

Agenda 21, Population and Role of Law : Indian Experience

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I. Introduction

MANDATED BY the UN General Assembly in 1989, United Nations Conference on Environment and Development held in Rio in June 1992 prepared Agenda 21, "an agreed programme of work by the international community addressing major environment and development priorities for the initial period 1993-2000 and leading into the 21st century". This was the key document of the Rio Conference.

The 800 - page Agenda 21 contains 40 chapters with 115 specific clean-up programmes, grouped into following four main parts:

- (1) The social and economic dimension (habitats, health, demography, consumption patterns, etc.);
- (2) Conservation and resource management (atmosphere, forests, water, waste, chemical products, etc.);
- (3) Strengthening the role of non-governmental organizations (NGOs) and other social groups such as trade unions, women, youth, etc.; and
- (4) Means of implementation (financing, institutions, etc.)

II. Role of law in implementing Agenda 21 generally

It is not generally understood that law can play an important role in the implementation of a policy such as Agenda 21. Only coercive side of law is generally seen and it is not appreciated that law can be a potent,

educative and motivating force also for accelerating human action.

Administrators in most of the countries think that their administrative fiats run just by themselves and conveniently forget that without backing of law, no administrative fiat can run. In fact, in order to make the administrative action look transparent, proper legal backing for the policy is essential.

Sustainable development which is the ultimate aim of Agenda 21, calls for the improvement of legal and administrative systems, through the adoption of forward-looking legislation, conducive to the integration of conservation and development. It calls for an integrated conceptual base for international and national environmental law making, as well as for a constant effort to implement and enforce existing conservation instruments.

III. Scope of the paper

Agenda 21 being a big document, as stated above, for a proper study, it is confining to only one chapter of Agenda 21, namely, 'Demographic Dynamics and Sustainability' (chapter 5) and I propose to discuss only India which is the second most populous country in the world.

IV. Demographic dynamics and sustainability (chapter 5 of Agenda 21)

This chapter contains the following programme areas:

- (i) Developing and disseminating knowledge concerning the links be-

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tween demographic trends and factors and sustainable development;

- (ii) formulating integrated national policies for environment and development, taking into account demographic trends and factors;
- (iii) implementing integrated, environment and development programmes at the local level, taking into account demographic trends and factors.

V. Gist of chapter 5 of Agenda 21

This Chapter does not speak directly of population control but, nevertheless, the objective of this Chapter is that some checks should be placed on undue growth of population. Agenda 21 should be implemented and in my opinion, law can be an important instrument for achieving this objective. We will now examine as to how far law is being used or could be used in India for the sake of implementation of this part of Agenda 21.

VI. Indian efforts at control of undue population growth through law

Before elaborating the Indian efforts in this direction, let us cast a glance over the latest population figures in India.

VII. Enormity of the problem of population

According to the Census of India 1991, the population of India was approximately

844 million. The decennial population growth 1981-91 was 160 million in absolute terms and 23.50% growth in 10 years. In the 10 years 1981-91, the average addition to the population of India has been at the rate of about 16 million¹ which is more than the population of a large number of countries of the world. This is the enormity of the problem.

VIII. Justification for use of law

The justification for law involving itself in population matters was provided by the Tehran proclamation on Human Rights^{1a} in the words: "that the parents have a basic human right to determine freely and responsibly the number and the spacing of their children." The U.N. Declaration of 1969 on Social Progress and Development has important significance because it is the first United Nations resolution to require Governments to provide families with not only the "knowledge", but also the 'means' necessary to enable them to exercise their right to determine freely and responsibly the number and spacing of their children.²

This human rights approach is being followed more and more as the time is moving on, so much so that for preparing the materials for U.N. International Conference on Population and Development (ICPD) held in Cairo in 1994, this was the dominant approach. It is being emphasised that family planning programmes should respond to two basic concerns:

- (1) the right of couples and individuals to decide the number and spacing of their children; and (2) the rights of the women and children, in particular, to have good health, away from mortality and morbidity.³

By virtue of this, it is the duty of the State to provide to people not only 'knowledge', but also the 'means' to enable

1. See *Census of India 1991*, Series I, Paper I, 1991 published by the Registrar General and Census commissioner of India.

1a. Tehran Proclamation on Human Rights, UN. DOC, A/Conf. 32/41, 1968, titled Human Rights Aspect of Family Planning.

2. Art. 22 (b). The Declaration was adopted by the General Assembly by a vote of 119 in favour, none against, with 2 absentions. G.A. Res. 2542, XXIV, 24 U.N. GAOR Supp. 30 at 49 A/7630, 1969.

3. See "International Conference on Population and Development (ICPD), Second Preparatory Committee", *Open File. 1* (June, 1993), published monthly by the International Planned Parenthood Federation (IPPF), London.

them to exercise their right to determine the number and spacing of their children. The State naturally has to perform this duty through the instrumentality of law, constitutional and otherwise.

IX. Population problem and the Indian Constitution

The Indian Constitution as adopted in 1950 had no specific provision bearing on the population problem. It was in 1976 that by the Constitution 42nd Amendment, 'population control and family planning' was introduced as an entry⁴ under the Concurrent List⁵ of 7th Schedule of the Indian Constitution. But this is not considered sufficient by Indian scholars and a demand⁶ has been made that there should be a more prominent mention of population control in the Constitution of India. Different suggestions in this regard which have been made are:

- a. To put Population Control as a Directive Principle in Part IV of the Constitution;
- b. to put Family planning as a Fundamental Duty in Part IV A of the Constitution of India; and
- c. to put family planning as a fundamental right of the women in the Constitution. The essence of this recommendation was that an obligation should be imposed on

the Governmental machinery to provide the necessary means for family planning at the door-step of each family.

It is rather surprising that in that enlightened land of champions of human rights, namely the U.S.A. this elementary human right is being interfered with causing the new U.S. Attorney General, Janet Reno, to urge Congress to move swiftly to make violence or threats against abortion providers and clients a federal offence. She said it would not threaten freedom of speech, but was needed because "anti-abortion activists have increased the intensity of their activities from picketing to physical blockades, sabotage of facilities, stalking and harassing abortion providers, arson, bombing and the murder of a Florida doctor."⁷

The Washington Post had recently reported that anti-choice protestors were increasing pressure on doctors in the hope of putting them out of business. The Rhode Island branch of Planned Parenthood Federation of America (PPFA) has taken legal action against two anti-choice protestors who have been harassing and stalking Executive Director Barbara Baldwin.^{7a}

X. Population and law in India

Population regulation through law is a very sensitive area where law should tread with caution. But at the same time, if people do not have adequate social awareness about their responsibilities, it falls on law, being an instrument in the hands of the State for achieving its socio-economic objectives, to lay down the social norms which in course of time by persistent persuasion and in-built pressure will become fully acceptable to the people.⁸ In a country like India which is tradition-bound and where illiteracy is rampant, the role of law as a norm setter in population field becomes all the more important.

4. Entry 20A.

5. Both Central Parliament and State Legislatures can legislate on a subject under the Concurrent List but in case of conflict, the Central law shall prevail.

6. See "Law and Population Control in India", *Special Number of Health and Population (Perspectives and Issues)*, Journal of National Institute of Health and Family Welfare, New Delhi, 4 (Jan - June 1980), published Proceedings of a U.N. Project National Seminar, directed by P.S. Sangal.

7. See "USA Attorney General pushes abortion clinic bill", in *Open File* pp. 12-13 (June 1993).

7a. *Id.*, at 13.

8. See P.S. Sangal, "Law and Fertility Regulation" in *Health and Population : Perspectives and Issues*, 134 (1980).

It is good to note that law has been used in India for the sake of fertility regulation, both directly as well as indirectly.

XI. Law for direct regulation of fertility

In this country, as probably in most other countries, women want to get rid of unwanted pregnancies. Before 1972 this was not legal except in a case when it was necessary to save the life of the mother. Because of this reason many induced abortions used to take place in a clandestine manner. The result was that the health of the women concerned was in most cases put in great jeopardy because it were quacks and untrained persons who used to perform the operations and even then charged exorbitant fees. In some cases they even black-mailed the women concerned. This kind of a situation was sought to be remedied by the enactment of the Medical Termination of Pregnancy Act, 1971. This Act was called a health measure, though from the very beginning this is being used by ladies to get rid of unwanted pregnancies. But the fact that it was enacted professedly as a health measure, still keeps its position anomalous.

XII. Termination of pregnancy - when and by whom

This Act provides exceptions to the inhibiting provisions of the Indian Penal Code in regard to abortions and it says in section 3 (1) that notwithstanding anything contained in the Indian Penal Code, a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act. Then sub-section (2) provides that subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner:

- a. Where the length of the pregnancy does not exceed 12 weeks, or
- b. Where the length of the pregnancy exceeds 12 weeks but does not exceed 20 weeks, if not less than two registered medical practitioners are of opinion, formed in good faith, that
 - i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or *mental health* : or
 - ii) there is substantial risk that if the child was born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Then there are two explanations. Explanation 1 says that where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. Explanation 2 says that where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman. Sub-Section (3) then says that in determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

XIII. MTP in cases of emergency

Section 5 (1), however, lays down provisions when section 3 and 4 given above, will not apply. It lays down that the provisions of Section 4 and so much of the provisions of sub-section (2) of Section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered

medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman. Sub-Section 2 of Section 5 then says that notwithstanding anything contained in the Indian Penal Code, the termination of a pregnancy by a person who is not a registered medical practitioner shall be an offence punishable under that Code. There is also an explanation attached to this Section which says that for the purposes of this section, so much of the provisions of clause(d) of Section 2 as relate to the possession, by a registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply. Therefore, what this Section provides is that though in emergency cases in order to save the life of the woman, the medical termination of pregnancy can be effected even after 20 weeks' pregnancy by only one registered medical practitioner even though his clinic has not been approved for the purpose by the Government, and further that in such cases of emergency even the requirement of experience or training in gynaecology and obstetrics, which clause (d) of Section 2d of this Act prescribes for a registered medical practitioner under this Act, is waived, yet even then it does not authorise a person who is not a registered medical practitioner to perform this operation because of the enormous danger to the health of the woman concerned in case of operation by an unqualified person.

XIV. Law for influencing fertility indirectly

In the National Population Policy,⁹ the following statements, among others, were made:

1. Raising the age of marriage will not only

have demonstrable demographic impact, but will also lead to more responsible parenthood and help to safeguard the health of the mother and the child. It is well-known that very early pregnancy leads to higher maternal and infant mortality. It has, therefore, been decided that the minimum age of marriage should be raised to 18 for girls and 21 for boys and suitable legislation to this effect will be passed.

2. It has been represented by some States that while, on the one hand, we are urging them to limit their population, those States which do well in this field face reduction of representation in Parliament while those with weak performance in family planning, tend to get increasing representation. It is obviously necessary to remedy this situation. It has, therefore, been decided that the representation in the Central Parliament as well as in the State Legislature will be frozen on the basis of the 1971 census until the year 2001. This means in effect that the census counts of 1981 and 1991 will not be considered for purposes of adjustment of the House of the People and Legislative Assembly seats. Necessary Constitutional Amendments will be brought forward during the current year.
3. In a federal system, the sharing of Central resources with the States is a matter of considerable importance. In all cases where population is a factor, as in the allocation of central assistance to State Plans, devolution of taxes and duties and grants-in-aid, the population figures of 1971 will continue to be valid till the year 2001.

All these promised measures were implemented promptly.¹⁰

XV. Proper approach to problem of population - incentives and disincentives

A trend has recently started of disqualifying persons from membership of the

9. A Statement by the Union Minister of Health and Family Welfare, Karan Singh on April 16, 1976.

10. See Articles 82 and 170 *Constitution of India*.

legislatures as well as local bodies like the gram panchayats in case they have more than two children. This welcome trend has yet to strike roots in the Indian polity in any significant manner. The proper approach, in our opinion, will be to use law more and more for providing incentives as well as disincentives in order to control undue population growth.

A policy of incentives and disincentives as applicable to individuals has legal and ethical implications. It has to recognize, on the one hand, the right of the couple to decide freely and responsibly the number and spacing of their children and on the other, the obligation of a Welfare State to improve the physical quality of life of the people. The State has a responsibility both to the individual and to the society. While procreative freedom is a human right the consequences of reproduction (such as the care of the child) are increasingly socialized and become a social burden. The State in its endeavour to reach a level of development necessary for the welfare of the people has therefore a responsibility to modify the conditions under which couples make choices about child bearing.

Individual freedom of the citizen of today cannot be the only ethical imperative of a population control policy. While such a freedom has to be tempered by the concern for others, a child's right not to be born to a life of degradation must be respected equally. A State can therefore take pre-emptive action to prevent 'irresponsible' fertility behaviour in terms of societal norms. It would appear to be a minimum restriction on individual freedom if the government were to build gradually a positive attitude towards a small family norm by a judicious use of incentives and disincentives.

Admittedly, there would be initially implementation problems and possibly even litigation; but once the government's intentions are announced and the scheme becomes operational from a prescribed future date, it would itself have a tremendous educative and

motivational value and the problem areas could get narrowed progressively.

If we hesitate now to introduce 'soft' measures, the need for harder measures, a decade from now, may become inevitable.

Incentives and disincentives should be more personal to the parent and should not directly affect the rights of children.

An individual one time cash incentive scheme appears to have a better justification for acceptors of sterilisation because it being a terminal method the couples are required to make a clear decision about the size of the family and being a surgical method, it requires rest and after care.

It may be impractical to have a tight criterion of two-child norm rightaway because more than half of the births are of the third and higher birth order. A scheme of differential incentives for two and three-child families may have to be introduced so that communication element in the 'preference scale' may usher in the two-child norm progressively. An incentive of Rs. 500 for sterilisation acceptor with two children and Rs. 300 for acceptor with three children could be effective.

For regular employees who undergo sterilisation after two children, there could be alternative types of monetary incentives in lieu of lumpsum payment in the form of:

- (i) advance increment(s) in salary,
- (ii) ten per cent increase in pension,
- (iii) educational allowances for the two children,
- (iv) lower interest and preference in loans for housing or for purchase of transport,
- (v) prolonged maternity leave with pay for the mother.

The family planning programme needs to be strengthened in permanent and even more in spacing methods as the latter enable

family limitation at a younger and hence more consequential age for fertility reduction. From the point of view of cost-effectiveness, verifiability and evaluation, individual one-time incentives may apply to sterilisation but deferred incentive schemes are ideal for temporary methods as it enables continued check over the non-pregnancy status of the beneficiary. Adopting the experience of United Planters Association of India (UPASI), a certain amount of money could be deposited every month in an account to be opened in the name of the beneficiary of spacing method and the accumulated amount given when the woman reaches 45 years. If the beneficiary has a third child the accumulated money is reduced by half and in the event of a fourth child, totally forfeited.

Deferred incentive schemes are suitable for regular employees of the public sector, organised industries, plantations, mines, co-operative societies and education institutions. Bonus to female employees who do not utilise their maternity leave for a certain number of years, is another effective scheme to delay the first birth or space the second.

Besides monetary incentives to the public for adopting the two-child norm, there could be several non-monetary incentives which would have a high demonstration effect. Examples of such incentives are:

- (i) provision of educational bond to parents who limit to two children,
- (ii) preference for 50 per cent of seats in all educational institutions to the first and second child in a family,
- (iii) preference in allotment in public housing projects,
- (iv) preference in loans for establishing small scale industries in rural areas.

Every family adopting the two-child norm may be issued a *Green card* which would entitle it to get priority in medical

attention in government hospitals, in provision of electricity or water connections, or claim any of the incentives applicable to them. The demonstration effect of benefits derived from the *green card* could be an important source of motivation to those who come in contact with such families. Indeed, the possession of the *green card* should become a status symbol in society and build gradually a contracepting society in which family planning becomes a way of life and not an *ad-hoc* response to an official programme.

Besides incentives to individual acceptors, two other categories for whom incentives could be offered are the intermediaries (viz. the stockists and distributors of contraceptives and providers of service such as doctors and paramedics) and the change agents or motivators from the private and public sector. *While incentives to private change agents could be offered after a follow-up of the acceptors, any incentive to public functionaries should guard against their becoming mercenaries and agents of coercion and corruption.*

XVI. Disincentives also necessary

Some of the disincentives which are more personal to the parent and affect the child minimally are:

- (i) for regular employees no maternity leave benefits for the third or subsequent child,
- (ii) low priority in admission of third and subsequent children in educational institutions,
- (iii) cancellation of educational bond given to the first two children if the parent has a fourth child,
- (iv) a graded increase in fee charged in maternity hospitals depending on family size (beyond two) and family income,

- (v) low priority in public housing projects for parents with more than three children,
- (vi) low priority in grant of loans by banks for any purpose if the applicant has more than three children,
- (vii) for public servants, low priority in allotment of residential accommodation for parents having more than three children,
- (viii) for public servants, restriction of free medical attention or medical reimbur-

sement to the first three children.¹¹

XVII. Conclusion

We have shown above that law can play a very important role in the implementation of different facets of Agenda 21, even in the area of undue population growth, which is very important together with control of consumerism for saving the globe from the impending environmental disaster. Therefore the need is to use law more and more in the manner indicated above.



11. See a Study by the Family Planning Foundation, New Delhi entitled "*Incentives and Disincentives to Promote Family Planning*", (1982).