

“Desideratum of Population Control in India: Intergenerational Equity V. Right to Procreation and an Analysis of the Population Control Bills”

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Introduction

Human beings are emphatically the most evolved species which have faced conditions of high mortality due to famines, accidents, illnesses, infections and war in the past and have survived by procreating in large numbers to ensure the survival of the species. Reproductive rights, however, have been at a forefront of legal discussion¹ in the contemporary world due to the population explosion which has led to adverse environmental and ecological consequences that the world is witnessing in the 21st Century.

India is a multicultural country which has been classified as a developing country. Though India is the seventh-largest country in the world, with a total area of 3,287,469 square kilometres (1,269,299 sq mi),² the landmass of this country is merely 2.4% of the earth's total landmass.³ The population of India is 1.34 Billion, which constitutes one-sixth or 17% of the world population.⁴ The national income which is barely 2% of the total global income shows the tremendous strain of population on the country's economy. There is an exigency to control the proliferating population in India as the earth has a carrying capacity which means that the maximum population size of any organism that an area can support, without reducing its ability to support the same species in the future.⁵ The depleting natural resources, increasing environmental degradation and state of crisis due to various forms of pollution in India clearly indicate the need to address population explosion as a problem affects the carrying capacity, present and future generations. However, there is also the aspect of individual liberty in the form of right to procreate that needs to be considered while evaluating the population control initiatives. Therefore, there is a need to find an optimum balance between individual autonomy and the equally legitimate but often conflicting, interests of the community that can be achieved⁶ and come up with alternate discourses in case of unfeasibility in achieving such a balance. The author seeks to weigh the importance of

¹ Simi Rose George, *Reproductive Rights: A comparative study of constitutional jurisprudence, judicial attitudes and state policies in India and the U.S.*, 18 (1) STUDENT BAR REVIEW, 69, at 69 (2006).

² Philip B. Calkins, *India*, ENCYCLOPAEDIA BRITANNICA, (Aug.10, 2018, 12:00 P.M.)
<https://www.britannica.com/place/India>

³ Dr. Samir Mazidbhai Vohra, *Population Growth – India's Problem*, 4 (11) PARIPEX -INDIAN JOURNAL FOR RESEARCH, 65, at 65 (2015)

⁴ *India Population*, WORDOMETERS, (Aug. 2, 2018, 7:30 P.M.),<http://www.worldometers.info/world-population/india-population/>.

⁵ Mona L. Hymel, *The Population Crisis: the Stork, the Plow, and the IRS*, 77 N.C. L. REV. 13, 18 (1998).

⁶ Simi, *supra* note 1, at 70.

right to procreation under Right to privacy which is protected as a constitutional right with intergenerational equity and right to clean environment in light of the population explosion in India and rising environmental issues as a consequence of the same.

Intergenerational Equity Principle V. Right to Procreation

The natural resources found on the earth are a result of various incredible phenomena that are unique to earth and have resulted in subsistence of life on the planet. These natural resources are permanent assets of mankind and no generation of humans must be allowed to have a monopoly over it.⁷ The principle of intergenerational equity has evolved from the premise that the future generations must have the same amount of access to the natural resources as the previous generation and that every generation has a responsibility to protect the environment to ensure the same. It lays emphasis on the right of each generation of human beings to benefit from the cultural and natural inheritance of its past generations. The present generation inherited earth from their ancestors, so they have an obligation to pass it on to the next generation with the same quality. The Stockholm Conference, 1972⁸ often known as the Magna Carta of Environment law lays down the definition of this Principle it states that Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.⁹

India has recognised and defined this principle in *State of Himachal Pradesh v. Ganesh Wood Products*¹⁰ where the Supreme Court stated that “the present generation has no right to imperil the safety and well being of the next generation or the generations to come thereafter.” The Indian definition for intergenerational equity is the “concern for the generations to come”.¹¹ The Intergenerational equity principle has been held to be a part of Article 21 of the Indian Constitution.¹² India currently faces various environment issues like excessive quarrying, noise pollution and air pollution due to traffic, soil erosion due to deforestation, loss of biodiversity, and climate change due to massive amounts of greenhouse gas emission into the atmosphere. Though India is no longer the country with maximum number of citizens classified as extremely poor,¹³ the number of people living in poverty is significantly high at 73 million in 2018.¹⁴ Though various schemes, policies and incentives have been formulated for uplifting these deprived classes of people, these initiatives are still not effectively implemented. This is due to lack of necessary infrastructure and facilities due to low economy. Over- Population also has other significant problems like lack of education

⁷ Kinkri Devi v. State, A.I.R. 1988 H.P. 4.

⁸ United Nations conference on Human Environment, 1972.

⁹ *Id.*, at Principle 1.

¹⁰ State of Himachal Pradesh v. Ganesh Wood Products, A.I.R. 1996 S.C. 149.

¹¹ *Id.*

¹² INDIA CONST. art. 21.

¹³ *New Global Poverty Estimates- What it means for India*, WORLD BANK, (Aug. 23, 2018, 9:30 P.M.), http://web.worldbank.org/archive/website01291/WEB/0_CO-59.HTM

¹⁴ *Id.*

due to low economy. This results in various problems like improper disposal of waste, excessive depletion and use of natural resources to meet sustenance needs. To avoid the same population control laws need to be implemented in the country.

The problem in implementing population control laws mainly involves right to procreation which is also protected under Article 21¹⁵ of the Indian constitution. The right to privacy was not considered to be a fundamental right when it was initially evaluated by Indian courts as it is not expressly mentioned in the Indian Constitution.¹⁶ With the development of constitutional interpretation and jurisprudence the recognition of the right to privacy as a fundamental right was no longer contentious by 1990 but limits of the right were vague and ambiguous. The court has tried to lay down in a plethora of cases the limits of the right to privacy. The state interest test was laid down in *Gobind Singh v State of Madhya Pradesh*¹⁷ and the Court in *R. Rajagopal v. State of Tamil Nadu.*,¹⁸ dealt with concept of public interest. These limits and recognition of the right to privacy was however by benches smaller than six judges and the question of legal validity of the same arose. The obscurity regarding the right to privacy in the Indian legal scenario was cleared when On 24th August 2017 by a nine-judge bench of the Supreme Court in Justice *K.S. Puttaswamy v Union of India*¹⁹ passed a historic judgment affirming the constitutional right to privacy. Indian courts seem to have accepted the right to privacy as a facet of Article 21, its limits are still beset with legal difficulties. Indian courts have always viewed the right to privacy debate as a matter of deciding whether public interest trumps privacy or vice versa. In recent decision of Puttaswamy case, courts have consistently pointed out that it is not an absolute right and is subject to the larger public interest. The court has also held that the limits of this right would be decided on a case to case basis. The specific question of whether the right to reproductive choices falls under the purview of the right to privacy is yet to be reaffirmed by the Supreme Court.

However, courts have observed that the right to privacy protects matters involving "procreation, motherhood and child-bearing."²⁰ Further, in the recent case of *Javed v. State of Haryana*²¹ the Court did not expressly reject the contention that Article 21 includes the right to reproductive choices. Instead, the Court held that regardless of how expansive an interpretation is to be accorded to the provision, reasonable restrictions may be imposed on the exercise of such rights.²² Thus, as per the existing understanding of the right to privacy in India, it may be concluded that there is scope for extending its protection to the realm of reproductive choices. The final determination of the question however, requires a Supreme Court decision on this specific point of law. If the right to reproductive choice and autonomy

¹⁵ *supra* Note 12.

¹⁶ *Kharak Singh v. State of Uttar Pradesh*, A.I.R. 1963 S.C. 1295.

¹⁷ *Gobind v. State of Madhya Pradesh*, A.I.R. 1975 S.C. 1378.

¹⁸ *R. Rajagopal v. State of Tamil Nadu*, A.I.R. 1995 S.C. 264.

¹⁹ *K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1.

²⁰ *Gobind & Rajagopal*, *supra* note 17 & 18.

²¹ *Javed v. State of Haryana*, A.I.R. 2003 S.C. 3057.

²² *Id.* , at 3067.

falls under the ambit of right to privacy, there can still be reasonable restrictions imposed on the same for the same which must be “just, fair and reasonable.” Various tests have been suggested by the Supreme Court to evaluate the scenarios with regard to when the right to privacy of an individual takes second ground like the test of proportionality which states that there must be an existence of a law and the law should seek to achieve a legitimate state aim. The proposed action must be necessary for a democratic society for a legitimate aim. There should be a rational nexus between the objects and the means adopted to achieve them. The extent of interference must be proportionate to its need. There must also be Procedural Guarantees to check against the abuse of State interference. Therefore, it can be concluded that intergenerational equity takes precedence over the right to procreate as a right of privacy as Article 38²³ deals with the provision for state to secure a social order for the promotion of welfare of people and article 48A²⁴ deals with protection and improvement of environment and safeguarding of forests and wildlife. The state aim in this scenario is to reduce population for protection of environment. An evaluation of the population control bill and the population stabilisation bill can help us understand if the right to procreate under the purview of right to privacy is under threat of excessive state interference.

Population Control Bill 2016

The population control Bill was introduced in the Lok Sabha on February 10th 2016. The reason for raising this bill is due to the population explosion in the country which is creating a pressure on the natural resources due to excessive consumption and welfare schemes are not giving desired results as these schemes are meant for limited population. It is also based on the realisation that it is very hard to replenish natural resources and every citizen has a responsibility to use our natural resources in a sustainable manner. In view of the threats to the environment, The Bill was framed to provide for making it compulsory for every citizen not to procreate more than two living children after one year from coming into force of this Act. It also provides that if any person contravenes the provisions of this Act, he shall not be entitled to avail any benefit under any ongoing welfare scheme of the Government as per Section 8 of the Bill. The objects and the method of trying to achieve population stability by the impugned Bill²⁵ fulfil all the aspects of the test of proportionality. However, the effectiveness of the Bill is under question as education and health in India are not centralised. The marginally deprived classes and lower income groups are the only classes which usually avail government schemes and most of the players in the education and healthcare market of India are private entities and non state players. Therefore it can be stated that, though the Bill seeks to address a contingency which is affecting the whole country and the future generations, the approach to ensure that this problem is dealt with does not seem to be very effective. The Bill is also not very comprehensive and does not deal with the process to ensure that every family has only 2 children. Section 2 of the Bill also states that no person

²³ INDIA CONST. art. 38.

²⁴ INDIA CONST. art. 48A.

²⁵ Population Control Bill,2016, No.77.

shall procreate more than 2 living children after one year of commencement of the Act. This creates a vague ambit with regard to the tenure for which this act is to remain in force. If it is indefinitely in force it may deal with other forms of population related issues.

The Population Stabilisation Bill, 2017

The Population Stabilisation Bill, 2017 mainly aims to increase the minimum age of marriage for woman from eighteen years to twenty one years and to establish a National Population Stabilisation Authority to look into the schemes to encourage two-child norm and having an appropriate gap between children, incentivising adoption, creating recreational centres in villages, formulating policies wherein certain minimum criteria is present before a family can start having children. The reason for formulating this Bill is due to high illiteracy rates, poverty and malnutrition among children and women. The Bill mainly deals with the establishment of a National Population Stabilisation Authority²⁶ at the central level but the position of delegation of powers in the state level is unclear. The Bill also tries to ascertain certain minimum criteria that a family must possess before they can start having children. The question that arises in this scenario is if such a restraint on right to procreation is "just, fair and reasonable" as it is an inalienable human right that is natural to all human beings. There is ambiguity regarding the parameters that would be taken into consideration to ascertain such minimum standards. The protection given to citizens under Article 21 and 14 of the Indian constitution can only be used to evaluate the minimum standards after they are ascertained and therefore there is a need to address the ambiguity and lacunae in the proposed law. The minimum standards would mainly ascertain if the Bill is violative of the test of proportionality with excessive state interference which are unreasonable.

Discrepancies in Implementing Population Control Policies.

The Indian approach to reproductive rights is in violation of India's international obligations and the provisions of the treaties and covenants to which it is a party. The Cairo Conference, 1994, for instance, specifically rejects coercive State policies, including models based on incentives and disincentives, as tools for restricting population growth.²⁷ Similarly, the 1995 Beijing Declaration recognizes that the recognition of women's right to control "all aspects of their health, in particular their own fertility, is basic to their empowerment."²⁸ Other international law instruments, which have been signed by India, also recognize the right to reproductive liberty to varying degrees like Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 which stresses that both men and women shall be given equal rights to "decide freely and responsibly, on the number and spacing of their children." Thus, it is evident that the current population policy of the Indian

²⁶ Population Stabilisation Bill, 2017.

²⁷ Rajani Bhatia, *Ten Years After Cairo: The Resurgence of Coercive Population Control in India*, SPRING 2005, (Aug. 20, 2018, 9:30 P.M.) <http://popdev.hampshire.edu/projects/dt/dt31.php>.

²⁸ Article 17 - *Beijing Declaration*, FOURTH WORLD CONFERENCE ON WOMEN, (Aug. 27, 2018, 7:30 P.M.) <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm>.

State is antithetical to its international commitments and to the right to reproductive choices.²⁹

Conclusion

Population Explosion has become an issue of grave public importance in India and needs to be given significant attention. Despite many efforts being taken in past to control population like family planning, sterilization processes and schemes on contraceptives among many other efforts, there seems to be no avail in achieving the same. India has close to 50% of its population in the fertility range which is 18-45 years in age. The population of India will reach 1.4 Billion in number by 2035 if no action is taken to control the same. Rapid Population spurts cause environmental degradation at large scales. The policies formulated for population control are inconsistent with one another and international obligations. It can be perceived that there are various contingencies faced while drafting legislation for the same. Various aspects need to be taken into consideration to formulate an effective population control mechanism. Aspects like abortion, sex selection, literacy, poverty, and economics also need to be carefully evaluated to redraft the Bills to ensure ambiguity if it is passed. There is desideratum to formulate policies which ensure inter-generational and intra-generational equity to ensure the protection of the environment and Indian citizens.

²⁹ Simi, *supra* note 1, at 81.