Freedom to pray

With its Sabarimala verdict, the SC underlines the Constitution's transformative power

The Constitution protects religious freedom in two ways. It protects an individual's right to profess, practise and propagate a religion, and it also assures similar protection to every religious denomination to manage its own affairs. The legal challenge to the exclusion of women in the 10-50 age group from the Sabarimala temple in Kerala represented a conflict between the group rights of the temple authorities in enforcing the presiding deity's strict celibate status and the individual rights of women to offer worship there. The Supreme Court's ruling, by a 4:1 majority, that the exclusionary practice violates the rights of women devotees establishes the legal principle that individual freedom prevails over purported group rights, even in matters of religion. The three concurring opinions that form the majority have demolished the principal defences of the practice – that Sabarimala devotees have constitutionally protected denominational rights, that they are entitled to prevent the entry of women to preserve the strict celibate nature of the deity, and that allowing women would interfere with an essential religious practice. The majority held that devotees of Lord Ayyappa do not constitute a separate religious denomination and that the prohibition on women is not an essential part of Hindu religion. In a dissenting opinion, Justice Indu Malhotra chose not to review the religious practice on the touchstone of gender equality or individual freedom. Her view that the court "cannot impose its morality or rationality with respect to the form of worship of a deity" accorded greater importance to the idea of religious freedom as being mainly the preserve of an institution rather than an individual's right.

Beyond the legality of the practice, which could have been addressed solely as an issue of discrimination or a tussle between two aspects of religious freedom, the court has also sought to grapple with the stigmatisation of women devotees based on a medieval view of menstruation as symbolising impurity and pollution. The argument that the practice is justified because women of menstruating age would not be able to observe the 41-day period of abstinence before making a pilgrimage failed to impress the judges. To Chief Justice Dipak Misra, any rule based on segregation of women pertaining to biological characteristics is indefensible and unconstitutional. Devotion cannot be subjected to the stereotypes of gender. Justice D.Y. Chandrachud said stigma built around traditional notions of impurity has no place in the constitutional order, and exclusion based on the notion of impurity is a form of untouchability. Justice Rohinton F. Nariman said the fundamental rights claimed by worshippers based on 'custom and usage' must yield to the fundamental right of women to practise religion. The decision reaffirms the Constitution's transformative character and derives strength from the centrality it accords to fundamental rights.

Think big

Merely tinkering with import duties will not narrow the current account deficit

The Centre's decision to increase customs duty on imports of 19 "non-essential" items amounts to tinkering at the margins to address a structural macro-economic issue. Using tariffs to curb imports of these items will not have a significant impact on narrowing the current account deficit (CAD), which is the Centre's stated objective. By its own admission, the aggregate value of these imported items in the last fiscal year was just ₹86,000 crore. At that level, these imports constituted a little less than 3% of the country's merchandise import bill in 2017-18. With the first six months of the current fiscal having elapsed, the impact of this tariff increase in paring the import bill and thus containing the CAD is at best going to be short-term and marginal. On the other hand, the decision to double import duties on a clutch of consumer durables to 20% could dampen consumption of these products, especially at a time when the rupee's slide against the dollar is already likely to have made these goods costlier. Here, it would be interesting to see if the government's move turns into a psychological 'tipping point' that ends up altering consumption behaviour towards this category of imported merchandise. If it does, that could have the salutary effect of fostering greater investment in the domestic production of some of these goods. The tariff on aviation turbine fuel – which will now attract 5% customs duty instead of nil – may add to the stress of domestic airline operators, the rupee and rising oil prices having already hurt their wafer-thin margins.

A more robust approach in addressing the widening CAD would be to institute wide-ranging measures to boost exports and simultaneously reduce the import-intensity of the economy. Policymakers must renew efforts to ensure that export growth starts outpacing the expansion in merchandise imports. This includes expediting the refunds on GST to exporters – smaller exporters have been badly hit by working capital shortfalls – to working to woo some of the labour-intensive supply chains that are moving out of China to countries such as Vietnam and Bangladesh. On import substitution, it is an irony that despite the abundance of coal reserves, thermal coal is one of India's fastest-growing imports. This is a consequence of under-investment in modernising the entire coal production and utilisation chain and must be addressed expeditiously. With global crude oil prices showing no signs of reversing their upward trajectory, and the sanctions on Iran that may force India to look for other suppliers looming, the government will need to act post-haste to address structural imbalances to keep the CAD from widening close to or even exceeding the 3% of GDP level.

The poor are left to themselves

The benefits being projected in Aadhaar's name are not backed by the data

REETIKA KHERA

The first death anniversary of Santoshi Kumar, a Dalit girl from Simdega, Jharkhand, was this week. She died of hunger, at the age of 11, a few weeks after her family's ration card was cancelled by the State government because they failed to link it to Aadhaar.

The Aadhaar judgment of September 26 provided an opportunity for the Supreme Court to make amends for her tragic death. The upholding (by and large) of Section 7 by the majority judges is, therefore, the biggest let-down in the Aadhaar judgment. This is because the judges decided to accept the government's 'assertions' – wrongly – as 'facts'.

Assertions versus facts

In the majority opinion, they state: "The entire aim behind launching this programme is the 'inclusion' of the deserving persons who need to get such benefits. When it is serving much larger purpose by reaching hundreds of millions of deserving persons, it cannot be crucified on the unproven plea of exclusion of some. We again repeat that the Court is not trivialising the problem of exclusion if it is there." (p. 389.) There are many instances of assertions being accepted as facts. This piece seeks to show why they were wrong in believing the assertion about inclusion, identification and exclusion, to illustrate the bigger problem with the majority view.

For instance, the Unique Identification Authority of India (UIDAI) submitted to the court that the 'failed percentage' of iris and finger authentication are 8.54% and 6%, respectively. Later, on Page 384, discussing the issue of exclusion, the judgment notes that the UIDAI is said to have claimed 99.76% "biometric accuracy", suggesting that two different failure rates have been submitted to the court.

Though the UIDAI claims to have taken care of these failures by issuing a circular on October 24, 2017 (after Santoshi's death), to put in place an exemption mechanism, until then there was no exemption. Even after the circular has been issued, there is little evidence of it being implemented. Since 2017, there have been at least 25 hunger deaths that can be traced to Aadhaar-related disruption in rations and pensions, of which around 20 deaths occurred after the aforementioned circular was issued.

The idea that Aadhaar enables inclusion has taken firm root in people's minds, as well as the judges'. This belief, however, is misconceived. If it means that Aadhaar is an easy ID to get, that is perhaps true. Only 'perhaps' because there are many people who have paid to get Aadhaar even though it is meant to be free; many have had to try several times before they succeeded in getting it. Those with any disability have found it very hard to enrol or have failed to enrol.

The number of people excluded from getting Aadhaar may be small (as a percentage of the population), but they happen to be the most vulnerable – bed-ridden old persons, victims of accidents, people with visual disabilities, etc.

Further, it is a misconception that for millions of Indians, it is the only (or first) ID they have. According to a response to an RTI, 99.97% of those who got Aadhaar numbers did so on the basis of existing IDs.

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More importantly, no one in government has been able to explain how Aadhaar enables inclusion into government welfare programmes. Each government programme has its own eligibility criterion. In the Public Distribution System (PDS), there are State-specific inclusion/exclusion criteria. In some States, if you have a government job or live in a concrete/pucca home, you cannot get a PDS ration card – even if you have an Aadhaar card.

Conversely, if you lived in a mud hut or were an Adivasi, you would get a PDS ration card. After the coming of Aadhaar, on top of satisfying the State eligibility criteria, you need to procure and link your Aadhaar number in order to continue to remain eligible for your PDS ration card.

Before Aadhaar was made mandatory, it was neither necessary (you could get subsidised PDS grain without Aadhaar), nor sufficient (possessing Aadhaar alone did not entitle you to PDS grain). With Aadhaar being made compulsory, it has become necessary, but it is not sufficient to get welfare. It is a pity that the majority judges were unable to grasp this point.

The biggest source of exclusion from government programmes (before and after Aadhaar) remains the fact that India's spending on welfare remains abysmally low. Before the National Food Security Act (NFSA), 2013 was implemented, roughly 50% of the Indian population was covered by the PDS. The NFSA expanded coverage to about two-thirds. This expansion of the PDS is what has led to inclusion though exclusion errors persist in some areas (for example, regions such as western Odisha where universal coverage is necessary).

It's about budgets

The question that arises is, did the government misdiagnose the source of exclusion by blaming it on a lack of IDs rather than inadequate budgets and faulty selection of eligible households? Or, did the government purposely mislead the public on this issue because fixing the real problem would have entailed an increase in government spending?

Either way, a very successful programme of propaganda was set in motion to convince people into believing that Aadhaar was a project of inclusion and the ultimate tool against corruption in welfare programmes.

The claims about what and how much Aadhaar could do for reducing corruption in welfare were similarly blown out of proportion. For instance, quantity fraud (where a beneficiary is sold less than her entitlement, but signs off on the full amount) continues with Aadhaar-based biometric authentication. A rogue dealer who I cannot easily hold to account can as easily force me to biometrically authenticate a purchase of 35 kg, but give me only 32 kg, as he could force me to sign in a register.

Meanwhile, the propaganda machinery again convinced people by repeating that the welfare rolls in India were full of fakes, ghosts, duplicates, etc. There was no reliable evidence on the scale of this problem ("identity fraud"). Recent independent surveys and government data are beginning to suggest that it wasn't the main form of corruption. Linking Aadhaar cards with the PDS in Odisha led to the discovery of 0.3% duplicates.

Pointer to a divide

Yet, the majority opinion states that "the objective of the Act is to plug leakages" and that "we have already held that it fulfills legitimate aim" (page 386). For those who work on these programmes, it is very puzzling why these straightforward misrepresentations have not been challenged by the media.

This phenomenon appears to be an outcome of the deep social and economic divide in Indian society. Those who benefit from these programmes and who understand why Aadhaar cannot improve inclusion do not have a voice in the media or policy-making. This allows anecdotes (repeated ad nauseam) to become the basis for taking big decisions. Contrary to the rhetoric of evidence-based policy-making, what we have seen in this case is anecdote-based policy-making. The opinion of the majority judges also betrays this deep divide – caste and class – in society.

Yet, Wednesday's Aadhaar verdict with four judges latching on to the government's version of the story, and one of them applying his mind to the matter independently, reaffirms that you can't mislead all the people all the time.

Reetika Khera is an Associate Professor at the Indian Institute of Management, Ahmedabad

Dumping an archaic law

The Supreme Court decision to decriminalise adultery is a step in the right direction

SHONOTTRA KUMAR

Following a series of landmark judgments delivered by the Supreme Court this month, it passed yet another remarkable decision on Thursday. It decriminalised the offence of adultery by holding Section 497 of the Indian Penal Code (IPC) unconstitutional.

As of few days ago, India was one of the few countries in the world that still considered adultery an offence. The appalling attribute of the Indian definition of this crime was that it did not punish the erring spouses, but instead punished the adultering man, or rather 'the outsider', for having extra-marital relations with a woman who he knows to be married. It was only an offence if the husband had not consented to this relation, implicitly suggesting that the wife was the property of her husband. Hence, the husband was considered to be the "victim" of adultery and could file a case. The same recourse was, however, not available to the wife.

Moral wrong as crime

For any act to be a crime, it has to be committed against society at large. The main argument for retaining the criminal provision was that the outsider should be punished for breaching the matrimonial unit and that the law should mandate punishment for such a moral wrong. This violation was seen as a crime against the institution of marriage, thus justifying it to be a breach of security and well-being of society. Thankfully, and rightly so, this argument was unanimously dismissed by the bench. The court observed that the issue of adultery between spouses was a private matter, and could be a ground for divorce under civil law. It did not warrant the use of criminal sanction against any party involved. Moreover, no justification can be given by the state for penalising people with imprisonment for making intimate and personal choices.

Further, addressing the issue of making the penal provisions of adultery gender neutral, the court held that even then the matter was private, and anything otherwise would be a grave intrusion into the privacy of individuals.

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In simple terms, as the law previously stood, in this offence, the victim would be the husband alone, whose property (i.e. the wife) was trespassed upon. Dismissing this regressive patriarchal notion of women being "chattels" of their husband, the court held that Section 497, as it existed, denied women ownership of their sexuality and agency over their own relationships. The court even relied on *K.S. Puttaswamy v. Union of India* to explain this deprivation of autonomy as a violation of their right to privacy and to live with dignity, thus violating their fundamental rights under Article 21 of the Constitution.

The adultery provision also violated the right to equality guaranteed under Article 14. The court observed that women were treated as passive entities, and possessions of their husband. The fact that the commission of the offence would have been in the absence of the husband's consent proved the inequality between the spouses. Section 497 consumed the identity of a wife, as an individual with rights as an equal partner to the marriage, tipping the scales to favour the husband. The court further explained: "Marriage in a constitutional regime is founded on the equality of and between spouses. Each of them is entitled to the same liberty which Part III [of the Constitution] guarantees." Therefore, not affording both parties to a marriage equal rights and opportunities would be discriminatory and a violation of their right to equality.

Previous challenges to this provision claimed that exempting women under Section 497 from prosecution and being prosecuted was 'protecting' them and was in consonance with Article 15(3) of the Constitution that allowed the state to make laws for the benefit of women and children. This provision was made when bigamy was prevalent and Lord Macaulay, the drafter of the IPC, did not find it fair to punish one inconsistency of the wife when the husband was allowed to marry many others. However, a fallacy in this reasoning was pointed out by the court – the law that takes away the right of women to prosecute, just as her husband had the right to proceed against the other man, could not be considered 'beneficial' and was, in fact, discriminatory.

In step with the rest

It is surprising to see that even after the verdict many have opposed this decision of the Supreme Court, most countries around the world have done away with this practice. While the struggle for equality in many other spheres still continues, the decision to scrap this archaic law is definitely a step in the right direction.

Shonottra Kumar is a legal researcher at Nyaaya, an initiative of the Vidhi Centre for Legal Policy

LETTERS TO THE EDITOR

Letters emailed to letters@thehindu.co.in must carry the full postal address and the full name or the name with initials.

Adultery is no crime

With Section 497 of the Indian Penal Code no longer valid, the Supreme Court has ushered in much-needed change (Page 1, "Adultery is not a crime, rules SC; strikes it off IPC", September 28). Indian society is by and large a patriarchal one where the rights and the dignity that a woman deserves by being the citizen of the country have been denied to her for long. Women are now able to compete with men in every field and their fundamental rights cannot be compromised.

PRIYANKA SHARMA,
Lucknow

■ This was a colonial legacy that aided patriarchy and cast a Victorian morality over our constitutional values. It's wonderful to see the top court of the land lay emphasis on constitutional morality rather than so-called 'moral values'. Such provisions should have been packed off to the archives a long time ago. With its series of far-reaching judgments and powerful constitutional interpretations, the Supreme Court has now shown us a bright way ahead. Let us hope that the legislature rediscovers the political will to follow that lead (Editorial, "Not a crime", September 28).

BIPIN THAIVALAPPIL,
Payyannur, Kannur, Kerala

■ India is a country respected all over the world for its rich culture and traditions. Now it seems that this tag will be at stake with the verdict of the Supreme Court. As a woman who believes in traditions of our country, I disagree with the verdict. I feel it is a blow to the institution of marriage which rests on the pillars of love, faith and loyalty. Adultery is a mistake irrespective of whether it is the mistake of the man or the woman. There is no meaning in the institution of marriage if the argument is about discrimination against woman.

KANDURI ROHINI KRISHNA,
Dammaiguda, Medchal, Telangana

■ One feels that the verdict will add its bit to dilute the institution of marriage and destabilise the family system. Society could be made vulnerable to sexual anarchy.

K. MALIKUL AZEEZ,
Chennai

■ The verdict endangers family values and Indian culture. I am afraid that judgments such as these accord too much freedom, which may lead to the collapse of any system. There needs to be an element of fear so that crimes do not happen. Perhaps India is now going down the path of Western culture. The top court of the land should foresee the impact of its judgments on a society such as ours and look at issues in a more pragmatic manner.

GEORGIL K. JEEMON,
Pallikkara, Ernakulam, Kerala

■ Data on murder in India will show that most cases are on account of infidelity. The learned judges seem to have cast to the winds the basic foundation and ethos upon which our Indian culture is based. The institution of marriage stands weakened by just the stroke of the pen. Could this be a case of textbook application of reading and interpreting the law rather than also using one's heart and soul?

B.S. JAYARAMAN,
Coimbatore

■ The verdict, ostensibly for upholding individual rights, is disappointing. This could only open the floodgates for a proliferation of sexual crimes associated with adultery. Maybe the colonial law was anachronistic but nevertheless it served somewhat as a deterrent. With the removal of provisions related to adultery from the IPC and the CrPC, there is an absolute cessation of deterrence now. It is preposterous to compare the culture of India with the West in trying to justify outlawing adultery.

P.K. VARADARAJAN,
Chennai

■ What is morally wrong cannot be legally right. The judgment has thrown the tenets of fidelity out of the window. When adultery is no longer a crime, divorce on that ground is next to impossible. Such a ruling cannot become 'lex loci' (law of the place/land), for it is laced with unconvincing reasons. The ruling should not stay long and needs to be stayed instead by a larger Bench.

K. PRADEEP,
Chennai

Flawed data?

It is unfortunate that a young man ended his life in Salem district, a day after his wedding, after his wife left him complaining that there was no individual toilet in his house (Tamil Nadu, "Man ends life a day after his wedding", September 28). Salem is said to have achieved the distinction of being an 'open defecation-free district' under the 'Clean India Mission'. When the base line survey of the 2011 census claims that all the households were provided with individual toilets, how was this man's house left out? Do the data in survey reports ever reflect the ground realities?

D. SETHURAMAN,
Chennai

***The Hindu* at 140**

I am now 76 and my association with the daily goes beyond 60 years. I have vivid memories of the daily being 'thrown on to' the verandah of our house by the paper delivery boy. My father would often say that reading the Editorial regularly would help one learn English. The second plus factor is the veracity and sobriety of the news published. Even after I moved out of Tamil Nadu for more than a decade, in the 1970s, I used to subscribe to the paper even though it reached me in the afternoon.

S. VENKATESAN,
Coimbatore

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CORRECTIONS & CLARIFICATIONS:

The opening sentence of the lead story, "Hearings on Ayodhya title suit to resume, decides SC" (Sept. 28, 2018), was: "A three-judge Bench of the Supreme Court, in a majority opinion of *3:1* declined to refer ..." It should have been majority opinion of *2:1*.

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