

Patriarchal courtrooms: Freedom of women in the eyes of the judiciary

TA theanalysis.org.in/patriarchal-courtrooms-freedom-of-women-in-the-eyes-of-the-judiciary

Swarati Sabhapandit | February 28, 2023

On 24th June 2022 in the matter of Dobbs v. Jackson, the United States Supreme Court [overturned](#) a landmark judgment (Roe v. Wade) delivered over half a century ago, effectively depriving citizens of a fundamental right to abortion. The apex court's decision resulted in the obliteration of the constitutional right to women's liberty and privacy, and at the same time, their [decision making](#) over reproductive choices was granted to the state and its institutions.

Among the voices on the bench, Justice Samuel Alito, a [practical originalist](#) – the one who gives primary weight to the text of the constitution while interpreting the law – maintained that abortion was a matter to be decided by the states and the voters in them. He argued that state [regulation](#) on abortion is presumptively valid and should be sustained “if there is a rational basis”, which includes “legitimate state interest” and “respect and preservation of parental life”. The exception can be the elimination of “gruesome and barbaric medical procedures”, preservation of “the integrity of the medical profession”, and prevention of discrimination based on race, sex, or disability.

In India, Delhi High Court on 11th May 2022 [delivered](#) a split verdict on the constitutional validity of the criminalization of marital rape. The case challenged the exception to [section 375](#) of the Indian Penal Code (IPC), 1860 which maintains that sexual intercourse between a man and his wife aged 18 or above is not rape, even if it occurs without consent. Justice Rajiv Shakti struck down the law as unconstitutional, stating that the right to withdraw consent forms the core of women's right to life and liberty.

There should be no doubt that the verdicts in both cases are significant for the implications they will have for the rights of individuals, specifically women, and the progressive imagination of society that the constitutions of these two countries have sworn to uphold. Equally important here is the legal reasoning of the two courtrooms that upheld these two verdicts.

In Dobbs v. Jackson, the US Supreme Court overturned the constitutional right to abortion by stating that the locus of the decision concerning abortion should come from the states or the voters who elect their representatives to the state.

There are three aspects that stand out: first, the narrative reinforces the historical legacy of [popular sovereignty](#) (which is known as the belief that the legitimacy of the state is created by the will or consent of its people, who are the source of all political power) that the state has been endorsing for ages; second, as a representative of [the people](#), the state has the right to decide; third, when a woman becomes pregnant, it appears, that she loses her ability to make decisions concerning her body as a citizen.

Notwithstanding the religious and ethical considerations about the new life gestating inside the womb and whether it would be biologically correct to even deem it as a person before a certain stage in the developmental cycle, this does present an issue of clash of rights. However, according to the court's reasoning, states' voters have the right to decide this issue.

The constitution of the United States has endowed the people with freedom as their individual right. The debates on the constitutionality of judicial review are dominated by the account around people's constitution and popular sovereignty. Individual freedom was widely upheld as an instrument to empower the people.

Interestingly, here the old constitutional conundrum of [individual versus group rights](#) ensues in the courtroom corridors. Dobbs v. Jackson highlighted this contradiction, where the legitimacy of group rights has taken precedence over individual freedom. By intruding inside the body of its citizenry, the verdict denies individual freedom of choice and strengthens the narrative of 'regulate and control'.

This idea of 'regulate and control' has long been ingrained in the state's patriarchal structure. However, modern constitutional democracies contradict this account by emphasizing individual rights as the primary unit of rights and raise two questions:

Is the judiciary responsible for upholding the constitution, which belongs to the people or is it answerable to the state that the people represent?

If the constitution guarantees individual freedom to its citizens, then why does the majority as a group have the right to make decisions for individual citizens to the extent that it involves encroachment over the body?

India has a set of constitutional guarantees with slightly different arrangements. Along with the judiciary as a guardian of constitutional rights, the state is offered the role of a necessary enabler of these rights toward the goal of social transformation.

However, historically, the state has transgressed this constitutional vision in many instances, and the judiciary has reinforced these practices in its courtroom skirmishes. The portrayal of the Delhi High Court on the criminalization of marital rape presents one such instance. The logic behind the deliberation in the courtroom was guided by issues concerning consent and safeguarding marriage as an institution.

India has a peculiar history of constitutionalism when it comes to rape laws. The predominant social attitude and systemic patriarchy have been able to influence courtroom debates as well.

In [Tukaram v. State of Maharashtra](#) (1979), when a constable raped a young Adivasi teenager inside a police station in Desaignaji, Maharashtra, the court noted that she was "habituated to sexual intercourse", essentially meaning that sexually active women were more likely to consent to have sex in the future, even with a stranger.

On a similar note, discourse around the case of marital rape is dominated by a patriarchal interpretation of assuming agency over women's bodies.

Two 'narratives' stand out here: first, Justice Shakti Dhur's argument touches upon a critical interpretation of the agency of women's bodies that downplays individual freedom within the institution of marriage. The interpretation of equating *consent for marriage* with *consent for sexual intercourse* automatically undermines bodily autonomy, individual freedom and the fundamental right to privacy. Second, taking a cue from Justice Hari Shankar's argument, suppose the withdrawal of bodily autonomy is permissible within the institution of marriage to preserve its sanctity; it would lead to constitutional chaos as the cornerstone of a progressive state would be defeated in letter and spirit.

Constitutionally guided liberal democracies around the world are governed through a set of institutional arrangements (the legislature, the executive, and the judiciary), among which constitutional courts are specifically responsible for protecting the rights and liberties of the individual. However, it is frequently noticed that these institutional arrangements collide with the structural realities of the social order, in which patriarchy features prominently.

When the locus of decision-making concerning women's bodily autonomy is given to the state driven by a set of overwhelming patriarchal reasoning, the notion of individual rights stands on shaky grounds. Society's general attitude towards women's actions and their bodies creep into the judiciary's imagination, and further influences the verdicts. People carry these notions to the institutions and legitimize these narratives under the aegis of the state. Patriarchy then continues to operate as a structural evil guided by an entity that has sworn to be the guardian of citizens' rights.

Swarati is a PhD scholar at the department of International Relations and Governance Studies at Shiv Nadar University, India. Her research focuses on ideas of populism, majoritarianism, and debates concerning democratic institutions with a particular focus on the judiciary. Her wider academic interests include migration and identity politics in South Asia, discourse studies, and a gendered inquiry into conflicts.