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Population Control through Restrictions on Right to Contest Elections: Constitutional Imperatives

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1. Introduction:

Recently, speculation is ripe that the Government of India is considering control of population growth by taking recourse to sanction based legislative means[1], resulting in a debate concerning the need to control population growth by imposing sanctions. The issues concerning religious, caste and regional demographics, concerns of micro minorities like Parsees and Jews, the impact of population control measures on existing legislations and various other sociological aspects are likely to emerge. Presently, there is no strict sanction based parliamentary legislation in this area. A sanction which is widely used is the restriction on the right to contest elections for local bodies such as panchayats, zilla parishads, municipalities, etc. Imposition of such a restriction falls within the legislative powers of the States[2] and accordingly, most States have enacted provisions which restrict the right to contest elections to local bodies if the individual desirous of contesting elections has more than 2 children living. This paper will highlight the judicial scrutiny of such measures in the States of Haryana, Rajasthan, Gujarat and Andhra Pradesh.

An argument has been raised quite often that there is no need to control population growth[3] and any measures to control population ought to be incentive based and not sanction based. For the purpose of this paper, it is deemed fit to not go into the merits of such an argument but to focus strictly on the Constitutional scrutiny of the existing population control measures in the form of restrictions on the right to contest elections.

In as early as 1952, India became the first country in the world to launch a national program which emphasized family planning measures to restrict the population growth at a level consistent with the requirement of the national economy.[4] The well known 42nd Amendment to the Constitution of India inserted "Population Control and Family Planning" into the concurrent list. Currently, the National Population Policy, 2000 (hereinafter to be referred to as NPP) is holding forte. This policy has emphasized the need to achieve population stabilization through several promotional and motivational measures and has asserted that to achieve the targets, a multi sectoral approach would be necessary. It is pertinent to note that the NPP does not recommend imposition of strict sanctions to achieve population control. Various States such as Maharashtra, Gujarat, Rajasthan, Haryana, Andhra Pradesh, Uttar Pradesh, Bihar, West Bengal, Madhya Pradesh, etc. have adopted measures to control population and that till date, there is not much initiative from the Parliament on the sanctions front. In most states, sanctions focusing on restrictions from contesting elections are to be found in the relevant statutes and the provisions are similarly worded. A mention of such

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provisions has been made in Chapter 2 of this paper.

2. Sanctions based on Restriction on the Right to Contest Elections to Local Bodies:

In most States where sanctions are imposed, individuals become disqualified from contesting elections to the Panchayats and Municipalities. The State Legislatures have, vide Article 243-F(1)[5], derived competence to take such measures in relation to Panchayats.

2.1. The Constitutional position as highlighted by the Apex Court:

The first and perhaps the only occasion for the Supreme Court to examine the constitutional validity of such measures arose in ***Javed vs. State of Haryana***[6] wherein a three Judge bench of the Apex Court upheld the provisions of the Haryana Panchayat Raj Act, 1994 which provided disqualifications from assuming offices of Panch, Sarpanch, Up Sarpanch of Gram Panchayat or member of Panchayat Samiti and Zilla Parishad if there are more than two children living. Section 175(1)(q)[7] of the Haryana Panchayati Raj Act, 1994 was the relevant provision in this regard. The Court repelled the contentions raised on the grounds of violation of Articles 14 and 25 of the Constitution of India. As regards non-implementation of the policy in a uniform manner and an attraction of the vice of violation of Article 14, the Court observed as follows;

"A uniform policy may be devised by the Centre or by a State. However, there is no constitutional requirement that any such policy must be implemented in one-go. Policies are capable of being implemented in a phased manner. More so, when the policies have far-reaching implications and are dynamic in nature, their implementation in a phased manner is welcome for it receives gradual willing acceptance and invites lesser resistance. The implementation of policy decision in a phased manner is suggestive neither of arbitrariness nor of discrimination."

The Court thus held that such a law cannot be held to be discriminatory or suffering from the vice of hostile discrimination as against its citizens merely because Parliament or the legislatures of other States have not enacted similar laws. It was noted that a uniform policy may be devised by the Centre or by a State. However, there is no constitutional requirement that any such policy must be implemented. Commenting on the arguments buttressed regarding the violation of Article 21, the Court observed as follows;

". The lofty ideals of social and economic justice, the advancement of the nation as a whole and the philosophy of distributive justice - economic, social and political - cannot be given a go-by in the name of undue stress on fundamental rights and individual liberty. Reasonableness and rationality, legally as well as philosophically, provide colour to the meaning of fundamental rights and these principles are deducible from those very decisions which have been relied on by the learned counsel for the petitioners. The torrential increase in the population of the country is one of the major hindrances in the pace of India's socio- economic progress."

On a bare reading of the above text, it become clear that the Court while testing the legislative

provision on the anvil of Article 21 has asserted that the criteria of analysis on the test of reasonableness is not subjective and that analysis of legislations on the anvil of the Constitution needs to be restricted to the contours indicated by the Constitution. The Court noted the problem of population explosion in order to repel the contentions of violation of the Fundamental Rights. It thus upheld the Constitutional validity of the impugned legislative provision.

2.2. Analysis by the High Courts and examination of the various grounds raised:

There have been several occasions for the various High Courts to consider the Constitutional validity of such provisions. In ***Bharatbhai Dhanjibhai Modi vs. Collector, Porbandar***[8], the Gujarat High Court was called upon to examine the constitutional validity of Section 11(1)(h)[9] of the Gujarat Local Authorities Laws Act which provided that a person having more than two children will be disqualified to contest elections for councillor and that if subsequent to such election, a third child is born, such councillor shall attract the disqualification and his seat will be vacant. It was contended that the said provision will be in conflict with the provisions of the Hindu Marriage Act as not giving the wife marital bliss and having children was treated as cruelty. The Court noted that;

"the statutory provisions under challenge do not take away the right of the wife to enjoy the marital bliss, nor do they impinge upon her right to prevent pregnancy."

It was also contended that the impugned provisions will be in conflict with the provisions of the Medical Termination of Pregnancy Act and more particularly S. 3(2) of the said Act which provided the various grounds for termination of a pregnancy by a registered medical practitioner. The Court repelled the said contention. However, the judgement does not elaborate the arguments which were raised in this regard and the Court has summarily dismissed that contention. As regards the contentions regarding violation of Article 14, the Court noted that it was bound by the law laid down by the Apex Court in Javed.[10]

In ***Mukesh Kumar Ajmera vs. State of Rajasthan,***[11] S. 19(L)[12] read with S. 39 of the Rajasthan Panchayati Raj Act, 1994 which prescribed a similar disqualification was challenged on the grounds of lack of legislative competence and violation of Articles 14, 21, 25 and 26 before the Rajasthan High Court. The Court traced the legislative competence to Article 243F and also took note of Entry 5 to List II which authorizes the State Government to enact law relating to local government. It observed as follows;

"*Besides Article 243F(a), Entry No. 5 of List II of Schedule VII authorises the State Legislature to make any law relating to Local Government. Entry No. 20-A of List III, i.e., the Concurrent List of Schedule VII of the Constitution authorises the Union of India and the State Legislature to frame the law on population control and family planning. Entries mentioned in Schedule VII are the fields of legislation and not the powers. Power to legislate is drawn from the relative Articles of the Constitution. The State Legislature derives powers to enact laws relating to the Local Government from Articles 243F and 246 of the Constitution of India. To enact a law relating*

to the Local Bodies, is in the exclusive domain of the State Legislature. We, therefore, uphold the validity of these provisions in view of Article 246, Entry 5 of List II and Entry 20-A of List III of Schedule VII of the Constitution of India."

As regards the violation of Article 14, the Court noted that the said provision does not prohibit the State from introducing gradual reforms and that merely because a particular legislative scheme was not having universal application would not deem it *ultra vires* the Constitution. It observed as follows;

"The principle of equality enshrined in Article 14 of the Constitution does not mean that every law must have a universal application. Article 14 does not forbid classification for the purpose of legislation provided the classification is based on intelligible differentia and is not arbitrary. Every classification though likely to produce an inequality but inequality alone cannot determine the question of Constitutionality. The State, for the purpose of giving effect to its policies, can make laws classifying and distinguishing persons to be subjected to such law. The mandate of Article 14 is that all persons similarly situated should not be discriminated and not that the same Rule of law should be applicable to all the elected bodies. By the process of classification, the State has the power to make the law for a particular set of persons. Article 14 cannot be used for declaring a law made by the State unconstitutional by a process of comparative study of the provisions made in the State Law and the Law made by the Centre. Two laws made by different legislature, i.e., one by the Centre and the other by the State, cannot be read in conjection."

The Court noted that the classification was reasonable and had a nexus with the object sought to be achieved. It is to be noted that the Court was very clear in its exposition while repelling the contention of violation of Article 21. It held that there was no right to marry or procreate enshrined in the Constitution. Such a right, according to the Court, did not even qualify as a Common law right. Hence, the Court emphatically rejected the said contention. It is to be noted that the stand taken by the Court rejecting the very existence of a right to marry or procreate as a fundamental right would probably have to be revisited. In Chapter 3 of this paper, the researcher has addressed this issue in more detail. Additionally, the following observations of the Court are worth noting;

"These provisions have been enacted by the Legislature to control the menace of population explosion. Growing population is one of the major problems which India is facing today. Population progresses by geometrical progression while the resources increase only at an arithmetical rate."

The Court traced the legislature's powers to deal with population control measures to the Directive Principles of State policy. In another landmark case decided by the Rajasthan High Court[13], the fact situation was that the petition had three children but from two wives and as such, he had contended that the disqualification would not be attracted as the first child was born out of the wedlock with the first wife and two children were born after the wedlock with the second wife, which was subsequent to the death of the first wife. The Petitioner contended that the disqualification will be attracted if a 'couple' has more than two

children. However, the Court observed that on a plain reading of the explanation to the said provision, no such interpretation could be culled out and hence, the Court rejected the Petitioner's contentions and upheld his disqualification.

In the case of ***Saroj Chotiya vs. State of Rajasthan***,[14] S. 26 (xiv) of the Rajasthan Municipalities Act which also provided for a general disqualification to be a member of the municipalities if a person has more than two children, was challenged. The principal ground of challenge was that the provision was discriminatory and against basic human dignity, behavior and the institution of marriage. The Court emphatically noted;

"that the growing population has hampered national progress." It was observed that, *"the right to be elected is neither a fundamental nor a common law right but is merely a statutory right."*

3. The Right to Procreate as a facet of Article 21

On examination of the various judgements noted above, it is noticed that a very popular contention raised is that there cannot be a restriction on the right to procreate, which, is equated to the status of a fundamental right under Article 21 of the Constitution of India. Before dealing with the question as to whether at all it can be elevated to such a status, a very brief analysis of the judgements noted above and a reiteration of their ratio, in so far as they are concerned with this aspect would be relevant. In B.K. Parthasarathi,[15] the Court, while commenting upon the relevant provision in the Andhra Pradesh legislation, has noted that the provision does not directly curtail the right to procreate but it attaches a disqualification. In this manner, the Court has attempted to summarily brush aside the argument of procreation rights. In Mukesh Kumar Ajmera,[16] the Court refused to acknowledge the existence of a right to marry or to procreate as a fundamental right. It is therefore necessary to first determine whether the right to procreate exists as a fundamental right. In *Javed*,[17] it was vehemently argued that Article 21 be interpreted to its optimum level in light of the judgements rendered in *Maneka Gandhi vs. Union of India*[18] and *Kasturi Lal Lakshmi Reddy vs. State of Jammu and Kashmir*[19] and a judgement holding that the right to procreate is included within the ambit of Article 21 was invited from the Court. In *Suchita Shrivastava vs. Chandigarh Administration*,[20] the Court, speaking through Balakrishnan CJ has observed as follows;

"There is no doubt that a woman's right to make reproductive choices is also a dimension of `personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children."

It is pertinent to note that in the Court here,

does not comment on the 'right to procreate' in terms of giving birth to as many children as the woman would desire but in terms of 'right to make reproductive choices.' This case was concerned with the right to procreate and to make reproductive choices in terms of the Medical Termination of Pregnancy Act, 1971. It was concerned with the right to carry out abortion and hence, it cannot be relied upon to contend that the restrictions on the right to contest elections on birth of a third child are violating the right to procreate. The Court has not, in any manner, recognized the right to procreate simpliciter, as a fundamental right. It has to be appreciated in the context in which the question of imposing a restriction on the said right arises. In *Z vs. State of Bihar*[21] as well, the Court, while dealing with an issue arising out of the Medical Termination of Pregnancy Act, 1971, reiterated the view that the right to make reproductive choices is fundamental. However, once again, it is to be noted that the Court was discussing the said right in the context of permission to carry out abortion since there was a risk to the life of the mother. It is thus submitted that in most such cases addressing the issue of reproductive rights, the Court has dealt with such rights by restricting themselves to the reproductive rights of women only and that the said rights have been understood by the Courts in a negative sense. In *Air India vs. Nargesh Meerza*,[22] the Apex Court did not find fault with a rule that allowed the termination of the services of an air hostess on a third pregnancy with two children living. The Court gave more than one reason to justify its decision. It observed as follows;

"In the first place, the provision preventing a third pregnancy with two existing children would be in the larger interest of the health of the Air Hostess concerned as also for the good upbringing of the children. Secondly, when the entire world is faced with the problem of population explosion it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of overpopulation which, if not controlled, may lead to serious social and economic problems throughout the world."

In this case as well, the Court did not comment on the status of the right to procreate. It is thus noted that the Supreme Court of India has not equated the right to procreate to the status of a fundamental right under Article 21 and in terms of restrictions on population growth, it would be wrong to say that there exists a fundamental right to procreate and all population control measures based on sanctions need to be set aside at the altar of such a right.

4. Blanket imposition of sanctions vs. Targeted imposition of sanctions:

In this paper, we have noted the judgements upholding the population control through restrictions on the right to contest elections from States of Rajasthan, Gujarat, Maharashtra, Andhra Pradesh and Haryana. It is now imperative to note the percentage population growth in these States from 2001 to 2011. It is observed that in the State of Rajasthan, the population has grown at the rate of 21%,[23] which is much higher than the national average. In the State of Gujarat, the population has grown at the rate of 19%[24] which is again

higher than the national average. In the State of Andhra Pradesh, the population has grown at the rate of 11% in the decade of 2001-2011, however, in the previous decade, it was almost 14%.[25] In the State of Maharashtra, the population growth from 2001 to 2011 has been 16%.[26] It is to be noted that the population growth figures in States of Rajasthan and Gujarat is much higher than the national average population growth rate. The question which arises is as to whether restrictions in the form of restraint on the right to contest elections to local bodies has aided in the process of population control. The Population Control measures in the country take various forms. As has been noted above, most measures to curb population are focused on informed choice and incentives and not on sanctions. Thus, it would be very difficult to state a proposition with certainty that minor sanctions as have been highlighted in this paper, have helped curb population growth. The domain of levy of minor sanctions has been left to the States. The Parliament has not done much in the sanction's arena. Also, as regards right to contest elections to the Parliament and the State Legislatures, though the Parliament is empowered to make law, no law imposing any such restrictions has ever been enacted. Looking at the issue from a constitutional standpoint, it is amply clear that such restrictions have been tested and upheld by the Courts repeatedly and hence, there does not remain much of a constitutional controversy in this area. However, the Courts have, in examining such laws, failed to note that the population growth rates are not uniform across all communities. The population growth rates differ across religious denominations. The statistics of the census of 2011 and that of 2001 make it amply clear that the population of certain religious denominations has been increasing at a rate much higher than the national average. As an example, it may be noted that the population of Muslims has increased at an alarming rate of 30%[27] from 2001 to 2011 whereas the population of Hindus has increased at the rate of 14%. Similarly, it is to be noted that the population of certain micro minorities like Parsees is decreasing. In order to stop the rapidly declining population of Parsees, the Government of India, in 2013, has launched the Jiyo Parsi scheme. The said scheme focuses on encouraging Parsee couples to have more than one child.[28] Hence, when confronted with a central government scheme which focuses on increase in the population growth rates of particular communities like Parsees, the question would arise as to whether the State legislations which are focusing on sanctions such as restrictions on the right to contest elections will survive. Admittedly, the Central Government scheme mentioned above is neither of a legislative character nor does it stem from legislation and hence, the State law would prevail. However, the question arises as to whether uniform application of such restrictions will pass the test of Article 14 as admittedly, not all communities can be looked at from the same lens. The Courts will have to consider, while examining constitutional validity of such restrictions, whether applying blanket rules for all communities can be considered to be valid in the existing scenario. If the population of a particular community is dwindling, then restrictive measures cannot be applied to that community since equating that community with other communities whose population is growing

rapidly will be a blatant violation of Article 14. The same logic would also apply to regions. Though initiating sanction-based programs has been left to the States, it is to be noted that within the States as well, there are several distinctions between communities as also between regions. This fact is true for sex ratios as well. The typical example of the State of Maharashtra can be taken to show that the sex ratio in the districts such as Ratnagiri and Sindhudurg is much better than the districts such as Satara, Sangli, Solapur, etc.[29] Admittedly, the focus area of the States has been to increase the sex ratio and hence, the birth of a girl child is encouraged. Thus, if a couple having two male children gives birth to a female child, such a birth will be encouraged by the State. However, on the other hand, since she is a third child, sanctions in the form of taking away the right to contest elections will be imposed. It is therefore amply clear that while looking at population control measures, several such overlapping aspects will have to be considered. Hence, whenever sanction-based population control measures are to be taken, such measures will have to be subjected to strict constitutional scrutiny as no two regions and no two communities can be equated in terms of population growth figures. The Supreme Court has repeatedly held that the right to vote and the right to contest elections are rights conferred by statute and they can be taken away by statute.[30] However, if blanket measures which apply across all regions in a State or across all communities irrespective of their population growth rates are adopted, then such measures will attract the vice of Article 14 and will have to be subjected to strict scrutiny. Not making a classification when a classification is required to be made, will also be hit by Article 14, as has been held by the Apex Court in the case of ***K.T. Moopil Nair vs. State of Kerala.***[31] In the case of ***Murthy Match Works vs. Assistant Commissioner of Central Excise***,[32] Krishna Iyer, J, observed that, *"Equal treatment of unequal groups may spell invisible yet substantial discrimination with consequences of unconstitutionality. That dissimilar things should not be treated similarly in the name of equal justice is of Aristotelian vintage and has been, by implication, enshrined in our constitution."* It is thus clear that from a constitutional standpoint, that the sanction mechanism has failed to use different lenses to look at different religious groups and also, within the states, at the different regions which encounter different issues.

5. Conclusion:

It is to be noted that we are discussing about sanctions and not incentives, and hence, such laws will have to be subjected to a stricter scrutiny. From the perspective of the makers of policy, it will be politically inconvenient to take region/community centric measures. However, in my submission, if a community and region centric approach is not adopted, then the laws will be liable to be struck down, being hit by Article 14 of the Constitution. To conclude with, it is noted that population control measures which focus on minor sanctions have been upheld by the Court by applying the nexus with the object sought to be achieved test. However, it is also opined that sanctions on population control cannot be imposed in a blanket manner but will have to focus on only those

communities or regions which have a very high population growth rate. In all other cases where the population growth rate is high but not greater than the national average, sanction-based measures need not be taken, rather, the focus area may be shifted to incentive based and awareness-based programs. It is submitted, as a concluding note that the Courts ought to, in light of the data available, examine the population control measures by noting that the population growth rates across all sections of the society are not uniform. The policy makers are well aware of the existing scenario with respect to population explosion. As has been noted earlier, political inconveniences and compulsions are very much recognized and acknowledged as factors for non-implementation of targeted sanctions. However, such political compulsions and inconveniences cannot be allowed to cause injustice to certain sections of the society which do not require sanction-based measures. It is therefore submitted that in the case of such communities whose population growth rates are not high or much lower than the national average, the law fails to show a nexus with the object sought to be achieved and thus, a need is felt to revisit such sanction-based population control programs.

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2 *Article 243-F, Constitution of India, 1950.*

3 *E.g. See Oomen Kurien, Why India must move policy away from population control, Observer Research Foundation, 19/04/2019, available at, https://www.orfonline.org/research/why-india-must-move-policy-away-from-population-control-50032/, last visited on 05/09/2019.*

4 *Introduction, National Population Policy, 2000.*

5 *243F. Disqualifications for membership*

(1) A person shall be disqualified for being chosen as, and for being, a member of a Panchayat

(a) if he is so disqualified by or under any law for the time being in force for elections to the Legislature of the State concerned: Provided that no person shall be disqualified on the ground that be is less than twenty-five years of age, if he has attained the age of twenty-one years;

(b) if he is so disqualified by or under any law made by the Legislature of the State.

6 *AIR 2003 SC 3057.*

7 *175. (1) No person shall be a Sarpanch or a Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad or continue as such who - (q) has more than two living children.*

8 *(2008) 2 GLR 1128.*

9 *"11(1)- No person may be a Councillor:(h) who has more than two children."*

10 *Supra note*

11 *AIR 1997 Raj 250.*

12 *"S.19L- a person is disqualified to be elected as a Panch or a Member to the Panchayat Raj Institution if he has more than two children."*

13 *RLW 2005 (4) Raj 2295.*

14 *AIR 1998 Raj 28.*

15 *Supra note 17.*

16 *Supra note 11.*

17 *Supra note 6.*

18 *(1978) 1 SCC 248.*

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31 *AIR 1961 SC 552.*

32 *AIR 1974 SC 497.*

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