PRICE FOR A 'PANCH' – NO THIRD CHILD

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On July 30, 2003, a three-judge bench of the Supreme Court of India comprising of Justice R C Lahoti, Justice Arun Kumar and Justice Ashok Bhan, dismissed a batch of 200 writ petitions[1] challenging the constitutional validity of the provisions of The Haryana Panchayati Raj Act, 1994 ("the Act") that enforce a two-child norm on Panchayat members. The writ petitioners/appellants were largely people who had been disqualified under the Act.

The impugned provisions were Sections 175(1)(q) and 177 of the Act. Section 175(1)(q) provides that no person who has more than two living children can be a sarpanch or a panch of a gram panchayat; or member of a Panchayat Samiti or a Zila Parishad. This is subject to the provisio that a person having more than two living children up to the expiry of one year from the commencement of this Act shall not be disqualified. Section 177 provides that any member who was disqualified on the grounds mentioned in Section 175 at the time of election, or incurs such disqualification during term in office, shall cease to hold office.

The provisions were challenged on five grounds: (i) that the provisions are arbitrary and hence violative of Article 14 of the Constitution of India; (ii) that the disqualification does not serve the purpose sought to be achieved by the legislation; (iii) that the provisions are discriminatory; (iv) that the provisions adversely affect the personal liberty of individuals, in that they restrict the number of children a person can have and hence violates Article 21 of the Constitution; (v) that the provisions interfere with the freedom of religion and hence violate Article 25 of the Constitution.

While dismissing the petitions, the Bench observed,

> *"disqualification on the right to contest an election by having more than two living children does not contravene any fundamental right, nor does it cross limits of reasonability."* [2]

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[1] *Javed and Others v. State of Haryana and Others*, JT 2003 (6) 283.

[2] supra n. 1 at 298, para 25.

The Bench lauded the provisions and saw them as a viable solution to the problem of 'population explosion'.

I. Article 14 rights 'not violated'

The first ground of challenge was that the provision is arbitrary in nature and violates Article 14[3] of the Constitution of India. It was further contended that the disqualification does not serve the purpose that the legislation seeks to achieve. Additionally, the provision was alleged to be discriminatory. These three grounds of challenge were dealt with collectively.

The Court observed that Article 14 forbids class legislation, but does not forbid making a 'reasonable classification' for legislative purposes. The classification will be deemed to be reasonable if two conditions are fulfilled, namely: the classification must be based on intelligible differentiation that clearly distinguishes persons inside the group, from those outside it; and secondly, such differentiation must have a rational relation to the object sought to be achieved by the legislation.

According to this test, the Court held the classification to be 'well-defined' since persons having more than two children are clearly distinguishable from those who do not. It was further held that one of the objects of the impugned legislation is to popularise family planning/family welfare programmes and the disqualification seeks to achieve the same by creating a disincentive.

The Bench, while rejecting the contention made with regard to arbitrariness, took the view that the number of children fixed at two was based on legislative wisdom. It could have been more or less, but the Court refused to delve into the issue as it was a policy decision outside the purview of judicial review.

Passing this judicial test, however, is not sufficient to answer questions of violation of the equality provision. The Supreme Court, spearheaded by Justice Bhagwati, has evolved an alternate mechanism of testing the validity of a provision on the touchstone of

[3] The provision reads as follows: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Article 14. The new approach to Article 14 goes beyond the classificatory principle and is not confined by its limits.[4] As Bhagwati, J. opined, *'Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits.'*[5] Under the new approach, Article 14 seeks to ensure fairness and equality of treatment. An arbitrary action strikes at the roots of equality, and Article 14 strikes at arbitrariness of State action.[6] Thus, essentially, 'reasonableness' of State action is the demand of Article 14.

Examining the impugned provisions of the Act in this light would perhaps give a different result. As elucidated below, the imposition of a two-child norm for panchayats goes against the aims of the National Population Policy (NPP), has serious societal fallouts and challenges the basic concepts of democracy. It is difficult to share the Court's confidence in the 'reasonableness' of the provisions in view of these.

II. Serving a "purpose"

The second contention raised was that the number of children a person has, does not affect his/her competence to be a member of the *panchayat* and thus, there was no nexus with the purpose sought to be achieved by the Act. The Court dismissed this contention while reiterating the view that one of the objectives of the legislation was family welfare/ family planning, which is consistent with the NPP.[7]

It was observed that Article 243G of the Constitution vested the State legislatures with the power to make such laws as would allow gram panchayats to function as units of self-governance, and Clause (b) of Article 243G allowed the gram panchayats to implement schemes of economic development and social justice. The Act noted "Public and family welfare- implementation of family welfare programmes" as one of the duties of gram panchayat under Section 21(XIX) of the Act and thus, the Court took the view that the provisions conformed with the objective of the Act.[8] However, the

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[4] MP Jain, "Indian Constitutional Law", 1029 (2003).

[5] *EP Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3; VN Shukla, "Constitution of India", at 64 (MP Singh ed. 2001), (1950).

[6] *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

[7] supra n. 1 at 293 para 9.

[8] ibid. at 293 para 10.

linkage made by the Court between family welfare and family planning, seems doubtful because a healthy, prosperous family does not necessarily require fewer members, though this may be a contributory factor.

III. 'No discrimination'

The Court saw no discrimination in the fact that the provisions applied only to panchayats in Haryana and not to other States, State Legislatures or the Parliament. Accepting such a submission was, according to the Court, violative of the autonomy given to State Legislatures and the Parliament (under Article 246 read with the Seventh Schedule to the Constitution) to make laws with respect to subjects within their legislative competence. It was held that legislation cannot be deemed to be discriminatory merely because only one State enacts it and other States lack similar law. The provision was seen as the first step in implementing a policy decision.

The Court held that a law enacted by a State Legislature while exercising its legislative powers cannot be compared to a law made by the Parliament or another State legislature under its legislative power, since the sources of power and those exercising the power are different. The Court opined that when the source of authority for two statutes thus differs, Article 14 has no application.

IV. Violation of Article 21?

The challenge to the constitutional validity of the Act with respect to Articles 21[9] and 25[10] was struck down while stating that the disqualification was "*conceptually devised in national interest*".[11] The Court observed that requirement of 'reasonableness' applies to all fundamental rights. It also believed that ideals of socio-economic justice and the nation's advancement cannot be ignored by citing 'undue stress' on fundamental rights.[12]

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[9] The provision reads as follows: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

[10] The provision reads as follows: "(1) Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to...right freely to profess, practice and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice. (b) providing for social welfare and reform..."

[11] supra n. 1 at 298, para 25.

[12] ibid. at 298, para 28.

The Court quoted national and global responses to the population problem to justify its stance, for instance, the 'carrot and stick' rule followed by China in controlling its population,[13] as well as the prominence given to population control in every five-year plan of our country and its failure in meeting set targets. The case of *Nergesh Meerza*[14] was also cited by the Bench to support their reasoning.

V. Challenge to Article 25

Another contention was that four marriages were permitted for men for procreation under Muslim law, and such a provision would violate the right to freedom of religion under Article 25. The Court held that it may be permissible for Muslims and other communities to have as many children as they want, but no religion or law in India puts an obligation on anyone to contract bigamous or polygamous marriages, or to have more children than one. The Court defined the ambit of protection under Article 25 by stating that the protection provided is only with respect to religious practices that form an essential and integral part of the religion.[15] It observed that polygamy, like practices of *sati* and human sacrifice, could be prohibited by the State in the interests of public order. The Court observed that a person is free to have more than two living children, but will have to "pay a little price" for doing so, by being ineligible to hold a post in a panchayat in Haryana.[16]

VI. Taking the old line

The Court's decision in these writ petitions may be seen in continuum with the decisions of the Rajasthan High Court in upholding similar provisions of The Rajasthan

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[13] Under this rule in China, couples following the one-child norm were provided incentives in the field of education and employment. Those breaching the one-child norm suffered under disincentives, which included penal action. The Supreme Court commented that India being a democracy, procreation beyond a limit has not yet been penalised, but "*complacence in controlling population in the name of democracy is too heavy a price to pay, allowing the nation to drift towards disaster* "; ibid. at 300, para 34.

[14] *Air India v. Nergesh Meerza*, (1981) 4 SCC 335; In this case the Court has upheld the validity of a rule which would terminate the services of airhostesses with two existing children on their third pregnancy. Reasons given were two-fold: firstly, the provision was seen as being protective of the larger health interests of the airhostesses and upbringing of their children; and secondly, it would 'whip up' the family planning programme.

[15] *Dr. M Ismail Faruqui and Others. v. Union of India and Others*, (1994) 6 SCC 360 was relied on.

[16] supra n. 1 at 307, para 61.

Municipalities Act 1959[17] and The Rajasthan Panchayati Raj Act, 1994[18]. The said Acts also disqualify a person with more than two children from holding office under the Acts. The High Court's reasoning while dismissing both cases was similar to that given by the Supreme Court in the present case. The right to be elected was said to be a statutory right subject to the limitations provided under the statute. While quoting Bertrand Russell to observe that "*Population explosion is more dangerous than a hydrogen bomb*", the Supreme Court expressed concern over how the growing population was hampering national progress, and justified the restrictions as having a social purpose.[19]

VII. The Right approach?

The Court's decision is in tune with a target-oriented approach of population stabilisation, but interestingly, the Government itself renounced this target- based approach[20] of the 1970's and 1980's, to adopt a 'development is the best pill' approach[21] to the population problem. The latest NPP claims to be one of advocacy, quality care and individual choice. It affirms the "*commitment of the government towards voluntary and informed choice and consent of citizens while availing of reproductive health services, and continuation of the target free approach in administering family planning services*".[22] This clearly contradicts the Court's assumptions of the provision being in conformity with the NPP.

The Supreme Court order is also not in consonance with the spirit of the International Conference on Population and Development, (ICPD), Cairo, 1994[23]. As a signatory to

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[17] *Saroj Chotiya v. State of Rajasthan*, AIR 1998 Raj 28

[18] *Mukesh Kumar Ajmera v. State of Rajasthan*, AIR 1997 Raj 250

[19] supra n. 1 at 299, para 32.

[20] Laxmi Murthy, "No Kidding: Apex Court Enforces Two-Child Norm", Infochange News and Features, August 2003 at <http://infochangeindia.org/features123.jsp>, last visited 25th February 2004.

[21] TK Rajalakshmi, "Children as Disqualification", Frontline, Vol.20, Issue-17, August 16-29, 2003 at < http://www.frontlineonnet.com/fl2017/stories/20030829002204600.htm>, last visited 25th February 2004.

[22] "Population and Family Planning-Laws, Policies and Regulations" at < http://www.unescap.org/pop/database/ law_india/india1.htm>, last visited 27th February 2004.

[23] Principle 8, ICPD, 1994, declares: States should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to health care services, including those related to reproductive health care, which includes family planning and sexual health...and provide the widest range of reproductive health care services without any form of coercion. All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so." < http://www.un.org/popin/icpd/ conference/offeng/poa.html>, last visited 25th February 2004.

the action plan, India is committed to making linkages between population, development and gender.[24]

VIII. Societal Concerns: Desired Impact?

The fallout of making eligibility of contesting panchayat elections contingent on family size is evident through the study conducted by 'Mahila Chetna Manch' (MCM), a Bhopal based NGO. Implications of the two-child norm on the Panchayati Raj Institutions in Madhya Pradesh, Orissa, Rajasthan, Andhra Pradesh and Haryana were recorded and MCM found that 40% of all candidates for Panchayat posts were disqualified or caught in legal proceedings relating to their disqualification on the basis of number of children. Of these 50% of Scheduled Castes and 38% of the Backward Castes were women. In Orissa, women constituted about 55% of all such cases, while in Andhra Pradesh they formed 48%.[25] Many cases have been reported of women being deserted, of forcible sex-selective abortions and instances of children being given in adoption or abandoned. An example is the case of a woman sarpanch from Madhya Pradesh who gave up one of her children in adoption in order to escape the disqualification.[26]

Health groups and women's groups had previously approached the National Human Rights Commission (NHRC) with a memorandum that the two-child norm was discriminatory, anti-democratic and violative of commitments made by the Indian Government in International Covenants. As a result, in a National Colloquium held in January 2003,[27] a Declaration was issued saying that "*propagation of a two-child norm and coercion or manipulation of individual fertility decisions through the use of incentives and disincentives violate the principle of voluntary informed choice and human rights of the people, particularly the rights of the child.*" The Declaration clearly stated that such measures are inconsistent with the NPP. Thus, we have a situation where the decision of the Supreme Court is

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[24] supra n.21.

[25] Akshaya Mukul, "Two child norm cripples women" at <http://timesofindia.indiatimes.com / articleshow/msid-39505740,prtpage-1.cms>, last visited 19th March, 2004.

[26] Angana Parekh, "Weighted against Women" at <http://timesofindia.indiatimes.com /articleshow/ 18491241.cms>, last visited 22nd March 2004.

[27] Dr. Justice AS Anand, Keynote Welcome Address on the theme "Women Empowerment –the key to achieve Millenium Development Goals", at a function organized by the U.N. Information Center on Mar. 7, 2003 at <http://nhrc.nic.in/womensday03.htm>, last visited 29th March 2004.

not in consonance with the Declaration issued by the NHRC. Though the NHRC declaration is not binding on the Supreme Court, it certainly has persuasive value.

On the submission that such a disqualification would be most harmful to women, as in India, women usually have to submit to the demands of their husbands and bear a third child if he so desires, the Bench opined *"...We do not think that with the awareness that is arising in Indian womenfolk, they are so helpless as to be compelled to bear a third child even if they do not wish to do so."*[28] However, this observation is not well founded in the Indian context. In a social scenario where preference is for the male child and there exists gender inequity, coercive methods will only serve to further undermine the status of women. In addition, there is high probability of a spurt in incidents of female foeticide and infanticide. The reproductive rights of the women are not respected and the skewed sex-ratios are ample evidence of the discrimination against the girl child. According to a study, large number of women members were disqualified under these provisions in Ambala, Mewat and Gurgaon districts of Haryana.[29] Prioritizing health, education and livelihood of women was hailed by the NPP as a better way of meeting required ends. As Rajeev Dhavan observes, *"...local democracy is fundamental to the Constitution. Women must share this power. But, they cannot, if, for some reason they decide to have a third baby."*[30]

IX. Lesson from the Past

Such coercive measures could possibly backfire on the Government. One must not forget the 'forced sterilisation' during the Emergency period in 1976. Thousands of people were sterilized within six months, while hundreds died of infections associated with the operations and in protests against the pogroms. This was an important factor in the Indira Gandhi government being voted out of power in the subsequent elections. There also followed a backlash against family planning as the number of sterilisations dropped to 900,000 that year. [31]

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[28] supra n. 1, at 307, para 63.

[29] Exploratory study commissioned by the Ministry of Health and Family Welfare and supported by United nations Population Fund (UNFPA) conducted in Andhra Pradesh, Madhya Pradesh, Rajasthan, Haryana and Orissa, supra n. 21.

[30] Rajeev Dhavan, "Democracy vs. Demography", The Hindu, August 8, 2003 at <http://www.hinduonnet.com/ thehindu/2003/08/08/stories/2003080801641000.htm>, last visited 6th March 2004.

[31] Betsy Hartmann, "Sterilization and Abortion" at <http://www.hsph.harvard.edu/rt21/race/HARTMANNCh13. html>, last visited 29th March 2004.

X. In Conclusion

With the restrictions imposed by the Act in force, people with more than two children might begin to be treated as lesser citizens, and if such a process starts, there's no knowing its end. As Rajeev Dhavan explains, in constitutional terms, this is called 'suspect classification' and once legitimised, it can be expanded in many directions. Licenses, education and other benefits may be denied to families with more than two children.[32] This does not augur well for our democracy.

We must learn from past mistakes and not attempt the use of coercive measures once again as a means to solve our population problem. The best way would be to make concerted efforts to ensure reproductive rights are respected and people are educated enough to make voluntary, informed choices to have smaller families rather than using undemocratic, coercive methods to do the same.

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[32] supra n. 30.