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Population and the Role of Law in the Americas

Proceedings of a Seminar of the Human
Rights Committee at the 18th Conference of the
Inter-American Bar Association
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FOREWORD

The Human Rights Committee of the Inter-American Bar Association organized as part of its agenda for its 18th conference during August 1973, a Seminar on Law and Population in the Americas. The purpose of the Seminar was to examine, in the light of United Nations Human Rights principles, the laws of various American states as they affect the fertility behavior of their peoples. Professor Carlos A Dunshee de Abranches, the Chairman of the Association's Human Rights Committee, presided over the Seminar. The Seminar was open to all the Conference delegates.

The principal Seminar participants were experts from Brazil, Chile, Costa Rica, Mexico and the United States, each of whom read short papers relating to the subject of law and population in their respective countries. These were in turn commented on from the floor by delegates from various countries attending the Conference. At the end of the meeting a draft resolution was prepared for submission to the Plenary Session of the Conference which called attention to the growing importance of the subject of law and population in the Western Hemisphere and to the need for further study. It suggested the creation of a small working group to keep the matter under review until the next Inter-American Bar Association Conference in 1975. The Plenary adopted the resolution at the end of the Conference.

The Seminar was made possible by financing from the Inter-American Bar Foundation and by the Law and Population Programme of the Fletcher School of Law and Diplomacy. These two institutions have decided, in view of the interest shown in the matter, to publish the attached proceedings. We acknowledge with thanks the help of the Foundation and of its President, Charles R. Norberg, Esq., for organizing the Seminar.

The proceedings published here include a statement on the part of the Chairman, Professor Dunshee de Abranches, as to the significance of the population problem in the Inter-American area, together with slightly edited versions of the statements presented by the principal participants which reflect the different situations in their countries. We have included also short summaries of the interventions made by a number of the attending delegates. We add to this collection of materials the following appendices: a copy of the resolution adopted by the Plenary Session of the Inter-American Bar Association Conference, a short statement on the conclusions reached at a meeting held just prior to the Seminar in São Leopoldo on the Brazilian population question, referred to by Father Beltrão during the Rio Seminar; and a short summary of the proposed revision of the Mexican population law accompanied by a statement in support of it by the President of Mexico. This recent development was referred to by the Mexican participant, Lic. José Cornejo.

We hope this material will be of value to any persons who are concerned with human rights and population matters in the Americas.

POPULATION AND THE ROLE OF LAW IN THE AMERICAS

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LAW AND POPULATION CONTROL: AN INTRODUCTION

Carlos A. Dunshee de Abranches*

In 1974, the United Nations will convene a World Population Conference in Bucharest as the culmination of its debates concerning international action to control population growth.

The controversy provoked in the U.N. springs from the complexity and variety of the factors involved. On one hand, we see the demographic explosion with its particular set of consequences, such as growing urban concentration, pollution of the environment, the risk of a food crisis and the difficulty which countries with a high rate of demographic growth are having in obtaining the resources necessary to cover the minimum requirements for the welfare of their increased populations. Hence, the question arises as to how to provide the population with adequate housing, education, medical and hospital assistance, transportation and recreation, if the number of births outstrips available resources.

On the other hand, we must recognize the reasonable desire of the less developed countries to exploit their natural resources, to accelerate their industrialization, to integrate and occupy their territory in a more rational manner, and to increase their participation in world commerce and in plans for international defense and security. In order to reach these vital objectives, it is incumbent upon each nation to expand or limit its population according to its respective needs.

If we assume that it is desirable to decrease the actual number of births in the majority of countries, there arise new and more delicate problems with regard to the carrying out of a family planning policy. Can a government require, or at least bring pressure on, its citizens to decrease or increase the number of their offspring? What are the licit means of such limitation in the face of law, morality and religion? Is the resolution of these issues within the exclusive competence of national governments in the legitimate exercise of their internal sovereignty, or do they fall in the area where the superior interests of all humanity are paramount, because of the nature of the international community?

As was inevitable, the jurists could not remain at the margin of the population polemic which was initiated by economists, sociologists, political scientists and theologians, and recently the lawyers in this Hemisphere have jumped into the midst of the debate. Because of this,

*Chairman, Human Rights Committee of the Inter-American Bar Association and member of the Human Rights Commission of the Organization of American States.

the Inter-American Bar Association, desiring to take into consideration the studies made in this field by lawyers in different universities, governments, and international organizations, included a "Seminar on Law and Population" on the agenda of its 18th Conference in Rio de Janeiro.

The purpose of the seminar has been to study objectively the extent to which the laws of the countries in this Hemisphere affect the problems of fertility and population, bearing in mind the standards in the various declarations and resolutions approved by the United Nations. Specialists from Brazil, Chile, Costa Rica, Mexico and the United States were invited to participate in the discussions and to present papers which describe population-related legislation and trends in their respective countries.

As the moderator of the seminar, the task fell upon me to make a presentation of the theme and to explore the two conflicting human rights conceptions. One of these sustains the principle that the right to life shall be protected by law from the moment of conception. The other proclaims the right of individual liberty and access to the information and the material means necessary to insure the effective exercise of family planning. The discussions by the speakers and the other participants, who numbered more than a hundred, were lively and instructive. They included participation by delegates from Argentina, Peru and Uruguay, as well as Brazil.

The positions varied between the two extremes--from those who defended the legitimacy of international cooperation and of internal action for the control of population, including the legitimacy of contraception and the interruption of premature pregnancy on request of the woman, to those who opposed any external or governmental interference whatsoever in the private sphere of human procreation, and who defended existing legal restrictions on contraception and abortion.

Despite these extremes, a balanced solution has prevailed. The provisions of the U.N. proclamation point out, on one hand, "that parents have a basic human right to determine freely and responsibly the number and spacing of their children," (Teheran, 1968) and recommend that the "knowledge and means necessary" to exercise the right be made available to them (Declaration on Social Progress and Development, 1969). On the other, it is recognized that decisions concerning the population policy of each country are within the competence of the government of that country, it being in a position to take into account its own particular conditions, interests, religion, demographic density and economic social and cultural development.

The papers and commentaries of participants at the Seminar are reproduced here in the hope that they will stimulate further discussion on the timely subject of law and population in the Americas.

FAMILY PLANNING: ETHICAL AND RELIGIOUS ASPECTS

Pedro Calderan Beltrão, S.J.*

I. FACTS, CHANGES AND SOCIOLOGICAL CONCLUSIONS

It took humanity more than one million years to reach the level of one billion inhabitants, all living simultaneously on this planet; that occurred in about 1830 A.D. The number reached 2 billion, one century later (1930), and not more than one generation passed before it was 3 billion (1960). The world population will reach the 4 billion level after the short lapse of but 15 years.

It took humanity more than 1 million years to reach a rate of demographic growth of 0.2 percent per year (between 1750 and 1850), but only as little as 150 years to increase the rate of growth tenfold, to 2.0 percent per year.

What are the reasons for this substantial change in population dynamics that has transformed a nearly horizontal demographic growth pattern into one that is vertical, dizzying and explosive? Among the most advanced of the world's people 150 years ago, one-third of those born died before one year of existence, one-half before adolescence, two-thirds before maturity, and three-fourths before old age. Today, barely 2 percent die before the age of adulthood, and more than three-quarters survive to more advanced ages.¹

When high levels of fetal, infant and juvenile mortality were in existence 100 years ago, of the 14 to 16 pregnancies which a woman might have--the average rate of physiological fertility--10 to 12 births would result, and of these, 4 to 5 children would reach adulthood. Under today's bio-social conditions, of an average of 14 to 16 pregnancies, 12 to 14 births will take place and 10 to 12 offspring will grow to adulthood.

Moreover, in the last century less than one-fourth of the families lived in cities, while more than three-fourths lived in the country where a child was economically active from a tender age and where the cost of

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¹For more details concerning this demographic aspect see Pedro Calderan Beltrão, Demografia-Ciência da População - Análise e Teoria (Porto Alegre: Ed. Sulina, 1972).

education was nearly insignificant. Today, more than three-fourths of our families live in urban or suburban areas where the cost of education increases constantly and where the entire task of providing for the education of the offspring beyond the earliest years falls on the parents.

Sociological Conclusion: Because of the biological, demographic, economic and social conditions under which humanity lived in the past centuries, the only sociologically functional behavior suitable to the contemporary conditions of life, work, coexistence and survival was to aim for maximum fertility. However, the behavior now required by the new conditions of life, work, coexistence and survival is to aim toward the minimization of fertility, by regulating offspring and by spacing and limiting the number of children.²

II. SOCIAL DOCTRINES: FROM PRO-NATALISM TO "OPTIMUM" POPULATION

In times when demographic growth was slow and uncertain, all social thinkers-- with rare exceptions, such as the Hellenic concept of "polis" -- were concerned with the idea of maximum fertility because the progress of human society was postulated in this manner. Social thinking was largely "populationist." For example, an expression typical of late 16th Century thought was the famous phrase uttered by Jean Bodin, the founder of modern economic analysis. "There are no riches other than human beings." At that time the relationship of demography to economic growth was thought of in the following terms:

Demographic growth is the cause of economic growth.

It was not until the 18th Century when clairvoyant spirits began to perceive the first indications of the secular decline in mortality that the earlier relationship was inverted into:

Demographic growth is the effect of economic growth.

This was the thesis of classical economic thought from before Malthus until after John Stuart Mill. Until the beginning of this century population continued to be thought of as a dependent variable, largely determined by economic factors. Then the neo-classicists and the neo-Malthusians began to regard the demographic factor as a variable independent of economic structures and events. It was then that population growth came to be thought of in terms of "optimum." What rate of demographic growth provides the best conditions for socio-economic development?

2

For more details concerning the sociological aspects of the subject see generally P.C. Beltrão, Sociologia da Família Contemporânea, (Petropolis, R.J.: Ed. Vozes, 2d ed. 1973).

³See generally P.C. Beltrão, supra note 1, 2d part: Teorias demográficas.

Even today, most demographic/economic research centers principally on this question. I have seen reference made to that question as recently as a symposium of the International Coordinating Committee for National Demographic Research of the United Nations which was held in preparation for the World Conference for the UN Population Year (1974).⁴ Even Marxist thought, which was for so long pro-natalist and decidedly anti-Malthusian, now adheres to a population policy in terms of the "optimum" population for each country or region.⁵

III. ETHICAL-RELIGIOUS POSITIONS: FROM "MULTIPLY AND REPLENISH" TO THE IDEA OF "RESPONSIBLE PARENTHOOD"

All existing ethical-religious codes had their origins and crystallizations during those centuries when circumstances lent themselves to pro-natalist attitudes. As far as the Judeo-Christian tradition is concerned, a certain preference was given to the "priestly" position expressed in the phrase "multiply and replenish," rather than the Jehovian one, which views the conjugal tie in terms of "and both shall be made one flesh." Until very recently this last concept, clearly preferred by Christ and Saint Paul,⁶ was largely ignored during the two Christian millenia.⁷ The procreation (and subsequent education) of offspring was considered as the "primary goal" of a marriage, until Vatican Council II (1962-66) intentionally abandoned this terminology, and Paul VI in Humanae Vitae (1968)⁸ made the procreative and uniting functions of the conjugal relationship explicitly and

⁴CICRED (Comité International de Coordination des Recherches Nationales en Démographie), "Séminaire sur la recherche démographique en relation avec les objectifs de croissance d'une population (3 au 9 avril 1973)," Bulletin No.1, July 1973, at 15s.

⁵Herman E. Daly, "A Marxian-Malthusian View of Poverty and Development," in Population Studies, Vol. XXV, No.1, pp. 25-37 (March 1971); Pedro Calderan Beltrão, "A evolução do pensamento marxista sobre a população" in Vale do Rio dos Sinos, No.8, pp.3-29 (1973).

⁶Matthew 19:5; Mark 10:7s; Ephesians 5:31; I Corinthians 6:16.

⁷See John Noonan, Jr., Contraception: A History of its Treatment by the Catholic Theologians and Canonists (Harvard University Press, 1965; Spanish transl: Buenos Aires: Editorial Troquel, 1967).

⁸". . . By safeguarding both these essential aspects, the unitive and the procreative, the conjugal act preserves in its fullness the sense of true mutual love and its ordination toward man's most high calling to parenthood." Humanae Vitae, No. 12 (English text found in N.Y. Times, July 30, 1973, at 20).

equally valid. Nevertheless, the great majority of today's Catholic Church uses this shift in sociological thought as a basis for further progression and gives priority to the conjugal aspect, without excluding the procreative goal to which "a married life 's naturally ordained" (according to the expression of Vatican II).

Consequently, the concept and criterion of "responsible parenthood" ⁹ was adopted and is firmly supported by the Church. With this, the Church ratified through official acceptance, the idea of regulation of offspring at the family level, a position already affirmed by Pius XII as early as 1951,¹⁰ and also prepared itself for the acceptance of "family planning" on

⁹" . . . Parents should regard as their proper mission the task of transmitting human life and educating those to whom it has been transmitted. They should realize that they are thereby cooperators with the love of God the Creator, and are, so to speak, the interpreters of that love. Thus they will fulfill their task with human and Christian responsibility. With docile reverence toward God, they will come to the right decision by common counsel and effort.

They will thoughtfully take into account both their own welfare and that of their children, those already born and those which may be foreseen. For this accounting they will reckon with both the material and the spiritual conditions of the times as well as their state in life. Finally, they will consult the interests of the family group, of temporal society, and of the Church itself.

The parents themselves should ultimately make this judgment, in the sight of God. . . "Gaudium et Spes, No. 50. (English transl. found in The Documents of Vatican II at 254 (W. Abbot ed. 1966).

¹⁰"Serious reasons, often put forward on medical, eugenic, economic, and social grounds, can exempt from that obligatory service even for a considerable period of time, even for the entire duration of the marriage. It follows from this that the use of the infertile periods can be lawful from a moral point of view and, in circumstances which have been mentioned as indeed unlawful." Pope Pius XII's Discourse to the Members of the Congress of the Italian Association of Catholic Midwives, Oct. 29, 1951. (English transl. found in Catholic Documents, No. 6, Feb. 1952, at 1, 9).

"On the other hand, the Church knows how to consider with sympathy and understanding the real difficulties of the married state in our day. Therefore, in Our last allocution on conjugal morality, We affirmed the lawfulness and at the same time the limits - in truth very wide - of a regulation of offspring, which, unlike so-called "birth control," is compatible with the law of God. One may even hope (yet in this matter the Church naturally leaves the judgment to medical science) that science will succeed in providing this method with a sufficiently secure basis. The most recent information seems to confirm this hope." Pope Pius XII's Address to the Family Front ("Fronte della Famiglia") and to the Italian Association of Large Families, Nov. 26, 1951. (English transl. found in Catholic Documents, ibid., at 28, 31).

the social level, as made official by Paul VI in Populorum Progressio in 1967.¹¹

On October 28, 1971, Osservatore Romano published a story concerning the granting of a pecuniary subsidy, on behalf of the Vatican, for the "Responsible Parenthood Program" in the Philippines, which is being sponsored by the Catholic bishops. In December 1972, the Mexican bishops endorsed the official government family planning program established earlier that spring. That program covers a country which is second only to Brazil as the most populous of the region.

IV. THE REMAINING CONTROVERSY

At the same time that official Church approval was given both to the regulation of offspring and to "family planning," as well as to a group of measures which fit the needs of all households whose circumstances permit them to regulate births, the Church maintained reservations concerning two of the contraceptive methods used in today's medical practice: the Pill and the intra-uterine device; the former as being "against nature" and the latter as being "an abortifacient".

With regard to the first problem, the majority of theologians consider the concept of "against nature" as being derived from a one-sided concept of "human nature" which makes the moral aspects of a human being's sexual conduct dependent on his natural physical and biological structure. This creates an unacceptable dichotomy between the personalized ideals of marriage and the conjugal relationship as fully described in the first part of Humanae Vitae and the casuistic examples as given in the second part of the same encyclical. For that reason, there predominates today in the Church, as much in the doctrinal context as in the pastoral practice, an open attitude that

¹¹"It is true that too frequently an accelerated demographic increase adds its own difficulties to the problems of development: The size of the population increases more rapidly than available resources, and things are found to have reached apparently an impasse. From that moment the temptation is great to check the demographic increase by means of radical measures. It is certain that public authorities can intervene, within the limit of their competence by favoring the availability of appropriate information and by adopting suitable measures, provided that these be in conformity with the moral law and that they respect the rightful freedom of married couples. Wherever the inalienable right to marriage and procreation is lacking, human dignity has ceased to exist. Finally, it is for the parents to decide, with full knowledge of the matter, on the number of their children, taking into account their responsibilities toward God, themselves, the children they have already brought into the world, and the community to which they belong. In all this they must follow the demand of their own conscience enlightened by God's laws authentically interpreted, and sustained by confidence in him. Populorum Progressio, No. 37. (English text found in N.Y.

leaves the practical question of methods to medical discretion.

With regard to intra-uterine devices and the manner in which they act-- whether they prevent conception or whether they prevent implantation-- the question of whether or not they are to be considered as abortifacient depends on the way in which one defines "abortion." The concept of "abortion" as used in the medical sense, even in Brazil, is not the same as that of lawyers, and a fortiori not the same as that of canon lawyers, or theologians, or philosophers.

The medical ethic defines abortion as the interruption of pregnancy (under circumstances of inviability), and states further that pregnancy begins with nidation and not with fertilization. Consequently, any method that works its effect prior to fertilization or even prior to implantation, as do the IUD and even the hormonal contraceptives, is not considered abortive by today's medical practice (as is pointed out in the World Health Organization with regard to the IUD).

However, in the philosophical-theological sense, abortion has a less pragmatic meaning: it is the elimination (direct or indirect) of a being which has already acquired a precise right to life, because it is already a human being.

According to the latest data on human biology, the beginning of a new human existence cannot be pinpointed at the moment of fertilization. The presence of a full genetic code proves nothing, since after fertilization two or more human existences (twins) can develop with the same genetic code. Neither can it be at the moment of implantation, because even after this, twin existences may also develop. The embryo does not become irreversibly individual until the end of the second week after fertilization and thus a few days after implantation. Nevertheless, even implantation of a fertilized egg in the uterus is not enough in order for one to speak of human personality, it is necessary for an embryo to have the characteristically human cerebral formation as a biologic substratum for thought and, hence, of liberty and responsibility. This development occurs between the 15th and 40th day after fertilization. Then, and only then, are we faced with a single human being (with distinct potential as an individual and not merely something generic or specific) and not with several different human

Times, Mar. 29, 1967, at 23-25).

¹²See Dr. Beni dos Santos, "A concepção personalista do matrimônio e a Humanae Vitae," Vozes (Nov. 1968); dos Santos, O sentido personalista do matrimônio (Petropolis, R.J.: Ed. Vozes 1969). See also Paul-Eugène Charbonneau, "Teologia da Reprodução Humana: a situação doutrinal cinco anos depois da Humanae Vitae," Seminário Brasileiro de População, São Leopoldo, R.S. 27-30 July 1973 (Manuscript); Marcus Bach, S.J., "Teologia da Reprodução Humana," ibid; Jerônimo de Sá Cavalcante, "Teologia da Reprodução Humana," ibid.

beings. Consequently, from conception until the second month, the embryo is in a state of evolution (ontogenetically), and from the 40th day on, the fetus has entered into an irreversible process of human development. Only then is it irreversibly a human personality in the full sense, for whom only time, a healthy environment, and quantitative change--not qualitative mutation-- are necessary until full development will take place. Therefore, one cannot speak of a right to be born until the 40th day after conception, and thus, whatever intervention takes place before this is not abortive in the philosophical-theological sense of the word.¹³

The problem of the moral propriety of abortion (in the philosophical-theological sense) does not depend on the answer given to the question of the so-called "animation" (ensoulment). Also, when we find ourselves face to face with a being (a begotten creature) that undoubtedly is a human person (a concrete potentiality), the moral problem remains as to the propriety or impropriety of his elimination. The Christian ethic never considered the killing of a human being as an act that was intrinsically immoral, that is, illicit in every circumstance. It is true that respect for human life--one's own as well as that of others--is a moral value, but it is not absolute: there can be circumstances under which, even with all respect for human life, one is justified in giving preference to other values, such as good conditions of life for the creature itself, the life and health (physical as well as mental of the mother, the dignity and liberty of the woman (in the case of rape) and others.

The moral problem of abortion should not be confused with the corresponding juridical problem. The concrete well-being of present day society can require that abortion, for whatever reason, not be considered a crime.¹⁴

It is better to prevent than to cure. The prevention of pregnancy is certainly preferable to its interruption by abortion. Neither is it true that the diffusion of contraception necessarily causes an increase in abortions. For example, it has been proven previously in the case of Japan, and in parts of Chile, that a good family planning policy can work to diminish the number of abortions. The experience in the People's

¹³See Wilfried Ruff, S.J., "Individualität und Personalität im embryonalen Werden--Die Frage nach dem Zeitpunkt der Geistbeseelung," 45 Theologie und Philosophie 1, 24-60 (1970).

¹⁴See generally Daniel Callahan, Abortion: Law, Choice and Morality (New York/London: Macmillan, 1970).

¹⁵See John A. Ross, et al., "Findings from Family Planning Research," Reports on Population/Family Planning, No. 12 (New York: The Population Council, Oct. 1972).

Republic of China seems to reinforce this same idea. ¹⁶

The social conscience of our time finds itself faced with this dilemma: whether to institute an effective policy of "family planning" or experience an increasing number of voluntary abortions. In the meantime, most of humanity has already chosen, for official family planning programs are already a universal fact. Fully 83 percent of the people on the less developed continents (Latin America, Asia and Africa) live in countries that have already adopted family planning as an official policy.¹⁷

V. FAMILY PLANNING AND SOCIAL PROTECTION

Under Brazilian doctrine, according to Barroso Leite, "social protection is a group of measures meant to provide for that which is commonly known as the social necessities of individuals, that is, certain individual needs of a social character." He continues:

Social protection is a series of measures which permits a society to take care of certain essential individual needs. Needs of a social character are those which are linked to the conditions of life, to the resources that each person requires to reach a minimum standard of living.

. . . This series includes, beyond general social protection, urban as well as rural, certain special protection systems, analogous programs and related assistance organizations, etc. It does not comprehend, at least in realistic, empirical terms, measures such as labor legislation nor general services such as public health and education.

Social protection, above all, concerns itself with individual problems of a social nature, which if left without solution are felt to have a direct impact on other individuals and in the final analysis on society. Society then, through its natural agent, the State, forestalls these problems principally by adopting social protection measures. Indeed, this seems to be the core of the concept: a social need is that which, if left unattended, can have a direct impact on society.

¹⁶See Anibal Faundes and Tapani Luukkainen, "Health and Family Planning Services in the Chinese People's Republic," Studies in Family Planning, Vol. 3, No. 77 supp. (New York: The Population Council, July 1972).

¹⁷See Dorothy Nortman, "Population and Family Planning Programs: A Factbook," Reports on Population/Family Planning, No. 2, (4th ed. Sept. 1972).

¹⁸Celso Barroso Leite, "O Sistema Brasileiro de Proteção Social," 35 Revista Brasileira de Estudos Políticos 9-27 (Jan. 1973).

. . . Social protection is basically made necessary by the insufficiency of individual initiative, or even of group initiative, in providing protection against certain risks. It was principally this insufficiency which led to the adoption of efficient compulsory measures in place of, or in addition to, voluntary collective measures which are not always satisfactory.

The compulsory social security law has become the principal basis for social protection. Private planning schemes exist, though not in great numbers, but their numbers are growing.

The Brazilian Social Security scheme has as its objective the guarantee of the following benefits to its beneficiaries (those who are insured and their dependents) in the form of:

- a) the most indispensable means of maintenance, in cases of advanced age, incapacity or length of service, as well as provision for dependents in cases of death or imprisonment.
- b) aid in case of birth of children, or other events that cause special expenditures; as well as credit in situations envisioned by the law;
- c) the provision of monies whose principal aim is health protection and professional rehabilitation.

Thus, it seems to us that we must include family planning within this doctrine of social welfare as a desirable improvement in the field of social protection. ¹⁹

¹⁹"An indispensable basic plan (should provide): . . . (1) social protection for the pregnant woman, the mother and the child, whether in the form of monetary benefits or of protection through special services." Silvio Pinto Lopes, "Aperfeiçoamentos desejáveis na área de Proteção Social," ibid., at 86.

A FAMILY PLANNING LAW FOR BRAZIL

Benjamin Moraes*

I. THE PLAN FOR A STUDY ON LAW AND POPULATION

In discussing the subject of "Law and Family Planning" it is important at the beginning to take into account several empirical considerations which affect the subject matter in Brazil, namely:

- (a) the high rate of demographic growth;
- (b) the insufficiency of national resources adequate to fill the basic and growing needs of the people;
- (c) the ecological distortions which alter the nature of the historic man-nature relationship and which distort common human goals;
- (d) the traditional ambiguity of the position of Brazilian authorities regarding this matter, as shown by contradictory pronouncements;
- (e) the social and economic condition of the country, a major part of which is almost uninhabited, and the growing movement toward the urban centers which are unprepared to absorb this human tide into their labor markets;
- (f) the different attitudes taken on the question by the various social classes; and,
- (g) the world-wide attention to the problem which, regardless of ideology, has developed into a global opinion, not dependent on the specific facts of each case.

A team of researchers (lawyers and sociologists) working on the Law and Population Project, after studying a classification plan covering all the types of law around the world which might affect fertility, has prepared a work-plan designed to deal with the particular circumstances of Brazil. This work-plan breaks the subject down into four chapters: (1) history; (2) compilation of present legislation; (3) economic factors; (4) conclusions and suggestions regarding possible new legislation in order to accomplish the objective.

A. History

The report will discuss the various causes that have led to the

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present situation. It will include a review of

- (a) the colonial situation of Brazil, having in mind its economic-political-social dependence on the metropole (Portugal-Spain) and its eventual relations with other countries (Holland-France-England), and the period of territorial expansion;
- (b) the absorption, after political independence, of the cultures of the above countries and the other influences that have had repercussions on the national mentality;
- (c) the influence of the Catholic religion on the national mentality;
- (d) the Brazilian economic situation in the 19th century; and,
- (e) the economic-political-social evolution of Brazil in the 20th century.

B. Present Legal Situation

In accordance with the world classification plan, the report will cover the following points: (a) regulation of fertility; (b) family law; (c) laws concerning welfare of minors; (d) criminal infractions and penology, (e) social welfare; (f) public health; (g) education; (h) property and economic factors; and, (i) miscellaneous.

Starting from the compilation of existing laws, the study will determine which of these laws impede or restrain the practice of family planning. For example, it will examine such relevant questions as:

Contraception. Should the restriction on the dissemination and publication of information concerning methods of contraception be removed? This restriction prevents the spread of the knowledge and understanding necessary for an informed public attitude toward the problem.

Abortion. Should there be a change in the present legal prohibition which may be deviated from only in cases where:

(1) the abortion is necessary to preserve the life of the pregnant woman; or

(2) the pregnancy results from rape.

This general prohibition leads to a high rate of clandestine abortions which involve serious risks.

Social Resources. What can be done about the scarcity of social welfare resources which forces the less fortunate classes to regard numerous offspring as the only reliable form of illness and old age protection? This facet of the problem may be combined with paternalistic and unrealistic laws which do not relate salaries to the size of the family, educational needs, etc.

Ethical-Religious Resistance. There is substantial ethical-religious resistance to the adoption of new legislation which would consider the population-related problems in a realistic manner.

C. The Economic Situation

With regard to the economic situation in Brazil, the report will include: statistics on the evolution of demographic growth, and show for each geographical region its population density and composition, age, labor market, etc. It will analyze the relation between the growth of the national product and the creation of new business enterprises. In addition to this, it will look at such infra-structure problems as health, food supplies, welfare, housing, and their respective marginal costs.

D. Conclusions

In the final analysis, the report will suggest a new legal approach to the population problem that will make it possible to adapt the scientific principles and the requirements of humanity to the realities of Brazil. This is the ultimate objective of the work.

II. THE CURRENT CONTROVERSY OVER FAMILY PLANNING

Certain conclusions are already clear with regard to the treatment given the subject of "population" in Brazil. For example, it seems certain that the problem has never been analyzed as a whole. The civil, penal, social security, administrative, and fiscal laws, and the economic, ethical and religious aspects of the matter have never been considered in a systematic fashion. This must be done if the problem is to be dealt with in a useful way. The contradictions which appear after superficial examination show that the "scientific-humanistic" synthesis has never been reviewed in terms of fundamental goals, nor has it been argued through, as thesis and antithesis, to its final consequences.

On one hand, it is argued that Brazilian economic problems could be solved more easily through a more extensive occupation of the land, through a quantitative increase in production, and through creating labor costs which are competitive on the international market. Others argue that the solution is a matter of national security and defense. Still others advance arguments of religious character in which man is not always the principal consideration and where the freedom of choice is confused with the decline of the family institution. Of more serious concern is the fact that this debate seems to conceal many problems whose solution might involve structural modifications in Brazilian society which would have far-reaching political-economic connotations.

In simple terms, the debate may be expressed as follows:

- (a) Is the cost which the country is paying in order to provide, unsatisfactorily, for a growth of 2.8 percent per year, compensated for by an enrichment of the welfare of the population?
- (b) Would family planning be a blow to the institution of the family?

If these questions are answered in the negative, then the question must arise as to whether the acceptance of family planning would be "natural."

The man-nature relationship urgently requires a dispassionate point of view if an equilibrium is to be reached. But, paradoxically, though man has been liberated from his history, he is still its prisoner because despite having acquired the means, he hesitates to adopt them. In the case of Brazil, and in the light of the paradox of underdevelopment on one hand, and an accelerated process of economic and population growth on the other, the question of whether family planning is to be adopted assumes the nature of urgency. It strongly suggests that every barrier which deprives the citizen of (a) an understanding of the population problem, and (b) his right, as a free individual, to think through and resolve this problem, be removed.

III. A FAMILY PLANNING LAW FOR BRAZIL: A PROPOSAL

Because of the conclusions reached as a result of its study, the team of researchers has prepared a draft law designed to give effect to its findings. The proposed law reads as follows:

Whereas:

--the liberty of action of the individual may only be limited for the protection of the social objectives of the society of which he forms a part;

--there is no evidence whatsoever that family planning, as properly conceived, constitutes any threat to society in general, or to Brazilian society in particular;

--informed family planning is an aspect of individual liberty which the Government is obligated to preserve and encourage.

Article 1

Each citizen has the right to plan his offspring, having in mind the need to assure to them the maximum spiritual, economic and social well-being.

Article 2

It is incumbent on the Federal Government, on the basis of Article 8, paragraph XIV and XVII of the Federal Constitution, to regulate the carrying out of the objective set forth in the previous Article.

Article 3

In carrying out its functions, the Federal Government shall:

- (a) provide by such means as it judges adequate for the instruction of the population concerning family planning;
- (b) enter into agreements, both domestic and international, for the accomplishment of the objectives of this law;
- (c) establish laws regulating the use of contraceptives, and adapt present legislation to the objectives of this law.

The States, Territories, Municipalities and Federal District shall cooperate with the Federal Government, and the Federal Government shall cooperate with them, in the implementation of the goals established in this Article.

Article 4

A Working Group shall be established with the collaboration of the Labor Unions and the Employers' Associations, for the purpose of drafting the appropriate regulations to accomplish the purposes of this law.

Article 5

The Working Group referred to in Article 4 shall be organized as follows:

- (a) 1 (one) representative of the Ministry of Health;
- (b) 1 (one) representative of the Ministry of Education;
- (c) 1 (one) representative of the Ministry of Planning;
- (d) 1 (one) representative of the Federal Council of Medicine;
- (e) 1 (one) representative of the Federal Council of the Brazilian Bar Association; and,
- (f) 1 (one) representative of the Council for the Protection of Human Rights.

The Working Group provided for in this Article has a period of ninety (90) days within which to present the drafts of legal and regulatory provisions that will accomplish the goals established by this Law.

Article 6

This law shall become effective on the date of its publication. Any provisions to the contrary are revoked.

POPULATION GROWTH: THE FALLACIES AND THE BRAZILIAN CONTEXT

José Thomaz Nabuco*

The desirability of a higher or lower birth rate in a given country should be considered in the light of the density of its population. Some countries may need more population, others may not. For example, Holland, with 300 inhabitants per square kilometer, may possibly need to restrict its population growth. On the other hand, Brazil, where there are 10 or 12 inhabitants per square kilometer only needs to worry about over population in 50 or 100 years.

The general reduction of the birth rate has serious disadvantages, among them the super-annuation of the population. As births decrease, the structure of the population changes and consequently there is a decrease in the number of young people and an excess of old people. The limitation on births cuts only into the number of young people and does not prevent others from growing old. At the beginning of the century, only 3 percent of the United States population was over 65. Now 10 percent are above this limit. In England, 12 to 13 percent of the population are over 65, and in Berlin, nearly 20 percent. The situation is so serious in Berlin that the current joke there is that the only prosperous industry is the funeral business.

If the United States had begun the birth control program it now has at the beginning of the century, their population at the time of World War II would have been about 90 million rather than 130 million. With that reduced number they could not have made the war effort which they did. The United States now has a birth rate which is between 1.5 and 1.7 per thousand inhabitants. At that rate, in spite of having a population of 200 million, the people of military age 18 years from now will only number 3 million. Brazil with a population of 100 million but with a demographic increase of 3% a year will have a class in military age as large as that of the United States.

There are many fallacies which surround the discussions about the birth rate, and the matter is not simple. If a low birth rate helped increase the G.N.P., economically Argentina and Uruguay should be the fastest growing countries in the Continent. But this is not so. The countries that are progressing faster are Brazil, Venezuela and Mexico, all with high birth rates.

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One of the speakers here mentioned a trilogy to show that the high birth rate prevents improvement in salaries and said:

The amount of land is limited, capital is scarce but births are abundant, so that land and capital receive the larger share of the returns but the working men receive little because there are too many.

There is a fallacy in this argument because it compares the limits of the entire world with the abundance of workmen in Brazil. Moreover, land in Brazil is not limited. It is practically unlimited, and we are constantly occupying new areas, opening new roads, one of which is the Transamazon road.

Another fallacy that has arisen is that the high birth rate increases concentration in the cities. The birth rate in the rural areas is not lower than in the cities, and if the concentration occurs it is because of the industrial revolution that offers better jobs in the cities than are available in the country. I might say incidentally that Governments contribute to this when they favor, for instance, urban populations as against rural population by limiting the price of agricultural and meat prices without doing the same to the products of the cities.

It was suggested that I approach the problem from its moral side. I am neither a theologian nor a moralist. I am only a lawyer, though I usually try to look at the moral side of my cases. This morning, we heard a priest speak about the subject with much greater knowledge of course than I have. But, I do not think that we should justify the use of intra-uterine devices or abortion with the argument that life only starts a few days after conception. Life, as this priest said this morning is a continuous flux. It ends only with death. The male cell is alive, extremely so, and has movements and senses without which it could not find its way to the top of the Fallopian tubes to fertilize the egg, which is also alive.

The last time I was in the United States I saw a program on television about the freedom of abortion in Hawaii. One of the things which the speaker mentioned was that it was necessary to retrain the nurses because they had been educated to save human life at all costs and many suffered serious shocks when they saw a child, already moving, removed from a womb and thrown into the incinerator of the hospital. In one of the last numbers of Time, I read an article about experiments being made with fetuses resulting from abortions which argued that they should be allowed to have a natural death and that their life should not be prolonged in culture media for the sake of experiments.

If we want to find a moral basis for abortion perhaps we might be

closer to the truth if we looked for it in the right of legitimate defense, which is quite evident in the case of a woman who interrupts a pregnancy that would kill her. This would be done on a basis similiar to that which permits a woman to kill to defend her honor, her children, or even her property. It is possible that this principle may also extend to the unborn child. This is a subject, however, which has to be decided by the Vatican. I prefer to restrict myself to the economic aspects of the problem. I cannot fail to condemn the hostility which surrounds the unmarried mother and to recognize that when she decides to interrupt a pregnancy she is acting under the most acute pressure which excludes or attenuates her fault and places it upon all of us.

The United States had a birth rate of 50 per thousand* in the beginning of this century and now the births are falling so low that there are not enough to assure the permanence of the population at its present level. The figures are already below zero population growth. For a population not to drop in numbers, it is necessary that there should be 2.3 children per couple. This 0.3 is added to compensate people who do not marry or who having married have no offspring. However, last year the birth rate in the United States dropped to 2.03 per couple.

The United States has never known such low figures. During the great economic depression of the 1930's, the birth rate fell a great deal but not as low as it is now. The reduction today is more frightening because it is coincidental with the beginning of the reproductive years on the part of a great number of women who were born just after World War II. After a war, there is always a boom in the birth rate because of the people who postponed their marriages during the conflict.

This baby boom contributed greatly to the economic boom in Japan which followed the last World War. In the 1930's Japan was afflicted by an excess of population which they could not feed, and Brazil very justly received 200 or 300 thousand Japanese immigrants. Now, with the industrial revolution, Japan is calling back Japanese citizens who are abroad, I do not know whether from Brazil, but from Korea, Formosa and other less prosperous places. And it even receives Korean immigrants for more menial jobs from which the Japanese workman is already beginning to free himself.

Americans seem to be confident that the drop in the birth rate will not go further than it has, but I see no reason for that confidence. The birth rate in Berlin has dropped to as low as 10 per thousand against a death rate of 18 per thousand, which means that the city is slowly emptying.

*Editor's Note: According to the U.S. Bureau of the Census, the birth rate in the United States around 1900 was 32 per thousand.

The birth rate is not something that you can turn on and off as you please. After people learn how to enjoy all the attractions which nature created to assure the survival of the species and, at the same time, cheat nature by avoiding the discomfort of propagation, it is very hard to turn back. In addition to this the fertility rate of women drops greatly with age. According to demographic statistics, a woman at 30 produces perhaps a tenth of the children that she produces at 20, since fertility drops as the population ages.

For all these reasons, I conclude my remarks by addressing an appeal to this Seminar that they not approve any resolution which may in any way reduce the growth of the population of Latin America.

I am against family planning because I fear that it may delay the development of my country. I recognize, however, that it may contain an element of injustice. Why should some people know and others not? I even think that I am fighting a losing battle because as we attain the development which we search for the birth rate will certainly drop. Malthus thought that humanity would end in poverty with an immense population having nothing to eat. But what is happening in the world is exactly the opposite. It is welfare that sterilizes men. The richer people become, the fewer children they have.

But we must not accept this. We must try to avoid or at least postpone the day in which we will enter into a population decline.

HEALTH AND POPULATION IN BRAZIL

Nelson Moraes*

The level of health of a community is influenced by various factors characterizing the demographic structure and behavior of its population. I will discuss those factors which appear to be most important in the case of the Brazilian population.

I. THE PROBLEM OF INDUCED ABORTION

The desire to limit offspring causes women the world over to seek induced abortions, which is the only procedure known by the general population to be available for this purpose.

Since abortion is illegal in Brazil, one can only get an idea of the magnitude of this phenomenon through methods of indirect statistical analysis. In 1970, there were in Brazil nearly 20.5 million women between the ages of 15 and 45 years who had the ability to conceive. On the assumption that one out of every four women conceived during that year, the number of conceptions would have been 5.2 million. These conceptions would have had to terminate in one of three ways: live births, still births and abortions.

The number of live births in 1970 was estimated at 3.8 million, with still births estimated at 500,000. By subtracting the number of live and still births, a total of 4.3 million, from the total number of conceptions, we arrive at the figure of 900,000, which would represent the number that were terminated by abortion. On the hypothetical basis that at least 70% of the total abortions were induced, close to 600,000 induced abortions would have occurred in Brazil during 1970. A phenomenon that repeats itself this frequently in our country and which causes a high risk of hemorrhage and infection and, at times, death, and which requires hospitalization, mobilization of medical skills and the use of critically scarce blood, should be reduced to a minimum. That can be done only by teaching contraceptive techniques which are at the same time more effective and less harmful.

II. THE PROBLEM OF MALNUTRITION

Malnutrition during the fetal period and during infancy tends to preju-

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dice intellectual capacity. It is now known that children suffering seriously from malnutrition have brains of below average size. Their brains tend to have 15 to 20 percent less cerebral cells than those of children who are well fed. Moreover, there is no doubt that there is a strong relationship between the frequency of malnutrition during infancy and sub-normal achievement in school.

Now, inasmuch as the families that have the most offspring are the ones with the least capability to feed their children adequately, the risk of a qualitative deterioration in our population is very great.

III. THE PROBLEM OF FAMILY WELL-BEING AND MULTIPLE PREGNANCIES

The sexual activity of the couple is now accepted as an important aspect of a harmonious home life. This type of activity can only be conveniently developed in a climate in which fear is absent. If the couple is exposed each month to anguish over the fear of a pregnancy that neither want, their sexual life is seriously disturbed. Moreover, it has now been proven through a number of studies that maternal, fetal and neo-natal mortality increases significantly after the fourth pregnancy. The danger is also higher for women less than 20 and more than 35 years of age.

IV. THE PROBLEM OF ACCELERATED URBAN GROWTH

The populations of all countries move internally, on either a major or minor scale. Of all the types of internal migratory movement, the most important in Brazil is without doubt that which takes place from the rural zones toward the cities. It is known that the rate of demographic growth is much higher in the cities than in the rural zone, a large part of which is a consequence of the migration from the latter to the former. For this reason it is estimated that in the next few years the great majority of the Brazilian population will be living in the cities. On one hand, one is forced to recognize that in the great urban centers it is possible to find certain services and comforts, including health protection and hospitalization. But on the other hand, it is known that these great human amalgams create sanitary problems that are difficult to solve. The demand for water, for example, is reaching astronomical proportions.

Man is a great polluter of the environment in which he lives, principally because of the wastes and residues of his industrial activities. The construction and operation of a system of drains to carry the waste of millions of individuals out of the cities represents a gigantic undertaking, technically as well as financially, and if the objective is not reached, conditions favorable to the occurrence of disease which in many instances take the form of epidemics are created.

The enormous density of the population in the cities favors the communication of diseases that are transmitted by direct respiratory contact,

such as the flu and measles. Beyond the deficiencies of housing and sanitation, the urban populations also run the risk of accidents at home, at the place of work and, principally, in the public streets, due to the rapid methods of transportation that are used.

Thus, the move to the great and prosperous industrial centers does not always represent betterment for the inhabitants of a rural zone. In the great centers, the immigrants, who are almost always of a low socio-economic level, are forced to live either in collective housing, where the conditions are overcrowded and promiscuous, or in the "favelas," where the sanitary conditions are extremely precarious. The rapid growth of the urban centers, with the arrival of many immigrants in a short period of time, aggravates still more the conditions of life in the cities.

Mayor José Carlos Figueredo Gerraz of São Paulo, in an audience with the President of the Republic on July 21, 1971, made a report on the disorderly growth in his city, commenting that it is necessary to substitute the new slogan, "São Paulo must stop" for the old slogan, "São Paulo can't stop." According to the facts that the Mayor transmitted to the President, from 150,000 to 200,000 people have converged on the city which has no infrastructure adequate to cope with this excess population and which must face enormous social and sanitary problems. Moreover, the Mayor pointed out that 70% of the city area does not have sewers, and that the remaining 30% empties its sewage into the two rivers that surround São Paulo - the Tiete and the Pinheiros - thus forming a belt which is dangerous and infectious.

V. THE PROBLEM OF REDISTRIBUTION OF INCOME

The limiting of offspring should be considered as an important instrument of any scheme for the redistribution of income in favor of the wage earners, and a condition sine qua non for the enforcement of the health of the population.

As Roberto Campos pointed out,

Of the three factors of the conventional theory of production--land, capital and labor--it will be found that land has a fixed yield, and capital a low return. The only flexible factor is the earnings of labor, which is a function of the elevated rate of demographic growth. The income from land and the interest and dividends paid to capital will increase only if salaries remain depressed.

It is apparent that a population that earns low salaries will also have a low level of health.

Because of all of the problems described above, it is necessary for Brazil to begin thinking about a population policy which will take into account the health and well-being of its population.

PRELIMINARY CONCLUSIONS REGARDING LAW AND POPULATION IN CHILE

Francisco Cumplido*

The purpose of the Law and Population Project at the Facultad Latinoamericana de Ciencias Sociales (FLACSO) in Santiago is to analyze the laws related to fertility and family planning within the context of the legal system of Chile. After a year of research and study, we have reached the following preliminary conclusions regarding the state of the Chilean law on the subject.

I. STERILIZATION

Under Chilean law at the present time, all forms of sterilization are punishable offenses, with the exception of therapeutic or prophylactic sterilization--that is, those which are performed to preserve life or to cure serious physiological or psychological problems. Therefore, both eugenic sterilization and sterilization performed for economic or social reasons are punishable offenses. Moreover, having acquired the consent of the person on whom the operation is performed is not a ground for legal justification and does not free the physician of criminal responsibility. Thus, the National Health Service has no sterilization programs. Neither are there eugenic programs of this type under development.

Although the National Health Service does have official eugenic programs for the treatment of persons who are mentally deficient, epileptic, sexually delinquent, and habitually criminal, the official view is that until it is shown in indisputable fashion that the above aberrant or pathological characteristics are transmitted genetically, it is not advisable to establish an official sterilization program. Sterilization is used, however, in the exceptional case of mentally ill women, when it is shown that a pregnancy aggravates the clinical ability to treat her, and in cases where there are serious socio-economic problems which justify its use on the basis of clinical protection.

II. ABORTION

Under our law anyone who maliciously causes an abortion, whether or not by violence done to a pregnant woman, is punishable irrespective of consent. Similarly, the law penalizes a woman who causes an abortion upon herself or who consents to have another perform it. (If the woman does it to avoid public dishonor, the penalty is less.) The law also

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punishes any doctor who, abusing his office, causes an abortion or participates in it. Only therapeutic abortion is permitted under Chilean Law.

It is important to note that although our laws reject what may be called criminal abortion, as described above, they do permit so-called therapeutic abortion. The latter is authorized explicitly in Article 119 of the Sanitary Code which states that:

Pregnancy may only be interrupted for therapeutic reasons. To proceed with this type of (medical) intervention, the documented opinion of two surgeons is required.

This legal precept without doubt would have been more complete and perfect from the technical-juridical point of view, if it had defined what is meant by "therapeutic reasons." Nevertheless, it is believed that it was not wrong to establish a vague standard because of the difficulty in creating a precise definition on a matter that is subject to constant doctrinal and medical evolution. The fact that each case presents factors which are unique can be appreciated by those who have the legal responsibility for protecting and re-establishing the health of individuals. Basically, it is up to the two surgeons to define whether a particular request for an abortion is therapeutically justified. Because of this, it is necessary that the health authorities establish, from time to time, official guidelines which cover the whole gambit of situations that actually occur and which distinguish those which are legally acceptable.

From the legal point of view, conception is considered as the beginning of the natural existence of the human being. Article 75 of the Civil Code declares that "the law protects the life of those about to be born." This protection has multiple manifestations in our law, among others the legal dispositions that condemn abortion and those which contemplate measures which protect the pregnant woman.

The law notwithstanding, the number of illegal (provoked) abortions in Chile is relatively high. This fact gives rise to serious social problems within the population, such as the high number of maternal deaths and the threat to the family's welfare. It is apparent that something ought to be done to alleviate these problems, the most serious of which is the dangerous conditions under which illegal abortions are normally performed.

At present, one Santiago hospital has been experimenting with a "planned abortion" program which uses the legally acceptable therapeutic abortion as a temporary solution pending changes in the abortion law. This is, however, only a temporary solution.

III. CONTRACEPTION

In the area of contraception, there are no legal precepts or regulations which prohibit or restrict the use of contraceptive methods. Since 1965, the National Health Service has carried out activities aimed at regulating the birth rate within the administrative-technical context of its programs of maternal and child health. The program is premised on respect for the conscience of the individual and the dignity of the family. The decision whether to use contraceptives is to be made freely by each couple, after receiving technical information from a professional team and with proper consideration of the socio-economic and cultural problems of each family. The practical application of the program is controlled through a set of special regulations by the Health Service.

The production of contraceptives is subject to a regulation that does not limit the quantity manufactured. Both pharmacological contraceptives and "Lippes loops" are manufactured in Chile. Contraceptives are also imported under the regulation. As far as sale is concerned, mechanical contraceptives are not subject to any regulation, but the pharmacological ones are: they must be sold at authorized pharmacies unless otherwise provided. The National Health Service has also formulated a regulation concerning the use of contraceptives and their quality control.

IV. TRIBAL CUSTOMS AND FAMILY PLANNING

One of the relatively interesting aspects of the study has dealt with the question of what role tribal customs play in the attitudes and behavior of indigenous peoples in the field of family planning. The Law and Population Project has studied the attitudes and behavior of the Mapuche Indians and of the indigenous peoples of Northern Chile. Of interest are the following findings.

A. Mapuche Indians

As far as this tribe is concerned, the following conclusions have been drawn:

1) Sterilization as a means of permanently controlling the birth rate is rarely employed by the Mapuches. Nevertheless, sterilization is used as a means of relieving the problems of difficult childbirth. For this purpose, women seek out a "machi" (traditional healer) as it is supposed that the "machi" can cause sterility through the use of herbs. The idea of surgical sterilization is unknown to the Mapuche.

2) Induced abortions are infrequent, because of the value placed by the Mapuche on having children and on the fact that having

children before marriage is not socially unacceptable. But if an abortion is desired, the women will seek a "machi," who gives them a potion of herbs and minerals which is effective only in the first month of pregnancy.

3) On the basis of collected data, it appears that there is an absence of traditional contraceptive methods. Knowledge of modern methods is only slowly becoming available.

4) The Mapuche family tends to have a relatively high number of children--on the average of four per family. Offspring are considered part of the wealth of the community. In the past few years, the demographic and economic pressures, the impossibility of continuing to divide the land, and the contact with the urban environment have forced the Mapuche to show a slowly growing interest in the use of contraceptives. The use of mechanical means, feminine as well as masculine, is not widespread, but contraceptive pills for women are distributed by the various centers of the National Health Service after medical examination.

5) The family is the basic unit of production and consumption, within which each member, including minors, participate. In extreme cases when the family is dissolved--by divorce or death of a parent--the children go to the home of the paternal grandparents, uncle or other close relative. It is impossible to find abandoned children among the Mapuches, and children are supported by the extended family.

B. Indigenous Peoples of Northern Chile

The following conclusions can be drawn as to these people:

1) The members of these isolated communities reject the practices of abortion and sterilization. Abortion is considered a serious offense, and the families which practice it incur various forms of social sanctions, among these, a general repudiation on the part of members of the community, the authorities, and others.

2) With regard to contraceptives, there exists a near total lack of knowledge as to methods. Moreover, there is a rejection of possible use of contraceptive methods, especially among the women.

3) The question of the number of children has been left for the individual family to decide. Both men and women feel that it is better to have many children because they can help as agricultural workers. The average family has from five to six children.

4) Although the pattern of sexual behavior before marriage is very free, extra-marital relations are prohibited by the existing rules of the community. However, this prohibition does not appear to remain in force during the Carnival fiestas, and the so-called "sons of Carnival" are accepted by the community.

5) Sex education encounters obvious opposition among the people of the community, especially among the women who become very reactionary when the subject is discussed. In general, the subject of sex is a delicate matter that is not discussed at home, and there is no sex education for the children.

V. DISCIPLINARY ACTION WITHIN HEALTH PROFESSIONS

In view of the rather strict laws in the areas of sterilization and abortion which impose criminal penalties on those who take part in such activities, it is also noteworthy that the rules which regulate professional conduct provide complementary internal sanctions for misconduct. The rules regarding the conduct of the medical profession--doctors, nurses, midwives, medical technicians, pharmacists, and practitioners--tend to affect behavior in the family planning field because the law forbids the performance of certain medical treatments. Therefore, those doctors who perform unauthorized sterilizations or abortions expose themselves to dual penalties--one criminal, one professional.

Concerning the application of disciplinary measures, the various organic laws of the Professional Organizations ("Colegios") provide that, without prejudice to the powers of either the National Health Service or the courts, the Regional Councils of the Profession can impose the following sanctions on any professional person within its jurisdiction who engages in conduct which is abusive or incompatible with the dignity of the profession: either warning, censure, or suspension from the exercise of the profession for a period in excess of 6 months.

At the same time, it is accepted that the General Council of the respective professional organizations, on a petition from a Regional Council or on its own initiative, can cancel a person's membership in the Colegio, on a two-thirds vote of the members, when serious reasons make it desirable. The following are considered sufficient to be "serious reasons:" having been suspended three times, having been found guilty of any of the offenses contained in articles 313-318 of the Penal Code (crimes against the Public Health) and, finally, being involved in commission of the offense of aiding the illegal exercise of the profession by an unauthorized person. The professional against whom this measure is taken may appeal to the Supreme Court, and it will be considered en banc.

VI. GENERAL CONCLUSION

We are now in the process of gathering information on the attitudes of Chilean law-makers in this field. This will be of value in connection with the improvement of the law so as to make possible the free exercise of the right of family planning. Whereas, the law in its

present form is not entirely inconsistent with the right, there are clearly certain inconsistencies which require clarification. It is possible that we will have to proceed cautiously at first through the use of amended regulations. But the ultimate goal is to make our law comply with the policies which promote the exercise of the right to family planning.

LAW AND POPULATION IN COSTA RICA

Elizabeth Odio*

I. PAST LACK OF RECOGNITION OF RELATIONSHIP BETWEEN LAW AND POPULATION

It has become commonplace to refer to the importance of demographic growth in Latin America during this century. We know that within the relatively brief period--between 1920 and 1960--the population of Latin America grew 138 percent and that it is expected to remain the world's leader in demographic growth until 1980, only to be surpassed by Africa after 1990.¹ We have read innumerable studies and essays about the weight which is given to these demographic phenomena in the policy decisions and planning for the economic development of our peoples. Despite this, it is evident that up to the present time, the field of law has remained on the margin of this difficult social question. The objective of the research undertaken by the Law and Population Project is to analyze the question of the relationship between the law and the phenomena of population growth.

When the problem of population growth became urgent, both at the local and at the continental level, a number of programs were launched to find possible solutions. There were sociologists, politicians, economists, anthropologists, psychologists and, of course, priests, planning what type of action to take. During all these years, it occurred to no one--least of all to the lawyers--that the law could have something to do with the formulation and application of a coherent population policy. It was only through the initiative of the United Nations, years later, that lawyers were called on to participate in the study. That developed because someone observed that if family planning was regarded as a basic human right,² it imposed a legal, as well as a moral responsibility on states--a responsibility within the ambit of International Law, whose transcendancy extends into the field of domestic law.

If we accept as a premise that law is a group of rules that regulate the conduct of the individual in society, the compliance with which

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¹R. G. Sáenz, "La Explosión Demográfica en América Latina: tiene implicaciones políticas?" Revista Nueva Sociedad No. 1 (San Jose, Costa Rica: 1972).

²U.N. Conference on Human Rights in Teheran, 1968.

appears to be backed up by the government's coercive apparatus, we will also accept the idea that law is at the service of society and that its specific ends are the establishment of peace, security and justice. From the former derives--to use the words of Dr. Luke T. Lee--the potential of the law to act as a catalyst for social change.

Through the years, we have become accustomed to hearing that the law is one thing in the books and another in actuality; that between the theoretical rule and the actual law, there exists enormous disparity. The law has, in fact, been indifferent to many of our greatest social needs and, as pointed out by Georges Ripert, lawyers tend to develop a conservative attitude and do not usually regard the law as an instrument of social change.

This period in which we live and act is characterized by economic inequalities; by social change and the crisis and renovation of anachronistic structures; and by individual anguish, insecurity and defiance. It is a period of revolution that demands a change in the traditional scale of values. Finally, it is a period in history that seeks a solution, by whatever means possible, to the problems of the time. In a time like this, what should be the role of law in an agitated society which seems unequal and unjust, and which is growing explosively?

It is for us, who are in direct contact with the law, to respond sincerely to these questions and to take action. If the rules do not respond to expectations, if they do not resolve the problems, if the objectives to which they aspire place too great a strain on the juridical order, then the time has come to act, and the hour has arrived to update the law. In the rather narrow field of legal order and population dynamics, we have an excellent opportunity to begin modernizing the law.

Turning to the situation in my own country, I should mention the following: today in Costa Rica, there are a good number of programs established and sponsored by public authorities, many with international financing, dedicated to family planning. We have a National Program of Family Planning and Sex Education which distributes contraceptives and instructs families concerning their use. The program teaches about responsible parenthood or motherhood, and there is a complete structure of offices and programs dedicated to convincing Costa Ricans to make reasonable decisions as to the number of their children. Despite this, there is not a single law which regulates the subject. Even though there is a National Population Council, its functions do not seem to be backed up by any formal legal framework.

The fact is that in Costa Rica, we have never legislated on such a delicate subject, and we have never made coherent and uniform policy decisions on a subject as important as the growth of the population. The proof of this is that the state, while supporting family planning activities, also

maintains strong policies of subsidies, family allowances, and tax exemptions, whose merit we are not judging here, but which certainly add an element of confusion. These policies which stimulate increased family size are in contradiction, whether intended or not, to the policy of responsible parenthood.

II. HISTORY OF FAMILY PLANNING ACTIVITIES IN COSTA RICA

A. The Contribution of the Private Sector

The use of pharmaceutical contraceptives in Costa Rica began in 1959. It was the private sector that introduced all of the contraceptive methods of this type into our country, with the exception of the intra-uterine device (IUD) which is not properly a pharmaceutical product. Until 1966, the commercial sector had a virtual monopoly over the importation, sale and transportation of the hormonal oral contraceptive, and the use of contraceptive methods began in Costa Rica fundamentally for commercial reasons as a result of the promotional work of the foreign producers. This distribution of contraceptives was easily accomplished in view of the fact that our legal system lacked express regulations applicable to the importation, distribution, sale, etc., of these contraceptive products. They were treated merely as patent medicines or pharmaceutical products. This absence of specific legal provisions emphasized the fact that there was no defined official policy on the subject.

The Family Planning Program of Clínica Bíblica was initiated spontaneously in 1962 without any official supervision or regulation, having arisen from the private practice of various doctors. At the outset, the major portion of the patients came from the middle and upper classes. However, the situation changed with the establishment of "specific consultations" at the clinic, and by 1966, the majority of the cases came from the middle and lower classes. This results from the fact that specialized consultation was intended only to cover persons who lacked resources.

In 1966, the officially authorized Costa Rican Demographic Association, composed mostly of elements of the private sector, was formed to make family planning services available on a rationally planned basis. By 1967, the Clínica and the Association had organized a service dedicated exclusively to family planning which reached a significant portion of the population.

B. The Role of the Public Sector

In 1967, the Office of Population was formed in the Ministry of Public Health, and the first legal provisions on the subject were put into effect by Executive Decree. In 1968, the Center for Social Studies and Population (CESPO) was formed at the University, and the National Committee on Population (CONAPO) was set up to coordinate activities. These organizations formed the National Family Planning Program, whose purpose is to

check the rapid population growth through education and to carry out research. It has functions in the fields of maternal and child health, family planning services, education and research.

Despite the creation of these public organizations, the decrease in the gross birth rate experienced in our country during the decade 1959-1969 cannot be attributed to the National Family Planning Program because the decline began before the Program's establishment in 1968 and before there was legal pronouncements on the subject. In fact, the practice of family planning spread well in the absence of legal regulations, and the Program itself only distributed limited quantities of contraceptives.³ (The distribution was limited to one-quarter of the total pills distributed because of the monopoly of the commercial sector.) The only change introduced by the Program was the IUD which until that date had been unknown in our country. In the judgement of Dr. Reynolds of CESPO, the principal causes of the decline in the rate of births were the increase in voluntary sterilization (which according to our study was brought about without any legal control) and the drop in the number of women entering into sexual unions. This development has been called "permanent celibacy," and is caused by the patterns of internal migration, which create an excess of women of reproductive age in certain areas of the country.

C. Positive Law in the Population Field

From the point of view of positive law, there exist in Costa Rica only four texts that directly and expressly regulate the phenomena of population dynamics. They are found in four Executive Decrees promulgated between 1967 and 1970.⁴ Three of them refer to the creation and regulation of the so-called "Office of Population" in the Ministry of Public Health, the only agency created in our judicial-administrative structure which is linked directly to the programs of family planning.

³ See generally J. Reynolds, Costa Rica: Midiendo el Impacto Demográfico de los Programas de Planificación Familiar (CESPO, University of Costa Rica, 1972).

⁴ The Executive Decree is a legal norm dictated by the Executive Power (the President of the Republic and the appropriate minister) in the exercise of the official functions within their jurisdiction. It is to be differentiated from a law from the formal point of view, because the latter is enacted by the Legislative Assembly following the formalities and procedures required by the Constitution. Both the laws and the Executive Decrees are obligatory in nature.

The fourth decree regulates state activity in the area of sex education, which is considered a very important aspect of the problem of population dynamics.

1. Executive Decree No. 3 of April 4, 1967

Since demographic phenomena have a strong influence upon health conditions of the population, it is necessary "to extend governmental health resources into matters related to population dynamics." With this objective, the Office of Population was created as an agency of the Ministry of Public Health and its functions were established.

2. Executive Decree No. 5 of April 5, 1967

This decree establishes that Government policy on the subject of population will take into account the studies made by the Office of Population, or by organizations that undertake such research in the field of health as is considered relevant to demographic phenomena. The Office of Population of the Ministry has the responsibility of maintaining proper supervision over these studies. The decree also requires that all the educational aspects of responsible procreation will be integrated into the Ministry's maternal and child care programs. Major emphasis is placed on studying the problems, consequences and effects of induced abortion as a problem of public health.

3. Executive Decree No. 1311 of October 24, 1970

This decree has as its basic objective, the restructuring of the Office of Population which had been created and regulated by the previous decrees. Among the functions assigned to the Office of Population are the following: to attain a decrease in the risk of maternal deaths related to induced abortion and the pathological states that might be experienced during pregnancy; to contribute to the avoidance of infant mortality through actions designed to raise the low standard of living arising from excessively large families; and to develop educational-information campaigns in an attempt to spread among the population, the knowledge needed to permit people to choose voluntarily the spacing of births, and to assume the responsibilities of so-called responsible parenthood. The decree also provides for teaching, investigation, and evaluation. The decree states that the mission of the state in the field of population education is not to obligate, or in any way to force the civil population to use methods to control family growth. The role is better described as trying to create a knowledge of the problem, which will permit individuals to act in a voluntary and knowledgeable way.

4. Executive Decree No. 26 of March 18, 1970

This decree creates the Office for the Supervision and Evaluation of

Family Planning and Sex Education as a special organ of the Ministry of Education, with the task of taking charge of the direction, promotion and coordination of educational activities dealing with "the consolidation and teaching of the values of the Costa Rican family." The purpose is to attain, through teaching, "the affirmation of a worthy life according to Costa Rican traditions." From the point of view of this paper, the only portion of the decree that directly mentions the question of population dynamics is Article 2, paragraph (h), where it is provided that the Office will serve as the link between the state and the different national and international organizations dealing with family planning and sex education.

As can be noted, all of the positive laws cited attempt to establish state control over the technical, informational, educational and human means employed in the area of family planning. However, while the laws analyzed embody the official policy of the government, they say nothing about the manner in which that policy is to be carried out. This makes us suppose that the implementation of these policies is intended to be carried out through internal administrative arrangements within the National Family Planning Program, and not through a special program based on specific laws.

D. Commentary on the Development of Family Planning

The active participation of the government in the family planning aspect of population dynamics has only occurred within the last five years. It is important to realize that the decrees which established the Office of Population were put into force as a consequence of the activities of the private sector which began in a spontaneous, though uncoordinated, manner as early as 1959. The Demographic Association lent the first element of coordination and direction to these activities. Through the association, family planning services were distributed effectively despite the absence of legal controls.

This permits us to conclude that even though regulations were eventually put into effect in this field, the advent of these regulations did not mark the beginning of birth control services because these were being supplied by various components of the private sector many years earlier.

III. PRELIMINARY COMMENTS AS TO CERTAIN SUBSTANTIVE LAWS AFFECTING POPULATION

There are various aspects of family and welfare laws which may have a direct effect on fertility. Among these are laws which control: marriage age, rights of illegitimate children against their fathers, divorce, the equality of the sexes, maternal protection and child support, and family subsidies. We have some preliminary comments to make as to these after studying some 742 laws covering the period from 1948 to 1972.

With respect to the age at which one may marry there are legal pro-

hibitions against marriage for persons less than 15 years of age, but these seem to lack practical effect as the statistics reveal a large number of marriages of very young couples. Whether or not this law was intended to control population growth, it is certain that the rule is disregarded in practice. Only the family based on marriage receives legal protection, and family groups that are founded on a "common law" relationship (i.e., open living together as man and wife) are left without protection. In our country this type of natural family is numerous and from them are generated a high number of illegitimate births.

Related to this, the Constitution gives every person the legal right to know who his parents are, but despite this broad and general principle, the Civil Code and its traditional interpretation by the Tribunals have made it very difficult to successfully investigate paternity, since the law suit may be filed only in the four instances permitted by Article 124 of the Civil Code.⁵

When we compare the legal theory with reality, we see that the number of illegitimate births registered in 1970 was 6,500 but during that year only 27 paternity investigations were initiated in the National Infancy Foundation. In a study made at the Law Faculty, we analyzed the sentences of the Court of Cassation in the period 1949-1967. We found that during this time only 60 paternity petitions were granted. From this it has become evident, even without concluding the study, that the constitutional right to know one's parents may have little meaning. It is also clear that the theoretical rules of law and the actual facts of population dynamics are not coordinated, and a legal rule which should have a real impact on fertility is not being given full effectiveness.

Because of the many problems which have arisen from the restrictive interpretation of the Tribunals, the Family Code Project, now under

⁵Article 124: The investigation of paternity is permitted:

- (1) when there exists a document (writing) in which the father expressly declares his paternity;
- (2) when the child is in the legal custody of the government;
- (3) when, in case of rape, violation or incest the period of conception coincides with an act punishable under the terms of Article 100; and,
- (4) when, in the case of a public union which has been stable for more than one year, there exists the same coincidence.

discussion in the Legislative Assembly has completely modified the text of Article 124 by making blood tests admissible and expressly accepting "el reconocimiento de vientre," which has been recognized in our jurisprudence in the last few years.

With respect to the dissolution of marriage, we find two forms in our legislation: through divorce or through the death of one of the spouses. The divorce action must be based on one of the grounds set forth specifically in the law. The most frequent ground is the scandalous concubinage of the husband, which in 1970 was used in 112 cases, followed by adultery on the part of the wife which was used in 65 judicial cases. The Family Code Project has suggested that adultery should be the fundamental ground for divorce, without making any distinction between adultery by the woman and scandalous concubinage by the husband. Undoubtedly, this may result in a considerable increase in the number of divorces. It is possible that an increase will also be stimulated by the introduction of a new ground: mutual consent. In any case, the possibility of establishing new families and consequent increased fertility is raised. However, according to their written annotations, the Project draftsmen did not have the phenomenon of population growth in mind when they drafted the proposed new laws.

Passing on to another type of law which has an important connection with demographic phenomena, we find that in the field of maternity protection there are a number of laws which deal with the issue, principally the Constitution of 1949, the Infancy Code and the labor laws. These laws provide for the equality of the sexes in the labor field, but at the same time they confer on the woman a series of prerogatives that give security both to herself and the children. Thus, there is an inconsistency in the legislative attitude as it concerns population phenomena, since if facilities and security are provided for the mother who works, she is in a position not to plan the number of her children. At the same time, by proclaiming the equality of the sexes for purposes of participation by the working mother in the labor field, the legislature has taken, probably inadvertently, a strongly anti-natalist step.

The question of obligation to maintain and support is principally regulated by the Civil Code and the Law on Maintenance and Support. The rules in this field can have great practical effect since support decrees are continually being issued. In 1970 alone, 1,400 minors were given assistance and 553 cases were handled. The duty to support, according to the law, is not concluded until there is no longer need for it. The Constitution affirms that parents have the same obligations toward children whether born within the marriage bonds or outside of them. The support obligation is compulsory and in the case of non-compliance the Maintenance Law provides a criminal sanction. However, the effect of these rules is weakened by the extension of family obligations to the so-called "extended family." The law establishes a list of the relatives

obligated as a group. For example, in the event that the father does not carry out his duties, the grandparents are made responsible for their grandchildren. This is another example of the contradiction which exists within our laws affecting population phenomena. While the prison sanction attempts to create an awareness of the responsibility that accompanies parenthood and the related obligation to support descendants, on one hand, the extension of the support obligation to the entire family encourages the principal debtor, in many cases, to ignore his duty.

The existing system of family subsidies in Costa Rica is intended to strengthen and protect the family institution. However, the various subsidy programs do not constitute a very important factor in the economic and social protection of the weakest sectors of the population. Benefits are given only to a small number of people, and important social groups are left out. Accordingly, the family allowances system is now under discussion in our Legislative Assembly with the purpose of setting up a much wider program. It will cover large sectors of the salaried population, both in the public and in the private sector.

However, our system of subsidies, based on the earnings of the family and on the number of children, exercises, and will increasingly exercise under the new system, a direct stimulus on the growth of the population. Moreover, the growth will occur in those sectors which are the weakest economically. This again reveals the absence of a clear-cut and coherent population policy. While, on one hand, public programs of family planning are being pushed, there is on the other hand, an attempt to establish systems of subsidies which will presumably work as a direct stimulus for population growth.

IV. GENERAL CONCLUSION

The problems which cause explosive population growth in Latin America directly affect the economic development of our people. The growth of the GNP, the rate of per capita income, the level of illiteracy and the housing deficit are indicators over which demographic phenomena have a direct influence.

The population, its increase and decrease, the control of births and family planning are not, in the strict sense, legal problems. At most, they are merely more or less conscious source materials underlying the law. Through our analysis of Costa Rican legislation, we have verified the fact that in our country the law has not been used to fulfill its modern programmatic function. It has not been used as an instrument to establish and implement a coherent official policy on the subject of population. In truth, the law has not kept up with the demographic problem. It has neither foreseen it nor has it provided a satisfactory solution.

The investigation that we have made, and our own personal views as to the role that the law should play as a catalyst to social change, indicate to us the importance that we should accord to the relationship between law and population. Without forgetting that in the field of population dynamics the decision is political, it is our duty as lawyers and professors of law to participate actively--as we have not done in the past--in the creation of an awareness which leads to the making of appropriate decisions for the welfare of our people.

There is something that we Latin Americans cannot lose sight of at any time: the threat that the extreme poverty of the masses of our people represents for the maintenance of peace, the attainment of justice and the establishment of the rule of law. This extreme poverty in our under-developed countries demands an urgent solution through just and equitable economic relations with the industrialized countries. The United Nations has not remained indifferent to this problem. Its concern during the First Development Decade led to the setting of minimum goals and objectives, which are yet to be fulfilled owing to the indifference of the industrialized nations.

It is clear that the conclusions that we finally reach will not alone solve the serious problems that confront our peoples, but at least we will have made a contribution--small though it be--in the search for effective tools to solve them.

THE LAW AND POPULATION STUDY IN MEXICO

José Cornejo*

I. STAGES OF THE STUDY

The study on Law and Population in Mexico is being carried out in coordination with the Fundación para Estudios de la Población (FEPAC) and a team of researchers composed of three lawyers and two sociologists. The study is organized so as to be carried out in five basic steps.

The first step was to establish an adequate plan of action. At the outset, it was necessary to try to determine which fields of legislation and judicial and administrative decisions have a relation to, or impact on, population growth and family planning.

The second step entailed reviewing and classifying all these laws and judicial and administrative decisions. Two hundred sources were consulted, including decrees, codes, texts on jurisprudence, regulations and resolutions. The process lasted about ten months.

In as much as the original research included materials which were only marginally related to the topic, the third phase was to sift through that material and to eliminate materials--over fifty percent--of little relevance. The fourth step was to investigate the application of the remaining laws and decisions. The method of investigation generally varied depending on the subject matter under study. The final phase, which is still underway, involves the interpretation of the material and the drafting of the final report.

II. PROBLEMS ENCOUNTERED

Generally, there were few problems in the selection and compilation phase of the work, and the team agreed unanimously on the results. In the first compilation there were 700 items classified, of which half were finally retained. Nothing of import to the subject was left out.

The difficulties occurred in connection with the application of the laws, and in judging their probable effect. First of all, there was a total absence of information in some cases and in other cases it was hard

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to get access to it. For example, Mexico has a law which provides that any farmer who fulfills certain minimal conditions may obtain an allotment of land. Nevertheless, it is known that a significant proportion of the rural population has no land. The Agriculture Department has figures on the allotments made every year but it does not know the number of applications refused or the number which are never answered. It is also known that immigration and emigration have been an important factor in the economic and demographic balance of the country, yet there are no estimates on the aspect of emigration which is perhaps the most important, namely illegal emigration.

As far as problems of interpretation are concerned, the investigation discovered that some of the tax laws discriminate against large families to the advantage of small families with equal incomes, since both must pay the same percentage of their income regardless of family size. Another example of the interpretation problem is the law on concubinage and prostitution, and how it is applied. The two problems are sufficiently common but their relationship to fertility has never even been studied. No one knows whether the relative ease of relations with several women increases or decreases fertility through making contact between spouses irregular and less frequent. Accordingly, one cannot predict the effect which a strict enforcement of the laws would have on fertility.

The above situation--the uncertainty as to the effect of the laws on the fertility behavior of Mexican couples--has a considerable effect upon the findings of our study as to law and population in our country.

With regard to laws which appear to have more direct impact on population and family planning in Mexico, they seem to impose relatively few direct barriers on the control of fertility. Voluntary sterilization is permitted under certain conditions. Abortion is prohibited except in cases of rape or threats to the life of the mother but, for various reasons, the law is not enforced. There are possibly five to six hundred thousand abortions per year. Also, most of the various kinds of contraceptives are produced in the country and, although they (the pills) are supposed to be sold only on medical prescription, even this requirement is not enforced in practice. One of the most recent reforms in favor of family planning is found in article 14 of the sanitary code, which now permits publicity for contraceptive methods. This was previously forbidden.

As far as family law is concerned, it appears that minimum marriage age (16 for men, 14 for women in some states; 14 and 12, respectively, in others), the lack of legislation against common law marriages, and the relative ease of divorce have a probable relationship to fertility.

Other laws that need attention because of their relationship to fertility are those on public welfare. There are parts of the new law on housing construction, and laws on pensions, old age assistance and retirement which appear to be pro-natalist since they do not appear to restrict

the number of children who may benefit, and the payments are the same regardless of the size of the family.

III. RECENT DEVELOPMENTS

It is important to mention certain very recent changes in the Mexican law that will affect family planning. In a declaration made by President Echeverría during his election campaign, which clearly showed his position on family planning at the time, he said:

I do not know whether Mexican mothers understand the effectiveness of the contraceptive pill. What I do know is that we need to populate our country; that we need to maintain our faith in our infants and our youth; that we must build schools and better conditions of living for the future. If the Mexican Revolution had established a dictatorial regime, we would have been controlling the growth of our cities. But what the government has in fact been doing for many years is trying to solve the problems created by this growth. We do not want to control our population, nor to set a pessimistic goal for ourselves in the future.

Three years later, in 1972, after seeing the palpable reality and sensing the felt need, and with more adequate information on the concepts of family planning, the government declared:

After the first of January 1973, the Government will initiate a program of Family Planning, based on education and on responsible parenthood. It will begin in ten states, but will have a national objective. It will consist of orienting parents - and particularly youth - on the educational, medical, sexual, nutritional and biological aspects of reproduction. It will be designed to make them consider the suitability of planning the growth of their families.

To this declaration of the Ministry of Health was added that of the Mexican Institute of Social Security, which announced that:

The Institute has decided to undertake projects in family planning with the fundamental purpose of increasing the medical and welfare protection which it now provides to its members. In doing this, its objective is to improve the health and welfare of the nuclear family. It will respect the inalienable right of each couple to make the decision as to the number and spacing of the children it wishes to engender, support and educate, with awareness and in the full exercise of its liberty of action, bearing in mind its own aspirations and resources.

There is no intention to influence the demographic growth of the country except to the extent that it takes place as the additional and indirect consequence of the above basic elements.

To fulfill this commitment the Institute accepts the obligation to guarantee the implementation of this right, putting at the disposition of couples the information and scientific and technical developments which will make it possible for them to plan their families as they please.

To these decisions of the Ministry of Health and the Institute of Social Security to begin to carry out programs on family planning, there was added, in June of this year, the third institution responsible for making health services available in Mexico. It is the Institute of Security and Social Services for Government Workers. It declared itself in favor of these programs and will make the service available to its members.*

As can be seen, these new initiatives on family planning in the public sector may differ in form from the efforts which the private institutions, like FEPAC have been making since 1965, but in the final analysis their respective goals are the same.

The question remains as to whether we can offer to Mexican women at all levels, the chance to exercise the right to plan her family--something which, up to the present time in Mexico, has been the privilege of groups which in addition to the knowledge have also had the economic resources necessary to exercise the right.

*Editor's note: The Declaration of the Mexican Bishops in December 1972 in favor of the Government's changed position demonstrates the profound change which has occurred in Mexico. Since this paper was presented, President Echeverría has submitted an initiative to the Congress which, if adopted, will revamp the General Population Law. Of particular importance is the establishment of a National Population Council which will coordinate demographic planning. Moreover, the Government Secretary will receive broad powers to institute family planning programs. (For a discussion of the law see Appendix III).

LAW, POPULATION AND HUMAN RIGHTS IN THE UNITED STATES

Edmund H. Kellogg*

I. THE ROLE OF THE STATES

Because the United States has a federally organized government, the responsibility for laws and decisions affecting population and fertility is shared between the Federal Government and the fifty states. Needless to say, the laws vary considerably from state to state, and since the middle 1960's there has been a basic liberalizing change in attitudes. The sixteen states which had heavy restrictions on contraceptives have given them up. Now, the sale and distribution of contraceptives and the dissemination of information about them are legal in all states. Such restrictions as do exist are concerned with such matters as sales to minors, who may sell or distribute and where this may be done, and the conditions under which the materials can be advertised or displayed. There is a clear trend, however, toward the liberalizing of these restrictions. At the same time, an increasing number of states have been organizing state-supported family planning services. Similarly, former state restrictions on voluntary sterilization have been largely eliminated. Finally, there has been a growing acceptance of sex education in the schools.

Typical of the above trend is a recent statute of the State of Tennessee, adopted in 1971, which declares in its preamble that:

Continuing population growth either causes or aggravates many social, economic and environmental problems, both in this state and in the nation.

* * *

It is desirable that inhibitions and restrictions be eliminated so that all persons desiring and needing contraceptive procedures, supplies, and information shall have ready and practicable access thereto.

* * *

All medically acceptable contraceptive procedures, supplies, and information shall be readily and practicably available to each and every person desirous of the same

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regardless of sex, race, age, income, number of children, marital status, citizenship or motive.

II. THE ROLE OF THE FEDERAL GOVERNMENT

Despite the important role of the states in this field, the Federal Government also has considerable influence. It acts through executive policy as set forth by the President, through the Food and Drug Administration which controls the sale of drugs, through Congressional action by legislation and appropriations, and through decisions of the Supreme Court and other Federal Courts.

In 1969 President Nixon said that:

We should establish as a national goal, the provision of adequate family planning services within the next five years to all those who want them but cannot afford them.

He added,

Unwanted or untimely childbearing is one of several forces which are driving many families into poverty or keeping them in that condition. Its threat helps to produce the dangerous incidence of illegal abortion. Finally, of course, it needlessly adds to the burdens placed on all our resources by increasing population.

The President called for the creation of a Commission on Population Growth and the American Future, designed to study the population situation in the United States, and to make recommendations. The Commission was established and made a very thorough study. It concluded:

. . . We have found no convincing argument for continued national population growth. On the contrary, the plusses seem to be on the side of slowing growth and eventually stopping it altogether. Indeed, there might be no reason to fear a decline in population once we are past the period of growth that is in store.

It added,

In regard to childbearing and child-rearing, the goals of our recommendations are to: (1) maximize information and knowledge about human reproduction and its implications for the family; (2) improve the quality of the setting in which children are raised; (3) neutralize insofar as it is practicable and consistent with other values those legal, social and institutional pressures that historically have been mainly pronatalist in character; and (4) enable

individuals to avoid unwanted childbearing, thereby enhancing their ability to realize their preferences. These particular policies are aimed at facilitating the social, economic, and legal conditions within our society which increase ethical responsibility and the opportunity for unbiased choice in human reproduction and child-rearing.

The Commission made a series of specific recommendations covering all aspects of the problem, including ones which lend support to population and sex education and the liberalization of access to the various means of fertility control.

The Congress, in adopting the Family Planning Services and Population Research Act of 1970, stated that the purpose of the Act is

to assist in making comprehensive voluntary family planning services readily available to all persons desiring such services;

to coordinate domestic population and family planning research with the present and future needs of family planning programs;

* * *

to develop and make readily available information (including educational materials) on family planning and population growth to all persons desiring such information. . . .

The Congress has repealed obsolete laws which restricted contraceptive distribution and has authorized the appropriation of increasing amounts of money for domestic family planning purposes each year. In the fiscal year ending June 30, 1973, the amount authorized for such services, training, research and information was over \$180,000,000.

It is the duty of the Supreme Court to interpret the Federal Constitution, which includes the so-called "Bill of Rights"--the first ten amendments of the Constitution. These, with a few other later amendments, constitute the legally binding statement of those human rights which have been adopted to govern both the conduct of the activities of the Federal Government and of the State Governments. Any law of any state or of the Federal Government which is found to be in conflict with these rights is stricken down as "unconstitutional" by the Supreme Court.

The Supreme Court has, during past years, developed a constitutional right which has come to be known as the right of privacy. The right has been forged from the Court's interpretation of the various amendments on security of the person, security against search, due process of law, etc.

The Court has recently extended this constitutional right into the field of marriage, family and sex. In the series of cases starting with the case of Griswold v. Connecticut in 1965, and including the recently decided case of Roe v. Wade, the Court has found that the right of married couples to use contraceptives is a "freedom" guaranteed by the Constitution; that this freedom includes the right of an unmarried person to have access to contraceptives, and that it also covers the right to decide whether and when to bear or beget a child or to terminate a pregnancy. The Court has, however, made clear that the right of privacy is limited by the "compelling interest" of the government in the "protection of health, medical standards, and prenatal life."

From the above, it can be seen that the position of the United States in the field of law and population, both at the federal and state levels, is based upon the principle that family planning is a constitutionally-protected human right. The objective is to make the decision as to whether and when to have a child entirely voluntary and free from any government compulsion, either for or against increased natality.

III. U.S. ACTIVITIES IN THE U.N.

The United States has followed this policy line in the United Nations. As early as the General Assembly of 1962, President John F. Kennedy instructed the United States delegation to raise the question of population, and this resulted in the first General Assembly Resolution on the subject. It called for a study by the Secretary-General, the Economic and Social Council and member governments of the relationship between population growth and economic and social development.

President Johnson was one of the thirty signers of the so-called "World Leaders' Statement on Population," which was promulgated by Secretary-General U Thant on Human Rights Day in 1966. (It was also signed by, among others, the Chiefs of State of Barbados, Columbia, the Dominican Republic and Trinidad). The statement was the first international document which declared that the opportunity to decide on the number and spacing of children is a human right.

United States delegates to United Nations meetings since that time have supported those U.N. actions which were designed to establish that right and to gain universal support for it. These efforts have been largely successful, and the question is now whether the right is to be accepted in fact, under the laws of each country, as well as in principle at international conferences.

Among the more important of the instruments adopted by the United Nations are the following:

- 1) The Proclamation of Teheran. The United Nations Conference on Human Rights in 1968 solemnly proclaimed by unanimous vote

that "parents have a basic human right to determine freely and responsibly the number and the spacing of their children." The Conference also resolved unanimously that couples have "a right to adequate education and information" in this respect.

2) The Declaration on Social Progress and Development. The General Assembly in 1969 declared that national and international action is required to mobilize resources to provide "to families . . . the knowledge and means necessary to enable them to exercise their rights" to make the above determinations as to children.

3) The Program of Concerted International Action for the Advancement of Women. The General Assembly recommended that, during the Second United Nations Development Decade (before 1980), the necessary information and advice be made available to all persons desiring it, "to enable them to decide freely and responsibly on the number and spacing of their children and to prepare them for responsible parenthood, including information on the ways in which women can benefit from family planning."

These documents received the support of the Latin American delegations.

The declaration of the U.N. General Assembly that 1974 will be World Population Year brings us to the special field of law and population which has been assigned to this Seminar.

IV. LAW AND POPULATION PROGRAMME

When the Secretary-General was requested to make recommendations as to how to prepare for World Population Year, he pointed out, among other things, that more information is needed on the influence of legislation. It was for these reasons that the Law and Population Programme of the Fletcher School of Law and Diplomacy was established. The Programme, whose international directing committee has been placed on the roster of non-governmental organizations accredited to the United Nations, has been working with the United Nations Fund for Population Activities and with the International Planned Parenthood Federation in organizing projects for the study and review, by distinguished local lawyers and law professors, of domestic laws affecting fertility in some twenty-five countries around the world.

In Latin America, these projects are represented here by distinguished experts from Brazil, Chile, Costa Rica and Mexico. Similar projects are now in operation in Ceylon (Sri Lanka), Egypt (U.A.R.), Ethiopia, Ghana, Indonesia, Iran, Kenya, South Korea, Lebanon, Malaysia, Morocco, Nigeria, Pakistan, Philippines, Singapore, Thailand, Togo, and Turkey, and more are under preparation.

In Europe, the International Union for the Scientific Study of Population has organized a committee of experts from sixteen countries, which has been reviewing their countries' legislation in this field. In the United States, a corresponding study has been carried out on the legislation of the fifty states by the experts working for the President's Commission on Population Growth and the American Future, to which I referred earlier.

Rafael M. Salas, Director of the United Nations Fund for Population Activities, while reporting to the U.N. Population Commission this spring, said that this work will result in compilations of "laws bearing directly and indirectly on population, and that "at a later stage, systematic review of these laws may be pursued to develop a more universal understanding of law and population." He added that the work had "in many cases resulted in remarkable transformations of social attitudes toward population questions" and had even resulted in alterations of the law in some cases.

As suggested by Dr. Salas, it is planned to organize an international symposium at some time during World Population Year, at which the experts working on these programs from all around the world can meet, exchange experiences and possibly draw conclusions and draft model provisions of laws for consideration by governments interested in developing their laws in conformity with the United Nations standards. It is also likely that suggestions along these lines may be transmitted to the United Nations Population Conference in August 1974.

If family planning is a human right, as declared by the United Nations, member governments and leading members of the Bar in each country may wish to review their own laws in the light of this declaration.

It is our hope that this seminar may result in increased interest in this emerging field of law, and that other countries in the Western Hemisphere and distinguished jurists throughout the Americas may find sufficient interest in this field so that they will also wish to organize law and population projects in their countries which will play a constituent part in the overall United Nations activity.

DISCUSSION*

Mrs. Romy Madeiros da Fonseca, a lawyer representing the Brazilian Council of Women, indicated that the Council viewed family planning as a woman's right. Due to this conception, the Council formulated in 1972 a recommendation which highlighted the need to assure "the right to family planning information and education, as a vehicle for responsible parenthood and for increasing the role of women in the exercise of the family functions." She expressed the need for laws on family planning in Latin America which would benefit all the women of the region, and pointed out that women must have access to information regardless of their social or cultural level.

A Peruvian lawyer stated that at the present time lawyers in his country opposed family planning. Before family planning can be implemented, it is necessary to have prior economic and social planning in the country. He was of the opinion that without the existence of certain conditions -- education, economic status, etc. -- it was impossible for a person to exercise the right to decide the number and spacing of children.

Professor Benjamin Moraes responded that the right to family planning -- to determine the size of the family according to individual possibilities -- is a basic human right. It should not be a privilege of either the rich or the educated. The right extends to all individuals.

An Argentine lawyer inquired as to why the words "birth control" always seem to imply some policy which is negative in nature. It occurred to him that the words could also mean an attempt to increase population in under-populated countries. In his view, the problem of overpopulation does not exist in Latin America; there is merely under-population with poor demographic distribution, i.e., over-concentration of the population in urban areas. Buenos Aires is a typical example of the urban crowding which may be found in most metropolitan areas. Lastly, he stated that the primary needs of the population are food, housing, and public health care, and that maternal and infant mortality, as mentioned in Professor Cumplido's paper are not as serious a reason for concern as are the other three more basic needs.

Professor Cumplido answered that it is impossible to have economic, social, and cultural development without giving proper consideration to the most important factor in the development process: the population. He was puzzled by the fact that there was so much fear of, and opposition

*Editor's note: Following the presentation of the various papers a stimulating discussion ensued. For the purpose of this publication the commentaries are summarized here.

to, family planning. He asserted that such a program would help rather than hinder economic development.

The Peruvian lawyer reiterated that if a country has proper economic, social, and cultural development, there is no need for family planning.

Professor Cumplido took issue with that position to the extent that he felt the Peruvian commentator was using economic development and education as a means to deny people of lower economic levels the right to determine family size.

Dr. José Nabuco alluded to the trend in the United States as an argument against family planning. Whereas, the birth rate there some years ago was 50/1,000 -- it is now 17/1,000. He considered this low birth rate to be detrimental to the United States. From this he reasoned that a declining birth rate would be detrimental to most countries. With regard to Brazil, he felt that having large areas of unoccupied territory in itself is not a problem since, in time, these spaces will become developed. He emphasized, however, that in order to develop the wilderness areas of Brazil, it will be essential that the population increase more rapidly rather than more slowly.

A Brazilian lawyer agreed with Dr. Nabuco's analysis and stated that he opposed any attempt to implement family planning in Latin America. He felt that if the respective countries, particularly Brazil, did not occupy their empty spaces, they will eventually be occupied by the imperialist countries. Nevertheless, he agreed that some dissemination of information on family planning is necessary but would resist anything beyond that.

Professor Odio remarked that the fact that a country has empty space to be occupied is not enough to justify the limitation of family planning. If there is an absence of acceptable living conditions in the frontier regions, people will not stay there. In order for a country to provide those conditions, there must be money available to provide such living conditions. That money must come from domestic savings. It is a basic economic fact that countries that have high population growth rates find it nearly impossible to accumulate the money required for those services.

Dr. Nabuco repeated his opposition to information on family planning, especially to poor people, for the reason that if such information is widely disseminated Brazil will stop growing. He saw no reason for Brazil to begin a birth control program at the present time and suggested that the concern with population in Brazil be postponed for 50 - 100 years.

Father Beltrão observed that a distinction must be made between family planning, on one hand, and birth control, on the other. Family planning is a human right for everyone, whether rich or poor. At the present time, only the wealthy in Latin America have ready access to the means for family planning. Birth control connotes government interference in the decision to plan a family. It involves the extensive mobilization of governmental resources and manpower, as has been done in the People's Republic of China.

APPENDIX I

18th CONFERENCE OF THE INTER-AMERICAN BAR ASSOCIATION

RESOLUTION
CT-XVIII/52

HUMAN RIGHTS: SEMINAR ON LAW AND POPULATION

WHEREAS the United Nations International Conference on Human Rights adopted the Proclamation of Teheran in 1968, which states that "parents have a basic human right to determine freely and responsibly the number and the spacing of their children", and unanimously resolved that couples have "a right to adequate education and information in this respect"; and

WHEREAS the United Nations General Assembly, in its Declaration on Social Progress and Development, in 1969, called for "the provision to families of the knowledge and means necessary to enable them to exercise" the above right; and

WHEREAS the United Nations has declared that 1974 shall be World Population Year, during which population matters of this kind should be examined by member governments and the Secretary-General has called on the various non-governmental and professional organizations concerned to support this effort; and

WHEREAS the decisions on population policies to be pursued are the responsibilities of sovereign States, in the light of their special conditions, interests, religion, demographic densities, stage of economic, social and cultural development; and

WHEREAS the Human Rights Committee of the Inter-American Bar Association has organized a seminar to explore the legal aspects of this question, and has found a considerable degree of interest in the matter on the part of lawyers from many of the Western Hemisphere countries, but that the matter has not yet been adequately studied in each country;

The XVIII Conference of the Inter-American Bar Association

RECOMMENDS that national members of the Association be encouraged further to explore and review the laws of their respective countries as they affect the rights proclaimed by the United Nations with a view to the further consideration of this question at the 19th Conference of the Bar Association in 1975, and requests its Committee on Human Rights to consider the possibility of establishing a working group to keep in touch with this matter until its next conference.

APPENDIX II

SEMINAR ON BRAZILIAN POPULATION GROWTH*

From July 27th to 30th, 1973, a Seminar on Population was held in São Leopoldo, Brazil which was organized by church-related organizations. The seminar aimed at re-establishing the dialogue between Catholic theologians and demographers on the problems arising from Brazilian population growth.

Eighty persons (36 clergymen and 44 laymen) from the various regions of Brazil participated in the seminar, which was held at the Center for Documentation and Research on Population and the Family of the University of Vale do Rio dos Sinos.

While the seminar did not arrive at any final conclusions, the responses to the evaluation questionnaire generally show among other things that:

[T]here are no convincing reasons to recommend an official policy of population control in Brazil, but there do exist many reasons for the official support of family planning in Brazil, with the purpose of granting Brazilian families, especially those of the lower economic classes, easy and free access to modern and safe methods of birth regulation; and it is necessary to continue the discussion of modern conditions of sex, marriage and family life.

*From a report by Professor Pedro Calderan Beltrão.

APPENDIX III

PROPOSED MEXICAN GENERAL POPULATION LAW

Mexican President Luis Echeverría has recently proposed legislation which would revamp the General Population Law of 23 December 1947, as amended 24 December 1947.

Abstract of Message of President Echeverría

The question of population should be considered as an integral element of social and economic development. It is now known that at present rates the size of the population of Mexico will double in the next 20 years. This understandably will bring increased demands on the public and private sectors for education, jobs, and services. If we are to increase the quality of life, it will be necessary to stabilize our population growth. It is therefore necessary to redesign and accelerate the strategy of our development by incorporating into it an authentic demographic policy, which takes into account such factors as the volume, structure, dynamics and distribution of the population, and includes family planning. We are aware that a population policy alone is not a substitute for development. But Mexico needs a demographic policy that corresponds with contemporary needs--one that is totally different from the present legislative orientation.

Summary of the Proposed Law

To meet the demands as outlined by President Echeverría, the Secretary of Government will be given exclusive charge of conducting the efforts of the Federal Executive in resolving national demographic problems. More importantly, a National Population Council is to be established as the organ for implementing the decisions taken on the subject of demographic planning. A representative of each executive department concerned with development will have a seat on the Council.

Of the broad powers given to the Secretary of Government under Chapter I of the proposed legislation, the following relate directly to law and population functions:

- to adjust programs of economic and social development to the needs created by population structure, distribution and dynamics.
- to institute family planning programs through the education and public health services of the public sector, and to supervise such programs, and those of the private sector, to the end that they respect individual liberty and family dignity with the object of rationally regulating and stabilizing population growth and making the best use of the human and natural resources of the country.

-to influence population dynamics through the education, public health, professional and technical training and child welfare systems and to obtain the participation of all in the solution of problems.

-to ensure the planning of urban population centers and the acquisition of effective public services for them.

Chapter II (Migration) sets up a regulatory scheme for personal internal and external movement.

Chapter III (Immigration) establishes a preferential immigration system for researchers, scientists, technicians and administrative personnel who possess skills not available in Mexico and who can contribute to its national progress.

Chapter IV (Emigration)

Chapter V (Repatriation)

Chapter VI (The Personal Identification and Population Center) Under this part of the law all persons must register. It is to act as a repository of all information pertinent to the human resource aspects of national development.

Chapter VII (Sanctions) imposes penalties for violations of the provisions of the law dealing with migration, immigration and emigration.

Conclusion

The object of the legislation is to regulate the phenomena which affect population growth, size, distribution and dynamics in Mexico, so that its people can participate equitably in economic and social development. It is an official recognition that matters concerning population structure must play a role in the formulation of development policy. Its adoption will mark the issuance of the official legislative stamp of approval for family planning programs.

International Advisory Committee on Population and Law

The Programme is under the general supervision of an International Advisory Committee on Population and Law, which is on the roster of non-governmental organizations accredited to the U N Economic and Social Council. The Committee meets annually in different regions of the world. Its members are

- Professor Georges Abi-Saab** (*Institute of International Studies, Geneva*)
Professor Richard Baxter (*Harvard University*)
Professor K. Bentsi-Enchill (*University of Ghana*)
Mr Robert Black (*Organization for Economic Cooperation and Development*)
Dr Jean Bourgeois-Pichat (*Comite International de Coordination des Recherches Nationales en Demographie*)
Mr Philander Claxton, Jr (*U S Department of State*)
Lic Gerardo Cornejo M (*Fundacion para Estudios de la Poblacion, A C , Mexico*)
Dean Irene Cortes (*University of the Philippines*)
Dr Jean de Moerloose (*World Health Organization*)
Mr Carl M Frisen (*U N Economic Commission for Asia and the Far East*)
Ambassador Melquiades J Gamboa (*University of the Philippines*)
Mr Robert K A Gardiner (*U N Economic Commission for Africa*)
Professor Richard Gardner (*Columbia University*)
Mr Halvor Gille (*U N Fund for Population Activities*)
Professor Leo Gross (*Fletcher School of Law and Diplomacy*)
Dean Edmund A Gullion (*Fletcher School of Law and Diplomacy*)
Miss Julia Henderson (*International Planned Parenthood Federation*)
Mr Edmund H Kellogg (*Fletcher School of Law and Diplomacy*)
Professor Dudley Kirk (*Stanford University*)
Dean Peter F Krogh (*Georgetown University*)
Dr Arthur Larson (*Duke University*)
Dr Luke T Lee (*Fletcher School of Law and Diplomacy*)
Mr Thomas C Lyons, Jr (*U S Agency for International Development*)
Vice-Chancellor O Roy Marshall (*University of the West Indies*)
Mr Bertil Mathsson (*U N E S C O*)
The Reverend Arthur McCormack (*Vatican*)
Mr Robert Meserve (*American Bar Association*)
Dr Minoru Muramatsu (*Institute of Public Health, Japan*)
Mrs Harriet F Pilpel (*U S Planned Parenthood-World Population*)
Dr Rafael M Salas (*U N Fund for Population Activities*)
Mr Marc Schreiber (*U N Human Rights Division*)
Mrs Helvi Sipilä (*Assistant Secretary-General for Social and Humanitarian Affairs, U N*)
Mr Leon Tabah (*U N Population Division*)