Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (M/S) No. 2302 of 2019

Pinki Devi ...Petitioner

Vs.

State of Uttarakhand and others ...Respondents

Mr. Piyush Garg, learned counsel for the petitioner.
Mr. S.N. Babulkar, learned Advocate General assisted by Mr. Paresh Tripathi, learned Chief Standing Counsel for the State of Uttarakhand.

AND

Writ Petition (M/S) No. 2280 of 2019

Jot Singh Bisht and others ...Petitioners

Vs.

State of Uttarakhand and another ...Respondents

Mr. V.B.S. Negi, learned Senior Counsel assisted by Mr. Sandeep Kothari and Mr. Anil Kumar Joshi, learned counsel for the petitioners.
Mr. S.N. Babulkar, learned Advocate General assisted by Mr. Paresh Tripathi, learned Chief Standing Counsel for the State of Uttarakhand.

AND

Writ Petition (M/S) No. 2295 of 2019

Manohar Lal Arya and others ...Petitioners

Vs.

State of Uttarakhand and another ...Respondents

Mr. B.D. Upadhyay, learned Senior Counsel assisted by Mr. Ganesh Kandpal, learned counsel for the petitioners.
Mr. S.N. Babulkar, learned Advocate General assisted by Mr. Paresh Tripathi, learned Chief Standing Counsel for the State of Uttarakhand.

AND

Writ Petition (M/S) No. 2335 of 2019

Ghausia Rahman ...Petitioner

Vs.

State of Uttarakhand and others ...Respondents

Mr. M.S. Pal, learned Senior Counsel assisted by Mr. Kishore Kumar and Mr. Rakshit Joshi, learned counsel for the petitioner.
Mr. S.N. Babulkar, learned Advocate General assisted by Mr. Paresh Tripathi, learned Chief Standing Counsel for the State of Uttarakhand.

AND
Writ Petition (M/S) No. 2352 of 2019

Mohan Prasad Kala ...Petitioner
Vs.
State of Uttarakhand and another ...Respondents

Mr. Rajeev Singh Bisht, learned counsel for the petitioner.
Mr. S.N. Babulkar, learned Advocate General assisted by Mr. Paresh Tripathi, learned Chief Standing Counsel for the State of Uttarakhand.

AND
Writ Petition (M/S) No. 2464 of 2019

Shri Kavinder Istwal ...Petitioner
Vs.
State of Uttarakhand and another ...Respondents

Ms. Anjali Benjwal Bahuguna, learned counsel for the petitioner.
Mr. S.N. Babulkar, learned Advocate General assisted by Mr. Paresh Tripathi, learned Chief Standing Counsel for the State of Uttarakhand.

AND
Writ Petition (M/S) No. 2465 of 2019

Radha Kailash Bhatt and another ...Petitioners
Vs.
State of Uttarakhand and another ...Respondents

Mr. Vipul Sharma, learned counsel for the petitioners.
Mr. S.N. Babulkar, learned Advocate General assisted by Mr. Paresh Tripathi, learned Chief Standing Counsel for the State of Uttarakhand.

Common Judgment

Judgment Reserved : 03.09.2019
Judgment Delivered : 19.09.2019

Chronological list of cases referred :

1. (1982) 1 SCC 691
2. AIR 1952 SC 64
3. AIR 1954 SC 210
4. (2003) 8 SCC 369
5. (2017) 2 PLJR 940
6. AIR 1954 SC 686
7. (2004) 8 SCC 1
8. AIR 1951 SC 318
9. (1979) 1 SCC 380
10. (2011) 3 SCC 238
11. (2014) 8 SCC 682
12. (1995) 5 SCC 482
13. (2018) 4 SCC 372
14. AIR 1977 SC 2279
15. AIR 2005 SC 986
16. (1983) 4 SCC 645
17. (1987) 1 SCC 395

18. (2014) 11 SCC 26
19. (1983) 2 SCC 33
20. (1737) WiLles 46
21. (2017) 10 SCC 800
22. (2012) 6 SCC 312
23. (1996) 3 SCC 709
24. (2017) 9 SCC 1
25. (2008) 4 SCC 720
26. 2003 (4) PLJR 44
27. (2008) 5 SCC 33
28. (2011) 3 SCC 380
29. (1978) 2 SCC 1
30. (2017) 7 SCC 59
31. (1992) 2 SCC 643
32. AIR 1951 SC 41
33. (1981)1 SCC 246
34. (1974) 1 SCC 19
35. (1983) 2 SCC 235
36. 1959 SCR 279
37. (1973) 1 SCC 500
38. 1991 Supp (2) SCC 190
39. AIR 1960 SC 457
40. (1989) 2 SCC 145
41. (1974) 4 SCC 3
42. AIR 1986 SC 210
43. (1983) 1 SCC 305
44. AIR 2004 SC 361
45. (2015) 10 SCC 681
46. 248 U.S. 152, 157
47. AIR 1968 SC 1
48. (2013) 1 SCC 745
49. (1976) 2 SCC 310
50. (1981) 4 SCC 675
51. (2016) 10 SCC 165
52. (1990) 4 SCC 366
53. AIR 1956 SC 246
54. AIR 1963 SC 1241
55. 1957 SCR 233 : AIR 1957 SC 397
56. (1996) 1 SCC 1
57. (2013) 2 SCC 775
58. (2018) 10 SCC 1
59. (1995) 1 SCR 1045
60. (2014) 16 SCC 72
61. (1990) 2 SCC 502
62. (1989) Supp. (1) SCC 116
63. (1974) 1 SCC 549
64. (2008) 13 SCC 30
65. (2007) 13 SCC 673
66. (2015) 12 SCC 611
67. (1996) 2 SCC 498
68. (1991) Supp. (1) SCC 600
69. (1999) 9 SCC 700
70. (1999) 4 SCC 458
71. (1993) 1 SCC 78
72. AIR 2003 SC 3268
73. (2004) 6 SCC 531
74. (2000) 1 SCC 566

Coram: Hon'ble Ramesh Ranganathan, C.J.
Hon'ble Alok Kumar Verma, J.

Ramesh Ranganathan, C.J.

The Uttarakhand Panchayati Raj Act, 2016 was amended by the Utrarakhand Panchayati Raj (Amendment) Act, 2019 (Act No. 10 of 2019) (for short the "2019 Act"), after the current five year term of the elected members of the Panchayat Raj Institutions, in the State of Uttarakhand, came to an end on 15.07.2019. In this batch of Writ Petitions, the constitutional validity of Section 8(1)(r), Section 8(8)(1)(d) and Section 10-C of the Uttarakhand Panchayati Raj (Amendment) Act, 2019, as notified on 25.07.2019, are under challenge.

2. Section 8(1)(r), as inserted by the 2019 Act, stipulated that a person shall be disqualified for being appointed, and for being a Pradhan, Up-Pradhan and a member of the Gram Panchayat, if he has more than two living children. The newly inserted Sub-Section (8) prescribes a further bar on holding two posts simultaneously and, under Sub-Section (1)(d) of Section 8(8) of the 2019 Act, a person shall be disqualified for holding the office of a Pradhan, Up-Pradhan or a Member of the Gram Panchayat if he is the Chairman, Vice-Chairman or a Member of any Cooperative Society.

3. Section 10-C, which was also inserted by the 2019 Act, relates to the election of Up-Pradhan and his term; and, thereunder, the Up-Pradhan shall be elected by the members of the Gram Panchayat, from amongst themselves, in such manner as may be prescribed. Under the proviso thereto, if the Gram Panchayat fails to so elect the Up-Pradhan within the time fixed by, or under, the Rules in that behalf, the prescribed authority may nominate, as the Up-Pradhan, any member of the Gram Panchayat, and the person so nominated shall be deemed to have been duly elected.

4. Mr. S.N. Babulkar, learned Advocate General appearing for the State Government, would submit, with respect to Co-operative Societies, that the State Government has already initiated steps to amend the law, and to restrict disqualification in Cooperative Societies only to its elected members, and not to ordinary members; and it is unnecessary for this Court,

therefore, to examine the constitutional validity of Section 8(8)(1)(d) of the 2019 Act.

5. Learned Senior Counsel, and learned counsel appearing on behalf of the petitioners, would fairly state that, in the light of the assurance of the State Government in its Counter-Affidavit and the submission of the learned Advocate General that Section 8(8)(1)(d) of the 2019 Act is in the process of being amended and, in the place of the words “a Member of the co-operative society” the words “elected member” are likely to be substituted, their challenge, in this batch of Writ Petitions, is confined only to the constitutional validity of Section 8(1)(r) and Section 10-C of the 2019 Act, whereby the Uttarakhand Panchayati Raj Act, 2016 was amended.

6. Elaborate submissions were put forth by Mr. V.B.S. Negi, , Mr. B.D. Upadhyay, and Mr. M.S. Pal, learned Senior Counsel and Mr. Piyush Garg, Mr. Rajeev Singh Bisht, Ms. Anjali Benjwal Bahuguna, and Mr. Vipul Sharma, learned counsel appearing on behalf of the petitioners. Mr. S.N. Babulkar, learned Advocate-General, put forth his submissions on behalf of the State of Uttarakhand. It is convenient to examine the rival contentions, urged by learned counsel on either side, under different heads.

I. IS THE CHALLENGE, TO THE CONSTITUTIONAL VALIDITY OF SECTION 10-C OF THE 2019 ACT, VALID?

7. In challenge to the validity of Section 10-C, inserted by the 2019 Act, it is contended on behalf of the petitioners that, in compliance with Part IX of the Constitution, there should be direct elections to the Office of Up-Pradhan; and appointment to the post of Up-Pradhan, through indirect elections, violates Part IX of the Constitution of India.

8. On the other hand Mr. S.N. Babulkar, learned Advocate General, would submit that the provisions relating to the Up-Pradhan has not been subjected to challenge on the ground of excessive delegation of essential legislative functions; in the absence of any challenge thereto on any such ground, this Court would not undertake an examination of the validity of the said provision on this score; and the contentions urged on behalf of

the petitioners, regarding the validity of Section 10-C, does not merit acceptance in view of Article 243-C(5) in Part IX of the Constitution.

9. Section 10-C of the 2016 Act, as noted hereinabove, stipulates that the Up-Pradhan shall be elected by the members of the Gram Panchayat, from amongst themselves, in such manner as may be prescribed. Under the proviso thereto, if a Gram Panchayat fails to so elect the Up-Pradhan within the time fixed by or under the Rules in that behalf, the Prescribed Authority may nominate as the Up-Pradhan any member of the Gram Panchayat, and the person so nominated shall be deemed to have been duly elected. Sub-section (2) stipulates that the term of office of the Up-Pradhan shall commence from the date of his election or nomination, as the case may be, and, unless otherwise determined under the provisions of the Act, shall expire with the term of the Gram Panchayat. Sub-section (3) stipulates that the provisions of Section 18 shall mutatis mutandis apply to the removal of the Up-Pradhan as they apply to the removal of the Pradhan.

10. Part-IX of the Constitution of India relates to Panchayats. Article 243(d) defines “Panchayat” to mean an institution (by whatever name called) of self-government constituted under Article 243-B for the rural areas. Clause (1) of Article 243-B stipulates that there shall be constituted, in every State, Panchayats at the village, intermediate and district levels in accordance with the provisions of Part IX of the Constitution of India. Article 243-C relates to composition of Panchayats, and under Clause (1) thereunder, subject to the provisions of Part IX, the Legislature of a State may, by law, make provisions with respect to the composition of Panchayats. Article 243-C (2) stipulates that all the seats in a Panchayat shall be filled-in by persons chosen by direct elections from territorial constituencies in the Panchayat areas and, for this purpose, each Panchayat area shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency, and the number of seats allotted to it, shall, as far as practicable, be the same throughout the Panchayat area.

11. While seats in a Panchayat are required to be filled by any person chosen by direct elections from territorial constituencies in the Panchayat areas, the office of Chairperson of Panchayats at the village, intermediate and district levels are governed by sub-clauses (a) and (b) of Clause (3) of Article 243-C of the Constitution of India. Clause (3) of Article 243-C stipulates that the Legislature of a State may, by law, provide for the representation (a) of the Chairpersons of the Panchayats at the village level, in the Panchayats at the intermediate level; and (b) of the Chairpersons of the Panchayats at the intermediate level, in the Panchayats at the district level. Article 243-C (5) (a) stipulates that the Chairperson of a Panchayat at the village level shall be elected in such manner as the Legislature of a State may, by law, provide; and Article 243-C (5) (b) provides that the Chairperson of a Panchayat, at the intermediate level or the district level, shall be elected by, and from amongst, the elected members thereof.

12. In terms of Article 243-C(5) (b), the Chairperson of a Panchayat at the intermediate level (called the Pramukh of the Kshetra Panchayat) and the Chairperson of a Panchayat at the district level (called the Chairman of the Zila Panchayat) are to be elected by, and from amongst, the elected members thereof. In effect Chairpersons of Panchayats, at the intermediate and the district level, can only be elected from amongst the elected members, and not by way of direct election. In compliance with the requirement of Clause 5(b) of Article 243-C, Section 55(1) of the 2016 Act stipulates that elected members of every Kshetra Panchayat shall elect a Pramukh and a Senior Up-Pramukh and a Junior Up-Pramukh from amongst themselves. Likewise, Section 92 (1) of the 2016 Act stipulates that, in every Zila Panchayat, a Chairman and a Vice-Chairman shall be elected, by the elected members of the Zila Panchayat, from amongst themselves.

13. We find no merit, therefore, in the submission urged on behalf of the petitioners, that Section 10-C, which provides for indirect elections to the Up-Pradhan, is violative of Part-IX of the Constitution. In any event, in the light of Article 243-C(3), it is for the State Legislature to make provisions in this regard. As elections to the office of Pradhan and Up-Pradhan of the Kshetra Panchayat, and the Chairman and Vice Chairman of

a Zila Panchayat, are required to be held only by way indirect elections, i.e. from amongst elected members of the Kshetra Panchayats and the Zila Panchayats respectively, the contention that elections to the office of Up Pradhan should be by direct elections, and not through indirect elections, does not merit acceptance.

14. It is possible that the proviso to Section 10-C(1), which enables the prescribed authority to nominate any member of the Gram Panchayat as an Up-Pradhan of the Gram Panchayat if it fails to elect him within the time fixed, suffers, in the absence of any guidance being provided by the Legislature for the exercise of such a power, from excessive delegation of essential legislative functions. As rightly submitted by the learned Advocate-General, in the absence of any challenge to Section 10-C on this ground, it is unnecessary for us to delve further on this aspect. The challenge to the validity of Section 10-C, inserted into the 2016 Act by the 2019 Amendment Act, must therefore fail.

II. DO THE PETITIONERS LACK LOCUS STANDI TO FILE THE PRESENT WRIT PETITION?

15. Mr. S.N. Babulkar, learned Advocate General appearing on behalf of the State of Uttarakhand, would submit that the petitioners do not have the locus standi to challenge the validity of the provisions of the 2019 Act as none of them have disclosed, in the Writ Petitions filed by them, that they intend contesting elections and, as they have more than two living children, they are disabled from doing so.

16. Mr. V.B.S. Negi, learned Senior Counsel appearing on behalf of the petitioners in Writ Petition (M/S) No. 2280 of 2019, would draw our attention to the supplementary affidavit to contend that the petitioners have specifically raised this plea of their having more than two children, and they intend contesting the ensuing panchayat-raj elections. Mr. Kishore Kumar, learned counsel for the petitioner in Writ Petition (M/S) No. 2335 of 2019, would refer to certain averments in the Writ Petition in this regard. Mr. Vipul Sharma, learned counsel for the petitioners in Writ Petition (M/S) No.

2465 of 2019, would place reliance on the contents of certain paragraphs of the affidavit, filed in support of the Writ Petition, to contend that they have also raised the plea of having more than three children, and to be desirous of contesting the ensuing panchayat-raj elections.

17. In her affidavit, filed in support of Writ Petition (M/S) No.2302 of 2019, the petitioner stated that she has three children, including two daughters and one son; all her three children were born prior to the enforcement of the Uttarakhand Panchayat Raj (Amendment) Act, 2019; she is a prospective candidate for contesting the panchayat elections which is to be held shortly; she is desirous of contesting the election to be held in the year 2019; she is aggrieved by the restriction being imposed by virtue of Section 8(1)(r) of the 2019 Act; she is desirous of challenging the same by means of the present writ petition; when she gave birth to three children, there was no such disqualification for contesting elections to Panchayats; and the 2019 Act cannot be applied retrospectively so as to bar a person having more than two living children who were born to him/her prior to insertion of Section 8(1)(r) in the Act.

18. In the affidavit, filed in support of Writ Petition (M/S) No.2335 of 2019, the petitioner has stated that, without knowing that in future the State Government would disqualify persons having more than two alive children from contesting elections of Panchayats, she had a third child; she has a fabulous and wonderful record as a Pradhan and hopes to win the next election, but due to non-clarity in the amendment to Section 8 of the 2016 Act, she has been declared disqualified to contest elections to Panchayats.

19. The petitioners in Writ Petition (M/S) No.2465 of 2019 have specifically stated, in the affidavit filed in support of the writ petition, that they are aggrieved by the amendment of the 2019 Act by insertion of Section 8(1)(r) as they already have three alive children; they are disqualified from contesting elections to the post of Gram Pradhan by virtue of Section 8(1)(r)of the 2019 Act; they are not disqualified in any other manner; and the first petitioner has been a Gram Pradhan, for the period from 2014-19, of her village.In the supplementary affidavit, filed in support of Writ Petition (M/S)

No.2280 of 2019, the petitioners have stated that they were disqualified from contesting elections due to the provisions contained in Section 8(1)(r); they were willing to contest elections; petitioner nos.1 and 2 have three children; these children were born before the Panchayati Raj (Amendment) Act came into force; and the manner in which the provision had been incorporated, rendered petitioner nos.1 and 2 disqualified on this count.

20. As noted hereinabove the petitioners, in several of these writ petitions, have stated that they already have more than three children, they are interested in contesting the ensuring elections to Panchayat Raj institutions, and the disqualification prescribed by the newly inserted Section 8(1)(r) will deprive them of the opportunity of contesting elections. The contention that the petitioners lack locus standi to file the present writ petitions does not, therefore, merit acceptance.

III. DOES THE 2019 ACT HAVE PROSPECTIVE APPLICATION, AND WOULD IT NOT APPLY TO THE ENSUING ELECTIONS?

21. It is contended, on behalf of the petitioners, that, in the light of Article 243E of the Constitution of India, the term of office of every Panchayat is only for five years from the date of its first meeting; the term of the earlier Panchayat expired on 15.07.2019; elections ought to have been held, to Panchayati Raj Institutions, on or before 15.07.2019; the law in force, as on 15.07.2019, can alone be applied to such elections; the present amendments by the 2019 Act, as notified on 25.07.2019, would only apply prospectively to later elections; if elections had been held as scheduled, i.e. on or before 15.07.2019, the 2019 Act, whereby the Uttarakhand Panchayati Raj Act, 2016 was amended, was not then in existence; applying the 2019 Act to the Panchayati Raj elections, which ought to have been held before 15.07.2019, would result in giving retrospective effect to the provisions of the 2019 Act; the 2019 Amendment to the 2016 Act would apply prospectively only to future elections and not to the ensuing Panchayat Raj elections which, but for the delay on the part of the State Government, ought to have been held before 15.07.2019; the right to contest elections is a constitutional right; and by giving the 2019 Act retrospective effect,

persons, who were qualified to contest Panchayat Raj elections before 15.07.2019, are now illegally disqualified.

22. It is no doubt true that a right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and simple a statutory right. So is the right to be elected. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. **(Jyoti Basu v. Debi Ghosal[1]; N.P. Ponnuswami v. Returning Officer, Namakkal Constituency[2]; Jagan Nath v. Jaswant Singh[3]; Javed and Others v. State of Haryana and Others[4]; Abha Lata v. State of Bihar[5])**. The right to stand as a candidate and contest an election is not a common law right; it is a special right created by a Statute, and can only be exercised on the conditions laid down by the statute. There is no fundamental right to be elected, and if a candidate wants to be elected they must observe the rules. **(Jamuna Prasad Mukhariya v. Lachhi Ram[6]; Javed and Others[4])**.

23. At the most, in view of Part IX having been added in the Constitution, a right to contest election for an office in Panchayats may be said to be a constitutional right — a right originating in the Constitution and given shape by a statute. But even so, it cannot be equated with a fundamental right. There is nothing wrong in the same statute, which confers the right to contest an election, to also provide for the necessary qualifications without which a person cannot offer his candidature for an elective office, and also to provide for disqualifications which would disable a person from contesting for, or holding, an elective statutory office. **(Javed and Others[4]; Zile Singh v. State of Haryana and Others[7])**. Since the right to contest elections is a statutory or a constitutional right, and not a fundamental right, the right to contest elections to Panchayat Raj institutions is undoubtedly subject to the limitations stipulated in Part-IX of the Constitution, and the disqualifications prescribed under the 2016 Act. Would that justify a manifestly arbitrary restriction being placed on the exercise of such a right, and in prescribing unreasonable and irrational

disqualifications for contesting elections to Panchayat Raj institutions, shall be examined later in this order.

24. Every statute is, *prima-facie*, prospective unless it is expressly or by necessary implication made to have retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only — "*nova constitution futuris formam imponere debet non praeteritis*" — a new law ought to regulate what is to follow, not the past. (**Zile Singh[7]; *Principles of Statutory Interpretation* by Justice G.P. Singh, 9th Edn., 2004 at p. 438)**.In the absence of a retrospective operation having been expressly given, the Courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (*i*) general scope and purview of the statute; (*ii*) the remedy sought to be applied; (*iii*) the former state of the law; and (*iv*) what it was the legislature contemplated. The rule against retrospectivity does not extend to protect it from the effect of a repeal, a privilege which does not amount to an accrued right. (**Zile Singh[7])**.

25. On the question whether the 2019 Amendment Act is prospective in its application, or is retrospective in its operation, it is useful to note that Article 243-E(3)(a) stipulates that an election to constitute a Panchayat shall be completed before the expiry of its duration as specified in clause (1); and Clause (1) of Article 243-E stipulates that every Panchayat, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer. The mere fact that elections to Gram Panchayats were not held, before expiry of the term of the previous Panchayats on 15.07.2019, would not mean that fresh elections to panchayat-raj institutions, whenever held, must nonetheless be deemed to have been held before 15.07.2019.

26. In view of Article 243-E(1) in Part-IX of the Constitution, the term of the newly elected Panchayats shall commence from the date appointed for its first meeting, i.e. the first meeting held after completion of the elections which are scheduled to be held shortly. Elections to panchayat-raj institutions cannot be deemed to have taken place prior to 15.07.2019, merely because the term of the existing panchayat-raj institutions came to an end on 15.07.2019. Since the 2019 Amendment Act, which came into force on 25.07.2019, is applicable to elections to panchayat-raj institutions to be held thereafter, it cannot be said that the 2019 amendment Act has been applied retrospectively, for it is only for elections to panchayat-raj institutions, to be held after 25.07.2019, would the2019 amendment Act apply. The contention that the 2019 amendment Act has been applied retrospectively does not, therefore, merit acceptance.

IV. SHOULD MARRIED DAUGHTERS BE EXCLUDED FROM THE TWO CHILD REQUIREMENT?

27. It is contended, on behalf of the petitioners, that the word "family", as defined under Section 2(48) of the Uttarakhand Panchayati Raj Act, 2016, excludes a married daughter; and a married daughter cannot, therefore, be included in computing the two child norm for the purpose of disqualification under Section 8(1)(r) inserted by the 2019 Act.

28. Section 2(48) of the Uttarakhand Panchayat Raj Act, 2016 defines "family" to mean a group of persons in which the spouse, son, unmarried daughter, parents, brother or any other member are residing together and take food on one hearth. It is true that a married daughter does not fall within the definition of a "family" under Section 2(48) of the 2016 Act. Such of those provisions of the 2016 Act, which refer to a "family", must derive its meaning from its definition under Section 2(48) of the 2016 Act. The disqualification under Section 8(1)(r) is for a person to be disqualified from being appointed, and for being a Pradhan, Up Pradhan, and a member of the Gram Panchayat if he/she has more than two living children. The word "child" would include both son and daughter, and the mere fact that the daughter is married later would not result in her ceasing to be a child of her parents. The disqualification of a person, who has more

than two living children, would include married and unmarried sons and daughters; and the mere fact that a married daughter is excluded from the definition of a "family", in Section 2(48) of the 2016 Act, would not justify her being excluded while computing the two child norm required to be adhered to for a person not to suffer the disqualification under Section 8(1)(r) of the 2016 Act.

V. IS THE LEGISLATION ANTI-MINORITARIAN?

29. Mr. M.S. Pal, learned Senior Counsel appearing on behalf of the petitioners in Writ Petition (M/S) No. 2335 of 2019, would submit that there is no uniform Common Civil Code prevalent in the country; the impugned legislation is anti-minoritarian as it violates the fundamental rights of procreation of minorities; the law permits a muslim male to have more than one wife, and even if he has one child through each wife he would still violate the onerous prescription of not having more than two living children; and this is also in violation of the right of a muslim woman to have at least one child.

30. The premise, on which this submission of the learned Senior Counsel is based, is that, since it is permissible for a Muslim male to contract four marriages, they would invariably have three or more children; and the disqualification prescribed in Section 8(1)(r) is therefore anti-minoritarian. This premise that it is only people, belonging to this religious minority, who have three children or more is belied by the fact that, in this batch of seven writ petitions itself, there are a total of 21 petitioners. Except for one, that too a lady from the Muslim community (petitioner in Writ Petition (M/S) No. 2335 of 2019), all the other twenty petitioners do not belong to any religious minority. They have all invoked the jurisdiction of this Court, challenging the constitutional validity of Section 8(1)(r) of the 2019 amendment Act, admitting that they have three children.

31. With respect to the contention that the personal law of Muslims permits performance of marriages with four women, obviously for the purpose of procreating children and any restriction thereon would be

violative of the right to freedom of religion enshrined in Article 25 of the Constitution, the Supreme Court, in **Javed and Others**[4], opined that it may be permissible for Muslims to enter into four marriages with four women, and for anyone whether a Muslim or belonging to any other community or religion to procreate as many children as he likes, but no religion in India dictates or mandates as an obligation to enter into bigamy or polygamy or to have children more than one; what is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion; a practice does not acquire the sanction of religion simply because it is permitted; the freedom under Article 25 is subject to public order, morality and health; the Article itself permits legislation in the interest of social welfare and reform which are obviously part and parcel of public order, national morality and the collective health of the nation's people; Muslim law permits marrying four women; the personal law nowhere mandates or dictates it as a duty to perform four marriages; no religious scripture or authority provides that marrying less than four women, or abstaining from procreating a child from each and every wife in case of permitted bigamy or polygamy, would be irreligious or offensive to the dictates of the religion; assuming the practice of having more wives than one, or procreating more children than one, is a practice followed by any community or group of people, the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform which the impugned legislation clearly does; and a statutory provision casting disqualification on contesting for, or holding, an elective office is not violative of Article 25 of the Constitution.

32. The absence of a uniform civil code notwithstanding, Section 8(1)(r) is applicable to people of all religious faiths, and is not anti-minoritarian. It does not also violate the fundamental rights of religious minorities enshrined under Article 25 of the Constitution of India.

VI. WOULD HAVING TWINS IN THE SECOND PREGNANCY VIOLATE SECTION 8(1)(r) ?

33. It is submitted, on behalf of some of the petitioners, that the 2019 Act would apply harshly to those who have twins in the second pregnancy, for the birth of a single child or twins, during the second pregnancy, is an act of God. On the other hand Mr. S.N. Babulkar, learned Advocate General, would submit that a law is made for the generality of people, and not to deal with exceptions; and no provision can be struck down on this score.

34. For a classification not to fall foul of Article 14 of the Constitution, it need not be mathematically precise. The guarantee of the equal protection of the laws does not prohibit legislation, which is limited in the objects to which it is directed. Mathematical nicety and perfect equality are not required. (**Constitutional Law, by Prof. Willis, 1st Edition, Page 578; State of Bombay & others v. F.N. Balsara**[8]). The constitutional command to the State, to afford equal protection of its laws, sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The Courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of the classification in any given case. **(Special Courts Bill, 1978, In re**[9]**; National Council for Teacher Education and Ors. v. Shri Shyam Shiksha Prashikshan Sansthan and Ors.**[10]**; Subramanian Swamy v. Director, Central Bureau of Investigation and Another**[11]**).** It must also be borne in mind that hardship of a few cannot be the basis of determining the validity of any statute. **(LIC of India v. Consumer Education and Research Centre**[12]**; Karnataka Live Band Restaurants Association v. State of Karnataka and Others**[13]**)**. A law should be adjudged for its constitutionality by the generality of cases it covers, not by the freaks and exceptions it martyrs. (**R. S. Joshi, S.T.O. Gujarat & others v. Ajit Mills Ltd., Ahmedabad & Anr.** [14]). Exceptional situation cannot form the basis of declaring a law ultra vires Article 14 of the Constitution of India. The possibility of a person having twins from a second pregnancy would not,

therefore, justify striking down the classification as violative of Article 14 of the Constitution.

35. On the contention that the impugned disqualification would hit the women worst, in as much as in Indian society they have no independence and they almost helplessly bear a third child if their husbands want them to do so, the Supreme Court, in **Javed and Others**[4], held that a male who compelled his wife to bear a third child would disqualify not only his wife but himself as well; with the awareness which was arising in Indian womenfolk, they were not so helpless as to be compelled to bear a third child even though they did not wish to do so; if the legislature chooses to carve out an exception in favour of females, it was free to do so but merely because women were not excepted from the operation of the disqualification, it did not render it unconstitutional.

36. The aforesaid contentions, urged on behalf of the petitioners, also necessitates rejection.

VII. IS SECTION 8(1)(r) IN FURTHERANCE OF THE OBJECT SOUGHT TO BE ACHIEVED OF PROMOTING FAMILY PLANNING, AND PREVENTING POPULATION EXPLOSION?

37. It is submitted, on behalf of the petitioners, that there is an increase in population, in the State of Uttarakhand, only in the plains; in fact, in two districts of Almora and Pauri Garhwal, there is a decrease in population; unlike in other States, where increase in population is the norm, the problems of population explosion do not exist in the State of Uttarakhand; and introduction of Section 8(1)(r) was, therefore, wholly unnecessary. On the other hand Mr. S. N. Babulkar, learned Advocate General, would submit that the legislature, while making laws, is required to keep in mind the changing needs of Society; this Court would not, merely on the basis of vague averments in the writ affidavits, sit in appeal over legislative wisdom in making laws to curtail population growth; and, as long as the legislation is not manifestly arbitrary, no interference is called for.

38. In the affidavit, filed in support of Writ Petition (M/S) No.2280 of 2019, the petitioners have stated that, except in selected towns, majority of the population of the State of Uttarakhand reside in rural areas; the State of Uttarakhand is confronted with a peculiar situation wherein the population, residing in rural areas, is continuously migrating either towards urban areas of the State of Uttarakhand or to other States for want of proper job opportunities, and for availing facilities of education and health; the effective population, residing in rural areas, has decreased considerably; as per the statistics available, 74.33% of the population of Uttarakhand was residing in rural areas in the year 2001, which has decreased to 69.77% in the year 2011; in the last 7 to 8 years, it is apparent that more people have migrated from rural areas, and there has been a substantial decrease in population in the rural and hilly areas of the State vis-à-vis the figures of 2011; if the actual figure of people, residing only in rural and hilly regions of Uttarakhand, are taken into consideration, it will reflect a substantial decrease in population; and increase in population was never a problem in the State of Uttarakhand. In the affidavit filed in support of Writ Petition (M/S) No.2352 of 2019, the petitioner has stated that there is no occasion for the State Government to promote family planning, more particularly when several villages in the hilly regions have turned into ghost villages; there is no justification for the State of Uttarakhand to incorporate such a provision for elections to Panchayat Raj institutions in this State; and, without there being any application of mind, such conditions have been prescribed in an arbitrary manner.

39. In the counter-affidavit filed in reply thereto, the respondents state that Section 8(1)(r) was inserted to promote family planning, as increase in population is the biggest problem facing the Country; because of such increase, poverty and price index were increasing, and the natural resources for livelihood were decreasing; the Supreme Court has already dealt with the said issue way back in the year 2003, and has upheld the validity of a similar provision; family planning is the necessity of the times, as the Country is facing an imminent danger of population explosion; the said provision cannot be said to be illegal or unconstitutional, as it is for the

betterment of the State; it is the obligation of the State Government to strive to promote the welfare of its people; those involved in contributing to population explosion, by having more than two children, should pay a small price for the same; and the purpose of introducing Section 8(1)(r) is to promote family planning.

40. Entry 6, of List II of the Seventh Schedule to the Constitution, speaks of "Public health and sanitation". In List III — Concurrent List, Entry 20-A was added which reads "Population control and family planning". Article 243-C makes provision for the legislature of a State enacting laws with respect to the constitution of Panchayats. Article 243-F in Part IX of the Constitution itself provides that a person shall be disqualified for being chosen as, and for being, a member of a Panchayat if he is so disqualified by or under any law made by the legislature of the State. Under Article 243-G of the Constitution, the legislature of a State has been vested with the authority to make laws endowing the Panchayats with such powers and authority which may be necessary to enable the Gram Panchayats to function as institutions of self-government, and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein. Clause (*b*) of Article 243-G provides that Gram Panchayats may be entrusted the powers to implement the schemes for economic development and social justice including those in relation to matters listed in the Eleventh Schedule. Entry 24 of the Eleventh Schedule relates to Family welfare and Entry 25 relates to Women and child development. Family planning is essentially a scheme referable to health, family welfare, women and child development and social welfare. Family welfare would include family planning. **(Javed and Others[4])**.

41. The learned Advocate General would submit, in our opinion rightly so, that the law does not remain static. It does not operate in a vacuum. As social norms and values change, laws too have to be re-interpreted, and recast. Law is fashioned by society for the purposes of achieving harmonious adjustments of human relations by elimination of social tensions and conflicts. (**B.P. Achala Anand v. S. Appi Reddy &**

Anr[15]). Law is a dynamic science, the social utility of which consists in its ability to keep abreast with the emerging trends in social advancement, and its willingness to re-adjust its postulates in order to accommodate those trends. (**Deena Vs. Union of India[16]**). Law has to grow in order to satisfy the needs of a fast changing society. As new situations arise, the law must evolve to meet the challenge of such new situations. (**M.C. Mehta & another v. Union of India & others[17]**). It is a truism that the legislature should change laws to keep the law abreast of change. (**Dias Jurisprudence, 5th Edition, Page 147; State of Punjab & another v. Devans Modern Breweries Ltd. & another[18])**. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. (**State of Gujarat and Another v. Raman Lal Keshav Lal Soni[19]).**

42. It is also true that the judiciary cannot cling to age-old notions of any underlying philosophy behind interpretation, and must move with the times. When the nature of things change, law must change too. (**Davies v. Powell[20**). Law does not standstill; it moves continuously. Once this is recognized, then the task of a judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. **(B.P. Achala Anand[15]).** The question which necessitates examination is whether the new situation of an imminent population explosion, and the urgent need of bringing the ever-growing population of this country under control, justifies insertion of clause (r) in Section 8(1) of the 2016 Act. Before examining this question, let us briefly note the problems of population explosion which the country faces, and the steps being taken to curb population growth.

43. India, the largest democracy in the world, has a population problem going side by side which directly impacts its per capita income, results in shortfall of foodgrains, has hampered improvement on the educational front and has caused swelling of unemployment numbers, leading to congestion in urban areas due to migration of the rural poor. **(Paper by B.K. Raina on Population Policy and the Law, 1992, edited by B.P. Singh Sehgal, p. 52; Javed and Others[4])**. In the beginning of this

century, the world population crossed six billion, of which India alone accounted for one billion (17 per cent) in a land area of 2.5 per cent of the world land mass. The global annual increase of population is 80 million. Out of this, India's growth share is over 18 million (23 per cent), equivalent to the total population of Australia, which has two-and-a-half times the land mass of India. In other words, India is growing at an alarming rate of one Australia every year and will be the most densely populous country in the world, outbeating China, which ranks first, with a land area thrice this country's. (Source — *Population Challenge*, Arcot Easwaran, *The Hindu*, dated 08.07.2003). **(Javed and Others[4])**.

44. The torrential increase in the population of the country is one of the major hindrances in the pace of India's socio-economic progress. Everyday, about 50,000 persons are added to the already large base of its population. The Karunakaran Population Committee (1992-93) had proposed certain disincentives for those who do not follow the norms of the development model adopted by the national population policy so as to bring down the fertility rate. The laudable goals spelt out in the directive principles of State policy in the Constitution of India can best be achieved if the population explosion is checked effectively. Population control is of central importance for providing social and economic justice to the people of India (**Usha Tandon, Reader, Faculty of Law, Delhi University — Research Paper on Population Stabilization, Delhi Law Review, Vol. XXIII, 2001, pp. 125-31; Javed and Others[4])**. The growth of population of India is alarming, and poses a menace to be checked. It is in the national interest to check the growth of population by providing for disincentives even through legislation. **(Javed and Others[4];** and **Zile Singh[7])**.

45. The National Population Policy, 2000 affirms the commitment of the Government towards voluntary and informed choice and consent of citizens, while availing reproductive health care services, and continuation of a target free approach in administering family planning services. It provides a policy framework for advancing goals and prioritizing strategies during the next decade, to meet the reproductive and child health needs of the people of India, and to achieve net replacement levels. It is based upon

the need to simultaneously address issues of child survival, maternal health, and contraception, while increasing outreach and coverage of a comprehensive package of reproductive and child health services by the government, industry and the voluntary non-government sector, working in partnership.

46. The object of the National Population Policy, 2000 is to address the unmet needs for contraception, health care infrastructure, and health personnel, and to provide integrated service delivery for basic reproductive and child health care. The policy formulates the National Socio-Demographic Goals to be achieved, which includes promoting delayed marriages for girls, not earlier than age 18 and preferably after 20 years of age; achieving universal access to information/counseling, and services for fertility regulation and contraception with a wide basket of choices; promote vigorously the small family norm to achieve replacement levels of the Total Fertility Rate (TFR); and to bring about convergence in implementation of related social sector programs so that family welfare becomes a people centred programme. It takes note of the fact that the small family norm should be adopted because 45 percent, of the population increase, is contributed by births above two children per family. The policy, thereafter, opines that Panchayati Raj Institutions are an important means of furthering decentralized planning and programme implementation in the context of the National Population Policy, 2000; and in order to realize their potential, they need strengthening by further delegation of administrative and financial powers, including powers of resource mobilization.

47. The policy provides for promotional and motivational measures to be undertaken such as rewarding the Panchayats and Zila Parishads, and honouring them for exemplary performance in universalizing the small family norm; for a family welfare linked health insurance plan to be established whereunder couples below the poverty line, who undergo sterilization with not more than two living children, would become eligible for health insurance, for hospitalization and a personal accident insurance cover for the spouse undergoing sterilization; rewarding couples who marry after the legal age of marriage, have their first child after the mother reaches

the age of 21, accept the small family norm, and adopt a terminal method after the birth of the second child; and a wider affordable choice of contraceptives to be made accessible at diverse delivery points, with counseling services to enable acceptors to exercise voluntary and informed consent.

48. The National Population Policy, 2000 (Government of India Publication, p. 35) states:-

> "Demonstration of support by elected leaders, opinion-makers and religious leaders with close involvement in the reproductive and child health programme greatly influences the behaviour and response patterns of individuals and communities. This serves to enthuse communities to be attentive towards the quality and coverage of maternal and child health services, including referral care.
>
> The involvement and enthusiastic participation of elected leaders will ensure dedicated involvement of administrators at district and sub-district levels. Demonstration of strong support to the small-family norm, as well as personal example, by political, community, business, professional and religious leaders, media and film stars, sports personalities and opinion-makers, will enhance its acceptance throughout society."
>
> **(Javed and Others v. State of Haryana and Others : (2003) 8 SCC 369)**.

49. With a view to curb population growth, the Ministry of Health and Family Welfare, Government of India issued a press bulletin dated 13.03.2018 detailing the schemes to restrict the ever increasing population in India. They include Mission Parivar Vikas, which has been launched to increase access to contraceptives and Family Planning services in 146 high fertility districts; introduction of new contraceptive packaging such as Injectable Contraceptives, Centchroman and Progesterone Only Pills (POP); redesigned contraceptive packaging; new family planning media campaign; enhanced compensation scheme for sterilization; a scheme for home delivery of contraceptives; a scheme for ensuring spacing of births; and for observing the World Population Day and fortnight, as well as Vasectomy Fortnight.

50. The Legislature can, undoubtedly, prescribe disincentives to curb exponential population growth in the country, and it would wholly inappropriate for this Court to undertake an examination of whether the

petitioners are justified in their claim that, except in the plains, there is a decrease in population in the rural and hilly regions of the State of Uttarakhand. It is settled law that it is not the job of the court to decide whether a law is good or bad. Policy matters fall within the realm of the legislature and not of the courts. The court is, however, empowered and has the jurisdiction to decide whether a law is unconstitutional or not. **(Independent Thought v. Union of India and Another[21])**. India being a democratic country has so far not chosen to go beyond casting minimal disincentives, and has not embarked upon penalizing procreation of children. If anyone chooses to have more living children than two, he is free to do so under the law as it stands now. **(Javed and Others[4])**.

51. An enactment cannot be struck down on the ground that the Court thinks it unjustified. The Court cannot sit in judgment over the wisdom of Parliament and the legislatures. **(State of Madhya Pradesh v. Rakesh Kohli and Another[22]; State of A.P. and Ors. v. Mcdowell and Company and Ors.[23])**. A legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the Courts do not substitute their views on what the policy is. **(Subramanian Swamy[11]; Shayara Bano and Others v. Union of India and Others[24]).** If two views are possible, one making the provision in the statute constitutional, and the other making it unconstitutional, the former should be preferred **(Independent Thought[21]; LIC of India[12]; Government of Andhra Pradesh and Ors. v. Smt. P. Laxmi Devi[25]; Kedar Nath Singh v. State of Bihar[26]).** If it is necessary to uphold the constitutionality of a statute to construe its general words narrowly or widely, the court should do so **(Independent Thought[21]; G.P. Singh's Principles of Statutory Interpretation, 9th Edn., 2004, p. 497)**. It is only when there is a clear violation of a constitutional provision, would the Court declare the provision unconstitutional. **(Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat and Ors.[27]; Smt. P. Laxmi Devi[25]; LIC of India[12]).**

52. While the efforts of the Government of India, as at present, is to promote family planning and provide incentives to those who adhere to the two child norm, having three or more children is not as yet a penal offence in this country. The Constitution contemplates Panchayats as a potent instrument of family welfare and social welfare schemes for the betterment of people's health, especially women's health and family welfare coupled with social welfare. The functions and duties, for such constitutional goals being achieved, can be discharged by the leaders of Panchayats themselves taking a lead and setting an example for others to follow. **(Javed and Others[4])**. While prescribing disincentives, such as disqualification to contest panchayat raj elections, in order to promote family planning may be justified, the question which necessitates examination is whether Section 8(1)(r) of the 2019 amendment Act promotes the object of family planning, or also has the effect of penalizing those who have three or more children?

VIII. IS SECTION 8(1)(r) OF THE 2019 ACT VIOLATIVE OF ARTICLE 14 OF THE CONSTITUTION?

53. It is contended, on behalf of the petitioners, that Section 8(1)(r), as amended by the 2019 Act, impinges upon the constitutional right of the petitioners; this provision is violative of Article 14 of the Constitution of India, since it is unnecessary, unreasonable and manifestly arbitrary; from the statement of objects and reasons for introduction of the Bill, as also from the averments in the counter-affidavit, it is evident that the object sought to be achieved is to promote family planning and to prevent population explosion; if the object sought to be achieved is to persuade people to adopt family planning techniques, and not to have a third child, the impugned provision, whereby persons who already have three children before 25.07.2019, are sought to be punished, though having more than two children is not a crime**,** defeats the object of the legislation; as they already have more than three children, these persons can now do nothing to comply with the requirement of having not more than two living children; the object of family planning cannot be achieved by the impugned classification, since these persons already have more than two children; the petitioners can do little, regarding breaking the two child norm in future, as they already have

three children; applying Section 8(1)(r) of the 2019 Act, to those who already have more than two children before 25.07.2019, (i.e. when the provision was brought into force), would not result in the object of family planning being achieved; the nexus test, for a classification to be upheld on the touchstone of Article 14 of the Constitution of India, is not satisfied; a common-sense test should be applied, and the reasonableness of the provision should be examined from the stand point of the common-man; when so read, it would be clear that Section 8(1)(r) of the 2019 Act is unreasonable as it seeks to punish those, who already have more than two children, by disqualifying them from contesting elections; and it does not act as a disincentive in preventing population growth.

54. On the other hand Mr. S.N. Babulkar, learned Advocate General for the State of Uttarakhand, would submit that the object sought to be achieved, by insertion of Section 8(1)(r) in the 2019 Act, is to affirmatively implement the National Family Planning Scheme/Programme; the present legislation is a step in furtherance of achieving the object stipulated in the said policy of curtailing population growth, and in promoting family planning; the onus, of establishing violation of Article 14, lies heavily on the petitioners; they have failed to discharge this onus; and the wisdom of the legislature in making laws, on subjects within its legislative competence, would not be subjected to microscopic scrutiny by Courts.

55. It is no doubt true, as has already been noted hereinabove, that the right to contest elections, to Panchayati Raj Institutions, is a statutory or a constitutional right and, ordinarily, the person, who seeks to contest elections, can only do so if he fulfills the conditions stipulated in the provisions of a Statute or a Statutory Rule governing such elections. Would that mean that even a manifestly arbitrary disqualification, for contesting elections to Panchayati Raj Institutions, necessitates compliance, and cannot be questioned as being violative of Article 14 of the Constitution of India? This question can be easily answered by way of an illustration. Let us take a hypothetical case where the Legislature makes a provision that people above 5 and half feet, and below 6 feet in height, can alone contest elections and,

as a result, people who are less than 5 and half feet or more than 6 feet in height are disqualified. While this would also be a statutory provision, which necessitates compliance for a person to contest elections, does it mean that the said provision cannot be subjected to challenge as being violative of Article 14 of the Constitution of India? The answer can only be in the negative. What then are the parameters on which the validity of a statutory provision can be examined on the touchstone of Article 14 of the Constitution of India?

56. Since there is a Constitution in our country providing for fundamental rights, statutory provisions cannot be given such a meaning as would make them unconstitutional. **(Indra Das v. State of Assam[28])**. Courts would interfere when the statute clearly violates the rights of the citizens provided under Part III of the Constitution. **(Pathumma v. State of Kerala[29];** and **Independent Thought[21])**. Article 14 of the Constitution gives the right to equal treatment in similar circumstances, both in privileges conferred and in the liabilities imposed. (**Binoy Viswam v. Union of India[30]; Special Courts Bill, 1978, In re[9]; Subramanian Swamy[11]; Sri Srinavasa Theatre v. Government of Tamil Nadu & others[31]**). The principle of equality does not take away, from the State, the power of classifying persons for legitimate purposes. (**F.N. Balsara[8]; Charanjit Lal Chowdhury v. Union of India[32]**). The Legislature has the power of making laws to attain particular objects and, for that purpose, of distinguishing, selecting and classifying persons upon whom its laws are to operate. The principle of equality of law means that alike should not be treated unlike, and unlikes should not be treated alike. (**Binoy Viswam[30]**). The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons or things in different circumstances. (**Akhil Bhartiya Shoshit Karamchari Sangh (Railway) v. Union of India & others[33]**). The legislature is free to recognise degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest. (**Akhil Bhartiya Shoshit Karamchari Sangh (Railway)[33]**; **State of Jammu & Kashmir v. Triloki Nath Khosa[34])**.

57. Before examining whether the disqualification prescribed by the 2019 Amendment to the 2016 Act, by insertion of Section 8(1)(r) thereto, violates Article 14 of the Constitution of India, it is necessary for us to take note of the tests to be applied in determining whether a classification fulfills the requirement of a valid classification under Article 14 of the Constitution of India. Classification means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis, and does not mean herding together of certain persons and classes arbitrarily. **(Special Courts Bill, 1978, In re[9]; National Council for Teacher Education and Ors.[10]; Subramanian Swamy[11])**. What Article 14 prohibits is class legislation, and not reasonable classification for the purpose of legislation. Article 14 permits a reasonable classification which accommodates the practical needs of society. A classification violates Article 14 only when there is no reasonable basis. (**Binoy Viswam[30]**; **Col. D.D. Joshi and others v. Union of India and others[35])**. In determining the validity or otherwise of a statute, the Court should examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes persons or things grouped together from those left out of the group, and whether such differentia has a reasonable relation to the object sought to be achieved by the Statute. **(Ram Krishna Dalmia v. Justice S.R. Tendolkar and Ors.[36]; Nagpur Improvement Trust and Anr. v. Vithal Rao and Ors.[37];** and **Subramanian Swamy[11]**).

58. A classification, in order to be upheld on the touchstone of Article 14 of the Constitution of India, must be reasonable. (**Special Courts Bill, 1978, In re[9]**). A plea of discrimination can only be raised by showing that the impugned law creates two classes without any reasonable basis and treats them differently. (**Binoy Viswam[30]**). To attract the attention of Article 14, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, and that it does not rest on any rational basis having regard to the object which the Legislature has in view. The Court should examine whether the classification can be deemed to rest upon differentia discriminating the persons or things grouped from those left out,

and whether such differentia has a reasonable relation to the object sought to be achieved. The policy or the object of the legislation are relevant considerations. **(Dhan Singh and Ors. v. State of Haryana and Ors.[38])**. Differential treatment does not per se amount to violation of Article 14 of the Constitution, and it violates Article 14 only when there is no reasonable basis. **(Binoy Viswam[30])**. If the classification is reasonable and is founded on an intelligible differentia, and the said differentia has a rational relation to the object sought to be achieved by the statute based on such a reasonable classification, the validity of the statute cannot be successfully challenged under Article 14. **(Kangshari Haldar and Ors. v. The State of West Bengal[39])**.

59. In considering the reasonableness of a classification, from the point of view of Article 14 of the Constitution, the Court should consider the objective of such a classification. If the objective be illogical, unfair and unjust, necessarily the classification will have to be held as unreasonable. **(Deepak Sibal v. Punjab University and another[40])**. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and, being contrary to the Rule of law, would violate Article 14. (**Shayara Bano[24]**). Where no reasonable basis of classification appears on the face of the law, or is deducible from the surrounding circumstances, or matters of common knowledge, the Court will strike down the law as an instance of naked discrimination. (**Ram Krishna Dalmia[36];** and **Subramanian Swamy[11]**).

60. In **Deepak Sibal[40]** the Supreme Court held that the classification of employees of Government/Semi-Government institutions etc. by the impugned rule, for the purpose of admission in the evening classes of a three-year LL. B. degree course, to the exclusion of all other employees, was unreasonable and unjust, as it did not subserve any fair and logical objective; the classification of Government undertakings and companies may, in certain circumstances, be a reasonable classification satisfying the twin tests, but it was difficult to hold that employees of Government/Semi-Government institutions etc., would also constitute a

valid classification for the purpose of admission to evening classes of a three-year LL. B. degree course.

61. A classification should also not be manifestly arbitrary. Article 14, in its ambit and sweep, does not allow any kind of arbitrariness and ensures fairness and equality of treatment. **(Binoy Viswam[30])**. Article 14 strikes at arbitrariness in State action. **(Shayara Bano[24]; E.P. Royappa v. State of T.N[41])**. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other to the whim and caprice of an absolute monarch. **(E.P. Royappa[41];** and **Subramanian Swamy[11])**.

62. Classification should never be arbitrary, artificial or evasive. **(Special Courts Bill, 1978, In re[9];** and **National Council for Teacher Education and Ors.[10])**. Classification, in order to be constitutional, must rest upon distinctions that are substantial and not merely illusory. (**Akhil Bhartiya Shoshit Karamchari Sangh (Railway)[33]**). Classification cannot be made arbitrarily, and without any substantial basis. (**F.N. Balsara[8]; Charanjit Lal Chowdhury[32])**. The classification must not only be based on some qualities or characteristics which are to be found in all the persons grouped together, and not in others who are left out, but those qualities or characteristics must have a reasonable relation to the object of the legislation. **(Special Courts Bill, 1978, In re[9]; Dhan Singh and Ors.[38]; National Council for Teacher Education[10])**.

63. Statutory law will be struck down if it is found to be “arbitrary” and falls foul of Article 14 and other fundamental rights. The test of manifest arbitrariness would apply to invalidate legislation under Article 14. Manifest arbitrariness is something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. Arbitrariness, in the sense of manifest arbitrariness, would apply to negate legislation under Article 14. **(Shayara Bano[24]; Independent Thought[21])**.

64. It must also be borne in mind that the common sense response that may be expected from the common man, untramelled by legal lore and learning, should always help the judge in deciding questions of fairness, arbitrariness, etc. If the Judge's friend and counsellor, 'the common man', if asked, would unhesitatingly respond that it would be plainly unfair to make any such classification, the provisions of the legislation must be held to be plainly arbitrary and discriminatory. **(B. Prabhakar Rao and Ors. v. State of Andhra Pradesh and Ors[42])**.

65. It matters little, in examining the validity of a law on the touchstone of Article 14 of the Constitution of India, whether the law is prospective or retrospective in its application, for it is well settled that neither prospective nor retrospective laws can be made so as to contravene the fundamental rights. **(Raman Lal Keshav Lal Soni[19])**. Whether a law offends Article 14, does not depend upon whether it is prospective or retrospective. There is nothing in Article 14 to indicate that a law operating retrospectively cannot offend it. It is possible both for prospective and retrospective statutes to contravene the provisions of that Article. **(Kangshari Haldar[39])**.

66. The onus of establishing that a classification is violative of Article 14 of the Constitution of India lies heavily on the petitioner, who challenges the validity of such a law on this ground. It is no doubt true that, relying on **D.S. Nakara & others v. Union of India[43]**, the Supreme Court, in **B. Prabhakar Rao[42]**, held that the burden of establishing the reasonableness of a classification, and its nexus with the object of the legislation, was on the State. It is, however, widely accepted that Courts have recognised that there is always a presumption in favour of the constitutionality of a statute, and the onus to prove its invalidity lies on the party which assails the same. **(Pathumma[29]; Independent Thought[21]; Shri Ram Krishna Dalmia[36]; Saurabh Chaudri and Ors. v. Union of India[44]; Charanjit Lal Chowdhury[32]).** The person challenging the act of the State as violative of Article 14 has to show that there is no reasonable

basis for the differentiation between the two classes created by the State. **(Union of India v. N.S. Rathnam[45])**.

67. Even though the onus lies on the petitioner, who challenges the validity, to establish that the classification is unreasonable and arbitrary, on the petitioner discharging the initial burden, the onus then shifts to the Government. If the Government, then, fails to support its action of classification on the touchstone of the classification being reasonable, having an intelligible differentia and a rational basis germane to the purpose, the classification should then be held to be arbitrary and discriminatory. **(N.S. Rathnam[45])**. This is for the reason that when the constitutional validity of the law enacted by the legislature is under challenge, the Court will always raise a presumption of its constitutionality. It would be reluctant to strike down laws as unconstitutional unless it is shown that the law clearly violates constitutional provisions or the fundamental rights of the citizens. **(Independent Thought[21])**. The fundamental nature and importance of the legislative process is recognised by Courts, and due regard and deference is accorded thereto. **(Subramanian Swamy[11])**.

68. In order to sustain the presumption of constitutionality, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived as existing at the time of the legislation. (**Ram Krishna Dalmia[36]; Subramanian Swamy[11]**). It must be presumed that a legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. (**Middleton v. Texas Power and Light Company[46]; Sub-Divisional Magistrate, Delhi v. Ram Kali[47]; Independent Thought[21]; Charanjit Lal Chowdhury[32]**).

69. Courts must, however, be wary of carrying this presumption too far. The doctrine of classification is a subsidiary rule evolved by courts to give practical content to the doctrine of equality. Anxious or a sustained attempt to discover some basis for classification may gradually and imperceptibly erode the profound potency of the glorious content of equality

enshrined in Article 14 of the Constitution. **(Namit Sharma v. Union of India[48])**. While good faith and knowledge of the existing conditions, on the part of the legislature, are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals to hostile or discriminating legislation. **(Shri Ram Krishna Dalmia[36]; Subramanian Swamy[11]; Saurabh Chaudri[44]; Deepak Sibal[40])**.

70. Care must be taken to ensure that the classification is not pushed to such an extreme as to make the fundamental right to equality cave in and collapse. (**Triloki Nath Khosa[34]; State of Kerala & another v. N.M. Thomas & others[49]; Akhil Bhartiya Shoshit Karamchari Sangh (Railway)[33]**). While the burden is upon him, who attacks the classification, to show that there has been a clear transgression of the constitutional principles (**R.K. Garg & others v. Union of India[50]**), the presumption may be rebutted by showing that, on the face of the statute, there is no classification at all, and there is no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class. (**F.N. Balsara[8]; Charanjit Lal Chowdhury[32]**).

71. As noted hereinabove, in order to satisfy the presumption of constitutionality, the Court may take into consideration several factors. It can also rely on external aids such as the Statement of Object And Reasons for introduction of the Bill which resulted in the legislation, and, for that matter, even the contents of the counter-affidavit, filed before it by the State Government, furnishing reasons in support of its claim that the classification satisfies the test of Article 14 of the Constitution of India. For determining the purpose or object of the legislation, it is permissible to look into the circumstances which prevailed at the time when the law was passed and which necessitated the passing of that law. For the limited purpose of appreciating the background and the antecedent factual matrix leading to the

legislation, it is permissible to look into the Statement of Objects and Reasons of the Bill which actuated the step to provide a remedy for the then existing malady. **(Hiral P. Harsora and Ors. v. Kusum Narottamdas Harsora and Ors[51]; Shashikant Laxman Kale v. Union of India[52])**.

72. In **A. Thangal Kunju Musaliar v. M. Venkitachalam Potti[53]**, the Statement of Objects and Reasons was used for judging the reasonableness of a classification made in an enactment to see if it infringed or was contrary to the Constitution. It was reiterated, in **State of West Bengal v. Union of India: AIR 1963 SC 1241[54]**, that the Statement of Objects and Reasons accompanying a Bill, when introduced in Parliament, can be used for 'the limited purpose of understanding the background and the antecedent state of affairs leading upto the legislation. In **Javed and Others[4]**, the Statement of Objects and Reasons of the Haryana Act 11 of 1994 was looked into to hold that disqualification of persons for election to Panchayats at each level, having more than two children after one year of the date of commencement of the Act, was to popularize family welfare/family planning programme.

73. The STATEMENT OF OBJECTS AND REASONS of the Bill which resulted in the UttarakhandPanchayat Raj (Amendment) Act 2019 being made**,** reads thus:-

> "The UttarakhandPanchayati Raj Act, 2016 (Act NO. 11 of 2016) is enacted by the Uttarakhand State Government. It is inevitable to amend the Principal Act in this perspective to make provision for reservation on the post of Pradhan of Gram Panchayat, Pramukh of KshetraPanchayat and Chairman of ZilaPanchayat, to prohibit holding of two office simultaneously and to determine the educational qualification for election and **to make ineligible the contestant, having more than two living children from Panchayat election for the purpose of promoting family planning** and to make clear the procedure of election as well as to rectify certain errors of the principal Act.
>
> 2. Therefore amendments in the Principal Act is proposed to make the provisions of Gram Panchayat, KshetraPanchayat and ZilaPanchayat more firm amending / substituting the Sections 2, 4, 8, 9, 10-A, 10-B, 10-C, 13, 23, 32-A, 53, 54, 55-A, 56, 62, 66, 90, 91, 92-A, 95, 130, 131 and 138 of the Principal Act.
>
> 3. The proposed Bill fulfills above objective."

74. In **A. Thangal Kunju Musaliar**[53], for determining the question regarding the validity of the classification, even the affidavit, filed on behalf of the State, of "the circumstances which prevailed at the time when the law under consideration had been passed and which necessitated the passing of that law", was relied upon. In **Pannalal Binjraj v. Union of India**[55] a challenge to the validity of a classification was repelled placing reliance on an affidavit filed on behalf of the Central Board of Revenue disclosing the true object of enacting the impugned provision in the Income Tax Act. To similar effect, are **Harbilas Rai Bansal v. State of Punjab**[56]**; Shashikant Laxman Kale**[52]**;** and **Hiral P. Harsora**[51].

75. From the Statement of Objects And Reasons, as also the counter-affidavits filed in reply to the Writ Petitions by the State Government, it is evident that the object, of inserting Section 8(1)(r), is to promote family planning and prevent population explosion which, as noted hereinabove, can be a valid ground for prescribing a disqualification for contesting elections to Panchayati Raj Institutions. A valid classification is based on a just objective. The result to be achieved by the just objective pre-supposes the choice of some for differential consideration/ treatment over others. **(Kallakkurichi Taluk Retired Officials Assn. v. State of T.N**[57]**)**. For a reasonable classification, under Article 14 of the Constitution, there must be a causal connection between the basis of classification and the object of the statute. If the object of the classification is illogical, unfair and unjust, the classification will be unreasonable. **(Navtej Singh Johar and Ors. v. Union of India and Ors.**[58]**)**. The object itself should be lawful and it cannot be discriminatory. If the object is to discriminate against one section, the discrimination cannot be justified merely on the ground that there is a reasonable classification which has a rational relation to the object sought to be achieved. **(Vithal Rao**[37]**; Subramanian Swamy**[11]**)**.

76. The object of the legislation must also be lawful. While the purported object, sought to be achieved by Section 8(1)(r), does appear to be lawful, the question which necessitates examination is whether, merely because the object is lawful, the provision in question must be upheld on the

anvil of Article 14 of the Constitution of India? The test, for a valid classification, is that persons are grouped together on the basis of an intelligible differentia which distinguishes those included in the group from those left out therefrom, and such a differentia has a reasonable nexus to the object sought to be achieved by the Statute. In the present case, the classification is based on a differentia. People included in the group are those who have two children or less, and those excluded therefrom are those who have three or more children. The second requirement, for a valid classification, is that such a differentia must have a rational relation to the object sought to be achieved. In other words, a valid classification must fulfill the nexus test.

77. The classification may be founded on different basis; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of the classification and the object of the Act under consideration. (**Budhan Choudhry and others v. State of Bihar[59]; Ram Krishna Dalmia[36]; Subramanian Swamy[11]**). The differentia, which is the basis of the classification, and the object of the Act are distinct, and what is necessary is that there must be a nexus between them. **(Special Courts Bill, 1978, In re[9]; Subramanian Swamy[11])**. Classification, to meet the test of Article 14, must always rest upon some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislation. When there is no reasonable basis for a classification, the legislation, making such classification, may be struck down as to be in violation of Article 14 of the Constitution. **(S. Seshachalam v. Bar Council of T.N.[60])**.

78. Those grouped together must possess a common characteristic justifying their inclusion in the group, but distinguishing them from those excluded; and performance of this exercise must bear a rational nexus with the reason for the exercise. **(Kerala Hotel and Restaurant Association and Ors. v. State of Kerala and Ors.[61])**. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. **(Shri Ram Krishna Dalmia[36]; Saurabh Chaudri and Ors.[44])**. The difference, which warrants a reasonable classification, need

not be great. It must, however, be real and substantial and there must be some just and reasonable relation to the object of the legislation. Classification, having regard to microscopic differences, is not good. To over-do classification is to undo equality. **(N.S. Rathnam[45]; Roop Chand Adlakha v. DDA[62])**. Surrounding circumstances may be taken into consideration in support of the constitutionality of a law which is otherwise hostile or discriminatory in nature. But the circumstances must be such as to justify the discriminatory treatment or the classification subserving the object sought to be achieved. **(Deepak Sibal[40])**.

79. Do the circumstances, which have been relied on by the respondents in the instant case, justify the classification whereby those, who already have more than two children prior to 25.07.2019 when the 2019 Act came into force, are disqualified from contesting elections to Panchayat Raj Institutions?

80. If the object, of insertion of Section 8(1)(r), is to promote family planning and prevent population explosion, does such a provision have a rational relation/nexus in achieving such an objective? The object of prescribing the two child norm, and disqualifying those who have three children or more, is to disincentivize people from having a third child, and not to punish them for having given birth to three or more children prior to such a law having been made. While the provision [Section 8(1)(r)], undoubtedly, seeks to achieve the object of providing disincentives, from having a third child, to those who have 2 children or less, what is its effect on those who, prior to the law being made, already have three living children or more? The object of disincentivizing people from having a third child, and to promote family planning, would not be achieved with respect to those who already have three or more children, since there is nothing that they can do to bring the children, they already have, below the two child norm. While Section 8(1)(r) may, possibly, have been contended to be valid if the object sought to be achieved by the legislation was to punish those who have three children or more, such a claim would, undoubtedly, not be free from doubt, for the object of the legislation, as noted hereinabove, must also be lawful. The National Population Policy, 2000, and the various schemes

introduced by the Government of India, show that the endeavor is to provide incentives to people having two children or less from not having further children. None of these policies, of the Government of India, seek to punish those who have three children or more. Likewise, while the State Legislature can, undoubtedly, make a law to achieve the just object of disincentivizing those who have two children or less, from having a third child, it may not be justified in punishing those who already have three or more children by an *ex-post facto* law. It is, however, unnecessary for us to dwell on this aspect any further since, even according to the respondents, the object of the legislation [Section 8(1)(r)] is to promote family planning by providing disincentives from having a third child. In so far as it is made applicable to that class of people, who already have three children or more, the legislation would, undoubtedly, be manifestly arbitrary as the differentia, between those left out of the group from those included in the classification, does not have a rational nexus to the object of the legislation.

81. The Constitution has assigned, to the Courts, the function of determining as to whether the laws made by the legislature are in conformity with the provisions of the Constitution. In adjudicating the constitutional validity of statutes, the Courts discharge an obligation which has been imposed upon them by the Constitution. Courts would be shirking their responsibility if they hesitate to declare the provisions of a statute to be unconstitutional where the provisions are found to be violative of the Articles of the Constitution. **(State of Punjab v. Khan Chand[63]; Subramanian Swamy[11]; Independent Thought[21])**. If the law under challenge violates the fundamental rights of the citizens, the law is arbitrary, or is discriminatory, the Courts can either hold the law to be totally unconstitutional and strike down the law, or the Court may read down the law in such a manner that the law when read down does not violate the Constitution. While the Courts must show restraint in dealing with such issues, it cannot shut its eyes to the violations of fundamental rights of citizens. If the legislature enacts a law which is violative of the fundamental rights of citizens, is arbitrary and discriminatory, the Court would be failing in its duty if it does not either strike down the law or read down the law in

such a manner that it falls within the four corners of the Constitution. **(Independent Thought[21])**. When Courts strike down laws they are only doing their duty. No element of judicial arrogance should be attributed to Courts when they determine whether or not the law made by the legislature is in conformity with the provisions of the Constitution. **(State of Punjab v. Khan Chand[63]; Subramanian Swamy[11]; Independent Thought[21])**.

82. Hesitation or refusal to declare the provisions of an enactment unconstitutional, even where it is found to infringe the Constitution, on misconceived notions of judicial humility would, in a large number of cases, have the effect of eroding the remedy provided to the aggrieved parties by Article 226 of the Constitution. Abnegation in a matter where power is conferred to protect the interest of others, against measures which are violative of the Constitution, is fraught with serious consequences. **(Khan Chand[63]; Subramanian Swamy[11]; Independent Thought[21])**.

83. What then should this Court do? Striking down Section 8(1)(r), in its entirety, may not be justified since the legislation, in so far as it seeks to provide disincentives to those who have two or less children from having a third child, seeks to achieve the object of promoting family planning and preventing rapid population growth. It is only with respect to those, who already have three or more children, does Section 8(1)(r) fail on the touchstone of Article 14 of the Constitution of India.

IX. DOES FAILURE OF THE 2019 ACT, TO PRESCRIBE A CUT-OFF DATE, RENDER IT UNCONSTITUTIONAL?

84. It is submitted, on behalf of the petitioners, that, unlike in the Haryana Act the validity of which fell for consideration in **Javed[4]**, the 2019 Act does not prescribe any cut-off date after which alone would this disincentive, for having more than two children, come into force; and failure to prescribe a cut-off date, after which alone would this two living children norm apply, renders the provision unreasonable, irrational and manifestly arbitrary.

85. The contention, urged on behalf of the respondent-State Government, that a provision similar to Section 8(1)(r), inserted by the 2019 Amendment to the 2016 Act, has been upheld by the Supreme Court is without merit. It is true that, in **Javed and Others**[4], the Supreme Court held that one of the objects of the enactment was to popularize family welfare/family planning programmes, and this is consistent with the National Population Policy; there was nothing wrong in the State having chosen to subscribe to the national movement of population control by enacting a legislation which would go a long way in ameliorating health, social and economic conditions of the rural population, and thereby contribute to the development of the nation which, in its turn, would benefit the entire citizenry; persons having more than two living children are clearly distinguishable from persons having not more than two living children; the two constitute two different classes, and the classification is founded on an intelligible differentia clearly distinguishing one from the other; one of the objects sought to be achieved by the legislation is popularizing the family welfare/family planning programme; the disqualification, enacted by the provision, seeks to achieve the objective by creating a disincentive; the disqualification contained in the provision seeks to achieve a laudable purpose — socio-economic welfare and health care of the masses — and is consistent with the National Population Policy.

86. It is necessary to bear in mind that, in **Javed and Others**[4], the vires of Sections 175(1)(*q*) and 177(1) of the Haryana Panchayati Raj Act, 1994 (for short the "1994 Act") were under challenge. Section 175 (1) (q) stipulated that no person shall be a Sarpanch, Up-Sarpanch or a Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad, or continue as such, who had more than two living children. Under the proviso thereto, a person having more than two children, on or upto the expiry of one year of the commencement of the 1994 Act, were deemed not to have been disqualified. Section 177 (1) stipulated that, if any member of a Gram Panchayat, Panchayat Samiti or Zila Parishad (a) who was elected as such, was subject to any of the disqualifications mentioned in Section 175 at the time of his election; (*b*) during the term for which he has been elected, incurs

any of the disqualifications, mentioned in Section 175, shall be disqualified from continuing to be a member, and his office shall become vacant. In **Javed and Others**[4], the Supreme Court held that a person having more than two children after the cut-off date, should pay a little price, and that is of depriving himself from holding an office in Panchayats in the State of Haryana; there was nothing illegal about it, and, certainly, no unconstitutionality attached to it.

87. It is because the 1994 Haryana Act made the provision applicable one year after the commencement of the 1994 Act was the validity of the said provision upheld by the Supreme Court since, thereby, the object of disincentivizing people from having a third child was achieved; and the provision acted as a deterrent to those, who already had two children, from having a third child, while at the same time avoiding punishing those who already had three or more children.

X. CAN SECTION 8(1)(R) BE READ DOWN TO SAVE IT FROM UNCONSTITUTIONALITY?

88. It is submitted, on behalf of the petitioners, that applying the said provision, i.e. Section 8(1)(r), prospectively, and stipulating that it shall apply only to persons who give birth to a third child or more after the 2019 Act was brought into force on 25.07.2019, would save the provision from unconstitutionality.

89. It is well settled that, with a view to save a provision from being declared unconstitutional, it may be read down. The creases may be ironed out (**Entertainment Network (India) Ltd. vs. Super Cassette Industries Ltd.**[64]) to ensure that it does not fall foul of Part III of the Constitution, and, only if it cannot, to then strike down legislation (plenary or subordinate) as ultra-vires Part III of the Constitution of India. If the law is arbitrary, discriminatory and violates the fundamental rights guaranteed to the citizens of the country, then the law can either be struck down or can be read down to bring it in consonance with the Constitution of India. **(Independent Thought**[21]**)**.

90. As the Court must start with the presumption that the impugned provision is *intra vires*, the said provision should be read down only to save it from being declared ultra vires, if the Court finds, in a given case, that the presumption stands rebutted. **(J.K. Industries Limited & another v. Union of India & others[65]; Hindustan Zinc Limited v. Rajasthan Electricity Regulatory Commission[66])**. A provision of an Act is read down to sustain its constitutionality (**Pannalal Bansilal Patil and others v. State of U.P. & others[67]; Delhi Transport Corporation v. D.T.C. Mazdoor Congress[68]**), and by separating and excluding that part of the provision which is invalid, or by interpreting the word in such a fashion as to make it constitutionally valid. (**B.R. Enterprises v. State of U.P. & others[69]**). The question of reading down a provision arises if it is found that the provision is *ultra vires* as they stand. (**Electronics Corporation of India Ltd v. Secretary, Revenue Department, Govt. of Andhra Pradesh and Ors.[70]**). In order to save a statute or a part thereof, from being struck down, it can be suitably read down. But such reading down is not permissible where it is negatived by the express language of the statute. (**C.B. Gautam v. Union of India & others[71]**).

91. An attempt should be made to make the provision of the Act workable and, if it is possible, to read down the provision. (**Balram Kumar Wat v. Union of India & others[72]; ANZ Grindlays Bank Ltd and Ors. v. Directorate of Enforcement and Ors.[73]**). If a provision can be saved by reading it down, it should be done, unless the plain words are so clear as to be in defiance of the Constitution. This interpretation springs out of the concern of Courts to salvage a legislation. Yet, in spite of this, if the impugned legislation cannot be saved the Courts shall not hesitate to strike it down. **(B.R. Enterprises[69])**.

92. In order to sustain Section 8(1)(r), an appropriate reading down of the said provision to save it from the vice of unreasonableness and arbitrariness should be resorted to. If it is not so read down, then Section 8(1)(r) would obviously fail on the touchstone of reasonableness, and would become void and inoperative. **(Hyderabad Karnataka Education Society v. Registrar of Societies and Others[74])**. Section 8(1)(r) can be read down

by giving it prospective application, meaning thereby that the disqualification under the said provision can be held to apply only to those who give birth to a third child or more after 25.07.2019 when Section 8(1)(r), inserted by the 2019 Amendment to the 2016 Act, came into force. The said provision can, thereby, be saved from being declared unconstitutional. It is only by so reading down Section 8(1)(r), and applying it prospectively from the date the 2019 amendment Act came into force on 25.07.2015, can the said provision be saved from unconstitutionality.

93. We, therefore, read down Section 8(1)(r) and declare that the disqualification from contesting elections to Panchayati Raj Institution, in terms of the said provision, would apply only to cases where persons, having two children or more, have a third child or more after 25.07.2019. The said provision shall not be understood as disqualifying those who already have three or more children before 25.07.2019.

XI. CONCLUSION :

94. The challenge, to the constitutional validity of the newly inserted Section 10-C of the 2019 Amendment to the 2016 Act, must fail. Section 8(1)(r) shall be read down as a disqualification, from contesting elections to Panchayati Raj Institutions, only to those who give birth to a third child or more after the 2019 Amendment to the 2016 Act came into force on 25.07.2019.

95. All the Writ Petitions are, accordingly, disposed of. No costs.

(**Alok Kumar Verma, J.**)
19.09.2019

(Ramesh Ranganathan, CJ.)
19.09.2019

Rahul