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Source : www.thehindu.com Date : 2023-10-05

RETRIBUTION FOR THE SOUTH, ACCOLADE FOR THE NORTH

Relevant for: Indian Polity | Topic: Issues and Challenges Pertaining to the Federal Structure, Dispute Redressal Mechanisms, and the Centre-State Relations

October 05, 2023 12:16 am | Updated 09:05 am IST

‘The problem of balancing the political representation of sub-central units that have lower populations arises in all federations’ | Photo Credit: PTI

In Indian federal democracy, a State’s relative population size gains political and economic significance. The strong linguistic identities and regional renaissances in political and social spheres propelled the southern States to scale greater heights in all spheres of development. In sharp contrast to the northern States, population control has been achieved in the southern States through social development and economic growth. In the federal political system, changes in population geography have a lasting impact on the political and economic geography.

Article 81 of the Indian Constitution stipulates that Lok Sabha constituencies in the country should be equal by the size of population. Based on the 1971 Census, the number of Lok Sabha constituencies for States was determined and frozen for the next 25 years through the 42nd Amendment Act 1976. In 2001, through the 84th Amendment Act, the freeze on the number of constituencies for each State was further prolonged until the first Census after 2026.

The population growth rates differ between the non-Hindi speaking southern States and the Hindi-speaking northern States. Between 1971 and 2011, the proportion of the population of Bihar, Chhattisgarh, Gujarat, Jharkhand, Madhya Pradesh, Rajasthan, Uttarakhand and Uttar Pradesh increased from 44% to 48.2%, whereas the proportion of population of the five southern States (Andhra Pradesh, Karnataka, Kerala, Tamil Nadu, Telangana) declined from 24.9% to 21.1%. If equal size of Lok Sabha constituencies by population is enforced today as in the population projections of 2023, the five southern States will lose 23 seats, while the northern States will gain 37. In other words, the proportion of political representation of northern States will increase by 6.81% and that of southern States will decline by 4.24%.

The problem of balancing the political representation of sub-central units that have lower populations arises in all federations. For instance, Canada has been consistently increasing the proportion of representation in the national Parliament for the less populous provinces. The attempt to equalise the size of constituencies by population is based on the dictum, “One Person, One Vote”. In a ‘First-Past-the-Post’ election system, along with a multi-party contest, voters know that only one of the contestants shall win, that is, the winner takes all. Often,

winners are elected even with less than one-third of the votes polled. If we calculate the proportion of votes secured by the winner in a constituency, it may be less than one-fifth of registered voters or even one-sixth of the total population of the constituency. A targeted vote gathering by a candidate should help to secure a win in this system. To give a perspective, from the 2019 election numbers, we can see that a Member of Parliament from the northern States of Bihar, Chhattisgarh, Gujarat, Jharkhand, Madhya Pradesh, Rajasthan, Uttarakhand, and Uttar Pradesh represent around 18 lakh registered electors, while the five southern State Member of Parliament represents 16 lakh registered electors. But in both these two groups of States, it requires only 12 lakh voters to elect a Member of Parliament. The real meaning of ‘one person, one vote’ is lost in this system. Hence, equating constituencies by the size of the population is not essential.

When family planning and population control are the stated policies of the national and regional governments in India, States that have implemented these policies and effectively controlled their population should not be penalised through reduced political representation in subsequent periods. Population control happens not only due to the implementation of family planning programmes but also because of the social change that is engineered by the leaders in the society. Population control in the southern States is a classic example of this feat. Therefore, reducing the proportional representation of southern States in the national Parliament is not only a disincentive for these States but also an incentive for others not to take population control and social change as public policy seriously. So, continuing with the freeze on the distribution of seats among States as they were in 1971 till the population stabilises in all States is the only way out.

Once in five years the Union government constitutes a Finance Commission to recommend, among other things, the share of each State in the assigned tax revenue of the Union government. Every Finance Commission recommends a formula for the horizontal distribution of the Union government’s tax revenue among the States. Population and per capita income of a State are considered to be two important indicators that are always included in the distribution formula with larger weights.

Population of a State is a measure of demand for public expenditure. Therefore, it is an important variable in the distribution formula. The first Finance Commission decided a State’s share based on its population size. The successive Finance Commissions reduced the weight assigned to the population in the distribution formula while including other variables. The Union government, in its terms of reference to the Eighth Finance Commission (1984-89), stipulated to use only the 1971 population in the distribution instead of the 1981 population. This practice continued thereafter till the Thirteenth Finance Commission (2010-15). In terms of reference for the Fourteenth Finance Commission, the Union government stipulated that apart from taking the 1971 population, the Commission may also consider demographic changes since 1971, wherever the population is to be used. Thus, for the first time, the established practice of rewarding the southern States for controlling the population was replaced by awarding the populous States. The terms of reference of the Fifteenth Finance Commission openly declared taking the 2011 population in the distribution formula. With this, the southern States lost the advantage of getting some financial rewards for population control. Therefore, the southern States have already started facing reduced financial transfers from the Union government as a reward for controlling population growth.

There is another factor that consistently brings in the current population in the distribution formula — the per capita income of a State. The per capita income of a State is considered as a proxy for its ability to raise its own revenue. The higher the per capita income of a State, the lower its share in the Union tax revenue. Lower per capita income of a State may be due to higher population for a given Gross State Domestic Product. Therefore, the higher the current

population of a State, the higher its share in the Union tax revenue. It is important to note that usually the per capita income is assigned larger weight in the distribution formula favouring the northern States. The combined share of the five southern States in the Union government's tax revenue from 2000-05 to 2021-26 declined from 21.1% to 15.8%. On the contrary, the combined share of Bihar, Chhattisgarh, Gujarat, Jharkhand, Madhya Pradesh, Rajasthan, Uttarakhand, and Uttar Pradesh increased from 51.5% to 53.2%.

Using the current population for delimitation of Lok Sabha constituencies by equalising population and in the distribution formula for assignment of Union government tax revenue to States is clear retribution for the population control efforts of the southern States and a transparent accolade for the higher growth rate of population in the northern States.

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Source : www.thehindu.com Date : 2023-10-17

DELAY AS TACTIC: ON THE CENTRE AND COLLEGIUM RELATIONSHIP

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

October 17, 2023 12:10 am | Updated 12:10 am IST

The Centre’s assurance to the Supreme Court that it would soon notify the appointment of Justice Siddharth Mridul of the Delhi High Court as Chief Justice (CJ) of the Manipur High Court is a welcome development. In another sign that it would be more accommodative of the Collegium’s recommendations, it has forwarded as many as 70 names approved by constitutional authorities in various States for appointment as judges of High Courts. The delay in notifying the appointment of Justice Mridul was apparently due to the State government taking time to give its views on the proposal. His name was recommended by the Collegium on July 5, and the delay was quite strange. The Collegium has also mooted the transfer of Justice M.V. Muralidaran, now Acting CJ in Manipur to the Calcutta High Court. A few days ago, it rejected his request that he be either retained in Manipur or allowed to go to his parent court, the Madras High Court. It is to be seen how long the Centre takes to notify his transfer. It was an order passed by Justice Muralidaran, directing the Manipur government to consider the inclusion of the Meitei community in the Scheduled Tribes category, that is seen by some as one of the triggers for the ethnic violence that rocked the State from early May. However, the order was not stayed by the Supreme Court as there was a request by the Centre that a stay order might exacerbate tensions.

The Court has been vocal about the Centre’s selective treatment of its recommendations. There are instances of the government returning names that had been reiterated more than once. In recent times, it has shown that it can have its way by merely ignoring some of the Collegium’s decisions. For instance, it ignored the proposal to appoint Justice S. Muralidhar, now retired, as CJ of the Madras High Court for so long that the Collegium ultimately rescinded its recommendation. In the case of Justice T. Raja, who was Acting CJ in Madras for an unusually long period, the recommendation to transfer him to the Rajasthan High Court was ignored by the government until his retirement. The conflict between the government and the Collegium over the appointment process is quite pronounced and often reaches a flashpoint. It is time the process was streamlined to give effect to the Supreme Court’s April 2021 order that set timelines for the government to process names recommended by the Collegium and express its reservations, if any. Once the Collegium reiterates any recommendation, it should be implemented within three to four weeks. Whatever the inadequacies and failures of the Collegium process, it does not augur well for the institution if the legal position that a reiterated decision is binding on the government is undermined.

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Source : www.thehindu.com Date : 2023-10-23

THE COURT'S 'NO FUNDAMENTAL RIGHT TO MARRY' IS WRONG

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

October 23, 2023 12:16 am | Updated 01:34 am IST

A LGBTQ+ community supporter sports a tattoo in Sanskrit that reads "Dharma protects those who protect it" in New Delhi on October 17, 2023. | Photo Credit: AP

So we have it from the Supreme Court of India in *Supriyo Chakraborty*. There is no fundamental right to marry, it holds. On that account, the Court decided that same sex persons cannot marry. In my view this is a wrong decision.

However, to the credit of the Court, it directed, unanimously, that same sex couples have to be protected from any harassment. The Court also passed directions to sensitise the authorities on this behalf and even directed the setting up of a committee to look into a number of issues. However, the flaw is fundamental which needs to be corrected, sooner than later.

To understand Supriyo Chakraborty, we need to contextualise it. In 2009, the Delhi High Court read down Section 377 of the Indian Penal Code (IPC) in Naz Foundation (Naz). That was set aside in Suresh Kumar Koushal by the Supreme Court in 2013, but ultimately upheld Naz in Navtej Singh Johar in 2018. Section 377 IPC, a law made by the British, that criminalised sex between non-heterosexual couples was punishable with 10 years imprisonment.

As a result, the LGBTQI communities suffered blackmail, torture, violence, harassment at the hands of the police, their lovers and families. A gay man, for instance, could not disclose his orientation for the fear of reprisals. This is what I heard from clients who began coming to the Lawyers Collective from 1997, when we took the decision to challenge the constitutional validity of Section 377 in 2001. Both Naz and Navtej Johar did not strike down Section 377. They held that adult non-heterosexual couples having physical relations with consent in private would not be criminalised.

In the meantime, even before Navtej Johar, the Court had held, in NALSA, that persons are entitled to identify their own gender. They may be born as males but if they want to identify as females or transgenders, they are entitled to do so. Pursuant to that, the Transgender Persons (Protection of Rights) Act was passed by Parliament which provides the procedure for changing one's gender and protection against discrimination in diverse establishments, private or state.

It had also been held by the Court in diverse decisions that in India a person is entitled to

autonomy, dignity, privacy and the right to choose their own partners to live with or in marriage. Obviously, after Navtej Johar, when one can have intimate relations with a person of any gender or sexual orientation, it is logical to assume that in that situation when a couple are having a physical relationship, they may prefer to develop a long-term relationship, including that of marriage. For marriage brings along with it a host of advantages for the couple, including succession in the field of inheritance, adoption of children, taking decisions in case of hospitalisation, and benefits from employers.

Decoding the Supreme Court's judgement against same sex marriage legalisation

More than anything else, in the eyes of society, it sanctifies the relationship beyond reproach. A relationship less than marriage is not considered by society to have the same legitimacy. Without that legitimacy, LGBTQI communities are stigmatised. Consequently, LGBTQI communities began making strong demands for their right to marry. Petitions were filed in the Delhi and the Kerala High Courts which were all transferred to the Supreme Court where too fresh petitions were filed. It is in this background that the Court, in Supriyo Chakraborty, was asked to decide the right of recognition to marriage by the state of non-heterosexual couples

The fundamental core decision of the Supreme Court in Supriyo Chakraborty is that there is no fundamental right to marry in India. In arriving at this decision, the Court ignored the fact that India was an original signatory to the Universal Declaration of Human Rights (UDHR), the founding document of all human rights in the world. It is well known that the Indian Constitution was greatly influenced by the UDHR.

As a signatory country to the UDHR, legislation by Parliament and State Legislatures in India must be in accord with the UDHR. More importantly, courts in India have interpreted the Constitution and statues in line with the UDHR and other international covenants.

Article 16 of the UDHR, 1948 provides that, "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family...." Under the UDHR, the right to marry is a human right. In the face of this can it be argued that it is not a fundamental right?

Editorial | Law and custom: On the Supreme Court's verdict on same-sex marriage

Critics would argue that the Indian Constitution does not provide for the right to marry explicitly. However, this ignores the Indian constitutional jurisprudence where the courts have interpreted constitutional provisions and enunciated new penumbral rights in a liberal and expansive manner.

The Supreme Court of India has read the right to be treated with dignity into Article 21 (a classical negative covenant on the state). It is on that basis, that positive rights, including the rights to education, food, environment have been evolved.

The Supreme Court has used the provisions of UDHR to elaborate rights under the Constitution. Thus, in the context of handcuffing and consequential torture contrary to Article 21 of the Constitution, in Prem Shankar Shukla, the Supreme Court referred to Article 5 of the UDHR stating that, "After all, even while discussing the relevant statutory and constitutional requirements court and counsel must never forget the core principle found in Article 5 of the Universal Declaration of Human Rights." This was reiterated in Francis Coralie Mullin, which based on the concept of dignity stated,"It would thus be seen that there is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the [UDHR]". In Maneka Gandhi, the Supreme Court relied on Article

10 of the UDHR to read in principles of natural justice into the administrative process to state, “Hark back to Article 10 of the [UDHR] to realise that human rights have but a verbal hollow if the protective armour of Audi altered parted is deleted”. Thus, it was eminently reasonable to develop the concept of the right to marry into Articles 19 and 21, especially because the right to intimate relations is now recognised in Supriyo Chakraborty itself. Surprisingly, the Court says that we cannot use foreign jurisprudence in the case of legal issues relatig to marriage, despite the fact that in Surpriyo Chakraborty, the Court has introduced the doctrine of intimate association borrowed from the jurisprudence developed in the United States.

The irony is that for transgender persons, the Court holds that marriage between a trans-man and a cis-woman or between a transwoman and a cisman is legal. That is correct. But there lies irony. It needs to be appreciated that according to the logic of the judgment, marriage is only legal between a man and woman, that is a biological man and woman. The Court has rightly made the leap from biological sex to gender, which is self-identified in accordance with NALSA. If the leap was possible for biological sex to self-identified gender, it is difficult to understand why a leap could not be made from biological sex to sexual orientation. After all, not recognising marriage for same sex couples is not only discriminatory against them. The unintended consequence of the judgment in the larger society is that the notion that same sex couples are “not fit for marriage” will be perpetuated. It now has the imprimatur of the highest court. It reduces them to second class citizens.

Also read |Transgender persons in heterosexual relationships have the right to marry under existing law, Supreme Court holds

The sooner this wrong is set right the better it would be for society as whole. My message to my LGBTQI colleagues is that fighting involves falling several times before the ultimate victory. We fell after Koushal. But we fought and won in Navtej. Now, we need to get up and fight and win again, which we shall do.

Anand Grover is a senior advocate practising in the Supreme Court of India. He appeared in the Naz Foundation, Suresh Kumar Koushal, Puttaswamy, NALSA, Navtej Johar and Supriyo Chakraborty of the LGBTQI groups/individuals

Source : www.thehindu.com Date : 2023-10-27

WHAT DOES SUPREME COURT'S ABORTION VERDICT MEAN FOR REPRODUCTIVE JUSTICE IN INDIA?

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

October 21, 2023 05:50 pm | Updated October 22, 2023 01:50 pm IST

A 2016 file photo shows the Supreme Court building in New Delhi, India. | Photo Credit: AP

The Supreme Court this week rejected a woman's plea for abortion. The woman — 26 weeks pregnant, married, with two children, and undergoing postpartum psychosis — requested termination because she was "physically, emotionally, mentally, financially and medically unable to carry, deliver or raise a child." Denying her request, the three-judge Bench headed by Chief Justice of India D. Y. Chandrachud said the Court's recognition of a woman's autonomy cannot eclipse the "rights of the unborn child."

India's Medical Termination of Pregnancy Act allows abortion up to 24 weeks, post which termination is permitted only if a board of doctors attests that continued pregnancy presents a risk to the woman's life or if there are foetal abnormalities. The woman approached the Court at 25 weeks when she was made aware of the pregnancy (she had lactational amenorrhea, where breastfeeding temporarily halts menstruation, thereby preventing pregnancy). The AIIMS medical board in its report found no cause for immediate concern: the foetus was healthy and viable. The government would bear medical costs and the woman may give the child for adoption post delivery, the Court said.

In a conversation with Saumya Kalia, **Gauri Pillai, Assistant Professor of Law at the National Law School of India University,** explains the Court's verdict— one year after a landmark ruling expanded the scope of abortion rights in India. Edited excerpts:

The Supreme Court in *X v NCT* last year acknowledged women's right to choose: "The right to choose for oneself... forms a part of the right to dignity. It is this right which would be under attack if women were forced to continue with unwanted pregnancies." How does the present verdict interpret the 'right to choose'?

The Court reasoned that it could not 'stop the [foetal] heartbeat.' There is no doubt that the Court's decision dilutes women's right to choose, as understood by previous Supreme Court decisions including the landmark *X v NCT* in 2022. On the one hand, rights are rarely absolute and are typically subject to limitations. On the other, in the context of abortion rights, Indian courts have not explicitly articulated what these limitations are.

At the level of constitutional principle, they have tended to see the right as vesting solely with women. *X v NCT* declared that 'it is the woman alone who has the right over her body' and is the 'ultimate decision-maker' in deciding if she wants an abortion. However, in practice, when individual women come before courts, a discourse on foetal rights has begun to emerge. Women, it seems, are not, then, 'ultimate decision-makers.'

And what is the immediate consequence of this conflict between theory and practice?

This leads to incoherence in jurisprudence, as the constitutional right to abortion does not appear to accommodate the limitations the Court authorises in practice. It also, more dangerously, risks reducing the Court's proclamations on women's rights to rhetoric.

This would extend to shedding doubt on the legacy of *X v NCT*. Beyond its immediate relevance in allowing unmarried women to access abortions, whether the rest of its holdings on women's rights have any real effect will depend on how future courts respond to this week's verdict.

Where does the verdict fall in the larger conversation around abortion rights, in India and beyond?

Globally, the abortion right is in a significant state of flux. So far, India seemed largely insulated from these negotiations. Courts were not hesitant in recognising strong, affirmative reproductive rights, and holding the state to account in fulfilling them. It almost seemed too good to be true.

And then it was. This week's Supreme Court verdict is a disruption. It offers ammunition for those arguing for restrictions on abortion. In 2022, a petition was filed to declare India's abortion law unconstitutional for authorising 'foeticide.' The petitioner's claims will arguably be bolstered by the verdict.

India has taken pride in abortion laws that respect women's autonomy, are "pro-choice" and ahead of other countries. In the present case, however, the Court refused to hear arguments on autonomy because "it was on a different footing." Why is that?

The Court seems to be pitting some form of foetal right to life against women's right to autonomy. In a battle between 'life' and 'autonomy,' it is not surprising that autonomy was seen to be on a 'different footing' and lost out. This form of reasoning could also create hierarchies: certain forms of autonomy (say, asking for abortion in case of rape) will be seen as more weighty when balanced against life, and other forms (like the petitioner in this case) as less weighty.

This pitting exercise indicates why it is so important to be clear on what the foetal interest involved is. Is it life? Is it a form of potential life (which would, arguably, be less weighty)? Most importantly, irrespective of what the foetus *is* (which is not a legal determination), what status *should* it be granted within the law? And how should this legal status, even if granted, be protected — through restricting abortions or other means? Which option would be constitutionally consistent?

The Court last year said that continuing with an unwanted pregnancy has an adverse impact on the pregnant woman's mental health and can be a ground for abortion. In the present case, the woman suffered from post-partum depression. What was the Court's stance?

This is another unfortunate example of seemingly expansive constitutional principles getting reduced to rhetoric in practice. In *X v NCT*, the Supreme Court did not confine 'mental health' to medical diagnosis of illness. Rather, the Court emphasised that it must be understood based on

the petitioner's 'self and experiences.' In the present case, the petitioner pleaded for an abortion at 26 weeks because she was suffering from post-partum psychosis — lack of sleep, hallucinations, suicide attempts — after her previous pregnancy. *[Evidence shows suicide is the leading cause of maternal death following childbirth.]*

She submitted prescriptions as evidence of her medical condition, stressing that postpartum psychosis was more severe than postpartum depression. While the Court eventually decided that the mental health ground for abortion did not extend beyond 24 weeks of gestation, it questioned the validity of the petitioner's argument throughout the hearings. It suggested that the prescriptions might have been doctored to 'bolster the case.' It also directed a medical examination of the petitioner to confirm the diagnosis.

The Union Government argued the foetus is "a viable baby with a reasonable chance of survival." What is the rationale of the viability argument, and has the government applied it before?

The theory is: when the foetus reaches a point of viability — where it can exist outside the womb of the woman (with medical support) — the right to abortion should be curtailed. Viability was most famously endorsed by the U.S. Supreme Court in *Roe v Wade* in 1973. Two decades later, in 1992, the U.S. Supreme Court replaced the viability standard with a different test, and in 2022, the Court rejected the viability standard completely.

In India, the viability of the foetus has historically had no purchase in restricting abortion. While India's 1971 law on abortion allows third-trimester abortions only in limited circumstances, this appears to have been driven by a need to protect women's health rather than protect the foetus. At the time of passing the 1971 law, only two members of the Legislative Assembly protested against abortion (calling it 'murder' and a 'crime against humanity'). The others endorsed it and affirmed that 'there is no violation of the right to life in any manner.'

However, in 2009, the Indian Supreme Court, citing the U.S. decision in *Roe*, suggested that the state has a 'compelling interest' to protect the foetus which is a form of 'potential life.' The state can, then, impose 'reasonable restrictions' on abortion. The Supreme Court did not, however, mention viability. Yet, some loose version of viability seems to exist in Indian law. In 2016, the Punjab and Haryana High Court claimed that once the pregnancy is viable, the 'potential child' becomes a part of the determination. Similarly, the Calcutta High Court in 2019 said that at an advanced stage of pregnancy, 'the right to life of the foetus outweighs the mental trauma' suffered by the mother.

However, there is no explicit articulation of this standard or a defence of it, despite it being highly critiqued; it has simply been slipped into the law.

What are the rights of a foetus under Indian law? [The CJI said, "We can't kill the child...there are rights of an unborn child too."]

The rights of a foetus under the Indian Constitution are unclear — there has been no upfront articulation of it. Whether the foetus possesses rights, or simply 'interests' (as the 2009 Supreme Court decision termed it) is also ambiguous. A 2016 Bombay High Court decision relied on international human rights law to hold that the foetus does not have rights till birth.

In essence, the state of law is jumbled, and requires urgent deliberation, especially if foetal interests (or, rights) are being used to restrict abortion rights.

How did women's autonomy and right to choose compare with the 'rights of an unborn child', as the court termed it, in the present verdict?

The pregnant woman's rights were seen as extending only as far as they did not harm a viable and healthy foetus. The Court reasoned that it was simply following the conditions under the Medical Termination of Pregnancy Act, 1971, and seemed to suggest that its hands were tied, as this was what the law required the Court to do.

However, this claim is not entirely true. The Supreme Court possesses the power to do 'complete justice' under the Constitution. It has previously read the abortion law liberally even when the text did not seem to explicitly authorise it. Here the Court choosing not to do so was, then, less about the law and more about the Court's concern for the foetus.

The government maintained that killing a foetus would 'amount to foeticide', evoking two sides of the abortion debate: pro-life and pro-choice. Is this a new discussion in India?

This conversation is largely alien to India; it is likely that the global contestation on these lines influenced the Court's reference to it. However, now that it has been initiated in courts, it has to be engaged with. Engagement would allow us to shape the judicial dialogue, instead of merely being bystanders to courts deciding the issue.

The question of when 'life comes into being' took centre stage even as the Court said it couldn't decide on that matter. Has the law tried to engage with this quandary in the past? How can it engage with it?

Whether the foetus should, at all, be a relevant factor in abortion regulation is a question that has not been answered in India. For the law, a pregnant woman is a unique subject. The foetus is intimately associated with the body of the woman, in a way that is different from all other situations that the law regulates. Any form of recognition of the foetus will, therefore, most likely grievously invade women's legally recognised rights. When we contemplate the *legal* (as opposed to ethical, moral or religious) status of the foetus, a strong case can be made that the impact on women has to be a consideration.

On the other hand, even if some legally relevant status is granted to foetuses, it need not signal the end of liberal abortion laws. Empirical evidence suggests that restrictive abortion laws do not really protect foetuses; they simply push women toward unsafe abortions and harm their health. In fact, if foetal protection is the aim, better alternatives exist. These include comprehensive sex education, access to temporary contraception, reducing violence against women, and providing forms of childcare support, which reduce the overall rate of abortions. Adopting this reasoning, constitutional courts in South Korea (2019) and Colombia (2021) liberalised abortion while also recognising foetal interests.

The CJI during the hearing asked why it took 26 weeks for the woman to realise she didn't want the child. Studies find that stigma and doctors' judgment also determine women's access to safe abortion services on time. Do abortion restrictions interfere with women's right to equality?

Typically, abortion cases are seen as involving the right to privacy. Reproductive decisions are intimate and personal, shaping who we are as individuals. However, abortions are also necessary to guarantee women equality.

Denying abortions perpetuates women's disadvantage at several levels. In pushing some women to seek abortions with unsafe backstreet providers, their lives are threatened. For others, who are forced to carry an unwanted to pregnancy to term, there is a risk to their physical and

mental health. *[In comparison to women who receive an abortion, those who are denied abortions report a higher risk of life-threatening complications like eclampsia, postpartum haemorrhage, chronic headaches or migraines, joint pain, and gestational hypertension, research shows.]*

Moreover, women are still the primary caregivers in India, with their responsibilities of care affecting their labour participation, workplace advancement and wages. Being denied abortions, then, has a socio-economic impact on women, as a group. It also entrenches stereotypical assumptions about women's role as mothers, which then leads to abortion stigma and provider bias. *[NFHS-5 data shows the burden of family planning mostly falls on women in India]*.

The Supreme Court has repeatedly held that perpetuating the disadvantage of a historically disadvantaged group is what inequality looks like. Under this definition, the denial of abortion is an obvious equality issue.

One critique of reproductive rights in India (including last year's judgment) is that abortion still falls within the framework of criminal law and the decision to abort rests with medical practitioners. What precedent does the verdict set for future cases, and for reproductive justice issues?

This week's verdict does not directly point to increased criminalisation. However, it could set in motion a prominent role for the foetus in abortion regulation in India. In other countries, foetal concerns have been the prime motivations behind criminalising abortion. In opening the door to foetal interests, the Supreme Court decision could weaken claims for decriminalising abortion in India.

Overall, the verdict does not conclusively decide the abortion issue. However, it presents an inflection point. As we traverse the paths it opens up, it is important for us to keep reminding ourselves, and the Court, about whose rights are at stake, which rights they are, and why.

(Gauri Pillai is an Assistant Professor at the National Law School of India University, Bangalore, and a Max Weber Postdoctoral Fellow at the European University Institute, Florence. Her work studies reproductive rights and constitutionalism in India and globally.)

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Source : www.thehindu.com Date : 2023-10-30

FARCE OF LAW: THE HINDU EDITORIAL ON THE SEARCHES IN RAJASTHAN AND THE ENFORCEMENT DIRECTORATE

Relevant for: Indian Polity | Topic: Issues and Challenges Pertaining to the Federal Structure, Dispute Redressal Mechanisms, and the Centre-State Relations

October 30, 2023 12:10 am | Updated 12:12 am IST

Searches at the premises of Rajasthan Congress president Govind Singh Dotasra, a sitting Member of the Legislative Assembly (MLA) and a party candidate from Lacchmangarh in Sikar in the Assembly polls in November, and that of independent MLA Om Prakash Hudla, who has been fielded this time by the Congress from Mahua, have turned the spotlight yet again on the Enforcement Directorate (ED), a central agency that stands accused of selective targeting of Opposition leaders. The ED's money-laundering investigation is based on the cases instituted by the Rajasthan police to probe the alleged leak of the general knowledge paper of the Senior Teacher Grade II Competitive Examination (2022), which was cancelled and rescheduled by the Rajasthan Public Service Commission. The ED has also summoned Rajasthan Chief Minister Ashok Gehlot's son Vaibhav Gehlot in an alleged foreign exchange violation case. In Rajasthan, incumbent governments usually get voted out, but Mr. Gehlot has effectively challenged that perception this time with a slew of new welfare schemes and the accompanying publicity blitzkrieg. Factionalism in the Congress has been contained, and Mr. Gehlot and party colleague Sachin Pilot are united. On the other hand, the Bharatiya Janata Party (BJP) is dealing with increasing friction within its ranks. The Congress has termed the ED's action in the election-bound State as a sign of the BJP's frustration.

The BJP's claim that all ED actions are purely to root out corruption could have been taken at face value only if they were even-handed and impartial. The pattern of action and inaction by the ED leaves no scope for any such inference. The ED's enthusiasm in pursuing political corruption fluctuates. It is also too much of a coincidence that the ED suspects corruption only in Opposition-ruled States and among leaders opposed to the BJP. Few would accept an argument, if at all the BJP or the ED is making one, that there is no corruption in States ruled by the party or by its leaders. The BJP has been the only beneficiary of large-scale defections of elected representatives in recent years. No one can argue that agencies should not do their job and enforce the law. But both governance and democracy are undermined when the rule of law is weaponised against political opponents, When action against political players is taken in the midst of an election, it could potentially tilt the scales. The current legal regime for fighting corruption — and also the one against terrorism for that matter — is fast degenerating into an arbitrary internment of those who are inconvenient for the ruling party. This needs to end.

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