Demography, Democracy and Population Policies

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Uttar Pradesh's proposed bill to enforce a "two-child norm" tries to link state government jobs, local government positions and welfare to the two-child norm through a series of incentives and disincentives. With the communally tinged rhetoric around this bill gaining currency, it is necessary to revisit the Supreme Court's controversial judgment in *Javed v State of Haryana* (2003) where such problematic provisions relating to panchayat elections were upheld.

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The Uttar Pradesh (UP) Population (Control, Stabillisation and Welfare) Bill, 2021 was recently made public by the UP State Law Commission with a view to seek public comments (Upadhyay 2021). The bill which intends to enforce a two-child norm across UP seeks to do so through a mixture of incentives and disincentives which relate to public employment with the state, eligibility to contest local body elections and entitlement to welfare benefits and subsidies from the state.

The justification for the bill harks back to debunked Malthusian notions of limited resources and population explosion (Saran 2021). While it is no doubt true that India is the second most populated nation on earth and UP the most populated state, over the last two decades, population growth has been slowing down on its own in India, largely as a result of improved access to healthcare, women's education and increased economic opportunities. From the National Family Health Survey, it is evident that even in UP, the total fertility rate has fallen from 4.06 in 1988–89 to 2.7 in 2015–16, suggesting that even prior to measures such as this, the state's population growth was slowing down, thanks to increased female literacy rates, contraception, etc (Singh 2021).

However, one particular measure in the bill is not very new and has been found in other laws in other states. Specifically, the bar on candidates in local body elections if they have more than a certain number of children. Haryana, for instance, had introduced such a provision for those persons with more than two children as far back as 1994 in the Haryana Panchayati Raj Act, 1994. The same was challenged as being unconstitutional but upheld by both the Punjab and Haryana High Court and the Supreme Court. The judgment of the Supreme Court in *Javed v State of Haryana*[1] ("Javed") upheld these provisions holding that they were "salutary" and in "public interest," and continues to be good law as on date. Whatever the merits of the other provisions, the UP State Law Commission may have relied on this to suggest that a two-child norm be imposed on candidates seeking to stand for panchayati raj institutions (PRIs).

Javed was criticised when it was delivered[2] but was nonetheless followed by the Supreme Court in *Rajbala v State of Haryana*[3] where a different set of restrictions on eligibility to stand for PRI elections were upheld by the Supreme Court.

However, even post Rajbala, constitutional jurisprudence has moved on with judgments such as *Justice (Retd) K Puttaswamy v Union of India,*[4] and *Shayara Bano v Union of India*[5] attempting to push the scope of fundamental rights and their interpretation in new directions. All of these being larger bench decisions, would Javed continue to hold the field as good law, should the UP bill be challenged in court, is an open question worth examining.

In this column, I therefore propose to revisit the reasoning in Javed and see if its approach holds up to scrutiny in light of subsequent decisions of the Supreme Court.

Revisiting Javed

While the judgment in Javed addressed multiple grounds of challenge raised against the provision, the key to understanding the approach of the Court lies in paragraph 22 of the judgment where it held:

> 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, ... 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. ... 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.

Although the term "constitutional right" is being used, it is not meant in that way. A "constitutional right" to stand for elections that can be limited in unlimitless ways by statute is not really a right at all, nor is it constitutional in any sense. What the Court in Javed means to say is that being eligible for PRIs is a privilege that may be granted and withdrawn by the legislature for any reason. At no point does the Court even acknowledge any limitations on the power of the legislature to decide eligibility to contest panchayat elections. If, theoretically, the legislature were to introduce a property requirement, bar anyone who does not speak Esperanto or with an income of less than ₹1 crore a month, the Court would not find it problematic per se as long as some justification is offered. While perhaps not as absurd as the examples mentioned here, this thinking also led to the Supreme Court upholding the disenfranchisement of women and the rural poor in Rajbala (Kumar 2015).

Subsequent to Rajbala itself, the Supreme Court has, in Puttaswamy, expanded the scope of the right to life and liberty under Article 21 by reading into a right to privacy that was far more well thought and nuanced than previous efforts to do so. One of the key aspects, highlighted by Aparna Chandra, was the increased space it offers to challenge laws that aim to control women's bodies, lives and choices (Chandra 2017). Decisional autonomy, according to the Puttaswamy judgment, could only be limited on the basis of proportionate measures that seek to meet a societal goal.

In Javed itself, the argument that Article 21 would be impinged by a law which mandates a two-child norm for panchayat elections is brushed aside in a bizarre manner. There is little by way of legal reasoning but a lot of pontificating on the importance of reducing population growth by references to an article in the *Hindu*, previous government reports, etc. The Court seems less concerned with finding constitutional justifications for the law but more with the need for a population policy, however drafted, citing ominously the example of China's "one-child policy."

Would the question be approached differently post Puttaswamy? Chandra herself was wary of the discordant notes struck in Puttaswamy in the context of social institutions being protected over individual freedom (Chandra 2017). While this was said in the context of personal laws, one can see that even within Puttaswamy the tendency to prioritise larger "national goals" over individual freedoms. More so if the right is narrowly defined to mean only to decide how many children one ought to have (as opposed to the freedom to stand for elections and be part of the democratic process) restrictions on such rights in "national interest," employing the kind of rhetoric used in Javed would still be upheld.

Another ground which was raised in Javed and again summarily rejected by the Court was that the legislation was arbitrary and therefore violative of Article 14, that is, the guarantee of equal protection of laws. As with the challenge under Article 21, the Court does not even bother to examine the jurisprudence on Article 14 or discrimination in general before simply dismissing it. The question whether persons with two children were being subjected to hostile discrimination, even under the reasonable classification test, is not even gone into. Rather, the Court's approach is again quite bizarre, starting from legislative competence and ending up with the union government's population policy. None of this amounts to "judicial reasoning" in any tangible manner but recalls another controversial judgment of Justice Lahoti—*State of Gujarat v Mirzapur Moti Kureshi Kassab Jamaat and Others*.[6] Here too, cow slaughter bans which impinged the right to livelihood of butchers was justified less on constitutional text and jurisprudence, and more on pseudo-scientific reports on the importance of cows.

Would a challenge to the proposed UP law stand up to scrutiny post Shayara Bano, Navtej Johar et al? Especially since it has now been held that arbitrariness can be a ground to challenge a law?

One would not think so. Arbitrariness as a basis for striking down legislation is a dubious doctrine—one that effectively seeks to supplant constitutional reasoning for the judge's own personal views on the matter, without necessarily following it up with jurisprudentially

sound reasoning (Kumar 2019). Where judges hold broadly liberal views, this leads to liberal outcomes. However, when judges do not necessarily hold such views, the outcomes may not be the same. Where a judge believes that "population control" is legitimate government policy (as Justice Lahoti in Javed did), theywould not really see the whole notion of linking eligibility for PRI elections to the two-child norm as "arbitrary" in any way.

Even applying the well-worn test of reasonable classification to pass muster under Article 14, as long as it is accepted by the judiciary that "population control" is a more important policy than ensuring grassroots democracy, it is unlikely that such a provision will be struck down for discriminating against those who choose to have more than two children.

Conclusions

"Population control" in India has had a long and sordid history involving large-scale rights violations going back to the forcible sterilisation of individuals (largely belonging to underprivileged groups) during the Emergency. While perhaps the worst excesses have not been repeated at that scale, a strain of thought that believes in discredited Malthusian notions of population explosion continue to inform present-day politics, tinged with communal and casteist biases.

The judiciary, it must be said, has not been free of the same; more so, when such thinking is added to a distrust of grassroots democratic institutions and local self-government.

While the Supreme Court has ranged far and wide in subsequent judgments on the scope of Article 14 (in respect of arbitrariness), Article 19 and Article 21 (in the context of privacy), what has not changed is the fundamental mistrust of local body governments. No matter how well fundamental rights jurisprudence develops in other contexts, as long as the Supreme Court continues to see PRIs as bodies to be tolerated rather than encouraged and nourished, governments will continue to find new ways of imposing limits on democratic participation in such institutions.

NOTES

1 AIR 2003 SC 3057.
2 See Rajeev Dhavan, "Democracy v Demography," *Hindu*, 8 August 2003 and Sumiti Yadava, "Price for a 'Panch'—No Third Child" (2005) 1 NSLR 58.
3 (2016) 2 SCC 445.
4 (2017) 10 SCC 1.
5 (2017) 9 SCC 1.
6 (2005) 8 SCC 534.

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