CHAPTER 3

3.1 POPULATION

This Chapter looks at the reason behind the problem. It looks at reasons for the starkness of the sex ratio, with a view to look at the limitations of law in addressing the problem. The Census, which prompted the legislature to amend the law and the Courts to give the directions they did, is looked at along with reasons for the results being what they are. Population policy is often touted as a reason for the present sex ratio. The population policy is looked at as a non-mandatory law on paper which is mandated in its implementation. The correctness of this approach in law is dealt with in the context of reproductive and other rights. The impact such a population policy would have on the effectiveness of the sex selection laws will be seen in the context of India. China and Korea provide examples and a comparative approach has been taken using examples of these two countries.

The main aspects of the population policy which have a bearing on the implementation of the Pre Conception and Prenatal Diagnostic Techniques Act are the two-child norm, incentives, and disincentives. The legal validity of these and their effect are looked at. Cases challenging the two-child norm are also examined.

Research question No. 3 is partly answered.

3. How do the various laws and policies dealing with reproductive rights, technology, and crime impact-

   a. Sex selection trends

   b. The implementation of law relating to sex selection.

The impact on sex selection trends and in the implementation of law relating to sex selection made by relevant facets of the population policy is discussed.
3.2 Introduction

The fact that sex determination was being done was proven by the Census. Demographic studies over a period of time indicated a change in the sex ratio, particularly the juvenile sex ratio. Several population-related rules, norms, and laws have had an impact on the sex ratio. These laws broadly fall into the following categories:

1. Incentives for adopting family planning (read family limitation) methods
2. Disincentives for not adopting family limitation methods
3. Laws limiting the number of children
4. Laws dealing with registration of births.

It is interesting to see that India is going the same way that China did a generation ago. Demographers, who hit the panic button too late in China, have already pointed out the dangers facing India in terms of the sex ratio. China had laws on the above areas mentioned earlier. Of course, except for certain areas like Tibet, China has a one-child policy. Though now they are planning to do away with this policy.

In this chapter, the researcher looks at the Chinese experiment and then the situation in India with special emphasis on Madhya Pradesh. While looking at the Indian situation, comparisons with global standards are made wherever useful.

Asked about the population in general, officials in the districts surveyed were very positive. Madhya Pradesh has a good track record. The population is slowly stabilizing. Any large increase is mainly due to migration from others areas, according to what comes through. They are full of enthusiasm to describe the family welfare structure and its success in bringing down the rate of growth of Madhya Pradesh’s population. Compared with the rest of the country, Madhya Pradesh is doing favourably.\(^1\)

\(^1\) Refer to Chart No. Population statistics in India
On the question of incentives and disincentives, wariness creeps in. Madhya Pradesh is one of the States with incentives for limiting family size. There are monetary incentives to beneficiaries as well as the operating surgeons, as well as an additional increment for government servants who limit the number of children to two or less\textsuperscript{2}.

On the question of the sex ratio, the wariness turns to worry. The fact that Madhya Pradesh is still doing well is pointed out repeatedly. The fact that it is already a concern is noted, and action taken in the form of publicity and prosecutions is pointed out. Nevertheless, the fact remains that the sex ratio is still alarming, and a district and a ward survey shows spots of server ‘girl child deficient’ areas.

Is there a link between family planning and the sex ratio? Have son preference and sex selection been resorted to in the name of family planning?

One or two children only seem to have become an accepted mode of behaviour in a large part of Madhya Pradesh. However, the importance of the son does not seem to have faded.

3.3 History of Sex Ratio/Sex Ratio Studies: A Partial Reason for the Late Legal Response:

Sex ratio at birth (SRB) refers to the ratio of male to female children born in a specific period. In most human populations, more boys than girls are conceived, and despite greater male than female foetal wastage, more boys than girls are born. Subsequently, mortality rates at every age are slightly greater for boys than for girls due to a combination of biological and behavioural factors. Thus, with increasing age, the population sex ratio balances out to a slight female dominance overall. Most societies, irrespective of level of income or development, exhibit this pattern\textsuperscript{3}.


Sex ratios in Europe, North America, Caribbean, Central Asia, and in the poorest region—Sub Saharan Africa are favourable to women. In the recent past in certain parts of the globe, the phenomenon of excessively masculine SRBs has been noted. The lowest sex ratio is found in India as seen in the Table below.\(^4\)

Table 1- Women per 100 men

<table>
<thead>
<tr>
<th>Region</th>
<th>Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Europe &amp; North America</td>
<td>105</td>
</tr>
<tr>
<td>Latin America</td>
<td>100</td>
</tr>
<tr>
<td>Caribbean</td>
<td>103</td>
</tr>
<tr>
<td>Sub Saharan Africa</td>
<td>102</td>
</tr>
<tr>
<td>South East Asia</td>
<td>100</td>
</tr>
<tr>
<td>Central Asia</td>
<td>104</td>
</tr>
<tr>
<td>South Asia</td>
<td>95</td>
</tr>
<tr>
<td>China</td>
<td>94</td>
</tr>
<tr>
<td>India</td>
<td>93</td>
</tr>
</tbody>
</table>

\(^4\) Vibhuti Patel, “Sex Selection & Pre Birth Elimination of Girl Child”, Round Table on Sex Selection, Bangalore, 17-18 February 2005 at 2
In the beginning of the 20th century, the sex ratio in colonial India was 972 women per 1000 men, it declined by -8, -11, -5 and -5 points in 1911, 1921, 1931, and 1941, respectively. During the 1951 Census, it improved by +1 point. During 1961, 1971, 1981, and 1991, it declined by -5, -11, -4, -7 points, respectively. Even though the overall sex ratio improved by +6 points, the decline in the juvenile sex ratio is of -18 points, which is alarmingly high. The euphoria of 1981, therefore, is not felt now.

The results of the population census in 2011 have clearly pointed to the following:

- The rate of decline in the sex ratio has increased rapidly
- The decline in the juvenile sex ratio is much higher in the urban context than in the rural context
- The decline is much higher in northern states versus southern states

Sex ratios in the Indian population are thus becoming rapidly masculine.

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5 Sex Ratio in India, 1901 to 2011 c.f. Vibhuti Patel, “Sex Selection & Pre Birth Elimination of Girl Child”, Round Table on Sex Selection, Bangalore

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Women per 1000 men</th>
<th>Decadal Variation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1901</td>
<td>972</td>
<td></td>
</tr>
<tr>
<td>1911</td>
<td>964</td>
<td>-8</td>
</tr>
<tr>
<td>1921</td>
<td>955</td>
<td>-11</td>
</tr>
<tr>
<td>1931</td>
<td>950</td>
<td>-5</td>
</tr>
<tr>
<td>1941</td>
<td>945</td>
<td>-5</td>
</tr>
<tr>
<td>1951</td>
<td>946</td>
<td>+1</td>
</tr>
<tr>
<td>1961</td>
<td>941</td>
<td>-5</td>
</tr>
<tr>
<td>1971</td>
<td>930</td>
<td>-11</td>
</tr>
<tr>
<td>1981</td>
<td>934</td>
<td>-4</td>
</tr>
<tr>
<td>1991</td>
<td>927</td>
<td>-7</td>
</tr>
<tr>
<td>2001</td>
<td>933</td>
<td>+6</td>
</tr>
<tr>
<td>2011</td>
<td>940</td>
<td>+7</td>
</tr>
</tbody>
</table>

6 The Sex Ratio is the number of women in a population for every thousand men. The juvenile Sex Ratio is the number of girl in the age group of 0-6 years in a population

7 Satish B. Agnihotri “Survival of the Girl Child” Economic and Political Weekly, October 11, 2003 at 4351
Shifts in sex ratios did puzzle demographers, but they did believe that it would somehow balance out automatically. For example, during war times, it was earlier believed that nature compensated for the loss of males during war years by producing more male births. Although proved wrong\textsuperscript{8}, it was a notion that was taken seriously on the basis of divine intervention and natural compensation\textsuperscript{9}. Yet, for a considerable time, there was concern over an excess of females\textsuperscript{10} during the war years. The fears expressed then were that women would find it difficult to hunt for husbands. Studies showed that this was mainly in the imagination\textsuperscript{11}, as was the specter of female domination\textsuperscript{12}. There was no worry displayed that women would disappear.

In 1932, a writer predicted that the preference for sons along with birth control would increase the sex ratio at birth\textsuperscript{13}. A preference for boys was demonstrated in upper-class American families by Winston, by presenting data where the sex ratio for the last-born child in completed families is significantly higher than the general sex ratio in the same group of families\textsuperscript{14}. A view was taken by some, that the conclusion that this preference tends to increase the general sex ratio in these families is, however, fallacious\textsuperscript{15}. This has been proved true, however, several decades later.

In order to explain the increasingly masculine SRBs, several explanations were thrown up. In China, for a long time demographers blamed mechanisms including non-reporting of female births, abandonment and/or out-adoption of girls, and female infanticide. Only recently is the combination of lowered fertility,

\textsuperscript{11} An examination of statistics of marital status in the 1940 census makes this quite clear. There were, in 1940, about 3.7 Million more single makes than single females among the population fifteen years old and over. The excess of single males was largely in the most “marrying” age group, fifteen to thirty-four years. The excess of single males was offset by an excess of approximately the same size among widowed and divorced females. Hope Tisdale Eldridge and Jacob S. Siegel, “The Changing Sex Ratio in the United States”, *The American Journal of Sociology* Vol. 52, No.3 (Nov.1946) 224-234 at 233.
\textsuperscript{14} Later studies showed the order of birth of children to be inversely associated with the sex ratio at birth. James D Tarver and Che-fu Lee, “Sex Ratio of Registered Live Births in the United States, 1942-63”, *Demography* Vol. 5 No. 1 (1968), 374-381 at 381.
continued strong son preference, widespread access to medical facilities, and the increased use of prenatal sex-determination techniques leading to abortion of female fetuses acknowledged\textsuperscript{16}.

Although competent demographers had discounted the possibility of undercounting, undercount as a result of political disturbances was one suggestion that was mooted\textsuperscript{17}. This of course came under criticism. That women had gone into hiding under political turmoil is a curious suggestion. Female foeticide as a factor or, rather, sex selection at birth as a factor was not discounted entirely, but was downplayed as limited to urban centers only. Some experts even advanced the hypothesis of a possible double count of males leading to a fall in the female ratio\textsuperscript{18}. It is plausible to argue that the urban ratios for the 0-6 age group could also be attributed to statistical fluctuations due to the small population size. It is intriguing, however, as to why the ‘fluctuations’ should point in the same direction\textsuperscript{19}.

Incompleteness of national vital registration data is a primary problem but not to the extent where it would affect variations in the sex ratio\textsuperscript{20}. Another problem is the under-enumeration of females, which has been pointed out by several writers\textsuperscript{21}. However, over time, this problem has been decreasing and is now marginal when it comes to the vast differences in the sex ratio on the ground. Migration was also cited as one of the problems in counting, but this cannot be applicable to the juvenile sex ratio because children do not selectively migrate based on sex\textsuperscript{22}.

\textsuperscript{22} See also Satish B Agnihotri “Survival of the Girl Child” Economic and Political Weekly, October 11, 2003 at 4351
Often the trump card of poverty was also used; however, as seen in the beginning of this Chapter, sub-Saharan Africa, arguably the poorest area, has a better ratio\(^23\). In India, the highest imbalances are seen in the wealthy States of Delhi, Haryana, and Punjab. Breaking it down further into districts and wards, we see that many of the ‘girl child deficient’ districts are, in fact, relatively prosperous areas.

3.4 Family planning policy and its Impact on the Sex Ratio/Sex Selection

Family planning by itself does not cause a sharp rise in the birth of baby boys\(^24\). Obviously, other factors, particularly cultural factors, have a role to play. For instance, in Korea there is no coercive one-child policy, but through voluntary use of Contraception and abortion, the total fertility rate in Korea has fallen to about 1.5 births per women, and couples strongly desire more sons than daughters, on average. As prenatal sex determination has become available, parents in Korea evidently have used it\(^25\). The difference here is not because of a law on population but is largely ascribable to greater satisfaction with a single male offspring than a single female offspring, resulting in a greater percentage on one-child families refraining from being increased when the only child is a male\(^26\). The contrast between the sex ratios of last-born children and all others in a given family has also grown wider over the years in Korea\(^27\).

Similar trends are visible in India as is evident from the results of the last two censuses. The contention that selective neglect or infanticide affects mainly higher birth order girls and that, therefore, the gender imbalance in demographic rates and


\(^{27}\) R Turner, “Male births Now Outnumber Female births in South Korea, Especially in Urban Areas and for First Births”; International Family Planning Perspective, Vol.21, No. 4 Dec., 1995) 160-161 at 160. In 1974, the sex ratio for the second birth in a family of two was 133 to 100, compared with 119 for the first; in a family of five, the ratio was 122 to 100 for the fifth child and 98 for other. By 1991, though, sex ratios for a family of two had grown to 141 to 100 for the second child and 130 for the first; for a family of four, the ratios were 159 for the fourth child and 71 for the others
indicators should decline with decreasing fertility and mortality is clearly not upheld\textsuperscript{28}.

The crucial question here is therefore-Does a population limitation law exacerbate the problem?

In a situation where it is compulsory to have one son for various cultural reasons, and if possible a spare son, it is quite likely that people will resort to sex selection in order to make sure that they get a son. This may be irrespective of the longing for a small family. The longing for a small family is slowly coming in. Statistics bear this out. Despite the lack of a ‘quota,’ the rate of growth of population has fallen. And the sex ratio showed a skewed balance.

Fewer children would not mean ‘any’ children; sons are essential. An important dimension of inquiry is that of changes in the relative pattern of births and survival of male versus female children in India, has been comparatively neglected, mainly due to lack of data.\textsuperscript{29}

With the draft of the 8\textsuperscript{th} Five-Year Plan, the Government of India aimed to achieve a Net Reproduction Rate of one (i.e., the replacement of the mother by only one daughter). For this objective, sex determination and son preference were seen as handy; the logic being a lesser number of women means less reproduction.\textsuperscript{30} Has the state, therefore, through a conscious choice followed this track in the past?

In the early days of amniocentesis, many including the government\textsuperscript{31} felt that our priority is population control by any means and, therefore, that amniocentesis

\textsuperscript{30} Vibhuti Patel, Sex Selection & Pre Birth Elimination of Girl Child, Round table on Sex Selection, Bangalore, 17-18 February 2005 at 7
\textsuperscript{31} The Indian Government has endeavoured to convince women to give birth to male children, thereby lowering the rate of population growth, C.F. Andrea Krugman, “Being Female can be Fatal: An Examination of India’s Ban on Pre-natal Gender Testing”, Cardozo Journal of International and Comparative Law, Spring 1998, 215-237.
should be used as a method of family planning and made available to everyone at a minimum cost or even free.\textsuperscript{32}

Forced sterilization of males during the emergency rule brought politically disastrous consequences for the Congress Party. As a result in the post emergency period, there has been a shift in the policy, and women have become the main target of population control. Population control research is sometimes conducted on women without consideration for the harm caused by such research to the women concerned\textsuperscript{33}.

The argument of procreative autonomy that has been developed in US courts, as also the right to privacy, has relevance to the Indian context\textsuperscript{34}. With respect to coercive family planning or population control programmes of the state, this right includes the right to refuse family planning without detriment to the entitlement to state welfare; it also includes the right to free, full, and informed consent with respect to the use of contraceptives. There is in this sense, an immediate link between the right to procreative autonomy and the right to life and livelihood of the mother with respect to conditionalities for receipt of welfare or participation in government\textsuperscript{35}.

### 3.5 China’s Population Policy: Lessons for Law and Policy in India

As in China, In India too female infanticide has been high, following the rapid decline in fertility in certain areas\textsuperscript{36}. Sex-selective abortions are spreading too. Medical facilities are concentrated in urban areas and those results are visible in the 2001 Census. However, by innovative means, this is spreading to rural areas as well.

\textsuperscript{32} Sanjeev Kulkarni, “Sex Determination Tests in India: a survey report”, \[\text{http://www.hsph.harvard.edu/Organisations/healthnet/Sasia/articles/sexdetermination2.html}\], (Dr S Limaye, Head, Obs/Gyn Department, Bokaro General Hospital Bihar Eves Weekly 1982 quoted in the study)

\textsuperscript{33} Mies, Maria (1986 August) “Sexist and Racist Implications of New Reproductive Technologies”, Paper presented at XI World Congress of Sociology, 18-22, New Delhi.

\textsuperscript{34} See Chapter on Abortion

\textsuperscript{35} Kalpana Kanabiran, “Female Feticide or Crime Against Humanity?” Reading Materials- II, Roundtable on Sex Selective abortions, HIVOS, Bangalore, 17-18 February 2005 at 2

\textsuperscript{36} For instance in some districts of Tamil Nadu, including Salem, Dharmpuri, and Madurai c.f. N Krishnaji, “Trends in Sex Ratio: a Review in tribute to Asok Mitra”, \textit{Economic and Political Weekly}, April 1, 2000 pp 1163
and in many cases this is slowly being reflected in the data coming in. Among southern states, Tamil Nadu presents alarming trends for both 1991 and 2002. Unlike most other states, the rural ratios among children in a number of districts have been poorer than the urban ratios and have declined faster than the urban ones, too. Kerala seems to be the only State that shows a different pattern, but some indications for alarm are there too.

In effect, what is happening in India now is what happened in China some time back.

The world in the 1950s was already beginning to look at population growth as one of the factors contributing to scarce resources in keeping with Malthusian theory. However, in China women were encouraged to have more children translated to mean more hands to work and labour. Population exploded. By the early 1960s there was famine, and for a long time China struggled. Too many mouths to feed became a liability for the country. Family planning, read family limitation, was seen as a legal solution and the only one. The new slogan was “Later, farther apart, and fewer”. The government urged urban and rural couples to limit the number of

38 Tamil Nadu with Salem (763), Theni (873), Namakkal (882), Dharmapuri (869), and Madurai (903). These districts may have an earlier history and prevailing pattern of infanticide co-existing with or replaced by provision of foeticide.
39 This has been attributed to various factors- a matrilineal society in many parts of Kerala, the fact that many women in Kerala are earning members, that there are a large number of literate Christians and a good education system, and left wing politics supporting causes of equality of sexes. V.K. Ramachandran, “Kerala’s Development Achievements,” Jean Dreze and Amartya Sen, eds, Indian Development: Selected Regional Perspectives (Delhi: Oxford University Press, 1996) at 13
40 This was seen in the Soviet Union as well.
41 The policy slogan was: “The more babies the more glorious are their mother.” Mao Zedong referred to birth control as a bourgeois plot to commit bloodless genocide on the Chinese peoples.
42 Three decades later, the population had exploded to more than 800 million.
43 With a population of 1.25 billion at the end of 1998, China had to provide for twenty-two percent of the world’s population on only seven percent of the world’s arable land. Xizhe Peng, “Population Policy and Program in China: Challenge and Prospective” 35 Tex. Int’l L. J 51
44 Wi, xi, shao The campaign ordered couples to wait until later in life to marry, to wait longer between births, and to cap the number of children per family at two. C.F. Rachel A. Bouman, “China’s Attempt to Promote Domestic Adoptions. How Does China’s One-Child Policy Affect Recent Revisions in China’s Adoption Law and Measure Up to the Hague Convention?” 13 Transatl’ L at 96 (2000)
children they had to two and three, respectively\(^\text{45}\). By the 1970s, there was discussion on adoption of the one-child family planning method. In 1979, Deng Xiaoping announced that official policy would promote the norm of the one-child family\(^\text{46}\). Although technically the policy is mere protocol, it is enforced by the government as binding law\(^\text{47}\). Following adoption of the one-child policy in 1979 as the national population policy, family planning regulations in the country changed several times. Now a one-son-or-two-child policy is in force. Family planning commissions treat adopting a second child in the same manner as bearing a second child. Under no conditions are couples allowed to have a third or higher-order birth\(^\text{48}\).

The policy was laid out in a series of laws and quasi-legal documents as follows:-

- Communist Party Committee\(^\text{49}\) and State Council resolutions and directives\(^\text{50}\)

which primarily outline the policy\(^\text{51}\)

\(^{45}\) Xiaorong Li, “License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China’s Family-Planning Program”, 8 Yale J.L. & Feminism 145 at 148. See also Nicole M. Skalla, “China’s One-Child Policy: Illegal Children and the Family Planning Law”, 30 Brook.J. Int’l L. 329 pp 332-333. However, when population specialists determined that a two-child policy would not help them realize their goal of zero population growth by 2000, the PRC abandoned the campaign.

\(^{46}\) Although called a one-child policy, there are several exceptions. If a child dies for some reason, couples are permitted to have another child. If the first child is not a son, a birth permit may be given for another child. Multiple birth, e.g., twins are of course exempt. Permit for a second child is given as a reward if both parents are only children or have just returned from living overseas. Members of minority groups are usually permitted more than one child, although this policy varies by region and minority group.

\(^{47}\) Mary H Hansel, “China’s One-Child Policy’s Effects on Women and the Paradox of Persecution and Trafficking” S Cal Rev. L. & Women’s Stud. 369 at 371

\(^{48}\) Chu Juhong, “Prenatal Sex Determination and Sex-Selective Abortion in Rural Central China”, Population and Development Review, Vol. 27, No. 2 (June 2001), 259-281 at 264

\(^{49}\) In China, the absolute leadership of the Central Communist Party is one of the four cardinal principles that rules China, and Party directives are equivalent of superior to legislation and codified laws. The preamble to the Constitution of 1982 states that “[u]nder the leadership of the Communist party of China and the guidance of Marxism- Leninism and Mao Zedong Thought, the Chinese people of all nationalities will continue to adhere to the people’s democratic dictatorship.” Xianfa (Constitution) preamble, 7(1982). The leadership of the Communist Party, the guidance of Marxism-Leninism and Mao Zedong thought, the preservation of socialism, and the continuation; c.f. Xiaorong Li, “License to Coerce: Violence Program,” 8 Yale J.L. & Feminism 145 note 21. See also Mary H Hansel, “China’s One-Child Policy’s Effects on Women and the Paradox of Persecution and Trafficking” S. Cal Rev. L. & Women’s Stud. 369 at 371

\(^{50}\) In 1980, the Central Party Committee called for limiting each couple to one birth. (Directive by the Central Communist Party Committee and the State Council Regarding Further Implementing Family Planning (adopted Feb. 9, 1982), The Complete Book of Laws and Legal regulation in the P.R.C.] 908
The unpopularity of its family planning measures was doubtless the main reason that it never converted the 1980 edict into a national law for a long time. The 1980 Marriage Law made family planning obligatory and raised the age of marriage to twenty-two for males and twenty for females. The Population and Family Planning Law essentially codified the OCP. It found mention in the Constitution as well.

This new legislation has several positive features. Population and family planning activities are combined with efforts for improving women’s education, employment (including special labour protections related to maternity), health, and social status. It prohibits discrimination of women who give birth to female children and women who are infertile. In order to combat female infanticide, discrimination against and maltreatment and abandonment of female infants is banned. Where family planning is concerned, the State is given the duty to guarantee safe sterilization and to provide free family planning services. The responsibility is shared by couples instead of burdening the wife alone. Importantly, family planning workers may be

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Mary H Hansel, “China’s One-Child Policy’s Effects on Women and the Paradox of Persecution and Trafficking” 5 Cal Rev. L. & Women’s Stud. 369 at 370


The Law of the People’s Republic of China on the Population and Family Planning (Family Planning Law). It became effective only in December of 2001. Some commentators see the new law as a landmark in China’s implementation of the OCP and it is the first national attempt to address gender issues on family planning c.f. Nicole M. Skalla, “China’s One-Child Policy: Illegal Children and the Family Planning Law,” 30 Brook. J. Int’l L. 329 at 361


investigated and punished for infringing upon citizen’s personal rights and property, abusing their power; and seeking or accepting bribes.

However, the legislation is a mixed bag and there are some problematic provisions\textsuperscript{58}. Having more than one child is a criminal act, punishable by way of a fine for those who do not fit within the limited exceptions. There is the creation of “detailed population control” quotas in all family planning and population measures. Although it creates ample access to family planning services for couples, nowhere in the law are the rights of adolescents or single people to family planning services and information discussed and affirmed. It prohibits sex determination and sex selective abortion. A scheme of incentives and disincentives still continues. Parents who have one child receive special treatment\textsuperscript{59}.

Since 2001, there has been the advocacy of “spiritual civilisation”\textsuperscript{60} and the “rule by virtues” reiterated by Jiang and Premier Zhu Rongji since 2001 as complements to the rule by law. This meant the focus was on the maintenance of a stable and low birth rate, coupled with improvements in the standards of infant and maternal care\textsuperscript{61}. Education and voluntary participation are emphasized and the abuse of technology for sex selective abortion\textsuperscript{62} is specifically tackled\textsuperscript{63}. This is more in keeping with the spirit of the CEDAW though it is only a beginning.

\textsuperscript{58} “China Turns One-Child Policy into Law,” http://www/crlp.org/www asia 1 child.html

\textsuperscript{59} Id.

\textsuperscript{60} The essence of the concept of “spiritual civilisation” mentioned by President Jiang and Premier Ahu Rongji since 2001 was systematically summarised in Jiang’s speech as General Secretary of the CPC at the grand gathering marking the 80\textsuperscript{th} anniversary of the CPC on 1 Jul 2001, available at http://www 1. Chinadaily.com.cn/highlights/docs/2001-07-01/17470.html, at Id note 67

\textsuperscript{61} Patrick T.C. Hui “Birth Control in China: Cultural, Gender, Socio-economic and Legislative Perspectives in Light of CEDAW Standards,” 32 HKLJ 187 at 201


\textsuperscript{63} Patrick T.C. Hui “Birth Control in China: Cultural, Gender, Socio-economic and Legislative Perspectives in Light of CEDAW Statndards,” 32 HKLJ 187 at 202.
How large a role does law play in the reproductive life of the people? For instance, though registration of marriage is compulsory\textsuperscript{64}, in rural areas, de facto marriages may include sixty to seventy percent of total marriages with parties lacking either the intent or the monetary means to register their union. This lack of registration has serious consequences for family planning- parties to an unregistered marriage cannot obtain birth permits, and thus, any children of these unions are illegal and unregistered\textsuperscript{65}. They do not get the benefits of education and other social security benefits available to ‘legal’ children born out of registered marriages.

Compared to the disincentives, incentives are few. One wonders how much it would actually persuade couples to adopt family limitation. In the Chinese carrot and stick method, the stick seems to be much more effective. It is significant to note that most authors concentrate on the disincentives and incentives are rarely mentioned and, then too, only in passing.

Incentives probably motivate poor families the most. Poor families that practice birth control would have a priority in getting loans, having access to farming material supply, and entering technology training programs. They would have better opportunity for employment or for selling their products to the state\textsuperscript{66}.

The penalties and consequences of noncompliance with the one child policy fall under several categories:-

- Penalties imposed on the parents
- Penalties imposed upon the family as a whole
- Penalties imposed upon the child
- Penalties imposed on local officials

\textsuperscript{64} In India too, although in some states, including Karnataka, there are some laws to make registration and India has a reservation on Article 16 (2) on this issue in the Convention on Elimination of All Forms of Discrimination Against Women

\textsuperscript{65} Nicole M Skalla, “China’s One-Child Policy” Illegal Children and the Family Planning Law,” 30 Brook J Int’l L 329 at 360

\textsuperscript{66} Xiaorong Li, “License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China’s Family-Planning Program,” 8 Yale J.L. & Feminism 145 at 154
Penalties imposed on the parents include heavy fines, disqualification for benefits, including poverty alleviation schemes, and administrative demotion and dismissal from employment\textsuperscript{67}. The focus here was on the mother. While the policy initially called for either spouse to use “effective” and “long term” contraception after the birth of one child, the government tightened restriction in 1982 and required IUD insertion for women with one child. Woman who proceed with unauthorized pregnancies, especially after having the permitted number of children, are forced to terminate the pregnancy\textsuperscript{68}. Women may be required to undergo forcible abortions even as late as the ninth month of pregnancy\textsuperscript{69}. Implementation of draconian measures includes violence against women, forcible late-term abortions, forced IUD insertion, forced sterilization, the detention of pregnant women or their family members, and destruction of “over-birth” families’ homes\textsuperscript{70}.

Moreover, after unplanned births, one spouse must sterilized\textsuperscript{71}. Other than black letter penalties, other forms of punishment could include psychological intimidation sanctioned by the policy: policy-created pressures from co-workers or fellow-villagers, intimidation and humiliation, including mandatory study sessions, visits by authorities, and public posting and monitoring of menstrual periods. Physical brutality and beatings also could take place\textsuperscript{72}.

Penalties imposed upon the family as a whole include demolition of residences by local officials, militia acting in a governmental capacity and the police. Disqualification from schemes would also affect the entire family\textsuperscript{73}.

\textsuperscript{67} Xiaorong Li, “License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China’s Family-Planning Program,” 8 Yale J.L. & Feminism 145 at 154

\textsuperscript{68} Nicole M. Skalla, “China’s One-Child Policy: Illegal Children and the Family Planning law,” 30 Brook J. Int’l L. 329 at 336

\textsuperscript{69} Nicole M. Skalla, “China’s One-Child Policy: Illegal Children and the Family Planning law,” 30 Brook J. Int’l L. 329 at 337

\textsuperscript{71} Nicole M. Skalla, “China’s One-Child Policy: Illegal Children and the Family Planning law,” 30 Brook J. Int’l L. 329 at 337 Between 1979 and 1984, 31 million women and 9.3 million men were sterilized, totaling almost one-third of all married productive couples.

\textsuperscript{72} Xiaorong Li, “License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China’s Family-Planning Program,” 8 Yale J.L. & Feminism 145 at 154

\textsuperscript{73} Id.
There are penalties imposed upon local authorities as well if they do not enforce the policy and meet birth quotas set by the central government. Such penalties may be in the form of demotion, salary reduction, and disciplinary sanctions for government officials. This has led to several abuses of power at this level in order to meet targets. They have a lot of power in this respect. They decide not only the number of births in that area, but also when a family may have a child. Women who fail to receive a quota are often induced to abort even if it is their first child. Local authorities must enforce the policy and meet birth quotas set by the central government. Failure to meet quotas can result in demotion, salary reduction, and disciplinary sanctions for government officials.

How do these laws impact the sex ratio in China? Discrimination against women is still rampant despite 55 years of “revolution”, “socialist reconstruction” and the latest, rapid capitalist development. The sex ratio has become even more skewed after the Chinese government’s adoption of the “one-child family” Policy. Many Chinese couples in rural areas do not agree to the one child policy, but due to state repression they, while sulking, accept it, provided the child is male. This shows how adaptive the system of patriarchy and male supremacy is. It can establish and strengthen its roots is all kinds of social structures- pre-capitalist, capitalist, and even post-capitalist – if not challenged consistently.

There is a lack of specific statutes to punish government officials or others acting in an official capacity who abuse the rights of women and girls in the process of implementing the one child policy. Even where penalties are legislated, there is a lack of enforcement which indicates that such penalties merely pay lip service to human rights. Prosecutions of local officials who participated overtly (by

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75 Id at 152 at 14
79 Most writers use interviews and direct sources of data to substantiate this. There seems to be no official literature on this point, which may probably be due to this issue becoming an embarrassment to the govt. China’s one child policy has often come under heavy criticism from human rights groups the world over.
authorizing) or covertly (by taking no action against offenders) have rarely taken place\textsuperscript{80}.

The Chinese government claims that its family planning policy “combines government guidance with the voluntary participation of the people.”\textsuperscript{81} Facts however do not bear this out. Besides which, the OCP has engendered a myriad of negative consequences, notably the rise of sex discrimination against women and its contingent repercussions. Men vastly outnumber women in China” there are 60 million more men than women in China today.

Effects of this disparity in the sex ratio have led to increased violence against women and children\textsuperscript{82}. Such children called \textit{hei haizi} or ‘black children’ are not recognized by the State, nor do they receive benefits of nutrition or education from the State\textsuperscript{83}. This is so in spite of the 1994 Maternal and Infant Health Case Law (MIHCL) which reiterates the role of the State as provider for mothers and children. This law is not enforced because its provisions conflict with the OCP, a higher priority for the government.

Such children are not a small, negligible population but are estimated at more than 300 million. Not just are second or higher order children marginalized, but even first born children whose mothers did not receive birth permits, and children from unregistered marriages\textsuperscript{84}. Strict enforcement of the Family Planning Law could include stricter sanctions and increase the number of sex-selective abortions.

\begin{footnotesize}
\begin{enumerate}
\item Xiaorong Li, “License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China’s Family-Planning Program,” 8 \textit{Yale J.L. & Feminism} 145 at 157. The author comes to this conclusion based on interviews with Chinese lawyers, family-planning officials, and international human rights monitors.
\item Dealt with in the Chapter relating to violence against women
\item Nicole M. Skalla, “China’s One-Child Policy: Illegal Children and the Family Planning law,” 30 \textit{Brook J. Int’l L.} 350 at 361
\item Nicole M. Skalla, “China’s One-Child Policy: Illegal Children and the Family Planning law,” 30 \textit{Brook J. Int’l L.} 329 at 350 - 361
\end{enumerate}
\end{footnotesize}
China has been a state party to CEDAW since 1980. China’s approach to human rights in general goes against the basic principles of not just CEDAW but also the Universal Declaration of Human Rights. China’s stand has always been that a State’s historical development, as well as political and economic conditions, dictates human rights. Reproductive rights find an echo in many provisions of this Convention. Elimination of discrimination against women in matters of health care is an important aspect. Access to health care services including those related to family planning is an important component of health care services. This, read with the freedom of choice which lies at the basis of reproductive rights, gives women the right to decide upon the number and spacing of children and also to an informed choice on contraception. Here even for the first child, a birth permit is required. Formal equality is not sufficient; equality as envisioned in CEDAW refers to real or substantive equality. CEDAW General Recommendation No 19 demands that state parties protect women from any compulsory sterilisation of abortion.

Ironically, it is women who have been targeted instead of men in family planning. This is despite the known fact that women seldom have control over their bodies. Thus, perpetuating the myth that women are responsible for over population. Chinese women are required to bear a disproportionate burden of their country’s development goals at the expense of their human rights.

Stereotyping, which the CEDAW strives against, is also marked in this behaviour. Men not being the bearer of children are seldom targeted for sterilization, penalties, study sessions, and invasions into privacy. The fact is that the policy is not strictly a one-child policy. It is seen as a one son or two-child policy. It allows son preference and allows a second child if the first one is female and shows that the one...

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85 Article 12(1) CEDAW
86 Article 16(1)(e)
87 Patrick T.C. Hui “Birth Control in China: Cultural, Gender, Socio-economic and Legislative Perspectives in Light os CEDAW Standards,” 32 HKLJ 187 at 190
89 Women are usually targeted for sterilization, though they are also performed on men.
90 Often women may be penalized and punished by local authorities, perhaps because they are easier targets. Otherwise, there is no rational for punishing only one half of a couple.
91 Often mandatory for women, and their attendance is noted. Advice for men to use condoms is seldom done.
92 This would include monitoring of menstrual cycles, which are sometimes put up in a public place.
child policy discriminates between girl and boy children at birth. It legitimizes cultural stereotypes which, under CEDAW, it has an obligation to eliminate.

Thus, the cultural-relativist, official stance of the Chinese government is based on two conceptual assumptions. Firstly, cultural practices such as the traditional son-preference are static. Secondly, there is no absolute inviolable human right as such in the abstract, and women’s rights as protected by CEDAW are no exception. The second assumption is in direct conflict with the Universal Declaration of Human Rights 1948, which forms the root of all international human rights treaties. The first assumption fails to recognise that culture is not a static identified set of information against which human rights shall be qualified or measured for compatibility or applicability.

In its reports to the U.N. Committee on the Elimination of Discrimination Against Women, China has painted its family-planning policy aims as improving women’s reproductive health. However, its campaign to control population belies this. Discrimination against out-of-plan children violates the rights of children enshrined in the Convention on the Rights of the Child. Article 2 specifically urges states parties to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members. Punishing children for their parents’ violations of population control is violative of the Convention. Yet, this discrimination is strictly implemented, especially in the urban regions, unless the first child suffers from mental or physical defects.

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93 The rationale seems to be combating female infanticide as a son is seen as necessary for continuing the family line. In rural areas, the demand for male manual labour may also be a casuse.
94 Patrick T.C. Hui “Birth Control in China: Cultural, Gender, Socio-economic and Legislative Perspectives in Light of CEDAW Standards,” 32 HKLJ 187 at 192
97 See Articles 2, 6, 7, 24, 27 and 28 of the UN Convention on Rights of the Child.
In addition to the CEDAW, several rights recognized by the International Conference on Population and Development, Cairo, 1994, have been violated. Ironically, China has often quoted statements from the “Programme of Action” to justify its actions\(^{100}\). Prime place is claimed for socio-economic rights and the right to development in the realm of human rights in China. Of course, it may be argued that basic health rights of women are still being affected.

The one-child policy as a method of population limitation\(^{101}\) can be said to be successful in achieving its purpose\(^{102}\). The policy so far appears to have been fairly successful in achieving its original purpose of lower birth rate\(^{103}\) and higher economic rewards. However, the skewed sex ratio is something that China will have to contend with.

\(^{100}\)“The formulation and implementation of population-related policies is the responsibility of each country and should take into account the economic, social and environmental diversity of conditions in each country ....... In the exercise of [reproductive rights], [all couples and individuals] should take into account the needs of their living and future children and their responsibility towards the community.” Patrick T.C. Hui “Birth Control in China: Cultural, Gender, Socio-economic and Legislative Perspectives in Light of CEDAW Standards,” 32 HKLJ 187 at 197

\(^{101}\)The lower birth rate has reduced the country’s and the world’s population by approximately 250 million from projections of the population without the OCP. C.f. Mary H Hansel, “China’s One-Child Policy’s Effects on Women and the Paradox of Persecution and Trafficking” S.Cal Rev. L. & Women’s Stud. 369 at 376

\(^{102}\)For a contrary opinion see Ofra Anson and Hon Anson, “Fertility trends in rural Hebei Province, People’s Republic of China” Population research and Policy Review, Vol. 22 No. 4, August 2003, 399, who argue “Although fertility has declined dramatically in the past three decades, the degree to which this was the result of the different population policies is still under debate. Unlike urban women, rural women experienced less social control (in the absence of a work unit) and received fewer benefits for adhering to the one-child policy. Findings: Our analysis indicates that the formal population policies of the PRC had little effect on the number of children ever born to rural women in Hebei. These retrospective data, by cohort, indicate consistently declining fertility since the revolution (1949). Limited child bearing was associated with age and the level of education. Controlling for the effect of age and education, women born after 1960, at whom the one-child policy was directed, at least as reflected in the experience of rural women in Hebei Province, derived mainly form secular changes in women’s access to education and other social resources rather than from the direct effects of population policies.”

\(^{103}\)The natural increase rate of China’s population has dropped from 2.583% in the early 1970s to approximately 0.97% today. C.f. Mary H Hansel, “China’s One-Child Policy’s Effects on Women and the Paradox of Persecution and Trafficking” S. Cal Rev. L. & Women’s Stud. 369 at 376. Population decline has eased pressures on China’s communities, state resources and the environment. It has also been deemed responsible for a 35% rise in the country’s GDP since 1995, lower mortality rates, better educational opportunities, and a grain output improvement such that, at the end of the 20th century, the world’s most populous country was finally able to feed its entire people. C.f. Mary H Hansel, “China’s One-Child Policy’s Effects on Women and the Paradox of Persecution and Trafficking” S.Cal Rev. L. & Women’s Stud. 369 at 376
3.6 The Courts and the Two-Child Norm

India has often had a fascination for China. The economic success of our neighbour has often filled us with envy and with the feeling that we too can be like them. One of the stark features of China is its one-child policy. There is an increasing feeling in India that the one-child policy and population control is the reason for China’s success. The flip side of the coin, that such population control was achieved by trampling on democratic rights is ignored.

With economics as the focal point, several States in India have made provisions which directly or indirectly uphold the two-child norm. These provisions included legislations. Ultimately, the two-child norm was challenged in Court.

*Javed v. State of Haryana*[^104] was a batch of writ petitions challenging the constitutional validity of the two-child norm[^105]. The provisions challenged pertained to the disqualification of a person having more than two living children from holding the specified offences in Panchayats.

The Supreme Court found that the safeguard of natural justice had been met for several reasons including sufficient notice for compliance[^106] and the fact that those with existing children or children *en vitro sa mere* would not be counted[^107]. The enforcement of disqualification is postponed for a period of one year from the date of the commencement of the Act. Though not disqualified on the date of election, if any person holding any of the said offices incurs a disqualification by giving birth to a child one year after the commencement of the Act, he becomes subject to

[^105]: *Javed v. State of Haryana* MANU/SC/0523/2003 at para 2. Section 175(1)(q) and 177(1) of the Haryana Panchayati Raj Act, 1994 (Act No. 11 of 1994) which are as follows:

175.(1) No person shall be a Sarpanch or a Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad, or continue as such, who-

- (q) has more than two living children

Provided that a person having more than two children on or upto 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 Sections 175 at time of his election;

During the term for which he had been elected, incurs any of the disqualifications mentioned in Section 175.....

[^106]: Enforcement of the disqualification is postponed for one year from its commencement.
[^107]: A person having more than two children upto the expiry of one year of the commencement of the Act is not disqualified. This postponement for one year takes care of any conception on or around the commencement of the Act, the normal period of gestation being nine months. If a woman has conceived at the commencement of the Act then any one of such couples would not be disqualified.
disqualification and is disabled from continuing to hold the office. Procedurally too, the Court found it reasonable.

Despite the Court’s decision on the point, it would be useful to examine the grounds of the challenge. In brief they were 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

(v) that the provision interferes with freedom of religion and hence violates Article 25 of the Constitution.

(i) *Is the classification arbitrary?*

Article 14 forbids arbitrariness. While class legislation would be arbitrary, reasonable classification for the purpose of legislation is not prohibited. To satisfy the constitutional test of permissibility, two conditions must be satisfied, namely (i) that the classification is founded on an intelligible differentia, which distinguishes persons of things that are grouped together from others left out of the group, and (ii) that classification has a rational nexus to the object sought to be achieved by the Statute in question.

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108 The disability is incurred by the birth of a child which results in increasing the number of living children, including the additional child born one year after the commencement of the Act, to a figure more than two.

109 If the factum is disputed the Director is entrusted with the duty of holding an enquiry and declaring the office vacant. The decision of the Director is subject to appeal to the Government. The Director has to afford a reasonable opportunity of being heard to the holder of office sought to be disqualified. These safeguards satisfy the requirements of natural justice.


111 *ibid*

112 *Budhan Choudhry And Ors. v. The State of Bihar*, (1995) 1 SCR 1045
The Court held that the classification is well-defined and well-perceptible. Persons having more than two living children are clearly distinguishable from persons having not more than two living children. The two constitute two different classes and the classification is founded on an intelligible differentia clearly distinguishing one from the other. One of the objects sought to be achieved by the legislation is popularizing the family welfare/family planning programme. The disqualification enacted by the provision seeks to achieve the objective by creating a disincentive. The classification does not suffer from any arbitrariness. The number of children, viz. two, is based on legislative wisdom. It could have been more or less. The number is a matter of policy decision which is not open to judicial scrutiny\textsuperscript{113}.

Unfortunately, the rational is not achieved at all. Will such a law bring down the population? No one is under any illusion that it will. In the face of high infant mortality, son preference, insurance in old age, and the need for more hands to labour, more children are preferred. What it will lead to is a lot of ‘black children’ as they are called in China – unacknowledged children on the periphery of society.

(ii) Does the legislation serve its object?

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 not nexus with the purpose sought to be achieved by the Act. The Court, however, held that there was no merit in the submission and that since one of the objects of the enactment is to popularize Family Welfare/Family Planning Programme, it is consistent with the National Population Policy\textsuperscript{114}.

This is not correct. The National Population Policy has tried to do away with population control which is exactly what the two-child norm does.

(iii) Is the provision discriminatory?

It was submitted that this disqualifier exists only in Haryana and not in other States and that it applies only to elective offices in panchayats and not other elective

\textsuperscript{113} Javed v. State of Haryana MANU/SC/0523/2003 at para 8
\textsuperscript{114} Javed v. State of Haryana MANU/SC/0523/2003 at para 9 & 10

[56]
offices and is therefore discriminatory\textsuperscript{115}. The Court however held that under the constitutional scheme, there is a well-defined distribution of legislative powers, and interference would be violative of the autonomy given to the Centre and the States within their respective fields under the constitutional scheme\textsuperscript{116}. The Court opined that a uniform policy may be devised by the Centre or by a State\textsuperscript{117}. But policies could be implemented in a phased manner\textsuperscript{118}.

A disqualification to stand for elections was seen as not violative of fundamental rights\textsuperscript{119} and was seen as having its roots in the national interest\textsuperscript{120}. Population control, long after it was rejected in the National Population Policy, was held to be a ‘national movement’ by the court.

Inaugurating the ‘First All India Workshop of Health Secretaries’ in New Delhi, Union Health Minister Anbumani Ramadoss presented a diagonally opposite view on the issue\textsuperscript{121}. He said the ‘two-child norm’ cannot be imposed on anyone as it will be a “violation of fundamental rights”. “Population stabilisation programme will be pursued wholly on voluntary basis,” he said, and added that goals to this effect “will be achieved without coercive measures being incorporated into National Population Policy”\textsuperscript{122}.

(iv) Is liberty violated?

Placing strong reliance on \textit{Mrs. Maneka Gandhi v. Union of India and Anr}\textsuperscript{123}, and \textit{Kasturi Lal Lakshmi Reddy and Ors v. State of Jammu and Kashmir and Anr.}\textsuperscript{124}, 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 personal liberty of procreation without limitations\textsuperscript{125}. The

\textsuperscript{115} \textit{ibid} at para 12
\textsuperscript{116} \textit{ibid} at para 12
\textsuperscript{117} \textit{ibid} at para 16
\textsuperscript{118} \textit{ibid} at para 16
\textsuperscript{119} On the ground that the right to vote and stand for elections was not a fundamental right but one governed by statute and at the most could be called a constitutional right.
\textsuperscript{120} \textit{Javed v. State of Haryana} MANU/SC/0523/2003 at para 25
\textsuperscript{121} “Two-child norm: Councilor loses job”, \url{http://www.rediff.com/news/2004/oct/12child.htm}
\textsuperscript{122} \textit{ibid}
\textsuperscript{123} (1978) 1 SCC 248
\textsuperscript{124} (1980) 4 SCC 1
\textsuperscript{125} \textit{Javed v. State of Haryana} MANU/SC/0523/2003 at para 27
Court upheld socio-economic justice and envisioned the population of the country as one of the major hindrances in the pace of India’s socio-economic progress\textsuperscript{126}. The Court held that fundamental rights are not to be read in insulation\textsuperscript{127}. They have to read along with the Chapter on Directive Principles of State Policy and the Fundamental Duties enshrined in Article 51A. This, in a nutshell, meant that socio-economic justice (read population control) justified limits on liberty and that people had a fundamental duty\textsuperscript{128} to comply. It upheld \textit{Air India v. Nergesh Meerza and Ors}\textsuperscript{129} which held valid a 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- the wellbeing of the mother and children and also combating population explosion\textsuperscript{130}. This is in blatant violation of reproductive rights. \textit{Nergesh Meerza} stereotyped notions of women being responsible for population.

\textbf{(v) Is freedom of religion being infringed upon?}

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 right to freedom of religion enshrined in Article 25\textsuperscript{131} of the Constitution\textsuperscript{132}.

\textsuperscript{126} \textit{Javed v. State of Haryana} MANU/SC/0523/2003 at para 31. In support of this point, the Court used the Karunakaran Population Committee Report (1992-93-It had proposed certain disincentives for those who do not follow the norms of the Development Model adopted by National Public Policy) and a paper written in a law review. (Usha Tandon, Reader, Faculty of Law, Delhi University,- Research Paper on Population Stabilisation, Delhi Law Review, Vol. XXIII 2001, pp. 125-131) The Court also quoted Bertrand Russell, “Population explosion is more dangerous than Hydrogen Bomb.” And Arcot Easwaran, “Population Challenge,” The Hindu, dated 8.8.2003, which stated that population explosion could lead to famine and abnormal conditions in parts of the country. (Paras 32, 33). The Court also noted that both the 1940 sub-Committee on Population, appointed by the National Planning Committee set up by President of the Indian National Congress (Pandit Jawaharlal Nehru), and the 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. (para 35). Every successive Five Year Plan has given prominence to a population policy (para 36).

\textsuperscript{127} \textit{Javed v. State of Haryana} MANU/SC/0523/2003 at para 39

\textsuperscript{128} Population control was read into sustainable development

\textsuperscript{129} (1981) 4 SCC 335

\textsuperscript{130} “In the first place, the provision preventing a third pregnancy with two existing children would be in the larger interest of the health of the Air Hostess concerned as also for the good upbringing of the children. Secondly, when the entire world is faced with the problem of population explosion, it will not be desirable but absolutely essential for every country to see that the family planning programme in 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.” \textit{Javed v. State of Haryana} MANU/SC/0523/2003 at para 40

\textsuperscript{131} 25. Freedom of conscience and free profession, practice and propagation of religion. –

[58]
The Court held that although Muslim personal law permits marrying four women, it is not mandated, nor is procreation\textsuperscript{133}. Therefore, the question of violation of Article 25 does not arise\textsuperscript{134}.

Defences in the proceeding under Section 177(2) of the Act on the ground that the disqualification was not attracted on account of a child or more having been given in adoption were held not available\textsuperscript{135}.

How has this decision impacted population and more specifically sex selection?

The National Population Policy, 2000, was conscious of sex selection and thus attempted to make a paradigm shift in its approach to family planning to one of advocacy, quality of care, and individual choice\textsuperscript{136}. But in a complete turnaround, the government today appears to be reaffirming its faith in coercive methods and has allowed states like Rajasthan, Madhya Pradesh, Delhi and Uttar Pradesh to formulate anti-people population policies\textsuperscript{137} - leading to fears that attempts are being made to push coercive population polices through the backdoor\textsuperscript{138}.

Women’s groups and health activists in the capital managed to scuttle the Delhi and UP Bill and highlighted these human rights violations in a petition to the National Human Rights Commission (NHRC) in July 2004. The petition said that the

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\textsuperscript{132} Javed v. State of Haryana MANU/SC/0523/2003 at para 42

\textsuperscript{133} 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. \textit{Javed v. State of Haryana} MANU/SC/0523/2003 at para 44

\textsuperscript{134} \textit{Javed v. State of Haryana} MANU/SC/0523/2003 at para 44

\textsuperscript{135} \textit{Javed v. State of Haryana} MANU/SC/0523/2003 at para 66

\textsuperscript{136} There was a general feeling that the target- oriented approach was not working, and therefore a change in tactics was called for.

\textsuperscript{137} Many of these are anti-women, anti-poor and anti-dalit

imposition of the two-child norm, and the disincentives proposed, would mean that significant sections among those already deprived populations would bear the brunt of the state’s withdrawal of ameliorative measures, at pitifully inadequate as they are\textsuperscript{139}.

A study conducted in 2002 by Mahila Chetna Manch, a Bhopal-based NGO, on the implications and consequences of the two-child norm in PRLs, reveals the “The way the norm is conceptualised and currently implemented is not without serious unintended negative consequences”\textsuperscript{140}. Thus, children have not been sent to school for fear of detection, children have been abandoned or given up for adoption, men have denied paternity of children, there has been desertion of pregnant wives and concealment of babies, birth records have been tampered with...the list goes on. In terms of real numbers, it is a substantial number. Economically and socially vulnerable sections suffered the most as 75\% of those disqualified belonged to SC, ST, and backward classes\textsuperscript{141}. Thus, the disincentives proposed – such as denying ration cards and education in government schools for the third child and the withdrawal of welfare programmes will hit the poor most\textsuperscript{142}.

This is not the first time such legislation has been taken to the Supreme Court. In the case of Zile Singh, the Court has again upheld the two–child norm. It addressed three issues. First, is disqualification tenable under the legislation? Not surprisingly, the answer is yes. Second, does the legislation violate fundamental rights? The court has rightly held that fundamental rights are not absolute and can be curtailed by legislation\textsuperscript{143}. The Court also made a third point, almost in the nature of obiter dictum. To quote, “It is the interest of the nation to check the growth of population by casting disincentives even through legislation.” This is a sentiment that resonates in many parts of India, especially among the educated segments. It makes

\begin{itemize}
\item \textsuperscript{139} \textit{ibid}
\item \textsuperscript{140} The study, commissioned by the Union Ministry of Health and Family welfare and supported by UNFFPA, convened Andhra Pradesh, Haryana, Madhya Pradesh, Orissa, and Rajasthan, contacting 262 respondents and examining 40 case studies c.f. Laxmi Murthy, “No kidding: Apex court enforces two-child norm,” http://infochangeindia.org/features123.jsp. See also Bibek Debroy “Unintended results of the two–child norm” http://fecolumnists.exoressindia.com/full column.php?content id = 71801 where the writer says that not only does it affect women who have no control over reproductive decisions, but that it has not impacted total fertility at all.
\item \textsuperscript{141} Laxmi Murthy, “No kidding: Apex court enforces two-child norm,” http://infochangeindia.org/features123.jsp
\item \textsuperscript{143} Bibek Debroy “Unintended results of the two-child norm” http://fecolumnists.exoressindia.com/full column.php?content id = 71801
\end{itemize}
no sense especially as demographers asserts that the total fertility rate has in fact come down and should stabilize by 2050 A.D. Assuming that national income is unchanged when total population is halved, is tantamount to assuming that the ‘extra population contributes nothing to national output’.

This tack on population and the two-child norm is not in keeping with the government commitments made in the international treaties like the CEDAW and agreements like the ICPD Program of Action (PoA) to which India is a signatory. In 1994, the Program of Action of the International Conference on Population and Development emphasized the relationship between population, sustainable development, comprehensive reproductive health services of good quality, gender equality, and the right of individuals and couples to freely and responsibly decide on the number and spacing of their children.

On the question of the sex ratio too, there is no doubt about the fact that though it is a pressing issue in reality and acknowledged as such by the State, at the same time, the State is trying to push the two-child norm which will push the ratio even higher. There is thus an urgent need to repeal the two-child norm.

Couples who have high order female birth will try to hide the birth from the authorities in one of the following ways:

1. Giving the girl to someone for adoption or sending her to friends and relatives living elsewhere. Johansson and Nygren (1991) convincingly estimated that adopted girls whose births were not reported account for about half of the total “missing girls” in China.

2. Not reporting the birth of the girl but reporting her as an immigrant at a later time. That is, some couples and local officials deliberately report a birth as an immigration so as to cover up an unplanned birth, especially a female birth, and thus evade penalties.

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144 Ibid. at 2
Some states had already made laws that conflicted with the NPP, such as the provision for disqualifying persons having more than two children from holding and contesting Panchayat positions. None of these laws were revoked as conflicting with the NPP 2000. Rajasthan was the pioneer in introducing this norm for Panchayats and municipalities in 1992, later incorporating it as a disqualification within the Panchayats Raj Act of 1994. Later, a number of other states including Haryana (Panchayati Raj Act, 1994), Andhra Pradesh (Panchayati Raj Act of 1994), Orissa (Amendment to Orissa Gram Panchayat Act 1994) also opted for this norm for elections to Panchayat bodies. Madhya Pradesh was the latest state to have included two-child norm in their panchayat legislation through a special amendment in its panchayat law in May 2000. It has also extended the norm to include elections to municipalities, agricultural produce marketing committees (Mandis) and cooperatives. It includes provisions for the denial of state programme benefits, e.g., loans, subsidy, poverty alleviation programs, and entry in government jobs to those who exceed the norm.

The NPP also encourages sterilisation after two children through a variety of incentives. The technologies for sex pre-determination are more easily available than appropriate contraceptives, and providers are always ready to conduct sex-selective abortions. Although the NPP mentions ‘strict enforcement of the Prenatal Diagnostic Techniques Act’, it is open knowledge that convictions under this Act are rare and difficult.

A running theme of the NPP 2000 is provision of quality services and supplies and a basket of contraceptive choices. “People must be free and enabled to access quality health care, make informed choice, can adopt methods for fertility regulation best suited to them” – it is in this spirit that the NPP 2000 speaks of the “small family norm.” Nowhere does the policy advocate “two child norm.” However, it is unfortunate and sometimes even disturbing to note that while talking about NPP,


148 Promotional and Motivational Measures for Adoption of the Small Family Norm, para 46, NPP 2000 at 4.

“small family norm” is often misinterpreted as “two-child norm” (which has a definite coercive connotation). “Two-child norm” implies that the state promotes two children per family and has a system of incentives and disincentives/punishments for achieving it. A “two-child norm” has the potential to cause immense harm to women’s health in the existing social situation where son preference is high and women’s status is very low. One of the gravest risks includes increase in sex selective abortion and consequent reduction of girl children.

The “two-child norm” policy of certain state governments, which are not in harmony with the NPP, can become an important factor responsible for exacerbating female foeticide in these states in future.\(^\text{150}\)

The Supreme Court order upholding the two-child norm contravenes the spirit of the Cairo Document, to which the Government of India is also a signatory. Principle 8, ICPD, 1994, declares, “States should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to health care services, including those related to reproductive health care, which includes family planning and sexual health and provide the widest range of reproductive healthcare services without any form of coercion. All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education, and means to do so.”\(^\text{151}\)


\(^{151}\) Laxmi Murthy, “No kidding: Apex court enforces two-child norm,” http://infochangeindia.org/features123.jsp
3.7 Incentives and Disincentives

An incentive may be defined as payments or their equivalent, made directly to contracepting couples and/or to couples not bearing children for specified periods. In other words, an incentive may be viewed as those objects of financial value that are given by an organization to individual, couple, or group in order to encourage reproductive behavioural change\textsuperscript{152}.

Incentives in India are officially referred to as “compensation for loss of earnings due to adoption of the I.U.D. or sterilization” and are thus seen as pro poor. Two types of incentives were recognized even at that early stage, namely, adopter incentives paid to the adopter to motivate adoption and diffuser incentives paid to the canvasser (motivator/promoter/field worker) to spread the rate of adoption of family planning methods\textsuperscript{153}.

Is there anything unethical about this argument? No doubt it is pro poor, it is unlikely that the better off would be enamored by the incentives. No doubt it compensates for loss of earnings. But then, the question could be asked, why compensation for loss of earnings through sterilization and not for other medical reasons?

Keeping in mind the realities of the widening sex ratio imbalance, if there is a population law limiting the quota to two, it is quite likely that many in this population would opt for a son and many for the spare son as well, now, if sex selection was not accessible, what would be done? The answer is not a happy one. The girls born would be ‘hidden’ as they are in China in many ways. They would not be registered, making them invisible and depriving them of essential goods and services – rations, education, and healthcare to name a few. They may be abandoned – the lucky few in orphanage which are well run. Others may be abandoned in such a way that leaves survival and safety questionable. Still others may be given in ‘adoption,’ though it is unlikely that so many young girls will be absorbed in this manner. And of course, they may be ruthlessly murdered. Violence against women would reach a new high.

\textsuperscript{152} “Incentives and disincentives to promote the Small Family Norm,” http://populationcommission.nic.in/incentive.htm
\textsuperscript{153} Id.
Elsewhere the issue of whether sex selection amounts to violence/discrimination against women has been discussed\(^{154}\). Sex selection cannot be permitted at any cost. Therefore, to avoid this violence to women, the coercive population quota must be removed and made truly voluntary.

Commenting on the serious decline in the 0-6 sex ratio in India, leading demographer Ashish Bose states that the government’s policies are all wrong. The two-child policy has got mixed up with female foeticide. Government slogans like ‘Beti ya beta, dono ek hain’ make little sense. And financial sops for couples having a girl-child can make no dent in the traditional preference for sons in India\(^{155}\).

During the past few years, several States in India\(^{156}\) have passed laws debarring persons from contesting elections\(^ {157}\) on the basis of certain population-based criteria. These include debarring, prospectively, persons who do not adopt the two-child norm from contesting local government elections\(^ {158}\). Disqualification in case they have already been elected is also provided for\(^ {159}\).

Disqualification on other population-related criteria includes non-registration of marriage and non-observance of minimum age at marriage\(^ {160}\). The case for rising the age of marriage is certainly undeniable. The linking of family size to the right to contest elections is presumed to demonstrate a degree of political commitment that is considered essential. The argument that it would adversely affect the interests of

\(^{154}\) See Chapter on Violence Against Women

\(^{155}\) Madhu Gurung, “The two-child norm only leads to female foeticide,” Info Change News and Features, November 2004 at 1

\(^{156}\) Haryana, Rajasthan, and Madhya Pradesh. For example by amendment to Section 11 of Rajasthan Panchayats Act and the Rajasthan Municipalities (Second Amendment) Bill, 1992

\(^{157}\) Using typically double standards, lawmakers at the Centre and State have not made this disqualification applicable to them.

\(^{158}\) Zilla Parishads, Panchayats, and Nagarpalikas – at the district, village, and town levels. Madhya Pradesh includes other local bodies like mandis and cooperatives.

\(^{159}\) “Incentives and disincentives to promote the Small Family Norm,” http://populationcommission.nic.in/incentive.htm

\(^{160}\) Rajasthan and Madhya Pradesh. Rajasthan even propose this criteria to make use of government facilities and services, though the details are unclear. Madhya Pradesh proposes this to act as disqualification for government jobs and posts. Some other States use this as a disqualification even for admission to educational institutions and for sanctioning loans. C.F. “Incentives and disincentives to promote the Small Family Norm”, http://populationcommission.nic.in/incentive.htm
women or the disadvantaged sections of society does not seem convincing to the State\textsuperscript{161}.

Incentive and disincentive programmes raise important ethical, administrative, and political questions. Ethically, some consider incentives coercive, reducing the freedom of choice that is important in family planning. Others argue in reply that incentives that reduce any extra costs of family planning can actually increase people’s choice, particularly the choices available to poorer people. Also, in some countries it is argued that the societal need to control population growth may have to take precedence over individual preferences. Administratively, incentive programmes present some pitfalls. Unless implemented without corruption or abuse, they may discredit rather than strengthen a family planning programme. Incentives or disincentives for government officials or salaried workers, based on their fertility behaviour or contraceptive use, are more easily administered than payments to rural residents or others outside the organized sector of the economy. Politically, incentives and disincentives have been most acceptable and most successful where public opinion supports the policy goals. In Singapore, for instance, where strong incentives and disincentives reinforce already low fertility, many people say that they would have small families anyway\textsuperscript{162}.

\textsuperscript{161} See “Incentives and disincentives to promote the Small Family Norm,” http://populationcommission.nic.in/incentive.htm

\textsuperscript{162} Ibid.
Several reviews of recent experience have concluded that in the short run, payments to acceptors and providers increase the number of sterilizations\textsuperscript{163}.

In this context views of two bodies may be useful to go into:


These two are significant documents as far as the States focus both on population is concerned and are evidence of how one might expect the State to respond to matters of population.

\textsuperscript{163} “Incentives and disincentives to promote the Small Family Norm”, http://populationcommission.nic.in/incentive.htm. In three-district survey study in Andhra Pradesh during 2002 conducted by the Population Research Centre, Vishakhapatnam, and sponsored by the national Commission on Population, 683 acceptors of sterilization were asked whether they would have accepted sterilization in the absence of incentives, almost 75\% stated that they would have accepted the methods even without incentives. However, one-fourth of the acceptors would not have adopted the methods without incentives. The validity of responses to a hypothetical question can always be doubted. Yet, the lesson clearly seems to be that incentives probably influence about 25\% of the acceptors or users of contraception. About 83\% of the acceptors reported that higher incentives should be given to couples who adopt the methods with only one or two daughters. Whether the adoption is because of fear of losing the benefits.
3.7.1 The National Development Council Committee on Population (1992)\textsuperscript{164}

The National Development Council (NDC) Committee on Population (1992) recommended the amendment of incentives and disincentives to make them more stringent. These include limiting a number of benefits to two children including Leave Travel Concessions, reimbursement of medical expenses, maternity leave benefit (excluding those directly affecting the health of the pregnant mother and foetus/new born), loan benefits and low interest rates, housing priority, increments for undergoing sterilization, etc\textsuperscript{165}.

The NDC recommended that benefit of loans, advances, allotment of land/house sites, and facilities of PDS should be withdrawn from families violating the two-child norm but may be restored after the couple has undergone sterilization operations and recommended that any public servant who has more than two children should be debarred from recruitment as well as promotion (if already recruited) for a period of five years, and birth of children beyond three should result in dismissal from service\textsuperscript{166}.

Perhaps the most controversial recommendation was that the amendment to Panchayati Raj Act brought by the Rajasthan Government be emulated. The Central/State Governments should consider bringing similar legislation for disqualifying the people’s representatives at different levels if they violate small family norm after getting elected. Such a step should have useful demonstration effect on the people at large\textsuperscript{167}.

This provision especially has come under heavy criticism for the same reasons that Javed was criticized as discussed earlier in this Chapter.

On a positive note, it recommended that special incentives and support to such programmes as involvement and continuation of schooling of female children,

\textsuperscript{164} Hereinafter NDC
\textsuperscript{166} Ibid.
\textsuperscript{167} Ibid
delaying the age of marriage, and old age pensions as already adopted by several States should be introduced in other States also\textsuperscript{168}.

### 3.7.2 The National Population Policy (2000)

The National Population Policy, 2000\textsuperscript{169} also advocates a small family. While it purports to move towards a gender friendly approach, this is debatable. Promotional and motivational measures for the adoption of small family norm-as envisaged in the National Population Policy 2000 include rewards for Panchayats and Zilla Parishads for universalizing the small family norm and achieving reductions in infant mortality and birth rates. Special benefits of insurance\textsuperscript{170} and rewards\textsuperscript{171} are envisaged in the NPP for couples and their two children for adopting the norm\textsuperscript{172}. Positive aspects of the National Population Policy include a wider, affordable choice of contraceptives at diverse delivery points, with counseling services to enable acceptors to exercise voluntary and informed consent and facilities for safe abortion\textsuperscript{173}.

The National Population Policy also recommends a strict enforcement of Child Marriage Restraint Act, 1976, and, what is especially relevant from the point of view of this study, strict enforcement of the Pre-Natal Diagnostic Techniques Act, 1994\textsuperscript{174}.

The 42\textsuperscript{nd} Constitutional amendment has frozen the number of representatives in the Lok Sabha on the basis of population at 1971 Census levels. The freeze is currently valid until 2001 and has served as an incentive for State Governments to

\textsuperscript{168} Ibid.
\textsuperscript{169} Hereinafter NPP
\textsuperscript{170} A family welfare-linked Health Insurance Plan will be established. Couples below the poverty line, who undergo sterilization with not more than two living children, would become eligible (along with children) for health insurance (for hospitalization) not exceeding Rs. 5000/-, and a personal accident insurance cover for the spouse undergoing sterilization.
\textsuperscript{171} Couples below poverty line, who marry after the legal age of marriage, register the marriage, have their first child after the mother reaches the age of 21, accept the small family norm, and adopt a terminal method after the birth of the second child, will be rewarded.
\textsuperscript{172} The Balika Samridhi Yojana run by the Department of Women and Child Development awards a cash incentive of Rs. 500/- at the birth of the girl child of birth order 1 or 2, to promote survival and care of the girl. Under the Maternity Benefit Scheme run by the Department of Rural development, Rs. 500/- is awarded to mothers who have their first child after 19 years of age Mohan Rao, “Population Policy: A Voice of Sanity,” http://www.frontlineonnet.com/f11919/19190460.htm
\textsuperscript{173} Couples below poverty line, who marry after the legal age of marriage, register the marriage, have their first child after the mother reaches the age of 21, accept the small family norm, and adopt a terminal method after the birth of the second child, will be rewarded.
\textsuperscript{174} Couples below poverty line, who marry after the legal age of marriage, register the marriage, have their first child after the mother reaches the age of 21, accept the small family norm, and adopt a terminal method after the birth of the second child, will be rewarded.
fearlessly pursue the agenda for population stabilization. This freeze needs to be extended until 2026. The NPP, following the ideas of the Swaminathan Committee Report had attempted to move away from both the two-child norm and target-based approach.

At the conceptual level, the question to be asked is ‘do we have a population policy or a family planning policy?’

It is clearly necessary to distinguish between the philosophy and actions towards a population policy and those towards a family planning policy. The former should include, besides demographic concerns, larger issues of sustainable and equitable development. In this context it is necessary to spell out the links between macroeconomic policy and population. The government’s repeated stress on the need to stabilise the size of the population as a precondition for economic development misjudges the linkages, and sidesteps the lack of effective and equitable development policies.

Disincentives, incentives, and targets have no place in a family welfare programme. First, they are unnecessary, as birth rates have commenced a decline in large parts of the country. Second, as experience in the past indicates, they are ineffective and serve only to generate false programme performance data. Third, the financial allocations for incentives are a drain of scarce resources that ought to be utilised for strengthening Primary Health Care. Fourth, they inflict damage on the credentials of a so-called welfare programme by deeply alienated people, the poor and the powerless in particular, from the health care system. Finally, they profoundly

violate democratic rights. Indeed, considering the NPP is framed in the discourse on rights, it is fundamentally at variance with policies of incentives, disincentives, and targets.  