise of the ideology called Hindutva. This hegemony itself is not new. Indeed, it has been a permanent feature since Independence, with a brief interruption during the 1990s. But while the earlier upper-caste dominance of the Nehru-era wore the garb of secularism and socialism and was neither overt nor aggressive, the Modi-era version is the opposite in each of these respects. Today, we have a violently anti-secular, unabashedly crony-capitalist form of dominance that insists not only on one nation, one leader and one religion but also on there being one and only one way of being Hindu, or even of being Indian. The caste hierarchies of Hinduism are attempted to be folded into a larger Hindu identity shaped by the upper castes, and defined by a visceral hatred towards Muslims and, to a lesser extent, towards Christians.

The fourth dimension — the most challenging from the point of view of social justice — has to do with the internal differentiations that are now an undeniable aspect of every major caste group. In other words, not only is there more than one class in every caste group but also the interests of these different classes cannot be easily harmonised in a one-dimensional caste politics. The indications are that caste politics will have to become more and more coalitional and address similar class-fractions across multiple castes if it is to remain electorally viable. This may also precipitate a class polarisation within castes with unpredictable consequences. There are intriguing asymmetries here that need to be considered: it is easier for upper caste politics to deal with the problem of poor upper castes than it is for lower caste politics to deal with the problem of rich lower castes. The former goes with the grain of democratic politics in general, while the latter is against the grain.

The ruling coalition in Bihar stands at a historic crossroads. It has the opportunity to inaugurate a new kind of caste politics that takes account of the various dimensions of our present. To do this, the habits of the past will have to be broken, while maintaining continuity with the core of the social justice agenda. The crucial point, obscured in the past but highlighted by the current conjuncture, is that caste politics can no longer be automatically equated with the politics of social justice. If this equation was taken for granted in the past, it was largely because of a misrecognition — itself prompted by the dominant upper caste ideology — that “caste politics” effectively meant lower caste politics. While the immediate effect of this misrecognition was to make upper caste politics invisible, it also shielded lower caste politics from critical scrutiny.

On the other hand, the politics of the lower castes, even when it is not fighting for social justice but for the interests of a particular community, can still be an effective counter to the politics of Hindutva, which is the current avatar of the politics of the upper caste neo-elites. Bihar has already been playing this role to some extent by halting the triumphant march of Hindutva politics across north India. Along with Karnataka, Kerala and Rajasthan in recent times, Bihar has also led the resistance against the erosion of Indian federalism. The very act of conducting a caste count was an assertion of the rights of States to fashion locally-relevant policies.

The survey itself raises questions that will profoundly affect our collective future as a nation. A census is ultimately about aggregated numbers, and as such, it privileges larger numbers — in other words, it carries the seed of majoritarianism. In the context of a majority-rule electoral system, the counting of identities like castes seems to juxtapose the “portrait” model of representation against a “proxy” model. Should our political representatives be judged by how well they resemble us (like a portrait), or by how well they act on our behalf (like proxies)? Bihar

has the opportunity to show us that even if sharing the same identity is a necessary condition for representation today, it must not be accepted as sufficient.

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SAME-SEX COUPLES: A JUDGE TO THE RESCUE

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

November 23, 2023 01:47 am | Updated 01:47 am IST

Madras High Court judge Justice Anand Venkatesh. Photo: Special Arrangement

Justice Anand Venkatesh of the Madras High Court has innovated yet again. On November 17, 2023, in *Sushma vs Commissioner of Police*, he tasked the State government with working out a "Deed of Familial Association" which would provide legal status to relationships between same-sex couples and other LGBTQIA+ couples. This order is truly trendsetting in the light of the recent Supreme Court decision in *Supriyo vs Union of India* wherein the Supreme Court refused to recognise the right to marry, or even the right to civil unions, of same-sex couples.

While the SC Bench in *Supriyo* was unanimous, sadly, in holding that there was no fundamental right to marry, there was a difference in the majority and minority opinions when it came to the question of civil unions. While all the judges paid eloquent lip service to the rights of queer couples to form relationships, to cohabit and to enjoy intimacy under Article 21 of the Constitution, the action was a rather different story. The minority endorsed recognition of a bouquet of entitlements but failed to carry the matter further by spelling out rights and giving focused directions. The majority wiped out even this timid advance and went into wholesale retreat by abandoning the field and leaving same-sex couples to the mercy of the government and the legislature, whose policy on this matter is clear. The State should not interfere, the State should protect them from violence (should it not for everyone?) but the State need not give them legal status from which rights and entitlements would follow. How an avowedly, and loudly, liberal and progressive Court can become so retrograde is a question rich for enquiry.

Against the backdrop of gloom and despondency, Justice Venkatesh shines not just a candle but a strong beacon lamp. What he has done is nothing short of genius. In law school, we were taught the doctrines of Maine and Graveson that the law moved from status to contract, thence to statute. Since the SC has declared that statute, i.e. the Constitution and marriage laws, cannot be invoked, this Judge has adroitly shifted from the forward line to the midfield and taken possession of the ball of contract. With this, he has fashioned the concept of a Deed (basically agreement) of Familial Association. Into this Deed, he conceptualises the inclusion of rights and protections for them against harassment and violence, and discrimination in matters of employment, housing and assimilation in society. The State government is directed to put this into effect. The analogy of a football game is that while star-studded forwards bungle five easy goals, a determined half-back boots the ball from 50 yards out into the corner of the goalkeeper's net.

Civil unions have been recognised in a few countries across all continents. Primarily created to provide recognition to same-sex couples, they refer to a legal arrangement wherein the benefits and entitlements arising from the relationship are extended to couples. This provides legal and social validity to queer couples who can now proclaim and celebrate their relationship in the face of an intolerant society and thus protect them from interference either from the State or others in society. It also stands as documentary “proof” of their relationship which would help couples in obtaining various benefits and entitlements that would previously be impossible.

A simple example would be getting a dependent visa.

This would not amount to creating a new legal institution of marriage, but a procedure to register such a contract would mean that “the State will be able to give its stamp of approval to persons, who are in a relationship in the community and to a great extent, this will enhance the status of such persons in the Society”. They will “… have protection to live in society without being disturbed or harassed”. Bravo!

So, what should the Tamil Nadu Government do now? At a minimum, establish the framework to recognise such relationships through registrations of such Deeds. However, much more is possible. The State government could enact legislation creating the institution of Civil Unions and accord such status to same-sex couples; the Supreme Court’s rationale is that this is the business of the legislature. Even more laws relating to marriage, divorce, inheritance, succession, minors, adoption etc., are all present in the Concurrent List under the Seventh Schedule to the Constitution, thereby giving powers to the State to legislate on the same. The Constitution provides the means to handle differences in legislation between State and Central legislatures, but peculiar to Tamil Nadu is another constitutional hazard in the person of its Governor, R.N. Ravi, who imagines that his antiquarian office calls the shots in a democratic Republic; hopefully, he will be straightened out by the Supreme Court soon.

Tamil Nadu has long been known for being progressive. The State can add another feather to its cap and shine as a trendsetter that respects and recognises the inherent principles of self-respect, equality and social justice. Considering that these are the planks on which the politics of the State runs, it should not be too difficult to do so.

What is remarkable about this order is that it is issued in the wake of a disastrous Supreme Court judgement which cribbed, crabbed, confined and worse, decimated hopes of equality and equal treatment before law that members of the LGBTQIA community may have harboured. With one stroke, this High Court Judge has created hope. He has worked change into the interstices of law (remember Oliver Wendell Holmes Jr. famously said “legal progress is often secreted in the interstices of legal procedure”) and expertly worked his way to arrive at a principled legal conclusion as well as a perfectly enforceable order. He deserves congratulations. This also brings hope. In this country’s troubled judicial history, it is frequently the High Courts that have come to the rescue. Remember, they did so brilliantly during the Emergency but were spectacularly upended by some famous names in the Supreme Court. It is heartwarming to see that our High Court judges continue to meet the challenge.

Sriram Panchu is a senior advocate; Vikas Muralidharan is a lecturer at Sai University

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