CHAPTER TWO

Contraceptive Information and Services and Government Population Policies

The Constitution of India guarantees the right to reproductive autonomy, including the right to decide whether to procreate or not, and hence, to access contraceptives.[1] Cases have arisen before courts questioning policies that restrict reproductive autonomy in the context of access to contraception, including coercive and substandard sterilization.[2] In this chapter, cases on the following issues are discussed:

- Fundamental Right to Access and Use of Contraception Information and Services
- Regulation of Contraception and Medical Termination of Pregnancy Act, 1971
- Sterilization Without Informed Consent and Lack of Implementation of National Sterilization Guidelines
- Indirect Population Control Measures
    - Disqualification under State Panchayati Raj Acts
    - Disqualifications under Employment or Education Related Policies

Fundamental Right to Access and Use of Contraception Information and Services

The Supreme Court in ***Suchita Srivastava v. Chandigarh Administration***,[3] held that Article 21 of the Indian Constitution guarantees and protects the right to reproductive choice of women. This includes women's right to refuse participation in sexual activity, to insist on use of contraceptive methods, or to choose appropriate birth-control methods.[4]

Regulation of Contraception and the Medical Termination of Pregnancy Act, 1971

In 2008, a public interest litigation was filed by an anti-choice organization seeking a ban on the advertisement, sale and distribution of the i-pill (an emergency contraceptive pill) and a declaration that sale of emergency contraceptive pills without prescription is illegal. The Kerala High Court in ***Krupa Prolifers v. State of Kerala***[5] rejected the argument of the organization holding that the contraceptive pill only prevents fertilization and does not cause abortion or termination of pregnancy, and thus fell outside the purview of Medical Termination of Pregnancy Act, 1971.

Sterilization Without Informed Consent and Lack of Implementation of National Sterilization Guidelines

The Supreme Court in ***Ramakant Rai v. Union of India***[6] noted that uniform procedures and norms were not being followed by States for implementing national guidelines on sterilization. It issued directions to all States to, amongst other measures, have an approved panel of doctors appointed under a uniform eligibility criteria for conducting sterilization procedures; require doctors to fill a prescribed checklist recording details such as the age of the patient, number of children and the health condition of the patient; require doctors to take consent of the patient for sterilization in a prescribed format; set up a quality assurance committee for monitoring implementation of prescribed guidelines; and to hold inquiries and take punitive actions in case of breach of national guidelines. It also directed the Union of India to lay down prescribed formats for States to follow on the issues listed above and to lay down norms of compensation.

Thereafter, in ***Devika Biswas v. Union of India***,[7] a public interest litigation was filed in the Supreme Court highlighting the unsanitary and unsafe conduct of sterilization procedures in sterilization camps in Bihar and Chhattisgarh. The Supreme Court recognized reproductive rights as both part of the right to health as well as an aspect of personal liberty under Article 21 and defined such rights to include the right to "access a range of reproductive health information, goods, facilities and services to enable individuals to make informed, free, and responsible decisions about their reproductive behaviour." The Supreme Court found that "the freedom to exercise these reproductive rights would include the right to make a choice regarding sterilization on the basis of informed consent and free from any form of coercion." Taking note of the non-compliance of prescribed procedures and the resulting deaths in the sterilization camps in various States, it issued supplementary directions for compliance with its order in ***Ramakant Rai.*** Further, the Court directed the government to discontinue its unnecessary focus on female sterilization and make efforts for ending the system of

sterilization camps within a fixed time frame, while simultaneously strengthening its primary health care facilities. It also directed the Union of India to promptly consider formulating a National Health Policy based on gender equity. The Court also noted that it may be necessary to reconsider policies that set targets and provide incentives for performing sterilization procedures, since these have a disproportionate impact on women from marginalized and vulnerable communities. The Court observed that women from these groups, due to their economic and social conditions, are left with no real choice and their consent to sterilization procedures may not be informed or true consent. It also noted that incentives and targets for service providers may force providers to coerce women into undergoing sterilization procedures. The Court relied on international human rights instruments as one of the bases for its ruling in this case, including to outline the obligation to ensure the full range of reproductive health services and informed consent.

Dr. Sukha Raj Singh Rathore v. State of UP[8] involved the death of a 28-year-old woman, who was induced to undergo sterilization by a basic health worker. Her post-mortem report and subsequent investigation by a Medical Board did not attribute her death to the sterilization procedure. The Allahabad High Court directed a police investigation to ascertain the cause of her death and verify if all the required medical tests were conducted prior to the sterilization operation. It noted that this case illustrated the dangers of coerced or induced sterilization on poor persons without their informed consent and without necessary preoperative tests and safety precautions.

Indirect Population Control Measures

DISQUALIFICATION UNDER STATE PANCHAYATI RAJ ACTS

In ***Mukesh Kumar Ajmera v. State of Rajasthan***,[9] writ petitions were filed in the Rajasthan High Court, challenging the constitutional validity of provisions of the Rajasthan Panchayati Raj Act, 1994 that disqualified persons having more than two living children after a prescribed date from holding certain public offices in the Rajasthan Panchayat. The Court rejected the argument that the disqualification provisions infringed upon the privacy and the right of procreation of the person and held that the provisions were not violative of Article 21. It stated that the rights to life and personal liberty are not absolute and can be curtailed in light of compelling State interest which in this case was controlling the "menace" of population explosion. The Court held that population control was essential to achieve goals laid down under Directive Principles of the State Policy enshrined under Articles 39(e) and (f), 41, 43, 45 and 47 of the Indian Constitution and that while the number of children had no bearing on the performance of officers of the Panchayat, the officers of the Panchayat should serve as role models for the electorate.

In ***B.K. Parthasarthi v. State of Andhra Pradesh***[10] and ***Elkapalli Latchaiah v. State of Andhra Pradesh***,[11] the Andhra Pradesh High Court relied on ***Mukesh Kumar Ajmera*** while upholding the constitutional validity of a similar disqualification provision under the Andhra Pradesh Panchayat Raj Act, 1994.

Subsequently, this issue came up before the Supreme Court in ***Javed v. State of Haryana***[12] in a challenge to the disqualification provision under the Haryana Panchayati Raj Act, 1994. The Court held that the disqualification of persons having more than two children after a prescribed date satisfied the test of reasonable classification and had a rational nexus with the objective of promoting public health, family welfare and population control. Reading fundamental rights in conjunction with directive principles of state policy and fundamental duties of citizens, the Court held that the provision did not violate the right to life and personal liberty under Article 21. It also rejected the argument that many Indian women, who lack the independence to make reproductive choices were disparately impacted by this provision.

In light of the decision of the Supreme Court in ***Justice K. Puttaswamy v. Union of India***[13] declaring the right to privacy to be a fundamental right and stating expressly that decisions about procreation are included within the right to privacy, the decision in ***Javed*** may have to be reconsidered by the Supreme Court.

DISQUALIFICATIONS UNDER EMPLOYMENT OR EDUCATION RELATED POLICIES

In ***Ku Madhuvanti Thatte v. State of Maharashtra***,[14] a writ petition was filed before the Bombay High Court by a candidate challenging her denial of admission on various grounds including exclusion under a rule for grant of additional marks in case any of the parents had undergone sterilization. Interpreting the rule broadly and in view of its intended objective of limited families, the Court held that the rule would be applicable even if the parents had not undergone sterilization but had limited their family by other means. Subsequently, in ***Miss Rajashri Yeshwant Jadhav v. State of Maharashtra***,[15] the High Court relied on ***Ku Madhuvanthi Thatte*** to uphold the constitutionality of the rule granting an additional mark for

family planning. It further held that rule satisfied the test of reasonable classification under Article 14 and had a nexus with national population control policy, which was closely connected with national health and medical education.

The Rajasthan High Court, in ***Smt. Renuka Sahal v. State of Rajasthan***,[16] dismissed a constitutional challenge to rules declaring candidates having more than two children on or after a prescribed date as ineligible for appointment or promotion in service. Relying on the Supreme Court decision in ***Javed***, the High Court noted that family planning was the need of the hour and the two-child norm was being promoted through the national population policy. Likewise, in ***Kanaiyalal Narandas Patel v. State of Gujarat***,[17] the Gujarat High Court dismissed a constitutional challenge to a government regulation which denied the benefit of encashing leave travel concessions to teachers working in government aided schools who had joined service after the prescribed date and were having more than two living children.

In ***People's Union for Civil Liberties v. Union of India***,[18] the Supreme Court extended the cash benefit under the National Maternity Benefit Scheme to all women irrespective of their age and number of children. However, the Court directed the Union of India to consider if grant of such benefit would go against the national population policy.

Related Human Rights Standards and Jurisprudence

Below is a selection of international and regional human rights standards and jurisprudence that explains states' obligations concerning contraceptive information and services, including freedom from coerced or forced sterilization.

The Government of India has committed itself to comply with the obligations outlined in various international human rights treaties that protect sexual and reproductive health and rights: these include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Covenant on Civil and Political Rights (ICCPR).[19] Under international law all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.[20] The Supreme Court has held that in light of the obligation to "foster respect for international law" in Article 51 (c) of the Indian Constitution "[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee."[21]

INTERNATIONAL TREATY STANDARDS

TREATIES

- **ICESCR, Articles 12, 15** (outlining the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the right to benefit from scientific process).
- **ICCPR, Articles 2, 3, 6, 17** (protecting the rights to equality, non-discrimination, privacy, life, and found a family).
- **CEDAW, Articles 10(h), 12(1), 14(2)-(b), 16(e)** (outlining women's right to family planning information, goods and services and to "decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights").
- **Convention on the Rights of Persons with Disabilities (CRPD), Article 25** (safeguarding the rights of persons with disabilities to sexual and reproductive health on a basis of free and informed consent, including the rights to retain fertility, to decide the number and spacing of children, and to access reproductive and family planning facilities, information and services, including in rural areas).

SELECTED GENERAL COMMENTS

- **CEDAW Committee,** ***General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19,*** U.N. Doc. CEDAW/C/GC/35 (2017), para. 18 (violations of women's sexual and reproductive rights, including forced sterilizations constitute gender-based violence and may amount to torture or cruel, inhuman or degrading treatment).
- **CEDAW Committee,** ***General Recommendation No. 24 on Article 12 of the Convention (women and health)***, U.N.

Doc. A/54/38/Rev.1 (1999), paras. 17, 22 (discussing the obligation on states parties to not permit non-consensual sterilization and to require fully informed consent for all health services, and stating that a lack of access to contraceptives can indicate that the state has failed to uphold its duties).

- **CEDAW Committee,** ***General Recommendation 21: Equality in marriage and family relations,*** U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (1994), para. 22 (women require access to contraceptive and family planning information and services to make decisions on whether to have children, and their decisions must not be limited by spouse, parent, partner or Government).
- **Committee for Economic Social and Cultural Rights,** ***General Comment No. 22 (2016) on the right to sexual and reproductive health***, U.N. Doc. E/C.12/GC/22 (2016), paras. 13, 18, 28, 41, 44-45, 57-59, 62 (states must ensure the availability of essential medicines, including a wide range of contraceptive methods, as well as access to relevant information; states may not ban, deny in practice or limit access to sexual and reproductive health care, including contraception, nor institute laws and policies that directly or indirectly perpetuate involuntary, coercive or forced medical interventions, including forced sterilization, or incentive- or quota-based contraceptive policies).
- **Human Rights Committee,** ***General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life***, U.N. Doc. CCPR/C/GC/36 (2018), para. 8 (explaining that states should ensure that women, men, boys and girls have access to information and education about sexual and reproductive health and to a wide range of affordable contraceptive methods).
- **Human Rights Committee,** ***General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women),*** U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), paras. 11, 20 (recognizing forced sterilization or imposition of requirements such as spousal consent for sterilization as violations of the rights to non-discrimination, privacy, and freedom from torture or cruel, inhuman and degrading treatment).

INQUIRIES AND INDIVIDUAL COMPLAINTS

- **CEDAW Committee,** ***Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to CEDAW, Report of the Committee*****,** U.N. Doc. CEDAW/C/OP.8/GBR/1 (2018), paras. 60, 76, 86(a) (outlining that the failure to "to provide contraceptives, including guidance on scientifically sound contraceptive methods" constitutes discrimination against women; and recommending that the state ensure access to information on and the accessibility and affordability of all methods of contraception).
- **CEDAW Committee,** ***Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*****,** UN Doc. CEDAW/C/OP.8/PHL/1 (2015), paras. 29, 32-34, 36-43, 49, 52 (recognizing that the failure to ensure "universal access to a full range of contraceptives and related information, in addition to counselling and services," including where health has been decentralized, constitutes a violation of women's rights to non-discrimination and health).
- **CEDAW Committee,** ***A.S. v. Hungary*****, Comm. No. 4/2004,** U.N. Doc. CEDAW/C/36/D/4/2004 (2006) (where a Roma woman was sterilized without her full informed consent, finding violations of the rights to information and advice on family planning, to access health care services, and to decide the number and spacing of children).

UNITED NATIONS HUMAN RIGHTS EXPERT REPORTS

- **Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (SR Torture),** ***Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment—Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development***, paras. 38-39, 57, 68-69 (2008) (forced sterilization is inherently discriminatory and when carried out in accordance with coercive family planning laws or policies may amount to torture or even crimes against humanity, where widespread or systemic).
- **SR Torture,** ***Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. A/64/272 (2009), paras. 55, 57, 73 (outlining common situations leading to forced sterilization and contraception and affirming states must ensure the absence of any form of coercion in reproductive health services).

SELECTED REGIONAL CASE LAW

EUROPEAN COURT OF HUMAN RIGHTS

- ***I.G. and Others v. Slovakia*, Application No. 15966/04 (2009)**, §§ B–D (in case of sterilization without consent of a Roma woman finding violations of the rights to freedom from inhuman and degrading treatment, to private and family life, and to found a family under the European Convention on Human Rights).
- ***N.B. v. Slovakia*, Application No. 29518/10 (2012)**, paras. 68-73, 92-99 (in a case involving sterilization of a Roma minor under the influence of sedatives, finding violations of the rights to freedom from inhuman and degrading treatment and to private and family life).
- ***V.C. v. Slovakia*, Application No. 18968/07 (2011)**, paras. 100-120, 138-155 (outlining that sterilization was not a life-saving surgery justifying waiver of consent and finding violations of the rights to freedom from inhuman and degrading treatment and to private and family life).

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

- ***Maria Mamerita Mestanza Chavez v. Peru*, Report No. 71/03[1], Petition 12.191, Friendly Settlement (2003)** (outlining the terms of friendly settlement by a State providing reparations and preventing reoccurrence in a case involving the coerced sterilization and subsequent death of an indigenous woman under a government policy stressing sterilization as a means for rapidly altering the reproductive behavior of the population, especially poor, indigenous, and rural women).

INTER-AMERICAN COURT OF HUMAN RIGHTS

- ***I.V. v. Bolivia*, Report No. 72/14, Case 12.655 (2016)**, §§ B–D (in a case where a woman was non-consensually sterilized in a public hospital, holding that forced sterilization is a form of gendered violence based on harmful gender stereotypes in violation of human rights, and finding violations, *inter a*lia, of the rights to personal integrity, to freedom from torture and cruel, inhumane or degrading treatment, to personal liberty and security, to privacy, to dignity, and to marry and raise a family).

RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

IN THE HIGH COURT OF BOMBAY AT NAGPUR

Ku. Madhuvanti Purushottam Thatte v. State of Maharashtra & Ors.
AIR 1983 Bom 443
Tulpule and Jamdar, JJ.

One of the rules framed for regulating admissions in State government-run medical colleges provided for addition of one mark to the qualifying score of a candidate if any of her parents had undergone a sterilization operation and the family did not have more than two living children. The Bombay High Court examined the correctness of this rule and its nexus with the object of admission to medical colleges in this writ petition filed by a candidate challenging her denial of admission on several grounds, including exclusion under this rule due to insistence on a formal sterilization operation as a precondition to a limited family.

Tulpule, J.: "The petitioner passed her H.S.C. Examination in March 1982 and secured in the science subjects 250 marks out of 300, which is 83.33%. She applied for admission to the Medical College and for that purpose filled in the form which is prescribed giving therein the information as she thought was necessary and applied to her. The petitioner had secured a First Class at her H.S.C. level examination.

2. Admissions to the Medical Colleges run by the Government, are regulated and are governed by rules framed by the State Government in that behalf in the year 1971. These rules provide for addition of marks obtained by a student at the qualifying H.S.C. examination and also deduction. These are called the modified marks. Admissions are according to merit and a list of students who applied and their ranking in the order of merit after corrected or modified totals are made is published on the Notice Board...

3. The petitioner was not able to get admission even with these marks and was out of the admitted students or the category of students who were likely to be admitted. She then challenged her exclusion or denial of admission to her by this petition on various grounds.

4. The grounds on which the rules framed by the State Government in the year 1971 are challenged can be classified in two ways or two classes. Some of the challenges did not directly enure (sic) to the benefit of the petitioner. They are general and question the correctness, legality and nexus of the rules and the preference vis-a-vis admissions to the Medical Colleges. The other class of rules which are challenged are those which directly enure (sic) to the benefit of the petitioner and would, if her contention is accepted, add to her total of marks, increasing or brightening the prospects of admission to the medical college.

…

15. That leaves us with R. 16(ix), which is in these terms:—

"16(ix) One mark shall be added if any of the parents of the students has undergone sterilisation operation and the family has not more than two children living."

16. It was contended on behalf of the petitioner that the thrust of R. 16(ix) is towards limited families and against a large family, which is a national objective of family planning. It was contended that family planning can be achieved in modern days by scientific and other appliances by so many ways other than the sterilisation. It is not merely enough that one of the parents of the student should have undergone a sterilisation operation. The most important condition which is laid down is that the family must not have more than two children living. It was also urged that a sterilisation operation is reversible and is easily possible in the case of males with high percentage of success, though the percentage of success in female sterilisation operation may not be as much as those in the case of males. In practice and in theory as also in principle reversion of sterilisation in the case of female is also possible. The rules have been framed in the year 1971 and though the objective remains the same, namely limited family, they have not marched in step with the scientific development. It

was therefore, urged that where the family is planned and does not consist, of more than two children, it would entitle a student under the rules, to get advantage of the rule and the student would also be entitled to get an addition of one mark.

17. In this context it was pointed out that looking to the keen competition and the large number of persons applying for admission, the grant of a single addition of mark does not go a long way in securing admission. The rule should, therefore, be interpreted in the light of its object and not in the light of its technical or formal requirement, which is capable of being defeated. The family which is planned, therefore, otherwise than by means of resort, to sterilisation, which is reversible, is deprived of the benefit and the discrimination there is without any rhyme or reason. If the nexus is the object of having limited family, then sterilisation alone is not capable of achieving that. If the family on the other hand is limited the children of such parents who could be said to be more enlightened, are discriminated against merely as the formal and technical operation has not been undergone. It was pointed out that it was possible to comply with this formal requirement by the parent undergoing an operation just at the time of the application for admission, though he had achieved the main objective of a planned family.

18. On behalf of the respondents it was not pointed out and contended that sterilisation is not reversible. It was also conceded that the principal object of the rule was that families should be limited and planned. In an effort to control the growth of population, the objective of devising disincentives, and grant of incentives, is certainly laudable and necessary. R. 16(ix) therefore, cannot be interpreted in any other way, excepting it being an incentive to have a limited family.

19. If, therefore, we interpret this rule in its spirit and in the broad sense in which it was intended to be worked, then we think, the technical and formal insistence upon a formal sterilisation operation need not be enforced. It need not become a precondition. If there is a limited family and the limited family is achieved by means other than the sterilisation. We think, the benefit of the rule should not be denied merely because the parents have not shown the further circumspection in undergoing sterilisation operation just before making an application for admission to medical college.

20. It was urged by Mr. Aney, the learned counsel before us that the petitioner's father or mother for the benefit of their daughter could have undergone this operation and secured for their daughter an addition of one mark. It was, therefore, urged that the technical and formal requirement should not be placed as a bar to achieve the object.

21. We think that the benefit of the rule is intended for children of those persons who regulate their family and plan it in accordance with the national objective and goal. If that is so, then we think that it is intended to be extended as an incentive and as a benefit which ought not to be denied in a particular case, merely because there was no formal compliance. The rule has to be interpreted in its broad sense and essentially in its spirit. If that is done, the petitioner would be entitled to one mark more to be added to her total.

…"

IN THE HIGH COURT OF BOMBAY

Miss Rajashri Yeshwant Jadhav v. State of Maharashtra & Ors.
AIR 1985 Bom 31
Dharamadhikari and Kantharia, JJ.

Rule 6 of the Medical Colleges of the Government of Maharashtra Rules for Admission 1983-1984 provided for, inter alia, addition of one mark to the candidates' total score if the candidate's parents had undergone sterilization operation. The constitutional validity of the rule was challenged before the Bombay High Court on the ground that it was arbitrary and had no nexus with the object of selection of candidates for admission to a medical college, and thus, violative of Article 14 of the Indian Constitution.

Dharamadhikari, J.: "In all these writ petitions the petitioners have challenged R. 6 of the Medical Colleges of the Government of Maharashtra Rules for Admission 1983-1984 (hereinafter called the Admission Rules) on the ground that the said Rule is violative of the petitioners' fundamental right guaranteed under Art. 14 of the Constitution it being arbitrary in nature and has no nexus with the objects sought to be achieved viz. selection of meritorious candidate for admission to the medical college.

…

3. …Rule 6 of the Admission Rules reads as under:—

> "Selection
>
> A. Selection of students amongst those who have applied for admission to a medical college will be on the basis of merit as determined by the marks obtained in the science subjects, as specified in R. 3(ii) and further subject to additions and/or deduction as detailed under the Rules. These conditions will also govern the selection inter se of candidates for the reserved seats at the colleges.
>
> B. Additions:—
>
> …
>
> (vii) 1 mark for sterilisation operation as stated in R. 4C(xv)(a) and (b)(viii). …

…

4. It is true that Art. 14 does not forbid classification, but the classification has to be justified on the basis of the nexus between the classification and the object to be achieved. The object to be achieved in the case with which we are concerned in this case is to get best talent for admission to professional colleges. The rules for admission must have some nexus with the medical education or national health. This does not mean that the person to be admitted should be bookish or a bookworm. Therefore, his merit in the field of extra-curricular activities can also be taken into consideration, so as to judge the development of integrated personality of the candidate concerned. Further as observed by the Supreme Court in *Chitra Ghosh v. Union of India* AIR 1970 SC 35. It is for the Government which bears the financial burden of running medical college to lay down criteria for eligibility. The questions of policy must depend inter alia on the over-all assessment and survey and requirements of the residents of particular territory and other categories of persons for whom it is essential to provide facilities for medical education. Further the rules, which partake the character of legislation, conferring benefits on various categories of persons, it is no argument to say that if the petitioners had known of such rules, they would have taken care to see that they came within the category of persons who are entitled to such a benefit. In this background we will have to consider the challenge raised-before us.

…

7. Sub-rule (vii) provides for granting one additional mark for family planning. It was contended by the learned Counsel for the petitioners that this rules has no nexus with the object sought to be achieved. Such a rule is not there in the admission rules relating to the engineering colleges. It was seriously contended that such a rule has no nexus with the object sought to be achieved viz. admission of meritorious students to the medical colleges. It was also contended that a student cannot be punished for act or omission of his parents. On the other hand it is contended by the respondent-Government that it is the Ministry of Health which is concerned with the formation of rules to the medical colleges. The Ministry of Health though it fit to give such weightage in view of the national policy. According to the respondents to put check on population is the national policy and to implement this policy is mainly the responsibility of the Health Department and the persons concerned with it The Division Bench of this Court in *Ku. Madhuvanti's case* had an occasion to consider the ambit and scope of this rule. This is what the Division Bench as observed in paras 19, 20 and 21 of the judgment.

> "19. If, therefore, we interpret this rule in the spirit and in the broad sense in which it was intended to be worked, then we think the technical and formal insistence upon a formal sterilisation operation need not be enforced. It need not become a pre-condition. If there is a limited family and the limited family is achieved by means other than the sterilisation. We think, the benefit of the rule should not be denied merely because the parents have not shown the further circumspection in undergoing sterilisation operation just before making an application for admission to medical college.
>
> 20. It was urged by Mr. Aney, the learned Counsel before us that the petitioner's father or mother for the benefit of their daughter could have undergone this operation and secured for their daughter an addition of one mark. It was, therefore, urged that the technical and formal requirement should not be placed as a bar to achieve the object.
>
> 21. We think that the benefit of the rule is intended for children of those persons "who regulate their family and plan it in accordance with the national objective and goal. If that is so, then we

> think that it is intended to be extended as an incentive and as a benefit which ought not to be denied in a particular case, merely because there was no formal compliance. The rule has to be interpreted in its broad sense and essentially in its spirit. If that is done, the petitioner would be entitled to one mark more to be added to her total."

A candidate who is a member of planned family has a sense of involvement. He is a part and parcel of the said family. The Division Bench also found that this rule, was intended to be extended as an incentive to achieve the national objective and goal of family planning. Therefore, it is quite obvious that the rule has a nexus with the national policy of population control Population control is closely connected with national health. Various ways and means invented for controlling population and the programme framed in that behalf has to be carried out by the medical practitioners. It cannot be said that the national policy of population control or planned family has no nexus with the medical education. Further only one additional mark is given on this count, which is wholly insignificant. The weightage given being micro-scopically insignificant, we do not propose to interfere with the said weightage.

…"

IN THE HIGH COURT OF RAJASTHAN

Mukesh Kumar Ajmera v. State of Rajasthan
AIR 1997 Raj 250
B.R. Arora and A.K. Singh, JJ.

Sections 19(L) and 39 of the Rajasthan Panchayati Raj Act, 1994 disqualified persons having more than two living children after a prescribed date from holding certain public offices in the Rajasthan Panchayat. The constitutional validity of these provisions was challenged before the Rajasthan High Court on the grounds of infringement of the candidates' privacy and right of procreation under Article 21 of the Indian Constitution.

Arora, J.: " This writ petition and the other eleven writ petitions mentioned in the Schedule, raise the common contro-versies, namely, (i) the validity of Section 19(L) read with Section 39 of the Rajasthan Panchayati Raj, Act, 1994; (ii) the legality and correctness of the orders passed by the respective Chief Executive Officer, by which the petitioners were declared disqualified; and (iii) the jurisdiction of the Chief Executive Officer to hold an enquiry in the matter of declaring a Panch or a Member of the Panchayat Raj Institution to continue as the Sarpanch as he has incurred the disqualification on account of birth of an additional child in the family raising the number of the children to more than two. As all these writ petitions involve the common questions of law and facts, therefore, they are being disposed of by this common judgment.

…

8. The striking feature of the new provisions inserted in the Constitution by Article 243 to 243(O) are that they are in the nature of basic provisions which are to be supplemented by law made by the respective State Legislatures because Local Government including the Self-Government Institutions for the rural areas, is an exclusive State Subject under Entry 5 of List II of Schedule VII. The Union, thus, cannot enact any law to create right and liability relating to these subjects. The Rajasthan Legislative Assembly, therefore, enacted this Rajasthan Panchayati Raj Act. The Rajasthan Panchayati Raj Act is an implementing legislation undertaken by the State of Rajasthan within the frame-work of the Scheme/Out-line set-out by the Union by inserting Part IX in the Constitution.

9. Section 19 of the Act deals with the qualification for election as a Panch or a Member and provides that every person registered as a voter in the List of Voters of a Panchayat Raj Institution, shall be qualified for election as a Panch or, as the case may be, a Member of such Panchayat Raj Institution unless such person is disqualified for the conditions mentioned in Sub-clauses (a) to (L). Sub-clause (L) of Section 19 provides that 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.

10. Proviso IV to Section 19 states that the birth during the period from the date of commencement of this Act, hereinafter in this proviso referred to as the date of such commencement to 27-11-95, of an additional child shall not be taken into consideration for the purpose of disqualification mentioned in Clause (L) and a person having more than two children (excluding the child; if any, born during the period from the date of such commencement to 27-11-95) shall not be disqualified under that Clause for so long as the number of children he/she had on the date of commencement of this Act, does not increase.

11. The Explanation appended to Section 19 (L) States that for the purpose of Clause (L) to Section 19 where the couple has only one child from the earlier delivery or deliveries on the date of commencement of this Act and thereafter any number of children born out of a single subsequent delivery, shall be deemed to be one entity.

12. Section 39 of the Act deals with the cessession of Membership. The Section provides that subject to the provisions of Section 40, a Member of a Panchayat Raj Institution shall not be eligible to continue as the Member if (a) he is or becomes subject to any disqualification specified in Section 19...

…

26. Now coming to the validity of Section 19(L) read with Section 39 of the Act. The validity of the provisions has been challenged on the grounds that (i) there is no authorisation under the Constitution to the Legislature to legislate such provision; (ii) the provisions are arbitrary and discriminatory and are against the basic features of the Constitution; (iii) infringe the privacy and right of procreation of more than two children and thus violative of Article 21; (iv) there is no reasonable nexus with the object sought to be achieved; and (v) it is violative of Article 25 and 26 of the Constitution of India.

…

36. The validity of these provisions have, also, been challenged on the ground that they are violative of Article 21 of the Constitution of India as it puts restrain on the inherent and natural human right of procreation of third and subsequent child and infringes the right of privacy.

We have considered this aspect of the case, also. What is guaranteed under Article 21 is that no person shall be deprived of his life and personal liberty except according to the procedure established by law. Right to marry and right to procreation of third and subsequent child is neither a Common Law right nor a right recognised or embodied in the Constitution…

37. These provisions have been enacted by the Legislature to control the menace of population explosion. Growing population is one of the major problem which India is facing today. Population progresses by geometrical progress while the resources increase only at an arthematical rate. Rertrand Bussel has stated "Population explosion is more dangerous than the hydrogen bomb." The legislative power to deal with the population matter effectively, purposely, meaningfully, objectively and efficiently stem basically from the social policy contained in the Directive Principles of the State Policy enshrined in Article 39(e), (f), 41, 43, 45 and 47 of the Constitution of India. This social policy is designed to secure social order for the promotion of welfare of the people, adequate means of livelihood, raising the level of nutrition and standard of living, improving public health etc. These objectives can be achieved if the rapidly increasing population is controlled and the rate of population growth is essentially minimised otherwise all these policies will remain in vacum. Imposing the conditions by providing the disqualification in the election of the Panchayat Raj Institution is a first step to achieve this goal. The Leaders at the grass-root level have to put an example before the electorates. The disqualification provided in Section 19(L) cannot be said to be against the basic human dignity or against the right to life and personal liberty. The right to be elected is neither a fundamental right nor a Common Law right. It is a statutory right which flows from the statute. A statutory right created under the statute is subject to the limitations provided under a particular statute…The right to be elected, thus, flows from Section 19 of the Act and, therefore, this right accrues to a person concerned is subject to the restrictions contained in Section 19 or other provisions of the Act.

…

39. Right to privacy and liberty are not absolute rights. A law imposing reasonable restrictions upon it for compelling interest of State must be, held to be valid. The restriction imposed in Section 19(L) does not outrage the dignity of the individual. The object of this provision is to control population growth and family planning and such type of interference is necessary in a democratic society in the economic welfare of the country. The restrictions have been laid down with a social purpose, i.e., to fulfil the mandate given in the Directive Principles enshrined in the Constitution. If the population growth is not controlled and family planning is not observed then looking to the limited sources available with the country, it will be difficult for the State to achieve these goals.

40. The Supreme Court, in *AIR India v. Nergesh Meerza* (5), considering the danger of over-population and the necessity of the family planning programme, observed:—

> "In the first place the provision preventing the third pregnancy with two existing children would be in the larger interest of the health of the Air Hostesses concerned as also for the good upbringing of the children. Secondly, as indicated above, while dealing with the rule regarding prohibition of marriage within four years, same considerations would apply to a bar of third pregnancy where two children

> are already there because when the entire world is facing with the problem of population explosion, it will not only be desireable 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 over-population which, if not controlled, may lead to serious social and economic problems throughout the world."

41. Law is enacted to serve the need of the society. It has to keep pace with the aspirations and need of the society as well as to take into consideration the changing concept of the value. It is only with an intention to serve the social purpose, namely, to control the problem of population explosion that these provisions have been enacted. We fail to find any constitutional infirmity or any element of arbitrariness in these provisions. There is no invasion of any constitutional right of any person. There is, also, no invasion on the part of the Legislature in marital right of a person concerned or a right or procreation of children. It is a statutory right guaranteed under the Panchayati Raj Act to be elected but that right is with certain restrictions and if somebody wants to assert that right, he has to abide by such restrictions because this statutory right is subject to statutory restrictions contained in the Act. We are, therefore, of the opinion that the restrictions imposed in Section 19(L) neither out-rage the dignity of a person nor it infringe any of the fundamental rights, Common Law right or a marital right of procreation of a child.

42. We, also, fail to understand how the provisions of Section 19(L) and Section 39 of the Act are against the basic structure or features of the Constitution. There is a reasonable nexus in framing these provisions with the object sought to be achieved. The object which is sought to be achieved is to implement the family planning programme and restrict the family to check the population explosion which is one of the major problems which India is facing today. Though having more than two children does not, in any way, affect the workings of the Sarpanch, Panch or a Member of a Panchayat Raj Institution but the population explosion has affected the economic condition of the State and it is with the purpose to implement the mandate of the Directive Principles of the State Policy that this measure was considered necessary. These provisions according to us also, do not violate Articles 25 and 26 of the Constitution of India as there is no invasion of any of the right to freedom of conscience and free profession, practice and propagation of religion. These provisions, also, do not invade the right of petitioners of freedom to profess his/her religious affairs. A person out of the marital life, can produce more than two children but in that case the statutory right conferred upon a voter under the Act will not be available to him as these are the rights created under the statute and are subject to the statutory limitations. There is, thus, no violation of Articles 25 and 26 of the Constitution of India.

43. We are, therefore, of the opinion that Section 19(1)(L) and Section 39 of the Rajasthan Panchayati Raj Act, 1994 are not violative of any of the provisions of the Constitution of India.

44. In the result, the writ petitions filed by the petitioners are partly allowed. The validity of Section 19(1)(L) and Section 39 of the Rajasthan Panchayati Raj Act, 1994 is up-held but the order Annexure 3 in this writ petition, as well as the orders passed in the writ petitions mentioned in the Schedule, declaring the petitioners as 'disqualified', are quashed and set-aside as being passed by the Chief Executive Officer without an enquiry being conducted by the Judicial Authority under Section 40 of the Act."

IN THE HIGH COURT OF GUJARAT

Kanaiyalal Narandas Patel v. State of Gujarat & Ors.
(1999) 1 GLR 126
K.G. Balakrishnan, C.J. and J.M. Panchal, J.

A government resolution with effect from a certain date denied teachers working in government-aided schools, having more than two children, the benefit of encashing their leave travel concessions. A teacher with more than two children challenged this resolution before the Gujarat High Court on the ground that it violated Article 14 of the Indian Constitution by treating employees with more than two children unequally on the basis of date of entering into service. However, the resolution was upheld by a Single Judge and an appeal against this order came before a Division Bench of the High Court.

Balakrishnan, C.J.: "…The appellant is a teacher working in an aided school. He challenged the Government resolution, dated 27 July 1989. The Government servants as well as the teachers working in aided schools are given leave travel concessions. In 1984, the Government liberalised its scheme for L.TC., and even permitted to claim encashment of the leave travel facility. As regards the encashment of the L.T.C. for the block period of 1992-95, the Government issued a resolution on 1 January 1992. Under Cl. (7) of the Resolution, it was stated that the L.T.C. would not be available to the employees who have entered in service after 1 April 1989, who have more than two living children. This resolution was challenged by the appellant before the learned Single Judge.

2. The appellant contended that he is having a family having more than two living children and as he entered service after 1 April 1989, he is being denied the facility of L.T.C. whereas employees who joined service prior to 1 April 1989 and who have more than two living children, are given this benefit and this is violative of Art. 14 of the Constitution as there is unequal treatment…

3. The learned Single Judge held that the Government has taken a policy decision in furtherance of the Government policy of family planning as a population control measure and as it is absolutely necessary for the Government to provide such a decision, the restriction imposed by the Government cannot be said to be bad. The view taken by the learned Single Judge is assailed before us.

4. …It may be noted that the Government passed the resolution as early as on 27 July 1989, a copy of which is produced as Annexure B. The resolution states that the benefit of leave travel concession to Government employees entering in service thereafter is restricted up to two children. In the resolution, it is further stated that in furtherance of the concept of small family norm of two children. Government is pleased to decide that the leave travel concession (including encashment) for new entrants in Government service shall be restricted to families not having more than two living children. In other words, the Government employees who have more than two living children, shall not been entitled for L.T.C. (including encashment) for himself/herself and as well as for other members of the family. The concerned Government employees would be required to give a certificate to this effect each time they claim leave travel concession. This order was made applicable to the Panchayat employees in the educational institutions. Government Corporations, Boards and to the grant-in-aid institutions. So, right from 1989, the Government had issued such a direction that the employee having more than two living children are not entitled to other benefit of L.T.C. The appellant has not challenged the said resolution in the special civil application, but has chosen to challenge only the later resolution passed in 1992, wherein Cl. (7) was included. Therefore, it is clear that Cl. (7) in 1992 resolution, which provided encashment facilities for the block period 1992-95, was on the basis of the earlier resolution passed on 27 July 1989. Therefore, it cannot be said that a privilege that was being enjoyed by the Government servants was taken away by the subsequent resolution.

5. …In the instant case, it cannot be held that similar employees are given different treatment. The Government restricted the benefit to the employees, who have two living children and who joined after 1 April 1989. This policy was adopted as an incentive to encourage small family as a drive towards family planning. As it is a part of the policy of the Government, it cannot be said that the State has adopted an irrational basis for this policy. It is one of our important national policies that we should have a small family and the State Government is fully justified in adopting such a policy and giving incentives to persons who have small family. The appellant has chosen to challenge this policy after long lapse of time. The learned Single Judge was fully justified in holding that there was no discrimination or violation of Art. 14 of the Constitution of India. This Letters Patent Appeal is without any merit and it is accordingly dismissed.

…"

IN THE HIGH COURT OF ANDHRA PRADESH

B.K. Parthasarthi v. Govt. of Andhra Pradesh & Ors.
AIR 2000 AP 156
Motilal B. Naik and J. Chelameswar, JJ.

Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994 disqualified persons having more than two living children after a prescribed date from holding certain public offices in the Andhra Pradesh Panchayat. Three writ petitions were filed before the Andhra Pradesh High Court by the disqualified candidates challenging the constitutional validity of the provision arguing, inter alia, that it infringed their right to privacy under Articles 19 and 21 of the Indian Constitution.

Naik, J.: "An important question of law as to the constitutional validity of Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994 is raised in this writ petitions.

…

6. …The relevant section for the purpose of deciding the issue before us is sub-Section (3) of Section 19, which reads as under:

> "A person having more than two children shall be disqualified for election or for continuing as member.
>
> Provided that the birth within one year from the date of commencement of the Andhra Pradesh Panchayat Raj Act, 1994 hereinafter in this Section referred to as the date of such commencement of an additional child shall not be taken into consideration for the purpose of this section.
>
> Provided further that a person having more than two children (excluding the child if any born within one year from the date of such commencement) shall not be disqualified under this Section for so long as the number of such commencement does not increase.
>
> Provided also that the Government may direct that the disqualification in this Section shall not apply in respect of a person for reasons to be recorded in writing".

7. As indicated above, in all these three writ petitions, the Constitutional validity of Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994, is challenged, mainly on three grounds.

8. Leading the arguments on behalf of the writ petitioners, Shri S. Ramachandra Rao, learned senior counsel, firstly, submitted that the impugned provision is in the nature of violating the right of privacy of the petitioners as enshrined under Articles 19 and 21 of the Constitution of India. It is secondly contended that the impugned provision has no nexus with the purpose which is sought to be achieved through the said Act. It is thirdly argued that the impugned provision violates Article 14 of the Constitution of India. In support of his submissions, the learned senior counsel has taken us to few decisions of the Supreme Court of India as well as the Supreme Court of America.

…

10. The "right of privacy" as a constitutionally protected right is not to be found in the express language of the Constitution of India. However, the said right is recognised as a facet of Article 21 of the Constitution of India. In *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295 and in *Govind v. State of Madhya Pradesh*, AIR 1975 SC 1378, the Supreme Court while examining this aspect held that the right to privacy is only a facet of Article 21 of the Constitution.

The American Supreme Court, in a series of decisions considered the ambit and scope of 'right of privacy' and the various facets thereof. The broad contours of this right are 'repose', 'sanctuary' and 'intimate decision'…

11. Coming to the view of the Supreme Court of India, in a separate but concurring judgment in *Kharak Singh's case*, (AIR 1963 SC 1295) (supra), Subba Rao, J. while examining the 'right of privacy' as a part of Article 21 of the Constitution of India, held thus:

> "……..If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Art. 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures……."

12. Justice Mathew in *Govind's case*, (AIR 1975 SC 1378) (supra) while recognising the existence of the 'right of privacy' under the Indian Constitution and the need to protect such a right, held thus:

> "The right to privacy in any event will necessarily have to go through a process of case by case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."

13. Various attempts of the State to invade the personality — contents and process of mind either by way of bodily intrusion or control, public command or deliberate omission became the subject-matters of debate before the American Supreme Court in various cases. The laws through which Government attempted to shape the minds of the subjects in the areas of liberty and conscience, education and freedom of enquiry, screening the sources of consciousness, coercive conditioning, intrusion on the body like physical invasion or gross neglect, decisions about the birth and babies, the liberty of the individual in the areas of risk taking, vocation, travel, appearance and apparel, the reputation and records are some of the specific areas which were considered by the American Supreme Court in the context of "right of privacy".

14. The personal decisions of the individual about the birth and babies called the right of reproductive autonomy' is a facet of a 'right of privacy'. The American Supreme Court in *Skinner v. Oklahoma*, (1941) 316 US 535 characterised the right to reproduce as a "one of the basic civil rights of man".

15. The right to make a decision about reproduction is essentially a very personal decision either on the part of the man or woman. Necessarily, such a right includes the right not to reproduce. The intrusion of the State into such a decision making process of the individual is scrutinised by the constitutional Courts both in this country and in America with great care.

16. In *Griswold v. Connecticut*, (1965) 381 US 479 the constitutionality of a statute which sought to restrict the right of married persons to use contraceptive devices fell for the consideration of the Court. The majority of the American Supreme Court held that this statute impermissibly limited the 'right of privacy' of the married persons. Justice Douglas (sic) who delivered the majority opinion, traced this 'right of privacy' to several guarantees of the bill of rights. The Court held that the impugned statute regulated a personal marital relationship without an identifiable and legitimate relationship and would expose the married couple to an inquiry into the intimate details of their relationship.

17. In *Eisenstadt v. Baird*, (1972) 405 US 438, the Supreme Court invalidated a statute which prohibited the distribution of contraceptives to unmarried persons on the ground that it violated the equal protection clause as the Court found no rationale or legitimate distinction between use of contraceptives by married or unmarried persons.

18. In *Roe v. Wade*, (1973) 410 US 113 the Court held that the right to have an abortion was a part of the fundamental constitutional right of privacy of the woman and such a right could be interfered with by the State only to promote a compelling interest of the State. The protection of the health of the woman was held to be a compelling interest of the State.

19. All the above-mentioned cases, of course, deal with the right of the individual either a man or a woman to take a decision not to reproduce and where the State sought to interfere with such a decision making process. Irrespective of the conclusion reached by the Court in each of the individual cases, the Court recognised in all these decisions that the 'right of privacy' is not an absolute right and such a right could be restricted if required to promote some compelling interest of the State.

20. As discussed above, 'the right of privacy' which is held to be a facet of Article 21 of the Constitution, in this country must also be subjected to similar restrictions which are held constitutionally permissible in the context of the other facets of the right guaranteed under Article 21 of the Constitution of India. The Supreme Court in *Govind's case*, (AIR 1975 SC 1378) (supra) held that even the right under Article 21 is not an absolute right.

21. Applying these principles, the challenge to the impugned provisions of the Andhra Pradesh Panchayat Raj Act, 1994 must be examined.

22. The impugned provision, viz., sub-Section (3) of Section 19 of the said Act does not directly curtail or directly interfere with the right of any citizen to take a decision in the matter of procreation. It only creates a legal disability on the part of any person who has procreated more than two children as on the relevant date of seeking an elected office under the Act. The substance of the provision is that it does not compel directly anyone to stop procreation, but only disqualifies any person who is otherwise eligible to seek election to various public offices coming within the ambit of the Andhra Pradesh Panchayat Raj Act, 1994 or declares such persons who have already been holding such offices to be disqualified from continuing in such offices if they procreate more than two children.

…

25. Whether creation of a restriction such as the one created in this case, would in fact achieve the object sought to be achieved, cannot be demonstrated in proceedings like this, but however, the legislative measure is reasonably be connected with the object sought to be achieved. In our considered view, the inquiry must stops there and this Court would not be justified in making a further inquiry as to what extent such a purpose would be achieved. The fact remains that the population growth is one of the major problems facing this country and any measure to control the population growth unless it impermissibly violates some constitutionally protected right must be upheld as a legally permissible exercise of legislative power…

26. What is sought to be curtailed by the Legislature in this case is not the right to procreation but the right to seek certain elected offices created under the Andhra Pradesh Panchayat Raj Act, 1994 if one begets more children than the prescribed limit. Right from the earliest decision in *N.P. Ponnuswami v. Returning Officer, Namakkal*, AIR 1952 SC 64, it has always been held that the right to contest in election is a statutory and not a fundamental right. In *Jamuna Prasad v. Lachhi Ram*, AIR 1954 SC 686, Bose, J. speaking for the Constitutional Bench of the Supreme Court in the context of a challenge to certain provisions of the Representation of the Peoples Act, as violating the fundamental right to freedom of speech, held thus:

> ".....The laws do not stop a man from speaking. They merely prescribe conditions which must be observed if he wants to enter Parliament.
>
> The right to stand as a candidate and contest an election is not a common law right. It is a special right created by the statute and can only be exercised on the conditions laid down by the Statute. The Fundamental Rights Chapter has no bearing on a right like this created by Statute. The appellants have no fundamental right to be elected as members of Parliament. If they want that, they must observe the rules they prefer to exercise their right of free speech outside these rules, the impugned sections do not stop them. We hold that these sections are 'intra vires'.

27. This has been the consistent view of the Supreme Court till today. Therefore, the submission made on behalf of the petitioners by the learned senior counsel that the petitioners 'right to privacy' is infringed, is untenable and must be rejected.

…

32. On the various propositions supporting the contentions of the learned counsel appearing for all the parties and the learned Additional Advocate General appearing on behalf of the official respondents, we have given our consideration to the genesis of the problem vis-a-vis the legislative intention which is brought under Section 19(3) of the A.P. Panchayat Raj Act, 1994. As is evident from the various decisions which are discussed by us, the privacy of a person to lead a life according to his desire has been well recognised by Courts. However, there is no reason for us to hold that through the impugned legislation, the privacy of an individual is attacked or sought to be taken away. The Legislature, through the impugned legislation, prescribed certain disqualifications for a person either to hold or contest the elected office under the Act if he procreates more children than the prescribed limit. At the cost of repetition, we must say that choosing to contest an elected office is not a fundamental right but only a right arising out of a Statute. That being so, no grievances could be made out on the ground that the right to liberty and right to privacy of an individual are deprived by the impugned legislation. The Legislature, however, has visualised a contingency arising out of birth of an additional child, during holding of an elected office, which disqualifies a person from holding such office, by empowering the Government to hold that such disqualification may not apply in respect of a person, by recording reasons in writing. Therefore, notwithstanding the fact of giving birth to an additional child than the prescribed limit by a person holding the office under the Act, still the Government is empowered to permit such person to continue in office, by recording reasons in writing. When the Legislature has provided this remedy, it cannot be said that the impugned provision is a draconian act of the Legislature whereby the right to privacy of a person is deprived and such deprivation offends Articles 19 and 21 of the Constitution of India.

33. Challenge to a similar provision arising out of the Rajasthan Panchayat Raj Act was made before the Rajasthan High Court in *Mukesh Kumar Ajmera v. State of Rajasthan*, AIR 1997 Raj 250(251). The Rajasthan High Court repelled the contentions made against such provision and upheld the validity of the said provision while considering various decisions of the Supreme Court and other High Courts.

34. For the foregoing reasons, we find no merits in these writ petitions and we accordingly dismiss the same holding that the rigour of the provision as brought out under Sec. 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994 is not violative of any fundamental rights or it is in the nature of depriving the privacy of an individual…"

IN THE HIGH COURT OF ANDHRA PRADESH

Elkapalli Latchaiah & Anr. v. Govt. of Andhra Pradesh & Ors.
(2001) 5 ALT 410 (DB)
S.B. Sinha, C.J. and V.V.S. Rao, J.

The constitutional validity of section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994, which disqualified persons having more than two living children after a prescribed date from holding certain public offices in the Andhra Pradesh Panchayat, was challenged in this case. The petitioners were candidates for the post of Sarpanch, whose nominations had been rejected since they had more than two children.

Sinha, J.: "The *vires* of sub-section (3) of Section 19 of the Andhra Pradesh Panchayat Raj Act, 1994 (Act No. 13 of 1994), hereinafter referred to as 'the Act' for the sake of brevity, falls for consideration in this writ petition.

2. The fact of the matter lies in a very narrow compass. The petitioners have filed their nominations for contesting to the post of Sarpanch and their nominations have not bee (sic) accepted on the ground that a person who is having more than two children is disqualified from contesting the election…*Mr. S. Ramachandra Rao*, the learned Counsel appearing on behalf of the petitioners, submits that having regard to the fact that the persons having more than two children are entitled to contest the election to the Legislative Assemblies and Parliament, the restriction imposed in terms of sub-section (3) of Section 19 is unreasonable. The learned Counsel would contend that clause (1) of Article 243-F providing for disqualification of membership and thus, sub-clause (b) clause (1) of Section 243 providing for disqualification of membership must be confined to sub-clause (a) and no law purported to have been made in terms of sub-clause (b) can impose a condition which is not provided for in terms of sub-clause (a).

3. The learned Advocate-General appearing on behalf of the State, however, would submit that the question is covered by two decisions of this Court in *B.K. Parthasarathi v. Govt. of A.P.*, 1999 (5) ALT 715 (DB), *Are Gangadhar v. Zilla Praja Parishad, Karimnagar*, 1999 (5) ALD 585.

4. It is not in dispute that a Division Bench of this Court in *B.K. Parthasarathy*(supra) has declared the said provision to be *intra vires*. The learned Counsel, *Mr. Ramachandra Rao*, who incidentally had appeared before the Division Bench, however, would submit that, as this aspect of the matter had not been taken into consideration, the said decision must be held to have been rendered *per incuriam*. The learned Counsel further contends that right to privacy, which would include the right to procreation, being a basic feature of the Constitution, cannot be taken away. The right to privacy, contends the learned Counsel, is guaranteed to the citizen in terms of Article 21 and thus sub-section (3) of Section 19 of the Act must be held to be unconstitutional. Strong reliance, in this connection, has been placed on the decisions of the Apex Court in *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632, *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301 and *Gobind v. State of M.P.*, (1975) 2 SCC 148. It was submitted that control of population is not one amongst the objectives of the Act and by reason of the said provision an element of arbitrariness has been introduced and thus the said provision must be held to be violative of Article 14 of the Constitution of India.

…

8. Right to privacy or a right to marriage may be a right under Article 21 of the Constitution of India, but such a right is not absolute. It is one thing to say that the person has a right to privacy or right to marriage and consequently right to procreation, but the same would not mean that no restriction as regards the said right can be put for other purposes whatsoever. Population explosion is a matter of great concern of the State. If certain measures are effected for controlling the population explosion, it cannot be said that such law would be unconstitutional.

…

10. In *Mukesh Kumar Ajmera v. State of Rajasthan*, AIR 1997 Raj. 250, a question arose whether Section 19(L) of the Rajasthan Panchayat Raj Act was *ultra vires*. The Division Bench answered the question in the negative…

…

12. The learned Judges opined: "…We, also, fail to understand how the provisions of Section 19(L) and Section 39 of the Act are against the basic structure or features of the Constitution. There is a reasonable nexus in framing these provisions with the object sought to be achieved. The object which is sought to be achieved is to implement the family planning programme and restrict the family to check the population explosion which is one of the major problems which India

is facing today. Though having more than two children does not, in any, affect the workings of the Sarpanch, Panch or a Member of a Panchayat Raj Institution but the population explosion has affected the economic condition of the State and it is with the purpose to implement the mandate of the Directive Principles of the State Policy that this measure was considered necessary. These provisions according to us also, do not violate Articles 25 and 26 of the Constitution of India as there is no invasion of any of the right to freedom of conscience and free profession, practice and propagation of religion. These provisions, also, do not invade the right of petitioners of freedom to profess his/her religious affairs. A person out of the marital life, can produce more than two children but in that case the statutory right conferred upon a voter under the Act will not be available to him as these are the rights created under the statute and are subject to the statutory limitations. There is, thus, no violation of Articles 25 and 26 of the Constitution of India".

13. The said decision, therefore, is an authority for the proposition to the effect that such a provision is not unconstitutional. This aspect of the matter has been considered by a Division Bench of this Court in *B.K. Parthasarathi v. Govt. of A.P.*(supra), *Are Gangadhar v. Zilla Praja Parishad, Karimnagar* (supra).

14. In *Parthasarathy* (supra), the Division Bench of this Court has held that Section 19(3) merely creates a legal disability on the part of any person who has procreated more than two children as on the relevant date of seeking an elected office under the Act…

15. We agree with the said decision. The said decision, in our opinion, cannot be said to have been rendered *per incuriam* only because certain aspects of the matter had not been brought to its notice…

…

17. The decisions cited by the learned Counsel may now be noticed. In *R. Rajagopal* (supra), the Apex Court upholding the right to privacy as being implicit in right to life and guaranteed to the citizens of this country by Article 21, it was held to be right to life alone. In *People's Union for Civil Liberties* (supra), it was held that right to privacy is a part of Article 21 of the Constitution of India.

18. In *Gobind* (supra), it has been held:

> "The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterise as a fundamental right, we do not think that the right is absolute".

19. In *State of Maharashtra v. Madhukar N. Mardikar*, (1991) 1 SCC 57, it was held that even a woman of easy virtue is entitled to right to privacy. In *Neera Mathur v. Life Insurance Corporation of India*, (1992) 1 SCC 286, it was held:

> "…… It is said that she gave a false declaration regarding the last menstruation period with a view to suppress her pregnancy. The modesty and self respect may perhaps preclude the disclosure of such personal problems like whether her menstrual period is regular or painless, the number of conceptions taken place; how many have gone full term ***etc.*** The Corporation would do well to delete such columns in the declaration. If the purpose of the declaration is to deny the maternity leave and benefits to a lady candidate who is pregnant at the time of entering the service (the legality of which we express no opinion since not challenged)."

20. By reason of Section 19(3) of the Act, no person's right to privacy has been taken away. The right to contest election is merely a statutory right and not a constitutional right. In terms of Article 243-F of the Constitution of India, the State is entitled to make law providing for disqualification. Right to vote and right to contest the elections by the petitioners having flown from the Act, such a right can also be curtailed by reasons thereof, particularly having regard to clause (1) of Article 243-F of the Constitution of India. In any event, as noticed hereinbefore, right to privacy is not an absolute right. In *Mr. 'X' v. Hospital 'Z'*, 1999 (1) ALD (S.C.S.N.) 9 : (1998) 8 SCC 296 : AIR 1999 SC 495, the Apex Court has held that such a right is subject to the right of others. The submission of the learned Counsel to the effect that sub-section (3) of Section 19 is violative of Article 14 of the Constitution of India is misplaced. By reason of the said provision, no classification has been made, which is impermissible under the Constitution of India. It is not a case where class legislation has been made. The persons who answer the description of Section 19(3) stand on equal footing. Only because the petitioners had married earlier or their children were born prior to coming into force of the Act would not mean that such a right is absolute.

21. For the reasons aforementioned, there is no merit in this writ petition, which is accordingly dismissed…"

IN THE SUPREME COURT OF INDIA

Javed & Ors v. State of Haryana & Ors.
(2003) 8 SCC 369
R.C. Lahoti, Ashok Bhan, and Arun Kumar, JJ.

Petitioners challenged the constitutional validity of the provisions of the Haryana Panchayati Raj Act, 1994 which disqualified persons having more than two living children from holding certain public offices in Haryana Panchayats. The stated objective of these disqualification provisions was to popularize the family planning programs of the government. The Supreme Court examined, inter alia, whether these provisions were violative of Article 14 for treating those who had more than two children differently from those who did not; whether they violated personal liberty with respect to the number of children one wishes to have; as well as whether the provisions had a disparate impact on women in Indian society as they often lack independence in decisions about having a child.

Lahoti, J.: "…

2. In this batch of writ petitions and appeals the core issue is the vires of the provisions of Sections 175(1)(*q*) and 177(1) of the Haryana Panchayati Raj Act, 1994 (Act 11 of 1994) (hereinafter referred to as the Act for short). The relevant provisions are extracted and reproduced hereunder:

> "175. (1) No person shall be a Sarpanch, Up-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:
>
> Provided that a person having more than two children on or up to the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified.
>
> ***
>
> 177. (1) If any member of a Gram Panchayat, Panchayat Samiti or Zila Parishad—
>
> (*a*) who is elected, as such, was subject to any of the disqualifications mentioned in Section 175 at the time of his election;
>
> (*b*) during the term for which he has been elected, incurs any of the disqualifications, mentioned in Section 175,
>
> shall be disqualified from continuing to be a member, and his office shall become vacant.
>
> (2) In every case, the question whether a vacancy has arisen, shall be decided by the Director. The Director may give its decision either on an application made to it by any person, or on its own motion. Until the Director decides that the vacancy has arisen, the members shall not be disqualified under sub-section (1) from continuing to be a member. Any person aggrieved by the decision of the Director may, within a period of fifteen days from the date of such decision, appeal to the Government and the orders passed by Government in such appeal shall be final:
>
> Provided that no order shall be passed under this sub-section by the Director against any member without giving him a reasonable opportunity of being heard."

3. …One of the objectives set out in the Statement of Objects and Reasons is to disqualify persons for election to Panchayats at each level, having more than two children after one year of the date of commencement of this Act, to popularize family welfare/family planning programme [vide clause (*m*) of para 4 of SOR].

…

5. Several persons (who are the writ petitioners or appellants in this batch of matters) have been disqualified or proceeded against for disqualifying either from contesting the elections for, or from continuing in the office of Panchas/Sarpanchas in view of their having incurred the disqualification as provided by Section 175(1)(*q*) or Section 177(1) read with Section 175(1)(*q*) of the Act. The grounds for challenging the constitutional validity of the abovesaid provision are very many, couched

differently in different writ petitions. We have heard all the learned counsel representing the different petitioners/appellants. As agreed to at the Bar, the grounds of challenge can be categorized into five: (*i*) that the provision is arbitrary and hence violative of Article 14 of the Constitution; (*ii*) that the disqualification does not serve the purpose sought to be achieved by the legislation; (*iii*) that the provision is discriminatory; (*iv*) that the provision adversely affects the liberty of leading personal life in all its freedom and having as many children as one chooses to have and hence is violative of Article 21 of the Constitution; and (*v*) that the provision interferes with the freedom of religion and hence violates Article 25 of the Constitution.

…

DOES THE LEGISLATION NOT SERVE ITS OBJECT?

9. It was submitted that the number of children which one has, whether two or three or more, does not affect the capacity, competence and quality of a person to serve on any office of a Panchayat and, therefore, the impugned disqualification has no nexus with the purpose sought to be achieved by the Act. There is no merit in the submission. We have already stated that one of the objects of the enactment is to popularize family welfare/family planning programme. This is consistent with the National Population Policy.

10. Under Article 243-G of the Constitution, the legislature of a State has been vested with the authority to make law endowing the Panchayats with such powers and authority which may be necessary to enable the Gram Panchayats to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein. Clause (*b*) of Article 243-G provides that Gram Panchayats may be entrusted the powers to implement the schemes for economic development and social justice including those in relation to matters listed in the Eleventh Schedule. Entries 24 and 25 of the Eleventh Schedule read:

> "24. Family welfare.
>
> 25. Women and child development."

In pursuance of the powers given to the State Legislatures to enact laws, the Haryana Legislature enacted the Haryana Panchayati Raj Act, 1994 (Haryana Act 11 of 1994). Section 21 enumerates the functions and duties of Gram Panchayat. Clause XIX(1) of Section 21 reads:

> "XIX. Public Health and Family Welfare—
>
> Implementation of family welfare programme."

Family welfare would include family planning as well. To carry out the purpose of the Act as well as the mandate of the Constitution the legislature has made a provision for making a person having more than two living children ineligible to either contest for the post of Panch or Sarpanch. Such a provision would serve the purpose of the Act as mandated by the Constitution. It cannot be said that such a provision would not serve the purpose of the Act.

11. In our opinion, the impugned disqualification does have a nexus with the purpose sought to be achieved by the Act. Hence it is valid.

…

20. We are clearly of the opinion that the impugned provision is neither arbitrary nor unreasonable nor discriminatory. The disqualification contained in Section 175(1)(*q*) of Haryana Act 11 of 1994 seeks to achieve a laudable purpose — socio-economic welfare and health care of the masses — and is consistent with the National Population Policy. It is not violative of Article 14 of the Constitution.

SUBMISSIONS (IV) AND (V): THE PROVISION IF IT VIOLATES ARTICLE 21 OR 25?

21. Before testing the validity of the impugned legislation from the viewpoint of Articles 21 and 25, in the light of the submissions made, we take up first the more basic issue — whether it is at all permissible to test the validity of a law which enacts a disqualification operating in the field of elections on the touchstone of violation of fundamental rights.

22. Right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a statute. At the most, in view of Part IX having been added in the Constitution, a right to contest election for an office in Panchayat may be said to be a constitutional right — a right originating in the Constitution and given shape by a statute. But even so, it cannot be equated with a fundamental right. There is nothing wrong in the same statute which confers the right to

contest an election also to provide for the necessary qualifications without which a person cannot offer his candidature for an elective office and also to provide for disqualifications which would disable a person from contesting for, or holding, an elective statutory office.

…

25. In our view, 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 the limits of reasonability. Rather it is a disqualification conceptually devised in national interest.

…

THE DISQUALIFICATION, IF VIOLATES ARTICLE 21?

27. Placing strong reliance on *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248] and *Kasturi Lal Lakshmi Reddy v. State of J&K* [(1980) 4 SCC 1] it was forcefully urged that the fundamental right to life and personal liberty emanating from Article 21 of the Constitution should be allowed to stretch its span to its optimum so as to include in the compendious term of the article all the varieties of rights which go to make up the personal liberty of man including the right to enjoy all the materialistic pleasures and to procreate as many children as one pleases.

28. At the very outset we are constrained to observe that the law laid down by this Court in the decisions relied on is either being misread or read divorced of the context. The test of reasonableness is not a wholly subjective test and its contours are fairly indicated by the Constitution. The requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights. 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.

29. It is necessary to have a look at the population scenario of the world and of our own country.

30. India has the (dis)credit of being second only to China at the top in the list of the 10 most populous countries of the world. As on 1-2-2000 the population of China was 1277.6 million while the population of India as on 1-3-2001 was 1027.0 million (Census of India, 2001, Series I, India — Paper I of 2001, p. 29).

31. The torrential increase in the population of the country is one of the major hindrances in the pace of India's socio-economic progress. Everyday, about 50,000 persons are added to the already large base of its population. The Karunakaran Population Committee (1992-93) had proposed certain disincentives for those who do not follow the norms of the development model adopted by the national public policy so as to bring down the fertility rate. It is a matter of regret that though the Constitution of India is committed to social and economic justice for all, yet India has entered the new millennium with the largest number of illiterates in the world and the largest number of people below the poverty line. The laudable goals spelt out in the directive principles of State policy in the Constitution of India can best be achieved if the population explosion is checked effectively. Therefore, population control assumes a central importance for providing social and economic justice to the people of India (Usha Tandon, Reader, Faculty of Law, Delhi University — *Research Paper on Population Stabilization*, Delhi Law Review, Vol. XXIII, 2001, pp. 125-31).

…

35. The growing population of India had alarmed the Indian leadership even before India achieved independence. In 1940 the Sub-Committee on Population, appointed by the National Planning Committee set up by the President of the Indian National Congress (Pandit Jawaharlal Nehru), considered "family planning and a limitation of children" essential for the interests of social economy, family happiness and national planning. The Committee recommended the establishment of birth-control clinics and other necessary measures such as raising the age of marriage and a eugenic sterilization programme. A Committee on Population set up by the National Development Council in 1991, in the wake of the census result, also proposed the formulation of a national policy. (Source — Seminar, March 2002, p. 25.)

36. Every successive five-year plan has given prominence to a population policy. In the first draft of the First Five-Year Plan (1951-56) the Planning Commission recognized that population policy was essential to planning and that family planning was a step forward for improvement in health, particularly that of mothers and children. The Second Five-Year Plan (1956-61) emphasized the method of sterilization. A Central Family Planning Board was also constituted in 1956 for

the purpose. The Fourth Five-Year Plan (1969-74) placed the family planning programme, "as one amongst items of the highest national priority". The Seventh Five-Year Plan (1985-86 to 1990-91) has underlined "the importance of population control for the success of the plan programme …". But, despite all such exhortations, "the fact remains that the rate of population growth has not moved one bit from the level of 33 per thousand reached in 1979. And in many cases, even the reduced targets set since then have not been realised". (*Population Policy and the Law*, ibid., pp. 44-46.)

37. The above facts and excerpts highlight the problem of population explosion as a national and global issue and provide justification for priority in policy-oriented legislations, wherever needed.

38. None of the petitioners has disputed the legislative competence of the State of Haryana to enact the legislation. Incidentally, it may be stated that the Seventh Schedule List II — State List, Entry 5 speaks of "Local Government, that is to say, the constitution and powers of Municipal Corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration." Entry 6 speaks of "Public health and sanitation" *inter alia*. In List III — Concurrent List, Entry 20-A was added which reads "Population control and family planning". The legislation is within the permitted field of State subjects. Article 243-C makes provision for the legislature of a State enacting laws with respect to constitution of Panchayats. Article 243-F in Part IX of the Constitution itself provides that a person shall be disqualified for being chosen as, and for being, a member of a Panchayat if he is so disqualified by or under any law made by the legislature of the State. Article 243-G casts one of the responsibilities of Panchayats as preparation of plans and implementation of schemes for economic development and social justice. Some of the schemes that can be entrusted to Panchayats, as spelt out by Article 243-G read with the Eleventh Schedule are schemes for economic development and social justice in relation to health and sanitation, family welfare, women and child development and social welfare. Family planning is essentially a scheme referable to health, family welfare, women and child development and social welfare. Nothing more needs to be said to demonstrate that the Constitution contemplates Panchayat as a potent instrument of family welfare and social welfare schemes coming true for the betterment of people's health, especially women's health and family welfare coupled with social welfare. Under Section 21 of the Act, the functions and duties entrusted to Gram Panchayats include "public health and family welfare", "women and child development" and "social welfare". Family planning falls therein. Who can better enable the discharge of functions and duties and such constitutional goals being achieved than the leaders of Panchayats themselves taking a lead and setting an example?

39. Fundamental rights are not to be read in isolation. They have to be read along with the chapter on directive principles of State policy and the fundamental duties enshrined in Article 51-A. Under Article 38 the State shall strive to promote the welfare of the people and developing a social order empowered at distributive justice — social, economic and political. Under Article 47 the State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular, the constitutionally downtrodden. Under Article 47 the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. None of these lofty ideals can be achieved without controlling the population inasmuch as our materialistic resources are limited and claimants are many. The concept of sustainable development which emerges as a fundamental duty from several clauses of Article 51-A too dictates the expansion of population being kept within reasonable bounds.

40. The menace of growing population was judicially noticed and constitutional validity of legislative means to check the population was upheld in *Air India v. Nergesh Meerza* [(1981) 4 SCC 335 : 1981 SCC (L&S) 599] . The Court found no fault with the rule which would terminate the services of air hostesses on the third pregnancy with two existing children, and held the rule both salutary and reasonable for two reasons: (SCC p. 374, para 101)

"In the first place, the provision preventing 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."

41. To say the least, it is futile to assume or urge that the impugned legislation violates right to life and liberty guaranteed under Article 21 in any of the meanings, howsoever expanded the meanings may be.

THE PROVISION IF IT VIOLATES ARTICLE 25?

42. It was then submitted that the personal law of Muslims permits performance of marriages with four women, obviously for the purpose of procreating children and any restriction thereon would be violative of the right to freedom of religion enshrined in Article 25 of the Constitution…The relevant part of Article 25 reads as under:

"25. *Freedom of conscience and free profession, practice and propagation of religion.*—(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise 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 or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."

…

44. The Muslim law permits marrying four women. The personal law nowhere mandates or dictates it as a duty to perform four marriages. No religious scripture or authority has been brought to our notice which provides that marrying less than four women or abstaining from procreating a child from each and every wife in case of permitted bigamy or polygamy would be irreligious or offensive to the dictates of the religion. In our view, the question of the impugned provision of the Haryana Act being violative of Article 25 does not arise…

…

59. In our view, a statutory provision casting disqualification on contesting for, or holding, an elective office is not violative of Article 25 of the Constitution.

60. Looked at from any angle, the challenge to the constitutional validity of Section 175(1)(*q*) and Section 177(1) must fail. The right to contest an election for any office in Panchayat is neither fundamental nor a common law right. It is the creature of a statute and is obviously subject to qualifications and disqualifications enacted by legislation. It may be permissible for Muslims to enter into four marriages with four women and for anyone whether a Muslim or belonging to any other community or religion to procreate as many children as he likes but no religion in India dictates or mandates as an obligation to enter into bigamy or polygamy or to have children more than one. What is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted. Assuming the practice of having more wives than one or procreating more children than one is a practice followed by any community or group of people, the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform which the impugned legislation clearly does.

61. If anyone chooses to have more living children than two, he is free to do so under the law as it stands now but then he should pay a little price and that is of depriving himself from holding an office in Panchayat in the State of Haryana. There is nothing illegal about it and certainly no unconstitutionality attaches to it.

SOME INCIDENTAL QUESTIONS

62. It was submitted that the enactment has created serious problems in the rural population as couples desirous of contesting an election but having living children more than two, are feeling compelled to give them in adoption. Subject to what has already been stated hereinabove, we may add that disqualification is attracted no sooner a third child is born and is living after two living children. Merely because the couple has parted with one child by giving the child away in adoption, the disqualification does not come to an end. While interpreting the scope of disqualification we shall have to keep in view the evil sought to be cured and purpose sought to be achieved by the enactment. If the person sought to be disqualified is responsible for or has given birth to children more than two who are living then merely because one or more of them are given in adoption the disqualification is not wiped out.

63. It was also submitted that the impugned disqualification would hit the women worst, inasmuch as in the Indian society they have no independence and they almost helplessly bear a third child if their husbands want them to do so. This contention need not detain us any longer. A male who compels his wife to bear a third child would disqualify not

only his wife but himself as well. We do not think that with the awareness which is arising in Indian womenfolk, they are so helpless as to be compelled to bear a third child even though they do not wish to do so. At the end, suffice it to say that if the legislature chooses to carve out an exception in favour of females it is free to do so but merely because women are not excepted from the operation of the disqualification it does not render it unconstitutional.

64. Hypothetical examples were tried to be floated across the Bar by submitting that there may be cases where triplets are born or twins are born on the second pregnancy and consequently both of the parents would incur disqualification for reasons beyond their control or just by freak of divinity. Such are not normal cases and the validity of the law cannot be tested by applying it to abnormal situations. Exceptions do not make the rule nor render the rule irrelevant. One swallow does not make a summer; a single instance or indicator of something is not necessarily significant.

CONCLUSION

65. The challenge to the constitutional validity of Sections 175(1)(*q*) and 177(1) fails on all the counts. Both the provisions are held intra vires the Constitution. The provisions are salutary and in public interest. All the petitions which challenge the constitutional validity of the abovesaid provisions are held liable to be dismissed.

…"

IN THE HIGH COURT OF ALLAHABAD

Dr. Sukha Raj Singh Rathore v. State of U.P.
2004 Cri LJ 4553
Amar Saran, J.

This writ petition was filed for quashing of the FIR and stay of arrest of a doctor in connection with the death of a woman immediately after a sterilization procedure. After dealing with the issue, the Court commented on the manner in which sterilization is incentivized and promoted over other forms of contraception, and the dangers of such a policy.

Saran, J.: "…

3. The facts of the present case are that when her husband Kallu was away in village Garhna, in Panna, M.P. to do the work of a labourer, Smt. Sunita, a Harijan woman, and mother of four little children appears to have been induced by the Basic Health Worker, Suman Raj co-accused, apparently on a promised incentive of Rs. 150, to get herself sterilised at the health camp at the State Allopathic Dispensary, Atarra, Banda. Smt. Sunita was operated on 12-3-2004 by the petitioner, who was the in-charge, CHC, Atarra. Only the consent of Smt. Sunita appears to have been taken for this operation, as her husband was absent. Also no laboratory tests appear to have been done before the operation.

4. It appears that Sunita's condition deteriorated on the operation table itself. After ligation of both the tubes Smt. Sunita appeared to have started gasping, her pulse became feeble, skin cold and her respiration slowed down. The petitioner rushed her to the District hospital at Banda on an ambulance with oxygen after preliminary medication. Written information was also given to the CMO Banda. However the Emergency Officer at the District Hospital, Banda declared her dead on arrival there. The Inspector incharge, Kotwali, Banda was informed and post mortem was conducted by 3 doctors on Sunita's dead body on 13-2-2004.

5. According to the post mortem report, there was no fault with the operation procedures. As the cause of death could not be ascertained, the viscera was preserved. The mandatory investigation by the Medical Board consisting of the CMO, Banda, an Anaesthetist, Gynaecologist and Surgeon, opined that cause of death could not be ascertained and that no action was proposed, and no defaulter was indicated. However, this report also noted a diagnosis of vaso vagal shock.

6. Initially after the operation the Respondent No. 5 appears to have been silenced by Rs. 10,000 incentive which is the price of life that is paid after an unsucessful (sic) operation and which was paid to him on 13-2-2004. However either on his own, or due to motivation from someone the Respondent No. 5 appears to have moved an application under S. 156(3), Cr PC against the health worker and the petitioner on 17-4-2004, before the JM I, Atarra, after an earlier S. 156(3) Cr PC application dated 27-3-04 was rejected by the CJM, Banda for want of jurisdiction.

7. The JM I, Atarra called for a preliminary report from the SHO, PS Atarra, who sumitted (sic) a report on 19-4-2004, favouring the doctor and the Basic Health Worker. The report concluded that whilst the operation had been performed as alleged, however the deceased had voluntarily opted for the operation without any illegal inducement from the Health worker. The petitioner had also not been negligent in the conduct of the operation and that the team of 3 doctors who conducted the post mortem had exonerated him. In spite of this report the Magistrate was inclined to direct registration and investigation of a case under Section 304-A, IPC against the petitioner and the health worker by the police by his order dated 1-6-2004. This has resulted in the present writ petition being filed by the doctor for averting his possible arrest.

8. At the moment as credible evidence is wanting for showing the complicity of the petitioner in any offence. I have no option but to stay the arrest of the petitioner in Case Crime No. C-5/2004 under Section 304-A, IPC, PS, Kotwali, Atarra until further orders or until credible evidence is available or charge-sheet is submitted, whichever is earlier.

9. However as we find that an apparently healthy woman of 28 years has died after an operation, and three doctors who conducted the post mortem have found no fault with the operation procedures, and no cause of death, either natural or unnatural, and they have simply sent the viscera for chemical examination, and the Medical Board headed by the CMO has also given a clean chit to the petitioner, it becomes incumbent to look for the circumstances which caused the death of Smt. Sunita, as normally a young healthy woman is not expected to die without cause. The SP Banda, Respondent No. 2 is directed to obtain the viscera report within 3 weeks. In case the viscera report is also negative, the Respondent No. 2 is directed to get an investigation made under his supervision by a senior officer for ascertaining the true causes for the death of Sunita and whether all the needed medical tests were conducted prior to the operation, whether the deceased was properly motivated, and whether the precautions needed for the operation and proper procedures were followed. He may seek the opinion of qualified gynaecologists and others in this regard. He should also probe whether a clean chit has been given to the petitioner by the 3 doctors who conducted the post mortem examination and by the medical board in a bona fide manner, or they have acted with improper motives and sought to screen the petitioner or any one else who may be responsible for the death of Smt. Sunita. In case any material is available suggestive of a conspiracy on part of the doctors who conducted the post mortem or any other authority to screen the petitioner or anyone else from punishment, if there are reasons to suspect any negligence in the procedures for sterilisation of Smt. Sunita, the Respondent No. 2, SP Banda will take appropriate action against the petitioner and the offending doctors or other authorities. The Respondent No. 2 is directed to submit a report to this Court on the action taken in compliance with this order within a period of two months.

10. Before parting I must point out that this case, in which a woman has died after undergoing sterilisation under the government's programme for mass sterilisation, illustrates the dangers of forced or induced sterilisation of a poor person without taking the needed precautions, health checks, and without considering whether the person was eligible for sterilisation under government criteria, or informing the patient of the risks of undergoing the sterilisation operation.

11. The problem appears to have arisen because for promoting the needed and laudable objective of family planning, the government and its functionaries have concentrated on a strategy of promoting sterilisations alone, to the exclusion of any other methods of birth control. This is not to say that this Court is undermining the importance of programmes for sterilisation of persons with large families. Family planning is indeed the absolute need of the hour. But hurried sterilisations, without proper precautions, in defiance of criteria and guidelines set out by government itself, without properly motivating and acquainting people of the problems and risks involved, and advising them on the appropriate family planning technique for persons in varying situations, is proving counter-productive. Presently family planning staff, doctors etc. are given awards on the basis of the numbers of sterilisations done, and are taken to task for not meeting sterilisation targets, whilst other techniques for birth control are consistently devalued. For meeting these targets poor persons, who may not be healthy or who would otherwise be ineligible under the official criteria fixed are offered petty incentives, and forced or motivated by hook or by crook to undergo sterilisation.

12. The present petitioner, who is a doctor, actually seeks credit for beign (sic) an expert in sterilisations and for having done 50,000 operations, and for having met 75% of Banda district's annual target single handedly. Even on the fateful day when Smt. Sunita died 20 persons had been sterilised. This per se creates a situation of risk, and one is left wondering whether proper attention could be given to individual cases, when tubectomies are conducted at such a large scale. Where deaths as in the present case or other problems arise, there is a set back and grave negative publicity for the family planning programme. The backlash provoked by Sanjay Gandhi's programme of forced sterilisations during the emergency are still stained in public memory.

…"

IN THE SUPREME COURT OF INDIA

Ramakant Rai v. Union of India
(2009) 16 SCC 565
Ruma Pal, Arijit Pasayat, and C.K. Thakker, JJ.

In this writ petition, the Supreme Court noted that no uniform procedures or norms were being followed by States for ensuring implementation of Union of India's guidelines on sterilization procedures. It issued various directions taking cue from the best practices followed by some States in this regard.

Pal, Pasayat, and Thakker, JJ.: "**1.** Several States have filed affidavits setting out the steps taken by them to regulate sterilisation procedures with regard to the male and female patients in their respective States. However, it is apparent that there is no uniformity with regard to the procedures nor the norms followed for ensuring that the guidelines laid down by the Union of India in this regard are being followed. Taking the best of what is being followed by some States, we direct that the States shall:

(*1*) Introduce a system of having an approved panel of doctors and limiting the persons entitled to carry on sterilisation procedures in the State to those doctors whose names appear on the panel. The panel may be prepared either on a Statewise, districtwise or regionwise basis. The criteria for including the names of the doctors on such panel must be laid down by the Union of India as indicated subsequently. Until the Union of India lays down uniform qualification criterion for the empanelment of doctors, for the time being no doctor without gynaecological training for at least 5 years' post-degree experience should be permitted to carry out the sterilisation programmes.

(*2*) The State Government shall also prepare and circulate a checklist which every doctor will be required to fill in before carrying out sterilisation procedure in respect of each proposed patient. The checklist must contain items relating to (*a*) the age of the patient, (*b*) the health of the patient, (*c*) the number of children, and (*d*) any further details that the State Government may require on the basis of the guidelines circulated by the Union of India. The doctors should be strictly informed that they should not perform any operation without filling in this checklist.

(*3*) The State Governments shall also circulate uniform copies of the pro forma of consent. Until the Union Government certifies such pro forma, for the time being, the pro forma as utilised in the State of U.P., shall be followed by all the States.

(*4*) Each State shall set up a Quality Assurance Committee which should, as being followed by the State of Goa, consist of the Director of Health Services, the Health Secretary and the Chief Medical Officer, for the purpose of not only ensuring that the guidelines are followed in respect of preoperative measures (for example, by way of pathological tests, etc.), operational facilities (for example, sufficient number of necessary equipment and aseptic conditions) and postoperative follow-ups. It shall be the duty of the Quality Assurance Committee to collect and publish six-monthly reports of the number of persons sterilised as well as the number of deaths or complications arising out of the sterilisation.

(*5*) Each State shall also maintain overall statistics giving a break-up of the number of the sterilisations carried out, particulars of the procedure followed (since we are given to understand that there are different methods of sterilisation), the age of the patients sterilised, the number of children of the persons sterilised, the number of deaths of the persons sterilised either during the operation or thereafter which is relatable to the sterilisation, and the number of persons incapacitated by reason of the sterilisation programmes.

(*6*) The State Government shall not only hold an enquiry into every case of breach of the Union of India guidelines by any doctor or organisation but also take punitive action against them. As far as the doctors are concerned, their names shall, pending enquiry, be removed from the list of empanelled doctors.

(*7*) The State shall also bring into effect an insurance policy according to the format followed by the State of Tamil Nadu until such time the Union of India prescribes a standard format.

(*8*) The Union of India shall lay down within a period of four weeks from date, uniform standards to

be followed by the State Governments with regard to the health of the proposed patients, the age, the norms for compensation, the format of the statistics, checklist and consent pro forma and insurance.

(*9*) The Union of India shall also lay down the norms of compensation which should be followed uniformly by all the States. For the time being until the Union Government formulates the norms of compensation, the States shall follow the practice of the State of Andhra Pradesh and shall pay Rs 1 lakh in case of the death of the patient sterilised, Rs 30,000 in case of incapacity and in the case of postoperative complications, the actual cost of treatment being limited to a sum of Rs 20,000.

2. All the States have responded except the State of Jammu and Kashmir. Needless to say that the State of Jammu and Kashmir will also follow this order.

…"

IN THE SUPREME COURT OF INDIA

People's Union for Civil Liberties v. Union of India & Ors.
(2009) 16 SCC 149
Arijit Pasayat and S.H. Kapadia, JJ.

Through an earlier order in this case, the Supreme Court had directed that the National Maternity Benefit Scheme ("NMBS") shall not be discontinued or restricted without its prior approval. The Union of India filed an interim application seeking permission to modify the NMBS and introduce a new scheme called Janani Suraksha Yojana ("JSY"). PUCL filed an application questioning the legality of the discontinuation of the cash benefit under NMBS pursuant to introduction of JSY. The Court ruled that the benefits under the NMBS should continue and cash assistance should be provided to women who are below poverty line, irrespective of their age and number of children. Meanwhile, the Court directed Union of India to consider if the grant of such benefit would go against the national population policy.

Pasayat, J.: "By this order two IAs Nos. 37 of 2004 and 54 of 2005 stand disposed of. IA No. 37 of 2004 is an application by the Union of India for permission to modify the National Maternity Benefit Scheme (in short "NMBS") and to introduce a new scheme called Janani Suraksha Yojana (in short "JSY"). IA No. 54 of 2005 is an application by the petitioner questioning legality of the discontinuation of the benefit under NMBS due to introduction of JSY. By order dated 27-4-2004 [*People's Union for Civil Liberties v. Union of India*, (2009) 16 SCC 598] this Court directed as follows:

> "No Scheme … in particular … National Maternity Benefit Scheme shall be discontinued or restricted in any way without prior approval of the Court."

2. Again, by order dated 9-5-2005 [*People's Union for Civil Liberties v. Union of India*, (2009) 16 SCC 614] this Court directed as follows:

> "By IA No. 37, permission is sought to modify the National Maternity Benefit Scheme (NMBS) and to introduce a new scheme, namely, Janani Suraksha Yojana (JSY). Whereas in IA No. 54, the prayer is that the Scheme should not be modified by reducing, abridging or qualifying in any way the social assistance entitlements created under the original scheme of NMBS for expecting BPL mothers, including cash entitlement of Rs 500 provided therein. We have requested learned Additional Solicitor General to place on record further material in the form of affidavit to effectively implement the new Scheme sought to be introduced. The further material shall include the approximate distance of Public Health Centre from the residential complexes and the facility of transportation, etc. The Commissioner shall also examine the matter in depth and file a report. The response to the application may be filed within eight weeks. Meanwhile, the existing National Maternity Benefit Scheme will continue."

3. The Government set a numerical ceiling of 57.5 lakh beneficiaries as the annual target for NMBS. However, the number of beneficiaries under JSY in 2006-2007 was only 26.2 lakhs i.e. 45.5% and in the year 2005-2006 this was as

low as 5.7 lakhs i.e. 10%. While there has been an improvement in the last one year, the coverage under this Scheme is still way below the target number of women to be covered by NMBS.

4. According to the Union of India, JSY was introduced to put a premium on the willingness of poor women to go in for institutional delivery instead of home delivery. But it was recognised that in the States with lower institutional delivery rates, one of the reasons for low performance have been lesser availability of facilities in the health centres, which acts as disincentive for the poor illiterate women to seek the service

…

14. At the time of hearing of the applications, learned counsel for the petitioner and the Union of India highlighted various aspects. Considering the submissions and the material data placed on record we direct as follows:

> (*a*) The Union of India and all the State Governments and the Union Territories shall (*i*) continue with NMBS, and (*ii*) ensure that all BPL pregnant women get cash assistance 8-12 weeks prior to the delivery.
>
> (*b*) The amount shall be Rs 500 per birth irrespective of number of children and the age of the woman.

…

15. At this juncture it would be necessary to take note of certain connected issues which have relevance. It seems from the Scheme that irrespective of number of children, the beneficiaries are given the benefit. This in a way goes against the concept of family planning which is intended to curb the population growth. Further, the age of the mother is a relevant factor because women below a particular age are prohibited from legally getting married. The Union of India shall consider this aspect while considering the desirability of the continuation of the Scheme in the present form. After considering the aforesaid aspects and if need be, necessary amendments may be made.

…"

IN THE SUPREME COURT OF INDIA

Suchita Srivastava & Anr. v. Chandigarh Administration
(2009) 9 SCC 1
K.G. Balakrishnan, C.J., and P. Sathasivam and B.S. Chauhan, JJ.

A "mentally retarded" woman became pregnant as a result of rape while she was living as an inmate in a government run welfare home in Chandigarh. The Chandigarh Administration had received approval from the Punjab and Haryana High Court to terminate her pregnancy (of 19 weeks), as it was considered by the court to be in her best interest. In this appeal, the Supreme Court examined the validity of the High Court's order which did not take into account the woman's consent. It also considered what should be the appropriate approach for a court while ascertaining the "best interests" of an intellectually disabled woman in exercise of its "parens patriae" jurisdiction.

Balakrishnan, C.J.: "**22.** 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. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. 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. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. 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."

IN THE HIGH COURT OF KERALA

Krupa Prolifers & Ors. v. State of Kerala & Ors.
MANU/KE/0499/2009
S. R. Bannurmath, C.J. and A. K. Basheer, J.

An organization claiming that its main aim and object is to protect, preserve and uphold the dignity of every human being, right from fallopian tube till natural death occurs filed a writ petition in the Kerala High Court seeking a ban on advertisement, sale and distribution of i-pill, an emergency contraceptive, and a declaration that use of emergency contraceptive without prescription is illegal. The High Court decided to adjudicate the case by looking at the effect of the i-pill to determine whether it is a contraceptive tablet or a termination pill.

Bannurmath, C.J.: "**1.** This Writ Petition, as a public interest litigation, is filed, seeking the following reliefs:

(a) Immediate action against advertisement in T.V. Channels, newspapers, magazines etc., of 'i-pill', manufactured by the 4th respondent, which is alleged to be causing termination of pregnancy (abortion).

(b) To declare the use of emergency contraceptive pills without prescription, as illegal.

(c) To ban the sale and distribution of i-pill.

2. The petitioner, a registered educational and charitable Trust, claims that its main aim and object is to protect, preserve and uphold the dignity of every human being, right from fallopian tube till natural death occurs, irrespective of consideration, such as creed, colour, language, religion, gender, politics etc., and also prevent abortion at any stage by all means.

3. According to the petitioner, with the help of media, such as television, newspapers, weeklies, magazines etc., the Pharmaceutical Company, the 4th respondent herein, is promoting abortion among women, by advertising that the use of the tablet named "i-pill" within 72 hours of fertilization will prevent pregnancy and also giving assurance that it will be available from any Medical Store without the prescription of a medical practitioner. It is vehemently argued that the law in this regard, especially, the Medical Termination of Pregnancy Act, 1971 (hereinafter called as "M.T.P. Act") allows/permits only registered medical practitioners to terminate the pregnancy of a woman, that too, in unavoidable circumstances, that too, in accordance with the provisions of the Act. It is submitted that the availability of these types of tablets, without any restriction, would adversely affect the younger generation of the nation and in the long run, it would destroy the morality and the society will fall into anarchy.

4. The learned counsel for the petitioner has, in this regard, apart from the provisions of the M.T.P Act, also relied upon the advertisements and the decision of the Apex Court in the case of Dr. Jacob George v. State of Kerala [(1994)3 SCC 430]. The learned counsel has also relied upon certain medical texts, to contend that within 12 hours of a successful sexual intercourse by male and female, there must be a pregnancy and at the time of fertilization itself or union of the sperm and the egg, there is a beginning of human life and as such, in view of the claim of the 4th respondent that no pregnancy can take place within 72 hours of sexual intercourse, is a misleading statement and in effect it amounts to abortion, as the life is terminated prematurely.

5. On the other hand, the 4th respondent, who entered appearance, has filed a detailed counter, along with the permission issued to the Company by the Drugs Controller General, Directorate General of Health Services and the recommendations submitted by the Consortium on National Consensus for Emergency Contraception, contending that the tablet i-pill does not cause any abortion and it is only a contraceptive pill, to prevent the pregnancy itself.

6. We have heard both the counsels at length and perused the documents produced. At the outset, it has to be noted that the conflict between the moralists and the medical science is going on, as to when life begins in the womb, when is an embryo said to have been formed and the conflict regarding the moral aspect of abortion. In our view, we are not required to go into the morality aspect, but only consider the medical consequences of the i-pill drug, that is to say, whether it is a contraceptive tablet or it is a medicine for causing abortion.

7. Though the M.T.P Act is enacted to prevent illegal abortions and even though termination of pregnancy or abortion is made a crime under the Indian Penal Code, the word "pregnancy" is not defined nor there is any definition of abortion, that is to say, when exactly pregnancy takes place and at what stage of beginning of life abortion takes place or said to have been induced.

8. As such, we have to depend upon the medical science. It is to be noted that undisputedly, according to the medical science, the beginning of pregnancy is at the stage when there is implantation of a fertilized egg into the lining of woman's uterus and this implantation takes 5 to 7 days after fertilization and is completed several days later. There is also no dispute that after sexual intercourse, millions of spermatozoa or sperms are released in the reproductive canal of the woman and if there is a mature ovum whose life span is 12 to 36 hours, the sperms try to unite with the said ovum. It is only one sperm out of millions may succeed and in that case, both ovum and sperm unite and become one and then start dividing and is called as Zygote. Thereafter, when this Zygote gets attached to the lining of the ovary, it starts taking shape as embryo. Till the Zygote attaches itself to the ovary (sic) and starts taking shape, it is called as pre-embryonic stage. It is also to be noted that there is considerable confusion even among experienced health care people about abortion and the contraceptive measures. There is no dispute that abortion is caused when pregnancy is terminated. On the other hand, contraceptive measures are to prevent the pregnancy itself. There are a number of contraceptive measures, like use of condom, I.U.T method or contraceptive pills, both for male and female. By use of these contraceptive measures, the sperms released by male in the re-production (sic) system of female are prevented from uniting with the ovum released by female. As already noted, unless there is fertilization and the united cell (pre-embryo) completes implantation into the lining of the uterus, it cannot be said, as per the medical science, pregnancy has taken place. Hence we find there is vast difference between contraceptive measures on one hand and abortion on the other. By contraceptive measures, fertilization itself is prevented whereas, by causing abortion the pre-embryo or embryo attached to the lining of the uterus is medically or mechanically tried to be dislodged and removed from the female body.

9. On perusal of the literature about the i-pill, the certificate in this regard issued by the medical authority, it is clear that it is only intended to avoid pregnancy after unprotected intercourse and is not effective, if the female taking the same is already pregnant.

10. As per the report of the Consortium on National Consensus for Emergency Contraception in collaboration with World Health Organization, Ministry of Health and Family Welfare and Indian Council of Medical Research, most of the women in India, following an accidental undesired sexual exposure and not wanting to conceive, do not even know that unwanted pregnancy can still be avoided; they just wait with anxiety, for the period to come and by the time they come to know that they are pregnant, it is too late. However, to avoid unwanted pregnancy, they resort to abortion, either with the help of Quacks or old women, who are known to be experts in causing abortion, or in some cases, abortion induced by medicines. It is also known that in this unscientific use of abortion, many women lost their lives and that is why the Medical Termination of Pregnancy Act, 1971 was enacted to prevent illegal prevention of pregnancy. It is also not much in dispute that for want of sufficient knowledge or awareness on the part of Indians, the population is increasing at enormous and alarming rate and because of the vast growth of population, the State Governments are not able to provide the basic requirements to all these people.

11. As such, in our view and as reported by the Consortium on National Consensus for Emergency Contraception, it is necessary to provide information to all the people as to the availability of contraceptive measures. In fact, the Government itself has come forward with Family Planning Schemes, by freely providing contraceptives, like Nirodh and also contraceptive pills at cheaper rate.

12. Keeping in view these objects and as we find that the tablet i-pill manufactured by the 4th respondent is only a contraceptive pill and does not cause abortion, the apprehension of the petitioner is misconceived. Though the individual morality concept based on religious faith may prohibit even the contraceptive measures, the courts cannot go into it. In the light of what we have observed above, since i-pill is only a contraceptive pill meant for preventing fertilization and not meant for causing abortion, we find no merit in the writ petitioner's case.

For the reasons stated above, the Writ Petition is dismissed, as devoid of any merits."

IN THE HIGH COURT OF RAJASTHAN

Smt. Renuka Sahal & Anr. v. State of Rajasthan & Ors.
and
Smt. Priyanka Panwar v. Rajasthan Public Service Commission & Ors.
2015 SCC OnLine Raj 6581
Ajit Singh and Anupinder Singh Grewal, JJ.

These writ petitions filed before the Rajasthan High Court challenged the constitutionality of service rules framed by the Government of Rajasthan which rendered the candidates having more than two children, on or after the prescribed date, ineligible for appointment or promotion to the service. The petitioners argued that the rules violated their fundamental rights, including those guaranteed under Articles 16 and 21 of the Indian Constitution.

Grewal, J.: "…

2. …The petitioners have challenged the Service Rules framed by the Government of Rajasthan under proviso to Article 309 of the Constitution of India. …[These Rules] provided that in all the services no candidate shall be eligible for appointment/promotion to the service who has more than two children on or after 01.06.2002. It is also contended that as per the original amendment dated 20.06.2011 under Schedule new sub-rule has been added regarding the qualifications for promotion that no person shall be considered for promotion for five recruitment years from the date on which his promotion becomes dues if he/she has more than two children on or after 01.06.2002.

3. The learned counsel for the petitioners have argued that the aforementioned rules are ultra vires the Constitution of India as several fundamental rights including those enshrined under Article 16 and 21 of the Constitution of India have been violated.

...

5. We have heard the learned counsel for the parties at some length and are of the view that the issue has already been adjudicated upon by the Division Bench of this court. The relevant extract of the judgment of the Division Bench in Civil Writ Petition No. 18662/2012 decided on 13.12.2013 is reproduced hereunder:-

> 9. A bare perusal of the notification quoted above would reveal that a candidate shall not be eligible for appointment to the service, who has more than two children on or after 1st June, 2002; as is evident from text of the notification as extracted herein above, which shall be deemed to come into force w.e.f. 20thJune, 2001 (Annexure-2). The rule has also imposed an embargo on the government servants, already in service, for not considering them for promotion for five 8 recruitment years from the date on which the promotion becomes due, if he/she procreate more than two children on or after 1st June, 2002.
>
> 10. It hardly needs reiteration that Article 14 of the Constitution forbids class legislation and not reasonable classification for the purpose of legislation. The twin conditions required to be satisfied for such a legislation are: (i) that the classification is founded on an intelligible differentia, which

distinguishes persons or things that are grouped together from others left out of the group and (ii) that such differentia has a rational relation to the object sought to be achieved by the statute in question; as has been held by the Hon'ble Apex Court of the land in a catena of judgments.

11. The classification, which can be perceived, is well defined between the persons having more than two living children, who are clearly distinguishable from persons having not more than two living children on or after 1st June, 2002. Further, the persons, who are not government servants and are seeking appointment to a post in government service, are clearly distinguishable from those, who are already holding post in government serivce (sic).

12. The object sought to be achieved is inherent in the legislation i.e., to encourage family welfare and family planning programme. Thus, the disqualification enacted by the amendment in the Rules of 2001; seeks to achieve the objective by creating a distinction between the candidates, who have more than two children on or after 1st June, 2002 as well as in between the persons seeking appointment to Government Service and those who are already in Government Service, governed by the relevant rules. We are afraid, if the classification could be termed as arbitrary or violative of any of the provisions of the Article 14 of the Constitution of India. Be that as it...may, the permissible number of children to a couple is based on legislative wisdom and in our view, is a matter of policy decision, which is not open to judicial scrutiny.

…

8. It is, thus, patent that family planning is the need of the hour and the two child norm is being promoted through the National Population Policy. There is no gainsaying that alarming rise in the Nation's Population has offset the gains of socio-economic growth to a considerable extent. Hence, the impugned rules barring persons having more than two children from appointment or promotion in services under the state cannot be termed unconstitutional.

9. We, therefore, have no hesitation in holding that there is absolutely no basis to doubt the correctness of the view taken by the Division Bench in CWP No. 18662/2012. We are in respectful agreement with the view taken therein. Hence, the law laid down by the Division Bench is the correct law and does not require reconsideration by a larger bench."

IN THE SUPREME COURT OF INDIA

Devika Biswas v. Union of India
(2016) 10 SCC 733
Madan B. Lokur and Uday U. Lalit, JJ.

This writ petition was filed before the Supreme Court seeking directions to ensure the conduct of sterilization procedures in accordance with existing legal norms and medical procedures across the country and provision of adequate compensation in case of failure to do so. The Court took note of unsafe and unsanitary conduct of sterilization procedures and resulting deaths in sterilization camps in various states and issued supplementary directions for the effective implementation of its directions in Ramakant Rai (1) v. Union of India. In doing so, the Court placed the right to make a choice regarding sterilization on the basis of informed consent within the framework of reproductive rights under Article 21 of the Indian Constitution.

Lokur, J.: "This public interest petition raises very important issues concerning the entire range of conduct and management, under the auspices of State Governments, of sterilisation procedures wherein women and occasionally men are sterilised in camps or in accredited centres. The issues raised also include pre-operation procedures and post- operative care or lack of it. A sterilisation surgery does not appear to be complicated and yet several deaths have taken place across the country over the years. Undoubtedly, this needs looking into by the Government of India and the State Governments and remedial and corrective steps need to be taken. Persons who are negligent in the performance of their duties must be held accountable and the victims and their family provided for. It is time that women and men are treated with respect and dignity and not as mere statistics in the sterilisation programme.

…

26. Sometime in 2005 the issue of sterilisation procedures for females and males under the Population Control and Family Planning Programme or the Public Health Programme of the Government of India came up for consideration before this Court in a petition filed by Ramakant Rai. The petition was substantially decided by this Court on 1-3-2005 by passing several directions. The directions are reported as *Ramakant Rai (1) v. Union of India* [*Ramakant Rai (1) v. Union of India*, (2009) 16 SCC 565] .

27. Pursuant to the directions given by this Court, the Government of India published a Quality Assurance Manual for Sterilisation Services (in 2006); Standards for Female and Male Sterilisation (in 2006); and Standard Operating Procedures for Sterilisation Services in Camps (in 2008). These manuals really form the procedural and substantive basis for conducting sterilisation procedures both of females and males in the country under the Population Control and Family Planning Programme or the Public Health Programme.

28. What seems to have provoked Devika Biswas in filing a writ petition under Article 32 of the Constitution in this Court is that on 7-1-2012 as many as 53 women underwent a sterilisation procedure in a camp in highly unsanitary conditions in Kaparfora Government Middle School, Kursakanta, Araria District in Bihar between 8 p.m. and 10 p.m. through a single surgeon. In fact, some of the broad issues concerning the sterilisation camp held on 7-1-2012 as found on investigation by Devika Biswas, included an absence of pre-operative tests on the women or proposed patients; they were not given any counselling of any kind at all; they had no idea about the potential dangers and outcomes of the sterilisation procedure; the sterilisation procedures were carried out in a school and not in a government hospital or a private accredited hospital; running water was not available at the site; the sterilisation procedures were carried out under torchlight with the women being placed on a school desk; the surgeon did not have any gloves or at least did not change the gloves available with him; no emergency arrangements were made, etc. etc. Essentially, the entire camp was conducted in unsanitary conditions, in an unprofessional and unethical manner. What is worse is that the camp was conducted under the auspices of an NGO called Jai Ambey Welfare Society which had been granted accreditation by the District Health Society only a few months earlier, that is, on 29-11-2011 apparently without following any formal and transparent procedure.

29. As a result of the sterilisation camp, many women who were operated upon underwent tremendous physical pain and anguish and were traumatised. Consequently, a series of complaints were filed…Some of these complaints were inquired into by the State authorities and it was found that the sterilisation camp was a success except that an expired medicine had been given to the women. On the other hand, the study and the investigations carried out by Devika Biswas along with a journalist called Francis Elliott concluded that the sterilisation camp did not meet any of the requirements laid down by this Court or by the Government of India and that this was confirmed by the women who were operated upon as well as their relatives.

30. Devika Biswas then felt compelled to file a public interest litigation in this Court to ensure that sterilisation procedures nationwide are conducted in accordance with accepted legal norms, medical procedures and the provisions of the manuals and that those women and men who suffer due to the failure or complications in implementing the norms, procedures and provisions are given adequate compensation. That is really the core issue raised by Devika Biswas and that such instances are not repeated.

31. In this context, Devika Biswas says in her writ petition that on 9-2-2008 the State Health Society in Bihar issued a memorandum to the Civil Surgeons in each district in the State. The result of this memorandum was that sterilisation procedures could now be conducted in accredited private health facilities also in a camp mode. The memorandum also mentioned that the State Government would provide funds to the private facilities and the motivators as per the Government of India norms for conducting sterilisation procedures. However it was made clear that extra funds for camp management, transportation, etc. would not be provided by the Government to the accredited private facilities.

32. This was followed by another memorandum dated 9-2-2009 regarding sterilisation procedures carried out at government institutions by empanelled private doctors. The memorandum issued by the State Health Society of Bihar to the Civil Surgeons in all districts stated that an empanelled private doctor might also be permitted to carry out family planning sterilisation procedures in government institutions. The Quality Assurance Committee of the district was entitled to employ private doctors including contractual doctors whose term had expired for carrying out the sterilisation procedures.

33. The petition filed by Devika Biswas goes on to say that in 2010 a non-government organisation (NGO) called the Centre for Health and Social Justice released a report concerning the quality of care and consequences of female sterilisation procedures in Bundi District of Rajasthan in 2009-2010. According to the report 749 women (mainly underprivileged) were sterilised at Public Health Centres, Community Health Centres or Camps. They were interviewed

by researchers who found that a significant number of them were not counselled about the permanent nature of the sterilisation procedure and almost 88% of them told the researchers that they did not receive any information about potential complications, failures or side effects of the sterilisation procedure. The report indicated that while the internationally accepted failure rate is 0.5% the failure rate in Bundi District in Rajasthan was 2.5%, that is, 5 times the acceptable international standard.

34. Similarly, in February 2012 a Fact Finding Mission by a social activist reported that sterilisation procedures carried out in three districts in Maharashtra, that is, Nagpur, Chandrapur and Gadchiroli found that sterilisation camps were routinely conducted in unsanitary and unsafe facilities.

35. Again in February 2012 a sterilisation camp in Madhya Pradesh was conducted in Balaghat District without following any of the established procedures and tribals were lured into sterilisation camps by motivators who collected a substantially large amount over and above the financial norms fixed by the Government of India.

36. In Kerala also a similar story was repeated in July 2011 highlighting that sterilisation procedures were not conducted in accordance with the prescribed requirements of law or the procedures laid down by the Government of India. In para 40 of the writ petition, Devika Biswas submits that:

> "In July 2011, a local journalist in Wayanad and the Chief of Kattunayakan Tribe, who serves as the President of the Primitive Tribal Association, met with health workers in Kerala. They shared stories of men and women who were told by the government health workers that it was compulsory to undergo sterilisation. The Chief is concerned about government coercion and compulsion in sterilisation and its effect on the tribe's population."

37. In this background, Devika Biswas prayed for a series of directions including setting up a committee to investigate the facts relating to the sterilisation camp held on 7-1-2012 and to initiate departmental and criminal proceedings against those who were involved in the sterilisation camp. It is also prayed that the guidelines given in the manuals prepared by the Government of India should be scrupulously adhered to so that such incidents do not recur in any part of the country and if they do, additional compensation should be paid to the women in distress.

38. In this writ petition, we are primarily concerned with the affidavits of the Union of India, the States of Bihar, Kerala, Madhya Pradesh, Maharashtra and Rajasthan since allegations have been made in respect of sterilisation camps held in these States only. However, during the course of hearing of this writ petition, allegations surfaced with regard to sterilisation camps conducted in Bilaspur District, Chhattisgarh (between 8-11-2014 and 10-11-2014) and so we are also concerned with the allegations made in respect of the camps conducted in that State as well.

39. What was brought to our notice with regard to the sterilisation camps conducted in Bilaspur District was that as many as 137 women were subjected to a sterilisation procedure and unfortunately 13 of them died. Many others complained of problems such as vomiting, difficulty in breathing, severe pain, etc. They were taken to nearby hospitals and discharged after necessary treatment. It appeared that some women who had not undergone a sterilisation procedure also had similar complaints and some of them died thereby increasing the number of deaths to over 13. Undoubtedly, this was a matter of great concern brought to our notice during the pendency of the writ petition.

…

IS IT A PUBLIC HEALTH ISSUE?

93. The fundamental error that the Union of India is making (and it has repeated that in its affidavits) is by asserting that the effective implementation of the sterilisation programme is the concern of each State since it is a "public health" issue covered by Schedule VII List II Entry 6 (the State List) of the Constitution. Apart from the fact that the various entries in the Seventh Schedule relate to legislative power, the error made by the Union of India is in completely overlooking the more appropriate Entry in the Concurrent List, that is, Entry 20-A which is "Population Control and Family Planning". This was inserted by the Constitution (Forty-second) Amendment Act, 1976. If the sterilisation programme is intended for population control and family planning (which it undoubtedly is) there is no earthly reason why the Union of India should refer to and rely on Entry 6 of the State List and ignore Entry 20-A of the Concurrent List.

94. Population control and family planning has been and is a national campaign over the last so many decades. Therefore, the responsibility for the success or failure of the population control and Family Planning Programme (of which sterilisation procedure is an integral part) must rest squarely on the shoulders of the Union of India. It is for this reason that the Union of India has been taking so much interest in promoting it and has spent huge amounts over the years

in encouraging it. It is rather unfortunate that the Union of India is now treating the sterilisation programme as a public health issue and making it the concern of the State Government. This is simply not permissible and appears to be a case of passing the buck.

95. As regards Entry 20-A of the Concurrent List, the Justice Sarkaria Commission had this to say in Chapter II titled Legislative Relations in Para 2.21.08:

> "Only one State Government has suggested that this Entry should be transferred to the State List. According to them family planning facilities should be an integral part of the health facilities which is a State subject and the present dichotomy between the two facilities hampers their adequate integration.
>
> Population control and family planning are a vital part of the national effort at development. This entry was inserted by the Forty-second Amendment to the Constitution recognising the importance of this matter. It is well known that a significant part of the fruits of development is neutralised by the high growth in population. With more mouths to feed, less savings are available for development. Large addition to the population has its impact on every aspect of the nation's life. Many of the ills of the society can be traced back to large numbers who are unable to find a rewarding employment. It is necessary to recognise this interdependence between family planning and other sectors. We are, therefore, of the view that Population Control and Family Planning is a matter of national importance and of common concern of the Union and the States."

Notwithstanding the view of that one State Government, the Union of India did not transfer Entry 20-A to the State List, thereby making its intentions quite clear and obvious.

96. When the Union of India formulates schemes of national importance such as family planning, their implementation is undoubtedly dependent on the State Governments since they have the requisite mechanism for implementing the schemes and can also take into account the needs that are particular to the State and its people. In this manner, the cooperation of the Union of India and all State Governments is indispensable to the success of such national programmes. Adverting to the provisions of the Constitution that allow for such coordination between the Union and States, the Justice Sarkaria Commission held that these provisions are not repugnant to but instead further the principle of federalism.

97. In the same manner, it is imperative for both the Union of India and the State Governments to implement schemes announced by the Union of India in a manner that respects the fundamental rights of the beneficiaries of the scheme. Given the structure of cooperative federalism, the Union of India cannot confine its obligation to mere enactment of a scheme without ensuring its realisation and implementation.

98. Apart from anything else, by not giving the sterilisation programme the importance it deserves (apart from other methods of population control and family planning) and trying to pass the buck to the State Governments, the Union of India is attempting to find an excuse for failure in its duty of effectively monitoring a programme of national importance. This game of passing the parcel and treating a national programme as a public health issue has to stop and somebody must take ownership of the Population Control and Family Planning Programme.

DRAFT NATIONAL HEALTH POLICY

99. To compound the problem, and it is much more than a pity, our country does not seem to have any health policy. The draft of a National Health Policy, 2015 was put up on the website on the Ministry of Health and Family Welfare of the Government of India in December 2014 for comments, suggestions and feedback but even after more than one-and-a-half years, the website of the said Ministry shows that the National Health Policy has not been finalised.

…

101. With respect to sterilisation, it states that sterilisation related deaths are a direct consequence of poor health care quality and is a preventable tragedy. It also recognises that female sterilisations are safest if performed in an operation theatre which is functional throughout the year and by a professional team with support systems which are in constant use. Camp mode for such operations itself becomes a reason for unsatisfactory quality. More monetary and human resource investment is required for the National Rural Health Mission.

103. Under the head of "Governance" the Draft National Health Policy states:

> "One of the most important strengths and at the same time challenges of governance in health is the distribution of responsibility and accountability between the Centre and the States. Though health is a State subject, the Centre has accountability to Parliament for Central funding — which is about 36% of all public health expenditure and in some States over 50%. Further it has its obligations under a number of international conventions and treaties that it is a party to. Further, disease control and family planning are in the Concurrent List and these could be defined very widely. Finally though State ownership has been used by some States to become domain leaders and march ahead setting the example for others, the Centre has a responsibility to correct uneven development and provide more resources where vulnerability is more."

Surely, someone should be concerned that we do not have a National Health Policy or is it that we do not need a National Health Policy and ad hoc measures are good enough?

FEMALE VERSUS MALE STERILISATION

104. A perusal of the various affidavits on record indicates that the sterilisation programme is virtually a relentless campaign for female sterilisation. This is more or less confirmed from the figures available on the website of the Ministry of Health and Family Welfare of the Government of India which indicate the following:

Year	2013	2014
Female sterilisations	1,57,431	1,49,262
Male sterilisations	8130	5085
Total sterilisations	1,65,561	1,54,347
% Female sterilisations	95.09%	96.7%
% Male sterilisations	4.91%	3.29%

105. The issue of male versus female sterilisations was debated and discussed during the course of the hearings and it was conceded by all the learned counsel that the sterilisation programme cannot be targeted primarily towards women but must also actively include the sterilisation of men as well. It appears to us, without going into the merits and demerits of the incentives given for undergoing the sterilisation procedure, the documents on record indicate that the incentive given to males for undergoing a sterilisation procedure is less than it is for females and that may perhaps be one of the reasons why the percentage of males being sterilised is so remarkably low as compared to females. This is an area that the Union of India must address itself to, if nothing else then at least for reasons of gender equity.

RIGHT TO LIFE

106. The manner in which sterilisation procedures have reportedly been carried out endanger two important components of the right to life under Article 21 of the Constitution—the right to health and the reproductive rights of a person.

…

(II) RIGHT TO REPRODUCTIVE HEALTH

110. Over time, there has been recognition of the need to respect and protect the reproductive rights and reproductive health of a person. Reproductive health has been defined as "the capability to reproduce and the freedom to make informed, free and responsible decisions. It also includes access to a range of reproductive health information, goods, facilities and services to enable individuals to make informed, free and responsible decisions about their reproductive behaviour".[22] [.] The Committee on Economic, Social and Cultural Rights in *General Comment No. 22 on the Right to Sexual and Reproductive Health* under Article 12 of the International Covenant on Economic, Social and Cultural Rights[23] observed that "The right to sexual and reproductive health is an integral part of the right of everyone to the highest attainable physical and mental health."[24]

111. This Court recognised reproductive rights as an aspect of personal liberty under Article 21 of the Constitution in *Suchita Srivastava v. Chandigarh Admn.* The freedom to exercise these reproductive rights would include the right to make a choice regarding sterilisation on the basis of informed consent and free from any form of coercion. The issue of informed consent in respect of sterilisation programmes was considered by *Committee on the Elimination of Discrimination Against Women in A.S.v. Hungary*,[25]where the Committee found Hungary to have violated Articles 10(*h*),

12 and 16 para 1(*e*) of the Convention on the Elimination of All Forms of Discrimination Against Women[26]by performing a sterilisation operation on A.S. while she was brought in for a Caesarean by making her sign a consent form that she did not fully understand. The Committee found that it was not plausible to hold that, in the brief period of 17 minutes commencing from her admission in the hospital to the completion of the surgical procedures, that the hospital personnel provided her with sufficient counselling and information about sterilisation, as well as alternatives, risks and benefits, to ensure that she could make a well-considered and voluntary decision to be sterilised. The Committee held:

> "Compulsory sterilisation … adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children. The sterilisation surgery was performed on the author without her full and informed consent and must be considered to have permanently deprived her of her natural reproductive capacity."

112. It is necessary to reconsider the impact that policies such as the setting of informal targets and provision of incentives by the Government can have on the reproductive freedoms of the most vulnerable groups of society whose economic and social conditions leave them with no meaningful choice in the matter and also render them the easiest targets of coercion. The cases of *Paschim Banga Khet Mazdoor Samity* [*Paschim Banga Khet Mazdoor Samity v. State of W.B.*, (1996) 4 SCC 37] and *Bandhua Mukti Morcha* [*Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161] have emphasised that the State's obligation in respect of fundamental rights must extend to ensuring that the rights of the weaker sections of the community are not exploited by virtue of their position. Thus, the policies of the Government must not mirror the systemic discrimination prevalent in society but must be aimed at remedying this discrimination and ensuring substantive equality. In this regard, it is necessary that the policies and incentive schemes are made gender neutral and the unnecessary focus on female sterilisation is discontinued.

SUPPLEMENTARY DIRECTIONS

113. On the basis of the submissions before us, we have highlighted some key issues that need active consideration. In addition, our attention was repeatedly drawn to the guidelines given by this Court in *Ramakant Rai (1)* [*Ramakant Rai (1) v. Union of India*, (2009) 16 SCC 565] and while it is generally the case of the Union of India and all the States that the guidelines are being followed, we find that at least in respect of some of them, there is still much more that needs to be done for their effective implementation not only in letter but also in spirit. Some fine-tuning is also necessary in view of the passage of time, change in circumstances and the need to use technology to the optimum. Accordingly, we find it necessary to issue the following supplementary directions:

113.1. The State-wise, district-wise or region-wise panel of doctors approved for carrying out the sterilisation procedure, must be accessible through the website of the Ministry of Health and Family Welfare of the Government of India as well the corresponding Ministry or Department of each State Government and each Union Territory. The list should contain all necessary particulars of each doctor and not merely the name and designation. This exercise should be completed on or before 31-12-2016 and thereafter the list be updated every quarter, that is, by 31st March, 30th June, 30th September and 31st December of every year.

113.2. The contents of the checklist prepared pursuant to the directions given in *Ramakant Rai (1)* [*Ramakant Rai (1) v. Union of India*, (2009) 16 SCC 565] should be explained to the proposed patient in a language that he or she understands and the proposed patient should also be explained the impact and consequences of the sterilisation procedure. This can be achieved by

(*a*) ensuring that the checklist is in the local language of the State;

(*b*) it should contain a certificate duly signed by the doctor concerned that the proposed patient has been explained the contents of the checklist and has understood its contents as well as the impact and consequences of the sterilisation procedure;

(*c*) in addition to the certificate given by the doctor, the checklist must also contain a certificate given by a trained counsellor (who may or may not be an ASHA worker) to the same effect as the certificate given by the doctor. This will ensure that the proposed patient has given an informed consent for undergoing the sterilisation procedure and not an incentivised consent.

Sufficient breathing time of about an hour or so should be given to a proposed patient so that in the event he or she has a second thought, time is available for a change of mind. The checklist prepared pursuant to the direction given in *Ramakant Rai (1)*[*Ramakant Rai (1) v. Union of India*, (2009) 16 SCC 565] with the aforesaid modifications should be prepared in the local or regional language on or before 31-12-2016.

113.3. The Quality Assurance Committee (QAC) as well as the District Quality Assurance Committee (DQAC) has been set up in every State and district in terms of the directions given in *Ramakant Rai (1)* [*Ramakant Rai (1) v. Union of India*, (2009) 16 SCC 565] . However, it is only the designation of its members that has been made available. The details and necessary particulars of each member of QAC and DQAC should be accessible from the website of the Ministry of Health and Family Welfare of the Government of India as well the corresponding Ministry or Department of each State Government and each Union Territory on or before 31-12-2016 and thereafter updated every quarter.

113.4. In addition to the six-monthly reports required to be published by QAC containing the number of persons sterilised as well as the number of deaths or complications arising out of the sterilisation procedure, as already directed in *Ramakant Rai (1)* [*Ramakant Rai (1) v. Union of India*, (2009) 16 SCC 565] , QAC must publish an Annual Report (on the website of the Ministry of Health and Family Welfare of the Government of India as well the corresponding Ministry or Department of each State Government and each Union Territory) containing not only the statistical information as earlier directed, but also non-statistical information in the form of a report card indicating the meetings held, decisions taken, work done and the achievements of the year, etc. This will have a significant monitoring and supervisory impact on the sterilisation programme and will also ensure the active involvement of all the members of QAC and DQAC. The first such Annual Report covering the calendar year 2016 should be published on the websites mentioned above on or before 31-3-2017.

113.5. As many as 363 deaths have taken place due to sterilisation procedures during 2010-2013. This is a high figure. During this period, more than Rs 50 crores have been disbursed towards compensation in cases of death. Apart from steps taken by Bihar and Chhattisgarh during the pendency of the writ petition to mitigate the sufferings of the patients, we have not been told of any death audit conducted by any State Government or Union Territory in respect of any patient, nor have we been informed of any steps taken against any doctor or anybody else involved in the sterilisation procedure that has resulted in the death of a patient or any failure or any other complication connected with the sterilisation procedure. There is a need for transparency coupled with accountability and the death of a patient should not be treated as a one-off aberration. Therefore, it is directed that the Annual Report prepared by QAC must indicate the details of all inquiries held and remedial steps taken.

113.6. With regard to the implementation of the Family Planning Indemnity Scheme (FPIS), there does not seem to be any definitive information with regard to the number of claims filed, the claims accepted and in which category (death, failure, complication, etc.), claims pending (and since when) and claims rejected and the reasons for rejection. QAC is directed to include this information in the Annual Report and the Ministry of Health and Family Welfare of the Government of India as well as the State Governments should make this information accessible on the website, including the quantum of compensation paid under each category and to the number of persons. We have mentioned above that the learned Solicitor General had assured us on 20-3-2015 that full details of the funds utilised under FPIS would be furnished but that information has not been given as yet, necessitating the direction that we have passed. In addition to the direction relating to FPIS, the Ministry of Health and Family Welfare should conduct an audit to ensure that the funds given by the Government of India have been utilised for the purpose for which they were given for the period from 2013-2014 onwards.

113.7. The quantum of compensation fixed under the Family Planning Indemnity Scheme (FPIS) deserves to be increased substantially and the burden thereof must be equally shared by the Government of India and the State Government. The State of Chhattisgarh has shown the way in this regard and it would be appropriate if others follow the lead. Every death or failure or complication related to the sterilisation procedure is a setback not only to the patient and his or her family but also in the implementation of the national campaign. We decline to fix the quantum of compensation but would suggest, following the example of the State of Chhattisgarh, that the amount should be doubled and shared equally.

113.8. The Union of India is directed to persuade the State Governments to halt the system of holding sterilisation camps as has been done by at least four States across the country. In any event, the Union of India should adhere to its view that sterilisation camps will be stopped within a period of three years. In our opinion, this will necessitate simultaneous strengthening of the Primary Health Care Centres across the country both in terms of infrastructure and otherwise so that health care is made available to all persons. The significance of having well-equipped Primary Health Centres across the country certainly cannot be overemphasised. Therefore, we direct the Union of India to pay attention to this as well, since it is absolutely important that all citizens of our country have access to primary health care.

113.9. The Union of India should make efforts to ensure that sterilisation camps are discontinued as early as possible but in any case within the time-frame already fixed and adverted to above. The Union of India and the State Governments must simultaneously ensure that Primary Health Centres are strengthened.

113.10. Although the Union of India has stated that no targets have been fixed for the implementation of the sterilisation programme, it appears that there is an informal system of fixing targets. We leave it to the good sense of the each State Government and Union Territory to ensure that such targets are not fixed so that health workers and others do not compel persons to undergo what would amount to a forced or non-consensual sterilisation merely to achieve the target.

113.11. The decisions taken in the high-level meetings held on 15-5-2015 and 17-11-2015 as well as the National Summit on Family Planning held on 5-4-2016 and 6-4-2016 should be scrupulously implemented by the Ministry of Health and Family Welfare of the Government of India. The said Ministry should also ensure effective implementation of the decisions taken keeping in mind that the sterilisation programme is a part of a national campaign.

113.12. The Union of India is directed to ensure strict adherence to the guidelines and standard operating procedures in the various manuals issued by it. The sterilisation programme is not only a public health issue but a national campaign for Population Control and Family Planning. The Union of India has overarching responsibility for the success of the campaign and it cannot shift the burden of implementation entirely on the State Governments and the Union Territories on the ground that it is only a public health issue. As the Justice Sarkaria Commission put it "Population Control and Family Planning is a matter of national importance and of common concern of the Union and the States."

113.13. We are pained to note the extremely casual manner in which some of the States have responded to this public interest petition. What stands out is the response of the States of Madhya Pradesh, Maharashtra, Rajasthan and Kerala in respect of which States allegations were made concerning mismanagement in at least one sterilisation camp. None of these States have given any acceptable response to the allegations and we have no option but to assume that the camps that have been referred to in the writ petition were mismanaged as alleged by Devika Biswas. However, the matter should not end here. We direct the Registry of this Court to transmit a copy of this judgment to the Registrar General of the High Court in the States of Madhya Pradesh, Maharashtra, Rajasthan and Kerala for being placed before the Chief Justice of the High Court. We request the Chief Justice to initiate a suo motu public interest petition to consider the allegations made by Devika Biswas in respect of the sterilisation camp(s) held in these States (the allegations not having been specifically denied) and any other similar laxity or unfortunate mishap that might be brought to the notice of the Court and pass appropriate orders thereon. We also direct the Registry of this Court to transmit a copy of this judgment to the Registrar General of the Patna High Court for being placed before the Chief Justice of the High Court. We request the Chief Justice to ensure speedy completion of the investigations and proceedings relating to the mishap on 7-1-2012 in the sterilisation camp in Kaparfora Government Middle School, Kursakanta, Araria District as well as the mishap in Chhapra in Saran District that led to cancellation of the accreditation of Gunjan Maternity and Surgical Clinic on 24-3-2012.

113.14. The State of Chhattisgarh is directed to implement the recommendations given in the Ms Anita Jha Commission Report at the earliest and with all sincerity.

113.15. We have already expressed our sadness at the fact that the National Health Policy has not yet been finalised despite the passage of more than one-and-a-half years. We direct the Union of India to take a decision on or before 31-12-2016 on whether it would like to frame a National Health Policy or not. In case the Union of India thinks it worthwhile to have a National Health Policy, it should take steps to announce it at the earliest and keep issues of gender equity in mind as well.

…"

Endnotes

1 Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.

2 Note that cases on medical negligence during sterilization procedures, leading to death, injury, or unwanted pregnancy are discussed in Chapter 11, "Medical Negligence, Consumer Protection and Reproductive Health".

3 (2009) 9 SCC 1.

4 The Supreme Court's holding was reiterated in its later decisions, Meera Santosh Pal v. Union of India, (2017) 3 SCC 462 and Z v. State of Bihar, (2018) 11 SCC 572.

5 MANU/KE/0499/2009.

6 (2009) 16 SCC 565.

7 (2016) 10 SCC 726 / 733.

8 2004 Cri LJ 4553 (All).

9 AIR 1997 Raj 250. In Saroj Chotiya v. State of Rajasthan and Ors., AIR 1998 Raj 28, while adjudicating a writ petition challenging Section 26(XIV) Proviso (e) of the Rajasthan Municipalities Act that disqualified persons having more than two children from being elected as members, the Rajasthan High Court rejected the petition based on its reasoning in Mukesh Kumar Ajmera v. State of Rajasthan, AIR 1997 Raj 250.

10 AIR 2000 AP 156.

11 (2001) 5 ALT 410 (DB).

12 (2003) 8 SCC 369. The Gujarat High Court in Bharatbhai Dhanjibai Modi v. The Collector (Porbander), AIR 200 Guj 106 and the Bombay High Court in Mangesha Ashok Chavan v. Sayajirao Damodhar, (2010) 1 Bom CR 136, relying on the Javed case rejected a challenge to Section 11(1)(h) of the Gujarat Municipalities Act, 1963 and Section 14(1)(j-1) of the Bombay Village Panchayat Act, 1959 that imposed similar more than two child disqualifications.

13 (2017) 10 SCC 1.

14 AIR 1983 Bom 443.

15 AIR 1985 Bom 31.

16 2015 SCC OnLine Raj 6581.

17 (1999) 1 GLR 126.

18 (2009) 16 SCC 149.

19 U.N. Office of the High Commissioner for Human Rights, "Status of Ratification Interactive Dashboard—India," available at http://indicators.ohchr.org/.

20 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC])*, *contained in* U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001), Arts. 3-4.

21 Vishaka v. State of Rajasthan, AIR 1997 SC 3011.

22 WHO, Sexual Health, Human Rights and the Law (2015) cited from Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), 2-5-2016, E/C.12/GC/22 at para 6.

23 India ratified this Convention on 10-4-1979.

24 General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22.

25 CEDAW/C/36/D/4/2004, UN Communication No. 4/2004, Committee on the Elimination of Discrimination against Women, Thirty-sixth session, 7-8-2006 to 25-8-2006.

26 "10. States parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women—***(h) access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.***12.1.States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.2.Notwithstanding the provisions of para 1 of this article, States parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.***16.1.States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women—***(e) the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;"