Impacting a woman's freedom to reproductive choices

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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.

Viable foetus versus woman's right

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 have amenorrhea, 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.

The judgment in *X vs Union of India*, which falls short of bestowing any explicit rights to the unborn, suffers from errors

Petitioner's plea's and rulings

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.

Foetuses and rights

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.

AI and the issue of human-centricity in copyright law

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The Executive Order in the United States, issued by the Biden administration on October 30, on 'Safe, Secure, and Trustworthy Artificial Intelligence (AI)', illustrates the changing attitude of global leaders towards AI regulation. Implementation and the use of AI without the necessary safeguards can have enormous implications for the future of humanity, and the changes in regulatory approaches are a welcome development.

Ownership and enforcement

One of the many areas wherein AI has raised tough questions is ownership and enforcement of intellectual property (IP) rights. For example, while generative AI tools such as ChatGPT and Midjourney allow people with minimal creative skills to produce reasonably beautiful outputs with the help of a couple of text prompts, their use has raised a number of copyright-related questions. These include whether the use of copyrighted materials, including texts and images, as training data infringes the rights of millions of authors and artists on the Internet. A related query revolves around copyright ownership over output generated by AI, autonomously or with inputs from humans.

A recent decision of the United States District Court for the District of Columbia in *Stephen Thaler vs Shira Perlmutter* is remarkable because it provides some insights on whether copyright can exist in work autonomously created by AI. In this case, Mr. Thaler owned an AI system named 'Creativity Machine' which he claimed had autonomously created a piece of visual art. In his application for copyright registration before the U.S. Copyright Office, 'Creativity Machine' was mentioned as the author of the work. Mr. Thaler also added that the copyright of the work would be transferred to him, as the owner of 'Creativity Machine'.

The copyright office rejected the application on the ground that the submitted work lacked human authorship. His pleas to the Office to reconsider its decision were also rejected on the same rationale. He challenged the rejection before the District Court subsequently. The primary legal question before the Court was whether a work autonomously generated by an AI system could be copyrightable. After reviewing the relevant statutory provisions, case laws, and theoretical justifications for copyright protection, the court concluded that human creativity was essential to copyright protection.

> There needs to be a cautious approach in extending existing IP protections to work generated by Artificial Intelligence

The court's line of reasoning is in tune with the general position of the U.S. Copyright Office thus far *vis-à-vis* work created autonomously by an AI system. In a document entitled 'Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence', released in March 2023, the copyright office had categorically stated that "copyright can protect only material that is the product of human creativity. Fundamentally, the term 'author,' used in both the Constitution and the Copyright Act, excludes nonhumans".

The office also clarified that copyright applicants had a duty to disclose the inclusion of AI-generated content in any application, followed by detailed guidelines on doing so in registration forms. Recently, it also initiated a public consultation on various copyright-related questions posed by AI.

The case in India

Compare the U.S. episode with the prevailing situation in India. In 2020, the Indian Copyright Office registered a work of art called 'Suryast', for which an AI system named "RAGHAV Artificial Intelligence Painting App" was listed as a coauthor. The Copyright Office had previously rejected an application in which the same system had been listed as the sole author. While India has not effected any legislative changes in the Copyright Act 1957, the Copyright Office ignored the human authorship requirement in Indian copyright law when granting registration with an AI system as a co-author.

When the matter became controversial, the office sent a notice to the human co-author in the application declaring its intent to withdraw the registration. But the data from the Indian Copyright Office website suggests that the work concerned continues to remain registered. The Copyright Office is also yet to articulate mandatory disclosure requirements on the use of AI or even initiate broader consultations on this important issue.

It may also be useful to review the current scenario in light of the recommendations of the 161st Report of the Department-Related Parliamentary Standing Committee on Commerce entitled 'Review of the Intellectual Property Rights Regime in India' (July 2021). The report had suggested reviewing the Copyright Act 1957 and the Patent Act 1970 to "incorporate the emerging technologies of AI and AI-related inventions in thir ambit".

A careful reading of the report suggests some of its recommendations aim to relax the standards for securing copyright and patents. But these recommendations do not appear to be informed by any study of IP-related challenges and needs of the AI innovation ecosystem in India. The committee did not consider the potential adverse implications of such an approach for the startup ecosystem in India. This is alarming.

IP rights confer monopoly protection, and as any monopoly rights can have extensive negative consequences on society, we need to be cautious about extending, in a straightforward way, existing IP protections to AI-generated work. Many of the traditional economic arguments such as the need to incentivise authors and inventors through copyright or patents, do not hold with the autonomous creative output of AI systems, since machines are not influenced by such incentives.

In sum, policymakers and courts in India also need to assume a more cautious approach against diluting the human-centricity in copyright law.