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COMMENTS ON:

THE UTTAR PRADESH POPULATION (CONTROL, STABILIZATION AND WELFARE) BILL 2021

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The Centre for Justice, Law & Society (CJLS) is a multidisciplinary research centre at Jindal Global Law School. CJLS is a collaborative endeavour of scholars, activists, and students that critically engage with contemporary issues at the intersection of law, justice, society, and marginalisation. CREA is a feminist international organisation based in the Global South and led by women from the Global South. CREA's work draws upon the inherent value of a rights-based approach to sexuality and gender equality. We are submitting our comments to the Uttar Pradesh Population (Control, Stabilization, and Welfare) Bill 2021 (*Draft Bill*) that was recently circulated by the State Law Commission for the State of Uttar Pradesh for suggestions and modifications by the public.

At the outset, we would like to note that the process of law-making undertaken by the State of Uttar Pradesh is not a consultative one. The Draft Bill has been introduced even prior to the publication of the data by the National Family Health Survey for the State of Uttar Pradesh and the period of one week for comments and consultations from the relevant stakeholders is demonstrative of the lack of public engagement in the legislative process. Further, the introduction of the Draft Bill by the Government of the State of Uttar Pradesh, at a time when the country is still recovering from the aftermath of a raging global pandemic that has put a strain on the public health infrastructure of the country, seems to be one that misrecognises the issues that most profoundly affect the lives of its citizens. At such a time, the Government must, instead, propose a measure that is rooted in the rationale of public welfare for all its citizens, especially the marginalised persons who have suffered the most under its mismanagement of the COVID-19 pandemic.

A policy guided by the rationale of public welfare and rights-based governance is one that would seek to refocus its attention from family planning—a euphemism for coercive population control—to addressing the sexual and reproductive health concerns of its citizens. Pertinently, the Population Policy 2021–2030 for the state of Uttar Pradesh released by the government on July 11th, 2021¹ envisages a scheme of rights-based initiatives and measures that are non-coercive. These call for improvements in the domain of sexual and reproductive healthcare to ensure that every individual has access to quality and comprehensive reproductive healthcare services. In contrast, the Draft Bill proposes a scheme of coercive measures that will have a negative impact on sexual and reproductive health and rights. Accordingly, the Uttar Pradesh Government must, along with withdrawing this Draft Bill, further increase public investment in healthcare from 6.3%,² address the 18% unmet need for contraceptives³ through non-coercive and non-permanent means, institute policy measures that counter the sociocultural and financial barriers preventing marginalised persons from accessing healthcare services, institutionalise courses concerning sex instead of population control, and financially empower its Accredited Social Health Activists (ASHAs) and Anganwadi workers to lead this

¹ Livemint, *Yogi Adityanath Unveils Population Policy 2021–2030 for Uttar Pradesh*, MINT (July 11, 2021), <https://www.livemint.com/politics/policy/yogi-adityanath-inaugurates-population-policy-2021-2030-for-uttar-pradesh-11625988696755.html>.

² Uttar Pradesh Budget Analysis 2021–2022, PRS LEGISLATIVE RESEARCH (Feb. 22, 2021), https://prsindia.org/files/budget/budget_state/uttar-pradesh/2021/State_Budget_Analysis_2021-22_Uttar_Pradesh.pdf.

³ Soutik Biswas & Aparna Alluri, *Uttar Pradesh Bill: The Myth of India's Population Explosion*, BBC (July 13, 2021), <https://www.bbc.com/news/world-asia-india-57801764>.

charge. As per *State of Punjab v. Ram Lubhaya Bagga*,⁴ Article 21 places a corollary obligation on the State to secure the health of its citizens under Article 47 by opening Government-run hospitals and health centres.

I. Introduction

In August 2017, a nine-judge Bench of the Supreme Court of India recognised the right to privacy as a fundamental right under Part III of the Constitution of India. The Court in *Retired Justice K.S. Puttaswamy v. Union of India*⁵ (*K.S. Puttaswamy*) recognised privacy as an inalienable right, grounded in values such as autonomy and dignity and held that the individual's right to privacy granted him autonomy over the most personal and intimate choices, including those pertaining to family and marriage.⁶ Pertinently, the decision in the *Puttaswamy* case specifically recognised the right of autonomy over reproductive choices as a facet of the right to life and liberty protected under Article 21 of the Constitution of India.⁷ The Court reiterated that reproductive rights include the right of a woman to decisional autonomy over carrying a pregnancy to term, to terminate a pregnancy, and to subsequently raise children; these were all within the realm of the right to privacy, dignity, and bodily integrity, which are constitutionally protected rights under Part III.⁸

In the given backdrop, the introduction of the Draft Bill violates the Government of Uttar Pradesh's obligations under the Constitution, and India's obligations under international law. Furthermore, it must be noted that the introduction of any law must take note of the significant structural barriers faced by marginalised persons in accessing public healthcare and welfare schemes. With respect to sexual and reproductive health and rights in India, there are visible challenges and systemic issues that adversely impact marginalised persons. These include barriers in accessing reproductive healthcare services as poor health infrastructure, stigma and discrimination in these healthcare facilities, lack of information on sexual and reproductive rights services and information and other structural impediments like the lack of comprehensive sexuality education and dissemination of information pertaining to immunisations, and lack of access to contraceptives and safe abortions, to name a few. The Draft Bill does not address any of these concerns, nor takes into account the disparate impact of such policies on already disadvantaged marginalised persons. It embodies a coercive approach to monitoring population growth, which has not only been shown to be ineffective but also disproportionately detrimental to marginalised persons such as women, transgender and gender variant persons, persons living with disability, Dalit and Adivasi persons, persons living in poverty, and the youth.

⁴ (1998) 4 SCC 117.

⁵ (2017) 10 SCC 1.

⁶ *Id.* (Misra, J., majority opinion).

⁷ *Id.* (Nariman, J. & Chelameswar, J., concurring opinions).

⁸ *Suchitra Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

In view of the above, we strongly object to The Uttar Pradesh Population (Control, Stabilization and Welfare) Bill 2021, and demand that the State Law Commission immediately withdraw it. We have noted our preliminary objections to Draft Bill in the next section of this response, followed by a detailed, clause-by-cause response to the provisions of the Draft Bill.

II. Preliminary Objections

A. **The Draft Bill violates the constitutionally protected sexual and reproductive rights of women, transgender, and gender variant persons and will have a detrimental impact on sexual and reproductive health.**

The sexual and reproductive rights of an individual are constitutionally protected, a position that has been reiterated by the Supreme Court of India in a plethora of cases. The courts in India have been at the forefront of securing reproductive rights for pregnant persons, and the jurisprudence of the Court has evolved consistently to offer expansive constitutional protections to the decisional autonomy of the pregnant person in matters concerning sexual and reproductive choices. Prior to the decision in *K.S. Puttaswamy*,⁹ the Supreme Court, in the case of *Suchitra Srivastava v. Chandigarh Administration*,¹⁰ held that the women's right to reproductive autonomy is a key aspect of the right to privacy and dignity. and the right to make reproductive choices emanates from the right to life under Article 21 of the Constitution. Further, in *Devika Biswas v. Union of India*,¹¹ the position taken by the court was that the right to reproductive health encompasses the capability to reproduce and the freedom to make informed, free and responsible choices about reproductive behaviour and the right to sexual and reproductive health is a significant and integral part of the right to health which has been held to be a constitutionally protected right.¹²

As noted above, the Supreme Court's judgement in *K.S. Puttaswamy*¹³ has led to a paradigm shift in the landscape of Indian law, especially relating to reproductive rights. It, unequivocally, affirmed the right to privacy as including decisional autonomy of the pregnant person. "Every individual in society irrespective of social class or economic status is entitled to the intimacy and autonomy which privacy protects. It is privacy as an intrinsic and core feature of life and personal liberty which enables an individual to stand up against a programme of forced sterilisation." Given the significant harms of the two-child

⁹ *K.S. Puttaswamy*, *supra* note 5.

¹⁰ *Suchitra Srivastava*, *supra* note 8.

¹¹ *Devika Biswas v. Union of India*, (2016) 10 SCC 726.

¹² *Id.*

¹³ *K.S. Puttaswamy*, *supra* note 5.

policy and the availability of less restrictive and more effective alternatives, the Draft Bill would also not pass the muster of proportionality laid down for testing State action that interferes with privacy. Additionally, it violates the right to equality of pregnant persons¹⁴. *Navtej Singh Johar v. Union of India*¹⁵ and *Joseph Shine v. Union of India*¹⁶ affirm the constitutional obligation to strike down laws such as the present Draft Bill, which reflects a discriminatory attitude towards the reproductive rights of pregnant persons and infringes upon their sexual autonomy.

Additionally, considering that Uttar Pradesh's sex ratio reflects a significant son preference.¹⁷ The cultural preference for male children, combined with the control of sexual and reproductive rights of women, transgender, and gender variants persons lying with their families, will further deprive pregnant persons of effective control over their reproductive health, thus leading to the violation of their fundamental rights of autonomy and liberty in matters concerning the family. A significant indicator of the likelihood of this adverse consequence is the data from other India States, where such a policy has been implemented, which already shows that it leads to a rise in children being given away for adoption and infant neglect.¹⁸

B. The Draft Bill makes access to basic utilities that each individual is entitled to as a matter of right contingent upon adherence to coercive policies and is therefore unconstitutional.

The Draft Bill bases its motivations on a false correlation between coercive control over population growth, and the provision of basic necessities such as food, water, shelter, education and economic security that are guaranteed by Part III of the Constitution, statutory law under the National Food Security Act 2013, and Supreme Court jurisprudence. Contrary to the Neo-Malthusian ideas that underlie the State's approach to population growth, it is the consumption rate of the middle and upper-class sections society that is responsible for the unsustainable depletion of resources.¹⁹ Far from being the cause of scarcity and unsustainable consumption—regardless of the size of their families—marginalised persons lack the bare minimum access to even be able to satisfy their basic needs.

¹⁴ Dipika Jain & Payal K. Shah, *Reimagining Reproductive Rights Jurisprudence in India: Reflections on the Recent Decisions on Privacy and Gender Equality from the Supreme Court of India*, 39 COLUMBIA JOURNAL OF GENDER AND LAW 1, (2020).

¹⁵ (2018) 10 SCC 1.

¹⁶ (2019) 3 SCC 39.

¹⁷ NITI Aayog, *Health States Progressive India: Reports on the Ranks of States and Union Territories*, http://social.niti.gov.in/uploads/sample/health_index_report.pdf.

¹⁸ Nirmala Buch, *Law of Two-Child Norm in Panchayats: Implications, Consequences and Experiences*, 40 ECONOMIC AND POLITICAL WEEKLY 2421, (2005).

¹⁹ Richard Ashltrom, *Affluence and Unsustainable Consumption Levels: The Role of Consumer Credit*, 1 CLEAR AND RESPONSIBLE CONSUMPTION, 2020.

Under the scheme of the Constitution, Parts III & IV in particular, the Government has a constitutional obligation to ensure that each individual enjoys the fundamental right to life as secured under Article 21 of the Constitution. It is the constitutional obligation of the State to provide adequate medical services to the people for “preserving human life,”²⁰ because the fundamental right to life includes the right to health.²¹ Additionally, the right to health is not merely a right to not be unwell but also the right to complete physical, and social well-being, which requires access to a system of healthcare that provides equal opportunities to attain the highest level of health.²² So, the right to health cannot be made contingent on family planning policies, but rather mandates the State to secure the *de facto* right to health of all its citizens.

A notable aspect of the policy in this context is the incentive to provide paid maternity or paternity leave, as the case may be, for one year for persons adherent to the two-child norm. It is alarming that Uttar Pradesh is extending paid paternity and maternity leave, for one year, to the parents for not exercising their reproductive rights. However, there is no paternity leave, for any duration (with or without pay), available under the Code on Social Security 2020. Further, it is settled law that fundamental rights, enshrined as they are as matters of public policy, cannot be subjected to the Doctrine of Waiver, as that would violate constitutional protections towards their fulfilment.²³ The Draft Bill is, therefore, unconstitutional for the reason that it makes welfare measures and benefits available to persons only upon the meeting of conditions, which, essentially, result in the waiver of their inviolable fundamental rights.

C. The adverse impact of the Draft Bill will disproportionately be borne by the most vulnerable and marginalised groups.

The use of coercive population control measures is counterproductive, because they can have a disproportionately negative impact on already marginalised groups, skew demographic distributions and cause other similar negative consequences.²⁴ In fact, the Central Government—in its Affidavit submitted to the Supreme Court on 7 December 2020—has expressed its disinclination towards the use of coercive family planning laws that impose a two-child norm, as they will, inevitably, lead to disastrous consequences for the demographic distribution.²⁵ During the National Emergency, the preoccupation of public health officials with

²⁰ Paschim Banga Khet Mazdoor Samity v. State of West Bengal, (1996) 4 SCC 37.

²¹ Devika Biswas, *supra* note 11.

²² Navtej Singh Johar, *supra* note 15.

²³ Behram Khrushed Pesikaka v. State of Bombay, AIR 1955 SC 123.

²⁴ Dinesh C. Sharma, *India’s Sterilisation Scandal*, 384 THE LANCET E68, (2014).

²⁵ Mehal Jain, *Population Control—Any Coercion To Have Specific Number Of Children Is Counter-Productive, Leads To Demographic Distortions: Centre Tells Supreme Court*, LIVE LAW (Dec. 13, 2020), <https://www.livelaw.in/top-stories/supreme-court-population-control-family-planning-welfare-public-health-centre-ashwani-upadhyay-167168?from-login=490084>.

sterilisation targets led to the forceful sterilisation of already marginalised persons, such as the youth, hospitalised patients, prison inmates, and homeless persons.²⁶ No attention was even paid to the age, fecundity, health status, history of already beings sterilised, or any other criteria that might make the process hazardous for the individual beings sterilised.²⁷ Approximately, eleven million individuals are estimated to have been sterilised during this period, and another one million fitted with intrauterine devices (IUDs).²⁸ The majority of the targets of forced sterilisation, during this period, were men living in poverty,²⁹ who revolted to vote-out the Government in the elections that immediately followed the end of the Emergency.³⁰

The adverse effects of coercive population control measures on marginalised persons can further be illustrated by citing the example of the United States. The United States has its own sinister history of forced sterilisations. As early as 1907, the United States had instituted a public policy that gave the Government the right “to sterilise unwilling and unwitting people.” These policies listed the “insane,” the “feeble-minded,” the “dependent,” and the “diseased” as incapable of regulating their own reproductive abilities, therefore justifying Government-forced sterilisations. Legitimising sterilisation for certain groups led to further exploitation, as group divisions were drawn along race and class lines.³¹ Forced sterilisations continue to remain a concern in the country, with various State Governments targeting prisoners in a manner that echoes earlier eugenic policies intended to eliminate criminal behavior. Tennessee only banned the coercive sterilisation of inmates last year, while California passed legislation to stop prisons from non-consensually sterilising inmates only in 2014.³² More than a quarter of tubal ligation sterilisation surgeries in Californian prisons from 2004 to 2013 were carried out without the prisoner’s consent.³³ The less fortunate and poorly educated continue to be denied the reproductive freedoms available to other women, and entitled by all.

Similarly, Puerto Rico’s 1937 colonial-era legislation, which sought to supposedly counter growing unemployment and poverty, led to the sterilisation of over one-third of the country’s women of child-bearing age.³⁴ The “target

²⁶ Chelsea Follett, *Neo-Malthusian and Coercive Population Control in India and China*, CATO INSTITUTE (July 21, 2020), <https://www.cato.org/sites/cato.org/files/2020-07/pa-897-updated.pdf>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Population Control: Is it a Tool of the Rich?*, BBC (Oct. 28, 2011), <https://www.bbc.com/news/magazine-15449959>.

³⁰ Abhijit, *The Dragon and the Elephant*, STRAY THOUGHTS (July 11, 2021), <http://cognitionstoday.blogspot.com/2021/07/the-dragon-and-elephant.html>.

³¹ Kathryn Krase, *The History of Forced Sterilization in the United States*, OUR BODIES OUR SELVES (Oct. 1, 2014), <https://www.ourbodiesourselves.org/book-excerpts/health-article/forced-sterilization/>.

³² Chelsea Follett, *The Cruel Truth about Population Control*, THE NATIONAL INTEREST (June 13, 2019), <https://nationalinterest.org/feature/cruel-truth-about-population-control-62467>.

³³ *Id.*

³⁴ Bonnie Mass, *A Case Study of Population Control*, 4 LATIN AMERICAN PERSPECTIVES 66, (1977).

population” for this policy were openly and dissimilatory identified as those “who suffer most from a condition of excess population (...) the groups with the least income and smallest amount of education.”³⁵ As per the Committee for Puerto Rican Decolonisation 1974, completely in line with this outlook, the campaigns were tied to welfare programs and factories, so as to target the most marginalised sections of society.³⁶

D. The Draft Bill’s reliance on coercive population policies to reduce the TFR is misguided.

The Total Fertility Rate (TFR) in Uttar Pradesh has been steadily declining, without the use of measures proposed under the Draft Bill, since at least 2000—when it was 4.7.³⁷ It stands at 2.7 as of 2015–2016,³⁸ and is projected to fall to the level of the ideal replacement rate (2.1) by 2025 as per the 2019 Report of the Technical Group on Population Projections.³⁹ The inability to see the immediate effects of this decline in TFR be reflected in the population growth is a result of a phenomenon that demographers refer to as “demographic momentum.” Due to the exponential population growth of the past few decades, a significant proportion of the populace now consists of a younger generation that falls within the reproductive age group.⁴⁰ Therefore, coercively restricting the number of children that a couple can conceive will not reap the substantial rewards that this policy seeks, because the cause of the momentum is more couples having children and not couples having more children. Rather than slowing down this momentum, the Draft Bill is likely to worsen its trajectory as families will have more children in quick succession to evade the policy, and reduce birth spacing. In China, twin births rose by at least 33% as families attempted to pass children born in quick succession as twins, and women used fertility drugs to improve the odds of birthing twins.⁴¹

Accordingly, China’s coercive one-child policy was not the main, let alone the sole, factor responsible for the drop in its TFR. In fact, contrary to the putative understanding of this population control policy, it was China’s socioeconomic development that was the driving force behind the decline in its fertility rates.⁴² This

³⁵ *Id.*

³⁶ *Id.*

³⁷ NITI Aayog, *Total Fertility Rate (TFR) (Birth/Woman)*, <http://niti.gov.in/content/total-fertility-rate-tfr-birth-woman>.

³⁸ International Institute for Population Sciences, *National Family Health Survey (NFHS-4), India, 2015–2016: Uttar Pradesh*, <http://rchiips.org/nfhs/NFHS-4Reports/UttarPradesh.pdf>.

³⁹ National Commission on Population, *Population Projections for India and States 2011–2036*, https://nhm.gov.in/New_Updates_2018/Report_Population_Projection_2019.pdf.

⁴⁰ Mohan Rao, *Population Policies and the Two-Child Norm: A Note*, DR. B.R. AMBEDKAR UNIVERSITY DELHI, <https://aud.ac.in/uploads/1/admission/admissions2015/mohanrao.pdf>.

⁴¹ Follett, *supra* note 26.

⁴² Yong Cai, *China’s Below-Replacement Fertility: Government Policy or Socioeconomic Development?*, 36 POPULATION AND DEVELOPMENT REVIEW 419, (2010).

finding is in consonance with the global consensus amongst economists, and demographers that improved living standards, rising opportunities for non-agrarian employment, higher family income, improved educational levels for women, and better access to healthcare lead to lower TFR levels by changing perceptions about the costs and benefits of having children.⁴³ Specifically with respect female literacy levels, studies have shown that women having studied up to the primary level have 0–30% fewer children than women with no education, and women having studies up to the secondary level have 10–15% fewer children than those with primary educational qualifications.⁴⁴ Uttar Pradesh's neighbour, Bihar, has also recognised the benefit of promoting education for females on its population growth.⁴⁵

Uttar Pradesh's data already reflects these correlations between socioeconomic development, and the TFR. As of 2018, the TFR for those with no formal education was 3.3 (rural) and 3.2 (urban) in the State, while the indicator fell to 2.8 (rural) and 2.1 (urban) for females that had studied up to Grade XII.⁴⁶ Although positive, these figures remain below ideal levels because Uttar Pradesh has failed to adequately fund the provision of necessities to the most vulnerable portions of its population, and, accordingly, satisfy its obligations under Article 38, 39, 41, 42, 43, 45, and 47 of the Directive Principles of State Policy.⁴⁷ On NITI Aayog's Health Index, it ranks last amongst the category of 21 Larger States.⁴⁸ The State has also performed especially poorly with respect to health indicators relating to infant health. Its neonatal mortality rate is 30 deaths per 1,000 live births, its under-five mortality rate is 47 deaths per 1,000 live births, and its full immunisation coverage is 84.68%.⁴⁹ Accordingly, families, especially from economically and socially disadvantaged communities, tend to have more children, because infant survival rate remains low, and a larger family is understood to provide greater economic support.⁵⁰

E. The Draft Bill also contravenes India's obligations under International Human Rights Law.

⁴³ Steven W. Sinding, *Population, Poverty and Economic Development*, 364 PHILOSOPHICAL TRANSACTIONS OF THE ROYAL SOCIETY 3023, (2009).

⁴⁴ Jungho Kim, *Female Education and its Impact on Fertility: The Relationship is more Complex than One May Think*, 228 IZA WORLD OF LABOUR 1, (2016).

⁴⁵ Subhash Pathak, *Law Alone Won't Help, says Nitish Kumar After UP Floats Population Control Bill*, HINDUSTAN TIMES (July 12, 2021), <https://www.hindustantimes.com/cities/patna-news/law-alone-won-t-help-says-nitish-kumar-after-up-floats-population-control-bill-101626100488413.html>.

⁴⁶ Office of the Registrar General and Census Commissioner, *Sample Registration System Statistical Report 2018*, https://censusindia.gov.in/Vital_Statistics/SRS_Report_2018/SRS_Statistical_Report_2018.pdf.

⁴⁷ *Uttar Pradesh Budget Analysis*, *supra* note 2.

⁴⁸ NITI Aayog, *supra* note 17.

⁴⁹ *Id.*

⁵⁰ Jagdish Rattanani, *Having the Last Word on Population Control*, THE HINDU (July 15, 2019), <https://www.thehindu.com/opinion/lead/having-the-last-word-on-population-control/article28701719.ece>.

India's obligations under international law, consistent with the spirit of the fundamental rights, should also be read into the interpretation of Part III of the Constitution.⁵¹ Parents have a basic human right to freely determine the number and spacing of their children, and receive adequate education and means to express this facet of their reproductive rights under international law.⁵² The inalienable right to development does not allow States to invoke it for violating international human rights,⁵³ so reproductive healthcare programmes should provide individuals with the widest range of services without any coercion.⁵⁴ In fact, the Ministry of Health & Family Welfare, National Human Rights Commission, and United Nations Population Fund have jointly affirmed that "the propagation of a two-child norm and coercion or manipulation of individual fertility decisions through the use of incentives and disincentives violate the principle of voluntary informed choice and the human rights of the people, particularly the rights of the child."⁵⁵ Accordingly, through its constant, and uniform usage, the right to reproductive choice, especially with respect to population policies, is a facet of customary international law as well.⁵⁶

It is pertinent to take note of the fact the efficacy of the two-child norm as a means of population control has not been independently evaluated and demonstrated.⁵⁷ On the contrary, prior attempts at introducing such coercive, restrictive policies have often resulted in the revocation of the two-child norm owing to the resulting adverse consequences for sexual and reproductive health rights and the rights of women and children. To illustrate this point, the two-child policy has been introduced in a total of 12 States including the 4 States of Haryana (1994), Himachal Pradesh (2000), Madhya Pradesh (2000) and Chhattisgarh (2000), where it was subsequently revoked.⁵⁸

This policy of non-coercive, non-targeted regulation of population growth was, in fact, adopted by the Atal Bihari Vajpayee-Government in the National Population Policy 2000. Uttar Pradesh's TFR has witnessed a decline from 4.7 in

⁵¹ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

⁵² United Nations, *Final Act of the International Conference on Human Rights, Tehran*, 63 AMERICAN JOURNAL OF INTERNATIONAL LAW 674, article 16 (1969); Report of the World Population Conference, article 14(f), U.N. Doc. E/CN.60/19 (1974); Convention on the Elimination of all forms of Disclination Against Women article 16(e), Dec. 18, 1979, 1249 U.N.T.S. 13.

⁵³ Report of the International Conference on Population and Development, principle 3, U.N. Doc. A/CONF.171/13/Rev.1 (1994).

⁵⁴ *Id.* at principle 8.

⁵⁵ National Colloquium on Population Policy—Development and Human Rights, (Jan., 2003), <https://india.unfpa.org/sites/default/files/pub-pdf/ColloquiumReport.pdf>.

⁵⁶ J.M. Bracken, *Respecting Human Rights in Population Policies: An International Customary Right to Reproductive Choice*, 6 INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW 197, (1995).

⁵⁷ Jagriti Chandra, *Efficacy oftwo-child norm has never been demonstrated, says Population Foundation of India's Poonam Muttreja*, THE HINDU (June 30th, 2021), <https://www.thehindu.com/news/national/efficacy-of-two-child-norm-has-never-been-demonstrated-says-population-foundation-of-indias-poonam-muttreja/article35061693.ece>.

⁵⁸ *Id.*

2000,⁵⁹ to 2.7 as of 2015–2016.⁶⁰ Additionally, it has seen an improvement in health indicators such as a rise in the maternal mortality ratio from 216 (2015–2017) to 197 (2016–2018),⁶¹ and a drop in the infant mortality ratio from 84 (2000) to 41 (2017).⁶² However, the Government, through its Draft Bill, will reverse these efforts, and cause a counterproductive effect on, both, its declining population growth and rising socioeconomic prosperity.

III. Clause-by-Clause Objections

Clause No.	Clause Text	Objection
2	The provision of this Act shall apply to a married couple where the boy is not less than twenty-one years of age and the girl is not less than eighteen-years of age.	<p>Firstly, restricting the application of this Draft Bill to married couples is in contravention of the Supreme Court's recognition of non-marital, live-in relationships in <i>S. Khushboo v. Kanniamal</i>.⁶³ So, any distinction drawn between marital and non-marital relationships would be arbitrary, under Article 14, and would have no rational nexus to the purpose of the Draft Bill.</p> <p>Secondly, it fails to account for the rights of divorced parents, and their subsequent spouses. Those divorced parents that have had two children with a prior spouse will not only be barred from having further children with their re-married spouse but will also prevent such spouse from having any children.</p> <p>Thirdly, it ignores the rights of single parents, and their children. Again, for the purposes of Article 14, the distinction between single parents, and couples is</p>

⁵⁹ NITI Aayog, *supra* note 37.

⁶⁰ International Institute for Population Sciences, *supra* note 38.

⁶¹ Office of the Registrar General, *Special Bulletin on Maternal Mortality in India 2007–09*, (June, 2011), https://www.censusindia.gov.in/vital_statistics/SRS_Bulletins/Final-MMR%20Bulletin-2007-09_070711.pdf.

⁶² Office of the Registrar General, *Sample Registration System Bulletin*, (May, 2019), https://censusindia.gov.in/vital_statistics/SRS_Bulletins/SRS_Bulletin-Rate-2017- May_2019.pdf.

⁶³ (2010) 5 SCC 600.

		arbitrary, and has no rational nexus to the object sought.
3(5)	“Married couple” means a married couple, the marriage of which has been solemnized legally and where the boy is not less than twenty-one years of age and the girl is not less than eighteen years of age.	The restriction of marriage to only a “boy” and a “girl” is in clear violation of the Supreme Court’s judgement in <i>National Legal Services Authority v. Union of India</i> . ⁶⁴ Therein, the Court rejected the binary framing of gender along the lines of the male/female binary, which excludes transgender and gender variant persons, and recognised the right of each individual to self-identify their gender identity. Additionally, in subsequent decisions, the courts have extended this principle to grant socioeconomic rights to transgender citizens. In <i>Arunkumar v. Inspector General of Registration</i> , ⁶⁵ the Court recognised the right of a transgender woman to legally solemnise her marriage with a cis-gender man.
3(11)	“Two-child norm” means an ideal size of a family consisting of a married couple with two children.	<p>Firstly, the treatment of a heteronormative family with two children as the ideal size, and composition of the family strengthens heteropatriarchal notions. It disincentivises, and socially stigmatises other familial arrangements that either consist of non-binary partners, and/or a different number of children. In as much as having one child differs from the proposed ideal, its dis-incentivisation is also against the Stated object of the Draft Bill.</p> <p>Secondly, under international law,⁶⁶ individuals have a right to determine the number of children that they conceive. So, no such coercive limitation can be placed upon the choice of such citizens to procreate by the State. The same has also been upheld by the Supreme Courts in K.S.</p>

⁶⁴ (2014) 5 SCC 438.

⁶⁵ 2019 SCC OnLine Mad 8779.

⁶⁶ United Nations, *supra* note 52.

		<p><i>Puttaswamy</i>.⁶⁷ The inalienable right to privacy is grounded in autonomy, and dignity. So, an individual has decisional autonomy over their personal choices relating to reproduction, that is, not only whether or not to reproduce but also how many children they may conceive. These reproductive choices are protected as a facet of the fundamental right to life and liberty, under Article 21 of the Constitution.</p>
4	<p>Notwithstanding anything contained in any other law for the time being in force, the public servants under the control of State Government who adopts two-child norm by undergoing voluntary sterilization operation upon himself or spouse, shall be given the following incentives:</p> <ul style="list-style-type: none"> a) Two additional increments during the entire service; b) Subsidy towards purchase of plot or house site or built house from Housing Board or Development Authority, as may be prescribed; c) Soft loan for construction or purchasing a house on nominal rates of interest, as may be prescribed; d) Rebate on charges for utilities such as water, electricity, water, house tax, as may be prescribed; e) Maternity or as the case may be, paternity leave of 12 months, with full salary and allowances; 	<p>Firstly, associating incentives, and disincentives with sterilisation amounts to coercion, as it forces individuals to undergo sterilisation to avail access to the basic necessities that are essential for a life with dignity under Article 21. This will have a disproportionately negative impact on socially and economically disadvantaged communities, who already lack adequate access to such facilities, and will push them into further marginalisation. The Supreme Court has, explicitly, held that the choice to undergo sterilisation is a significant aspect of reproductive rights, and must be based on informed consent that is free from any coercion.⁶⁸ It has also affirmed that such sterilisation initiatives are often accompanied by targets for Government employees, which, aside from being unconstitutional, greatly affect the reproductive freedoms of the most marginalised persons whose socioeconomic circumstances leave them with no meaningful choice.⁶⁹</p> <p>Secondly, the foundation of any family planning initiative must be based on free choice and reproductive autonomy. The <i>Puttaswamy</i>⁷⁰ understanding of</p>

⁶⁷ K.S. Puttaswamy, *supra* note 5.

⁶⁸ Devika Biswas, *supra* note 11.

⁶⁹ *Id.*

⁷⁰ K.S. Puttaswamy, *supra* note 5.

	<p>f) Three per cent increase in the employer's contribution Fund under national pension scheme;</p> <p>g) Free health care facility and insurance coverage to spouse; and</p> <p>h) Such other benefits and incentives, as may be prescribed.</p>	<p>proportionality, and decisional autonomy requires the citizens to be provided with a variety of other birth control methods that are less restrictive, less coercive, and better suited to the health status of each individual. This will also increase compliance with the policy. The State must therefore ensure that each individual is provided with the necessary and correct information to enable them to make free and informed choices and that a basket of choice is available when selecting contraceptive measures so that sexual and reproductive health services are provided within a broader rights-based framework. The Draft Bill cannot, and should not enforce only one contraceptive method for satisfying its policy agenda, especially since the State already has at least an 18% unmet need for contraceptives.⁷¹</p> <p>Thirdly, the sterilisation requirement is only facially neutral, and voluntary. Given that the final word with respect to reproductive decisions lie with the husband, misinformation regarding vasectomies and its effect on social ideas of masculinity remain widespread,⁷² and only 17% of health centres in Uttar Pradesh provide non-surgical vasectomies,⁷³ the burden for undergoing sterilisation will, inevitably, fall solely on the woman. Uttar Pradesh's existing data already reflects this focus on female sterilisation, whereby, male sterilisation only accounts for 0.1% of all family planning, while female sterilisation account for 17.3%.⁷⁴ Additionally, women from marginalised</p>
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⁷¹ Biswas & Alluri, *supra* note 3.

⁷² Yusra Husain, *Vasectomy Fear: More Women go under Scalpel*, THE TIMES OF INDIA (July 11, 2019), <https://timesofindia.indiatimes.com/city/lucknow/vasectomy-fear-more-women-go-under-scalpel/articleshow/70166024.cms>.

⁷³ *Barriers to Family Planning Use in Rural Uttar Pradesh*, STATE INNOVATIONS IN FAMILY PLANNING SERVICES AGENCY, <http://www.sifpsa.org/family-planing.php>.

⁷⁴ International Institute for Population Sciences, *supra* note 38.

		<p>groups continue to be sterilised without their consent in Uttar Pradesh, and, that too, under unsafe conditions.⁷⁵</p> <p>Fourthly, it is the constitutional obligation of the State to provide adequate medical services to the people for preserving human life,⁷⁶ because the fundamental right to life includes the right to health.⁷⁷ The Supreme Court of India, in <i>C.E.S.C Limited v. Subhash Chandra Bose</i>,⁷⁸ held that the right to health, as a fundamental right under Article 21, “ is the most imperative constitutional goal, whose realisation requires the interaction of various socio-economic factors.” Additionally, the right to health is not merely a right to not be unwell but, more so, the right to complete physical and social well-being, which requires access to a system of healthcare that provides equal opportunities to attain the highest level of health.⁷⁹ So, the right to health cannot be made contingent on family planning policies, and mandates the State to secure the <i>de facto</i> right to health of all its citizens.</p>
5	<p>Notwithstanding anything contained in any other law for the time being in force, the public servant, who have only one-child and undergo voluntary sterilization operation upon himself or spouse, in addition to the incentives provided under Section 4, shall be given the following incentives:</p> <p>a) Two additional increments during the entire services</p>	<p>This provision places an even higher burden upon the public servant by requiring the said person to have no more than one child. Associating social and financial incentives with reproductive decision-making amounts to coercion, as it forces individuals to only have one child and undergo sterilisation to be able to continue to access these resources. Such policies will disproportionately affect those sections of the society who, through their</p>

⁷⁵ Sandhya Srinivasan, *Sterilisation Deaths are the Natural Consequence of India's Obsession with Population Control*, SCROLL (Sep. 16, 2016), <https://scroll.in/pulse/816656/sterilisation-deaths-are-the-natural-consequence-of-indias-obsession-with-population-control>.

⁷⁶ Paschim Banga Khet Mazdoor Samity v. State of West Bengal, (1996) 4 SCC 37.

⁷⁷ Devika Biswas, *supra* note 11.

⁷⁸ (1992) 1 SCC 441.

⁷⁹ Navtej Singh Johar, *supra* note 15.

	<p>Provided that the additional increments provided shall be in addition to the increments provided under clause (a) of Section 4;</p> <ul style="list-style-type: none"> b) Free health care facility and insurance coverage to the single child till he attain the age of twenty years; c) Preference to single child in admission in all education institutions, including but not limited to Indian Institute of Management, All India Institute of Medical Science etc.; d) Free education up-to graduation level; e) Scholarship for higher studies in case of a girl child; f) Preference to single child in Government jobs; and g) Such other benefits and incentives, as may be prescribed. 	<p>marginalisation, have been denied access to healthcare, education, and Government employment. The Supreme Court has, explicitly, held that the choice to undergo sterilisation is a significant aspect of reproductive rights, and must be based on informed consent that is free from any coercion.⁸⁰ It has also affirmed that such sterilisation initiatives are often accompanied by targets for Government employees, which, aside from being unconstitutional, greatly affect the reproductive freedoms of the most marginalised groups whose socioeconomic circumstances leave them with no meaningful choice.⁸¹ Therefore, rather than applying coercion to incentivise/disincentivise citizens from accessing the basic necessities required for a life with dignity,⁸² the State Government must remove the structural barriers that prevent marginalised persons from accessing them as a matter of right.</p>
6	<p>(1) Notwithstanding anything contained in any other law for the time being in force, any individual other than public servant, who adopts two-child norm by undergoing voluntary sterilization operation upon himself or spouse, shall be given the incentives and benefits as provided under clause (c), (d), (e) and (h) of Section 4, and such other</p>	<p>Firstly, associating incentives, and disincentives with sterilisation amounts to coercion, as it forces individuals to undergo sterilisation to be able to continue to access the basic necessities that are essential for a life with dignity under Article 21. This will have a disproportionately negative impact on socially and economically disadvantaged communities, who already lack adequate access to such facilities, and will push them into further marginalisation. The Supreme Court has, explicitly, held that the choice to undergo sterilisation is a significant aspect of reproductive rights, and must be based on informed consent that</p>

⁸⁰ Devika Biswas, *supra* note 11.

⁸¹ *Id.*

⁸² People's Union for Civil Liberties v. Union of India, (2013) 2 SCC 688.

		<p>benefits and incentives, as may be prescribed.</p> <p>(2) Notwithstanding anything contained in any other law for the time being in force, any individual other than the public servant, who have only one-child and undergo voluntary sterilization operation upon himself or spouse, in addition to the incentives provided under sub-section (1) of this section, shall be given the incentives and benefits as provided under clause (b), (c), (d), (e) and (f) of Section 5, and such other benefits and incentives, as may be prescribed.</p>	<p>is free from any coercion.⁸³ It has also affirmed that such sterilisation initiatives are often accompanied by targets for Government employees, which, aside from being unconstitutional, greatly affect the reproductive freedoms of the most marginalised persons whose socioeconomic circumstances leave them with no meaningful choice.⁸⁴</p> <p>Secondly, the foundation of any family planning initiative is free choice and reproductive freedom, which necessitate that the citizens must be provided with a wide choice in terms of making their own reproductive decisions. The <i>Puttaswamy</i>⁸⁵ understanding of proportionality, and decisional autonomy requires the citizens to be provided with a variety of other birth control methods that are less restrictive, less coercive, and better suited to the health status of each individual. This will also increase compliance with the policy. The State must therefore ensure that each individual is provided with the necessary and correct information to enable them to make free and informed choices and that a basket of choice is available when selecting contraceptive measures so that sexual and reproductive health services are provided within a broader rights-based framework. The Draft Bill cannot, and should not enforce only one contraceptive method for satisfying its policy agenda, especially since the State already has at least an 18% unmet need for contraceptives.⁸⁶</p> <p>Thirdly, the sterilisation requirement is only facially neutral, and voluntary. Given that the final word with respect to reproductive decisions lie with the</p>
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⁸³ Devika Biswas, *supra* note 11.

⁸⁴ *Id.*

⁸⁵ K.S. Puttaswamy, *supra* note 5.

⁸⁶ Biswas & Alluri, *supra* note 3.

	<p>husband, misinformation regarding vasectomies and its effect on social ideas of masculinity remain widespread,⁸⁷ and only 17% of health centres in Uttar Pradesh provide non-surgical vasectomies,⁸⁸ the burden for undergoing sterilisation will, inevitably, fall solely on the woman. Uttar Pradesh's existing data already reflects this focus on female sterilisation, whereby, male sterilisation only accounts for 0.1% of all family planning.⁸⁹ Additionally, women from marginalised groups continue to be sterilised without their consent in Uttar Pradesh, and, that too, under unsafe conditions.⁹⁰</p> <p>Fourthly, it is the constitutional obligation of the State to provide adequate medical services to the people for preserving human life,⁹¹ because the fundamental right to life includes the right to health.⁹² The Supreme Court of India, in <i>C.E.S.C Limited v. Subhash Chandra Bose</i>,⁹³ held that the right to health, as a fundamental right under Article 21, "is the most imperative constitutional goal, whose realisation requires the interaction of various socio-economic factors." Additionally, the right to health is not merely a right to not be unwell but, more so, the right to complete physical and social well-being, which requires access to a system of healthcare that provides equal opportunities to attain the highest level of health.⁹⁴ Therefore, the right to health cannot be made contingent on family planning policies, and mandates the State to secure the <i>de facto</i> right to health of all its citizens.</p>
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⁸⁷ Husain, *supra* note 72.

⁸⁸ *Barriers to Family Planning Use in Rural Uttar Pradesh*, *supra* note 73.

⁸⁹ International Institute for Population Sciences, *supra* note 38.

⁹⁰ Srinivasan, *supra* note 75.

⁹¹ Paschim Banga Khet Mazdoor Samity, *supra* note 76.

⁹² Devika Biswas, *supra* note 11.

⁹³ C.E.S.C. Limited, *supra* note 78.

⁹⁴ Navtej Singh Johar, *supra* note 15.

		<p>Lastly, this provision places an even higher burden by requiring the said person to have no more than one child. Associating social and financial incentives with reproductive decision-making amounts to coercion, as it forces individuals to only have one child and undergo sterilisation to be able to continue to access these resources. Such policies will disproportionately affect those sections of the society who, through their marginalisation, have been denied access to healthcare, educations, and Government employment. The Supreme Court has, explicitly, held that the choice to undergo sterilisation is a significant aspect of reproductive rights, and must be based on informed consent that is free from any coercion.⁹⁵ It has also affirmed that such sterilisation initiatives are often accompanied by targets for Government employees, which, aside from being unconstitutional, greatly affect the reproductive freedoms of the most marginalised groups whose socioeconomic circumstances leave them with no meaningful choice.⁹⁶ Therefore, rather than applying coercion to incentivise/d disincentivise citizens from accessing the basic necessities required for a life with dignity,⁹⁷ the State Government must remove the structural barriers that prevent marginalised persons from accessing them as a matter of right.</p>
7	Notwithstanding anything contained in this Act or any other law for the time being in force, a couple living below the poverty line, having only one-child and undergo voluntary sterilization operation upon himself or spouse	The stricter requirement, albeit in the beguiling form of a “special benefit,” is being coercively, and maliciously imposed on couples living below the poverty line. There is no intelligible differentia, for the purposes of population growth, between couples below, or above the poverty line,

⁹⁵ Devika Biswas, *supra* note 11.

⁹⁶ *Id.*

⁹⁷ People’s Union for Civil Liberties, *supra* note 82.

	<p>shall be eligible for payment from the Government for a one-time lump-sum amount of rupees eighty thousand if the single child is a boy, and rupees one lakh if the single child is a girl.</p>	<p>especially not such that they should be subject to a stricter norm than the two-child one. Rather than addressing the issue to poverty—high rates of infant mortality, economic disparity, inequitable access to healthcare and nutrition, and lack of access to education—the policy targets this section on the basis of stereotypes.⁹⁸</p>
8	<p>Whosoever, after the commencement of this Act, in contravention of two-child norm procreates more than two children shall be ineligible to avail any incentives and benefits provided under Section (4) to Section (7), and, in addition thereto, shall be subject to additional disincentives like:</p> <ul style="list-style-type: none"> a) Debarring from benefit of Government sponsored welfare schemes; b) Limit of ration card Units up to Four; c) Other disincentives as may be prescribed. 	<p>Firstly, the disincentives assigned relate to the fulfilment of the fundamental rights of Uttar Pradesh's citizens, under Article 21's guarantee of a life with equal dignity. Fundamental rights reflect concerns of essential public policy, and welfare, so they cannot be subject to the doctrine of waiver.⁹⁹ Associating these rights to population control, and withdrawing access thereto, would violate the constitutional protections towards their fulfilment.</p> <p>Secondly, such disincentives will disproportionately affect economically disenfranchised communities, who cannot afford financial distinctives,¹⁰⁰ and rely on welfare schemes for their day-to-day survival.</p> <p>Thirdly, the fundamental right to life, under Article 21, includes the right to food, and right against malnutrition; these are inexplicably linked to a life with dignity, and constitutionally guaranteed access to the bare necessities, as per the law as laid down by the Supreme Court in the case of <i>People's Union for Civil Liberties v. Union of India</i>.¹⁰¹ This right has also been granted statutory recognition under the National Food Security Act 2013, the enactment of which led to a paradigm shift by reframing</p>

⁹⁸ Alaka M. Basu, *Make No Mistake, a Population Control Policy will Target the Marginalised*, THE WIRE (Feb. 13, 2020), <https://thewire.in/rights/india-population-control-policy>.

⁹⁹ Behram Kurshid Pesikaka, *supra* note 23.

¹⁰⁰ Follett, *supra* note 26.

¹⁰¹ People's Union for Civil Liberties, *supra* note 82.

		<p>the issue of food security under a rights-based framework rather than a welfare measure. The Government cannot shrug off its responsibility to ensure food security for the most vulnerable sections of its citizenry—those dependant on the ration card.</p> <p>Fourthly, Article 39 of the Directive Principles of State Policy requires the Uttar Pradesh Government to ensure that children are not abused, that they are given facilities to develop in a healthy manner, and are protected against moral and material abandonment. It must also, under Article 45, endeavour to provide early childhood care. However, by denying a third child born into a family, out of no fault of its own, adequate nutrition, the State is violating its right to food, and adequate nutrition.</p>
9	(1)	<p>Notwithstanding anything contained in any election law for the time being in force, whosoever, after the commencement of this Act, in contravention of two-child norm procreates more than two children shall be ineligible to contest elections to local authority or anybody of the local self-Government.</p> <p>Provided that sub-section (1) shall not apply in cases of an individual, who is already a member of local body or any body</p> <p>Firstly, studies from other India States where the two-child norm has been sought to be used to restrict eligibility for contesting local authority elections, has shown that it has adverse consequences for all sections of the citizenry other than upper-caste, upper-class, and older generation men. 80% of the disqualified candidates were from Scheduled Castes, Scheduled Tribes or Other Backward Classes, women formed 41% of the disqualifications, and almost all those disqualified had an annual income of less than ₹20,000.¹⁰² Therefore, rather than promoting access to resources, and opportunities for the State's youth, it entrenches the dominance of older generational male candidates.</p> <p>Secondly, such a policy leads to men deserting their wives and abandoning their</p>

¹⁰² Buch, *supra* note 18.

	<p>of the local self-Government, having more than two children at the time of commencement of this Act.</p> <p>(2) Every member of local body or any body of the local self-Government, having more than two children at the time of commencement of this Act, have to give an undertaking to the effect that they shall not act in contravention to the two-child norm.</p> <p>(3) Every such application under sub-section (2) has to be made within a period of one year from the date of commencement of this Act, in the manner as may be prescribed.</p> <p>(4) If any action of a member of local body or any body of the local self-Government, is found to be in violation of the undertaking given by him under sub-section (2), he shall be dismissed from his post as a members of local body or any body of the local self- Government, as the case may be, with immediate effect and shall be debarred from contesting further election to local body or</p>	<p>children, so as to be able to continue contesting elections.¹⁰³ Therefore, due to the continuance of the exception for marital rape, and women lacking control over their bodies with respect to sex, they will be forced to bear the sole, non-consensual burden of such unwanted pregnancies.</p> <p>Thirdly, the exception noted under the Draft Bill for excluding those candidates that have already had two children prior to the enactment of the proposed law is likely to result in disparate adverse consequences for the youth. Young persons desirous of starting families will have to encounter significant barriers to accessing their rights and reproductive choices given the coercive policies proposed by the Draft Bill. This will also have a negative impact on the avenues and choices for professional opportunities available to them, especially in view of the lack of socioeconomic security.</p>
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¹⁰³ *Id.*

		any body of the local self-Government.	
10	(1)	<p>Notwithstanding anything contained in any law dealing with employment of Government employees for the time being in force, whosoever, after the commencement of this Act, in contravention of two-child norm procreates more than two children shall be ineligible to apply for Government jobs under the the State Government.</p> <p>Provided that this sub-section (1) shall not apply in cases of an individual, who is already a Government employee under the State Government.</p>	<p>Firstly, as per the Supreme Court's decision in <i>K.S. Puttaswamy</i>,¹⁰⁴ the inalienable right to privacy is grounded in autonomy and dignity. So, an individual has decisional autonomy over their personal choices relating to reproduction, that is, not only whether or not to reproduce but also how many children they may conceive. These reproductive choices are protected as a facet of the fundamental right to life and liberty, under Article 21 of the Constitution. This right of the individual suffers gross violation when the Draft Bill seeks to indirectly restrict it via denying any citizen that has more than two children the opportunity to receive Government employment. Furthermore, in as much as the denial of such employment denies the individual the opportunity to earn a livelihood, it deprives them of their dignity. When citizens are unable to purchase the basic necessities such as food, potable water, shelter, etc. due to a coercive policy of the State, it amounts a clear violation of the expansive interpretation provided to Article 21, by the Supreme Court, in <i>In re: Problems and Miseries of Migrant Labourers</i>.¹⁰⁵</p>

¹⁰⁴ K.S. Puttaswamy, *supra* note 5.

¹⁰⁵ 2021 SCC OnLine SC 441.

	<p>commencement of this Act.</p> <p>(4) If any action of a Government employee under the State Government, is found to be in violation of the undertaking given by him under sub-section(2), he shall be dismissed from his employment with immediate effect and shall be debarred from applying in future for any Government jobs under the State Government.</p>	have a long-term detrimental impact on the individual and their family's socioeconomic security, who already face significant difficulties in accessing public resources.
11	<p>Notwithstanding anything contained in any law dealing with employment of Government employees for the time being in force, any employee of the Government jobs under the State Government, after the commencement of this Act, in contravention of two-child norm procreates more than two children shall be ineligible to get promotion in Government services.</p> <p>Provided that sub-section (1) shall not apply in cases of an individual, who is already a Government employee under the State Government, having more than two children at the time of commencement of this Act.</p>	<p>Firstly, as per the Supreme Court's decision in <i>K.S. Puttaswamy</i>,¹⁰⁶ the inalienable right to privacy is grounded in autonomy, and dignity. So, an individual has decisional autonomy over their personal choices relating to reproduction, that is, not only whether or not to reproduce but also how many children they may conceive. These reproductive choices are protected as a facet of the fundamental right to life and liberty, under Article 21 of the Constitution. This right of the individual suffers gross violation when the Draft Bill seeks to indirectly restrict it via denying any citizen that has more than two children the opportunity to receive a promotion. Furthermore, in as much as the denial of such promotion denies the individual the opportunity to earn a livelihood, it deprives them of their dignity. When citizens are unable to purchase the basic necessities such as food, potable water, shelter, etc. due to a coercive policy of the State, it amounts a clear violation of the expansive interpretation provided to Article 21, by the</p>

¹⁰⁶ K.S. Puttaswamy, *supra* note 5.

	<p>Supreme Court, in <i>In re: Problems and Miseries of Migrant Labourers</i>.¹⁰⁷</p> <p>Secondly, the exception created for excluding those candidates that have already had two children prior to the enactment of the proposed law is likely to result in disparate adverse consequences for the youth. Young persons desirous of starting families will have to encounter significant barriers to accessing a promotion in Government employment, which is often the only source of employment effectively available to socioeconomically persons, and those living in rural areas of the country. This is likely to have a long-term detrimental impact on the individual and their family's socioeconomic security, who already face significant difficulties in accessing public resources.</p> <p>Thirdly, the fundamental right to life, under Article 21, includes the right to food, and right against malnutrition; these are inexplicably linked to a life with dignity, and constitutionally guaranteed access to the bare necessities, as per the law as laid down by the Supreme Court in the case of <i>People's Union for Civil Liberties v. Union of India</i>.¹⁰⁸ This right has also been granted statutory recognition under the National Food Security Act 2013, the enactment of which led to a paradigm shift by reframing the issue of food security in a rights-based framework rather than a welfare measure. The Government cannot shrug off its responsibility to ensure food security for the most vulnerable sections of its citizenry—those dependant on the ration card.</p>
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¹⁰⁷ 2021 SCC OnLine SC 441.

¹⁰⁸ People's Union for Civil Liberties, *supra* note 82.

12	<p>Notwithstanding anything contained in any law dealing with subsidies provided by Government, any individual who after the commencement of this Act, in contravention of two-child norm procreates more than two children shall be ineligible receive any kind of Government subsidy. Provided that this sub-section shall not apply in cases of an individual, having more than two children at the time of commencement of this Act.</p>	<p>Firstly, the disincentives assigned relate to the fulfilment of the fundamental rights of Uttar Pradesh's citizens, under Article 21's guarantee of a life with equal dignity. Fundamental rights reflect concerns of essential public policy, and welfare, so they cannot be subject to the doctrine of waiver.¹⁰⁹ Associating these rights to population control, and withdrawing access thereto, would violate the constitutional protections towards their fulfilment.</p> <p>Secondly, such disincentives will disproportionately affect economically disenfranchised communities, who cannot afford financial distinctives,¹¹⁰ and rely on welfare schemes for their day-to-day survival.</p>
14	<p>Notwithstanding anything contained in this Act or any other law for the time being in force, an action of an individual shall not be deemed to be in contravention of the two-child norm under this Act, if he or as the case may be, she having two children conceived from his marriage adopts a third child under The Hindu Adoption and Maintenance Act 1956 or The Juvenile Justice Act 2015, The Guardians and Ward Act 1890 or any other law for the time being in force dealing with adoption in India.</p> <p>Explanation I: This section shall apply only for individuals who have two children born out of their marriage and have opted for an adoption of a third child.</p> <p>Explanation II: This section shall not apply to individuals having no</p>	<p>Firstly, instead of promoting adoption, this clause will have the counterproductive effect of disincentivising adoption. Apart from associating adoption with the socially stigmatised policy of population control, it will further complicate the bureaucratic process of adopting children. Any prospective parent will, now, also have to ensure that they satisfy the coercive requirements of this Draft Bill to be able to adopt a child. The rate for in-country adoptions is already an abysmally low figure of 3,142 for 2020–2021.¹¹¹</p> <p>Secondly, Illustration (d), and (e) create an unintelligible difference between two scenarios, which solely reflects a preference for biological children over adopted ones. Illustration (d) allows a couple to have two biological children and adopt a third child, but Illustration (e) unreasonably bars a couple from having one biological child and adopting two</p>

¹⁰⁹ Behram Kurshid Pesikaka, *supra* note 23.

¹¹⁰ Follett, *supra* note 26.

¹¹¹ Central Adoption Resource Authority, *Adoption Statistics*, http://cara.nic.in/resource/adoption_Statistics.html.

	child or one child born out of his marriage, and subsequently has more than two children, as a result of adoption.	children. In both scenarios the total number of children would amount to three. The latter circumstance would, more strongly, promote couples adopting children as well.
15	<p>Notwithstanding anything contained in this or any other law for the time being in force, an action of an individual shall not be deemed to be in contravention of the two-child norm under this Act, if the either, or both, of his children born out of the earlier pregnancy suffer from disability and the couple conceives a third child subsequently.</p> <p>Explanation: The term ‘disability’ for the purpose shall have same meaning as the term ‘person with disability’ defined under Section 2 (t) of the Rights of Person with Disability Act 2016.</p> <p>Provided that in no case shall the total number of children under this section shall be more than three, except in cases where there has been multiple birth.</p>	<p>Firstly, for the object of limiting the number of children that a family can conceive, there is no intelligible differentia between children living with disability, and those without. It treats such children as less-than-ideal members of the family, and, essentially, refuses to treat them as children for the purposes of the two-child policy. The disadvantages associated with disability are not the outcome of an inherent shortcoming of the individual, but, rather, are the cause of the discriminatory treatment, and stigma that persons with disability face in society.¹¹² The provisions of the Draft Bill, in this regard, not only violate the constitutional right of equality under Article 14 and life with dignity under Article 21,¹¹³ but also contravene the statutory rights granted under the Rights of Persons with Disabilities Act 2016.¹¹⁴</p>
18	(1) Notwithstanding anything contained in this Act or any other law for the time being in force, if actions of a husband of polygamous marriage is in contravention of the two-child	<p>Firstly, as per the 1961 census, the incidence of polygamy was the lowest amongst the Muslim community in India.¹¹⁵ It was higher amongst Hindus at 5.8%, and the highest amongst Adivasi communities at 15.2%.¹¹⁶ In fact,</p>

¹¹² Erik Parens & Adrienne Asch, *Disability Rights Critique of Prenatal Genetic Testing: Reflections and Recommendations*, 9 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES RESEARCH REVIEWS 40, 41 (2003).

¹¹³ Francis Coralie Mullin v. The Administrator, 1981 SCR (2) 516.

¹¹⁴ Section 3 of the Rights of Persons with Disabilities Act 2016 states that, “The appropriate Government shall ensure that persons with disabilities enjoy the right to equality, life with dignity and respect for his or her integrity equally with others.”

¹¹⁵ Rohan Venkataramakrishnan, *Muslim Women and the Surprising Facts about Polygamy in India*, SCROLL (July 8, 2014), <https://scroll.in/article/669083/muslim-women-and-the-surprising-facts-about-polygamy-in-india>.

¹¹⁶ *Id.*

<p>norm, he shall be precluded from receiving any benefits and incentives under provided under this Act, and in addition as a consequence of such contravention, shall be liable to face the disincentives provided under this Act.</p> <p>(2) Notwithstanding anything contained in this Act or any other law for the time being in force, the mere fact that the actions of a husband of polygamous marriage is in contravention of the two-child norm, shall not preclude his wives and their children who are eligible for claiming incentives and benefits provided under this Act. Provided that in any case, if the actions of any of the wives of polygamous marriage is in contravention of two-child norm, she shall not be eligible for benefits and incentives provided under this Act, and in addition for such contravention, shall be liable to face the disincentives provided under this Act</p>	<p>Polygamy continues to be practiced amongst the Hindu-dominated village of Fattepur in Uttar Pradesh, wherein, upper-caste Bhramins, and Thakurs that have had at least two marriages continue to hold Government jobs.¹¹⁷ Amongst the Muslim community as well, cases of polygamy are, usually, found within the upper-class, and privileged strata of the community.</p> <p>Secondly, the myth that there is a direct causal link between the practice of Islam and higher population rates has been successfully rebuked by scholars who note it is critical to understand that fertility among a religious community varies substantially across States¹¹⁸. For instance, the fertility among Hindus was much higher in Uttar Pradesh (2.67) than among Muslims in Tamil Nadu (1.74). It can, therefore, be inferred that if populations of some religions were concentrated in high-fertility regions, they are likely to have high fertility on account of the region factor rather than the religion factor¹¹⁹. This suggests that there is no ‘Hindu fertility’, ‘Muslim fertility’ or ‘Christian fertility’ as such. Further, regional, socioeconomic and other conditions also influence fertility rates and like Hindus, Muslims are not a homogenous or monolithic group but differ widely in terms of their socioeconomic and demographic behaviour in different regions of the country, factors which have a significant bearing on fertility rates¹²⁰. To cite an example, as per a study conducted by Sriya Iyer there is no statistically significant difference between Hindus and</p>
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¹¹⁷ Namita Bajpai, *In this Hindu Village in Uttar Pradesh, Polygamy is an Age-old Tradition*, THE NEW INDIAN EXPRESS (July 27, 2019), <https://www.newindianexpress.com/nation/2019/jul/27/in-this-hindu-village-in-uttar-pradesh-polygamy-is-an-age-old-tradition-2010285.html>.

¹¹⁸ S.Y. Quraishi, THE POPULATION MYTH: ISLAM, FAMILY PLANNING AND POLITICS IN INDIA 55 (Harper Collins 2021).

¹¹⁹ *Id.* at 57.

¹²⁰ *Id.* at 58.

		<p>Muslims in the effect of religion on contraceptive adoption¹²¹.</p> <p>The TFR of, both, Adivasi persons and Muslims is a result of the failure of the State to address the issues of poverty, and illiteracy amongst the general population, of which these communities are a part.¹²² It reflects the previously discussed trend, wherein, increasing the socioeconomic wellbeing of these communities, and not subjecting them to coercive measures, will decrease their fertility rate. If Islam were directly linked to greater birth rates, Muslim-dominated countries, like Indonesia and Bangladesh, would not have been able to achieve falling birth rates.¹²³</p> <p>Thirdly, the TFR for Hindu women is 2.13, which reflects a decline of 0.67%, while for Muslim women it was 2.62, which reflects a 0.78% decline.¹²⁴ So, the fertility rate of Muslims shows a sharper decline than Hindus.</p>
19	<p>In cases of a polygamous marriages, where the husband has more than one wife:</p> <p>(1) It shall be deemed that the Action of the husband is in contravention of two-child norm, if he has more than two children, from all his marital relationships.</p> <p>Provided that in cases of multiple birth, where more than one child is born out of same pregnancy, all the</p>	<p>Firstly, although the provisions treat each wife of the polygamous man as a separate family for all other purposes, it treats them as one family for the purpose of counting the number of children. It is unreasonable to treat all the families as one, because it denies his other wives the opportunity to rear their own families. So, it unfairly disadvantages any subsequent wife by barring her from having any children, because the husband has already had two children with another wife, even though</p>

¹²¹ *Id.* at 68 ; Sriya Iyer, *Religion and the Decision to Use Contraception in India*, 41 JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 711, (2002).

¹²² Ram Puniyani, *Busting Myths About Muslim Population Growth in India*, THE LEAFLET (June 14, 2021), <https://www.thleaflet.in/busting-myths-about-muslim-population-growth-in-india/>.

¹²³ The Wire Staff, *India Should Learn from China, Coercive Population Policies Don't Work: NGO*, THE WIRE (June 1, 2021), <https://thewire.in/rights/india-china-population-control-policies-pfi-two-child>.

¹²⁴ Puniyani, *supra* note 122.

	<p>children in excess of ‘one’ shall be counted as ‘one’ for the computation of total number of children.</p> <p>Provided further that the first proviso shall not apply in case of multiple children born out of the first pregnancy of the first marriage of the husband with his first wife, and in such cases the number of children shall be counted as ‘two.’</p> <p>(2) It shall be deemed that the action of the wife of a polygamous marriage, is in contravention of two-child norm, only if she has more than two children from her marital relationship with the husband, irrespective of the total number of children the husband may have from all his marital relationships.</p> <p>Provided that in cases of multiple birth, where more than one child is born out of same pregnancy, all the children in excess of ‘one’ shall be counted as ‘one’ for the computation of total number of children.</p> <p>Provided further that for computation of number of children of the wife only, the first proviso shall not apply in case of multiple children born out of the first pregnancy of the marriage, and in such cases the number of children shall be counted as ‘two’.</p>	<p>they entered into the polygamous relationship voluntarily.</p> <p>Secondly, the violation of the sexual and reproductive rights as well as the right to privacy and autonomy of persons in polygamous marriages is arbitrary and unconstitutional to the extent that it violates the freedom of religion protected under Article 25 of the Constitution. Polygamous marriages are a cultural practice, which enjoy constitutional protection under the scheme of fundamental freedoms. By introducing a policy that in effect penalises persons engaging in a religious or cultural practice like polygamy, the policy disproportionately targets certain groups and abrogates the fundamental freedoms of such groups.</p>
21	In cases of a polyandrous marriages, where the wife has more than one husband, in order to determine whether the actions of husband or wife are in	The violation of the sexual and reproductive rights as well as the right to privacy and autonomy of persons in polygamous marriages is arbitrary and unconstitutional to the extent that it violates

	contravention of the two-child norm, provisions of Section 19 shall apply <i>mutatis mutandis</i> .	the freedom of religion protected under Article 25 of the Constitution. Polyandrous marriages are a cultural practice, which enjoy constitutional protection under the scheme of fundamental freedoms. By introducing a policy that in effect penalises persons engaging in a religious or cultural practice like polygamy, the policy disproportionately targets certain groups and abrogates the fundamental freedoms of such groups.
22	There shall be constituted a State Population Fund on such date as may be notified by the Government, which shall be utilized for the purposes of implementation of this Act.	No information is provided regarding how the State Population Fund will be funded, how it will be administered, by whom it will be managed, or how withdrawals will be made from it. In this regard, it is also pertinent to take note of the fact that the poor and inadequate allocation of resources by the Government of Uttar Pradesh for the management of the pandemic in the State only further strengthens the need for transparency and accountability so as to ensure that the funds allocated to the public bodies are being utilised efficiently. The creation of additional fund in the absence of more information regarding the particulars of the fund is only likely to create more avenues for mismanagement of resources in the absence of any public accountability.
26	(1) The State Government shall as soon as possible after the commencement of this Act take steps for group insurance, at Government expense, of all qualified allopathic surgeons carrying on sterilization operations on men or women and of other	The Uttar Pradesh Government cannot tie the sterilisation indemnity scheme to the two-child policy, because it already has an existing, separate obligation to ensure the dispersion of such compensation. The Supreme Court in <i>Ramakant Rai v. Union of India (1)</i> had mandated all States to institute an independent insurance policy with respect to sterilisations, in 2009. ¹²⁵ In furtherance of this, the Ministry of Health

¹²⁵ *Ramakant Rai v. Union of India (1)*, (2009) 16 SCC 565.

	<p>staff and of hospital authorities concerned to cover claims for compensation to be paid to a couple where the woman operated on or the wife of the man operated on becomes pregnant even after such operation:</p> <p>Provided that a fixed sum of fifty thousand rupees shall be payable as compensation even where the claimant fails to plead or establish that the operation was unsuccessful due to the negligence of the surgeon or the hospital staff or authorities.</p> <p>(2) The State Government may in exceptional cases of clearly culpable negligence recover the compensation paid to the claimant or any part thereof from the surgeon or other person found negligent.</p> <p>(3) A child born in the circumstances mentioned in sub-section (1) shall not count for the purposes of breach of the two-child norm within the meaning of this Act.</p>	<p>and Family Welfare has drafted a variety of uniform indemnity schemes for all States. The latest of these schemes, with effect from 1 April 2013, mandates Uttar Pradesh to disperse ₹2,00,000 for death immediately following sterilisation, ₹50,000 for death following 8–30 days after sterilisation, ₹30,000 for failure of the operation, and actual costs of hospital expenditure not exceeding ₹25,000.¹²⁶ These payments are in addition compensation for the loss of wages, transportation, diet, drugs, dressing, and other such liabilities.¹²⁷</p>
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IV. Conclusion

In conclusion, we would like to reiterate that the introduction of the Draft Bill by the government of the state of Uttar Pradesh is in contravention of its constitutional obligations. The Draft Bill, through the introduction of a scheme of incentives and

¹²⁶ Ministry of Health and Family Welfare, Manual for Family Planning Indemnity Scheme, (Mar. 2016), https://nhm.gov.in/images/pdf/programmes/family-planing/schemes/FPIS_2nd_Edition_2016.pdf.

¹²⁷ *Id.*

disincentives for the imposition of a two-child policy, violates the fundamental and statutory rights of individuals. It denies women, transgender, and gender variant persons their right to equality and decisional autonomy over matters concerning reproductive health by proposing the implementation of coercive population control measures that will result in the denial of sexual and reproductive rights of pregnant persons. Further, as noted above, the Draft fails to account for the structural barriers in accessing reproductive healthcare services as well non-development of health infrastructure, or other structural impediments like the lack of comprehensive sexuality education and dissemination of information pertaining to immunisations, and lack of access to contraceptives and safe abortions, to name a few. The Draft Bill does not address any of these concerns, nor takes into account the disparate impact of such policies on already disadvantaged marginalised persons. It embodies a coercive approach to monitoring population growth, which has not only been shown to be ineffective but also disproportionately detrimental to marginalised persons such as women, transgender and gender variant persons, persons living with disability, Dalit and Adivasi persons, persons living in poverty, and the youth.

Rather than proposing a scheme of coercive measures, the state machinery must make concerted efforts towards implementing policies and programs that are rooted in a rights-based framework and create an enabling environment that addresses the sexual and reproductive health concerns of its citizens. The emphasis should be on taking steps to develop the public health infrastructure by instituting policy measures that counter the sociocultural and financial barriers preventing marginalised persons from accessing healthcare services, rather than placing reliance on coercive measures like the ones envisaged under the Draft Bill.

In view of the above, we strongly object to The Uttar Pradesh Population (Control, Stabilization and Welfare) Bill 2021 and demand that the State Law Commission immediately withdraw it.