AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON, D. C. 20523
**BIBLIOGRAPHIC INPUT SHEET**

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BATCH 76

1. SUBJECT CLASSIFICATION
A. PRIMARY: Population — PA00-0000-G140
B. SECONDARY: General--Kenya

2. TITLE AND SUBTITLE
Law and population growth in Kenya

3. AUTHOR(S)
Uche,U.U.

4. DOCUMENT DATE: 1974
5. NUMBER OF PAGES: 48p. 46p.
6. ARC NUMBER: ARC

7. REFERENCE ORGANIZATION NAME AND ADDRESS
Tufts

8. SUPPLEMENTARY NOTES *(Sponsoring Organization, Publishers, Availability)*
(In Law and Population monograph ser.no.22) (Prepared for the Regional Workshop on the Teaching of Population Dynamics in Law Schools in Africa,Nairobi,1974)

9. ABSTRACT

10. CONTROL NUMBER
PN-AAF-169

11. PRICE OF DOCUMENT

12. DESCRIPTORS
Kenya
Law

13. PROJECT NUMBER

14. CONTRACT NUMBER
CSD-2810 GTS

15. TYPE OF DOCUMENT

AID 590-1 (4-74)

PSD-2812 Tufts 6TS

Law and Population Monograph Series
Number 22 (1974)

PN-AAF-169

# Law and Population Growth in Kenya

by U. U. Uche

Background paper for Workshop on the Teaching of
Population Dynamics in Law Schools
University of Nairobi
November 24-30, 1974

Law and Population Programme
THE FLETCHER SCHOOL OF LAW AND DIPLOMACY
Tufts University
Administered with the Cooperation of Harvard University
Medford, Massachusetts

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21/ *Law and Population Growth in Iran*, Parviz Saney (1974).

22/ *Law and Population Growth in Kenya*, U. U. Uche (1974).

This monograph is one in a continuing series published under the auspices of the Law and Population Programme, the Fletcher School of Law and Diplomacy. / The Law and Population Programme and its field work are supported in part by the International Planned Parenthood Federation, the United Nations Fund for Population Activities, and the U. S. Agency for International Development, among others. The Programme is under the general direction of an International Advisory Committee on Population and Law, whose members are listed at the end of this monograph. / The conclusions and opinions of this monograph are the sole responsibility of the author, and do not necessarily reflect those of the Law and Population Programme, the Fletcher School, or any of the supporting agencies. / Printed in the U.S.A.

This is a background paper prepared for the Regional Workshop on the Teaching of Population Dynamics in Law Schools in Africa, which was convened in Nairobi, November 24 - 30, 1974, under the joint sponsorship of the Faculty of Law of the University of Nairobi and the Law and Population Programme of the Fletcher School of Law and Diplomacy. The present monograph will be part of a volume containing the entire proceedings and background papers of the workshops, due for publication in 1975.

For a more detailed treatment of the relationship between law and population in Kenya, please refer to The Law Relating to the Growth and Control of Population in Kenya, a two-volume final report of research conducted by the Law and Population Project at the University of Nairobi under a grant from the Interdisciplinary Communications Program of the Smithsonian Institution.

# LAW AND POPULATION GROWTH IN KENYA

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# LAW AND POPULATION GROWTH IN KENYA

## I. INTRODUCTION

### A. Character of the Population Problem

Kenya's first national population census was taken in 1948. At that point in time, Kenya was found to have 5 1/2 million inhabitants. In 1962 another census indicated an annual growth rate of 3 per cent. In that year the population was 8 1/2 million. At that time, it was forecast that at the annual growth rate of 3 per cent the population would double in the next 23 years. Between 1962 and 1969 the annual growth rate jumped to 3.3 per cent. The 1969 census put the population of Kenya at 10,942,705. The current figures given for 1974 indicate that the population will reach 12,934,000, a growth rate of 3.5 per cent. This is a rather disturbing level of growth for a country with limited resources. Table 1 below shows the increasing rate of growth since the 1948 census. This high and accelerating population growth rate, coupled with a large dependency rate and increasing rates of rural-urban migration, act to slow and reduce Kenya's potential for economic and social development.

TABLE 1

Population Growth Rate in Kenya

| Year | Population | Average Annual Growth Rate |
|---|---|---|
| 1948 | 5,405,966 | |
| 1962 | 8,636,263 | 3.2 |
| 1969 | 10,942,705 | 3.4 |
| 1974 | 12,934,000 | 3.5 |

Source: Development Plan 1974 - 78, Vol. 1, p. 99.

The vast majority of the population in Kenya are of African or Somali origins--nearly 98 per cent. The rest of the population is Arab, Asian or European. As would be expected the population is unevenly distributed. The average population density is about 20 persons per square kilometre. Just over 8 per cent of the population live in towns. The coastal belt, the highlands, the foothills of the mountains and the shores of Lake Victoria are the most densely populated areas.

### B. Social, Religious and Cultural Elements

It has often been suggested that since the traditional customary law attitude in Kenya was pro-natalist, that it must ipso facto be contrary to and in conflict with the aims and objectives of family planning. Polygamy, the involvement of the parties' families, the payment of marriage consideration have all been said to emphasize the child-centred nature of cus-

tomary law marriages which therefore leaves no room for family planning. But the suggestion that family planning is inconsistent with traditional customary law notions can be quite misleading.

The position is based on the mistaken assumption that family planning necessarily means birth control. Even if it did mean that--which it does not--customary law marriages in Kenya do recognize some degree of control when this helps spacing. Intercourse has traditionally been abstained from during breast feeding, a period of time which could last up to two years. In the past, this of course helped to achieve some degree of child spacing, even though it applied to but one wife in a polygamous household.

1. Traditional Attitudes Affecting Fertility

Nevertheless, there are a number of aspects of the traditional family that would yet have to adapt to changed conditions and the demands of the modern state. Firstly, there is polygamy. A group of theologians, who conducted a study on the institution of polygamy in Kenya, came to the conclusion that the majority of Kenyans still felt that it was right to have more than one wife. Even a good proportion of the educated elite seemed to share the view. The 1971 survey for the Family Planning Association of Kenya seemed to have reached a similar conclusion.

Secondly, there is the traditional notion concerning the chastity of women. A woman who has had free sexual relationships is considered 'loose'; a good woman is chaste, thus a virgin. This tends to have a limiting influence on premarital sexual practices.

Thirdly, the whole concept of bride-wealth and marriage consideration is still very much part of traditional marriage law, as is the humble status of the wife in the relationship--witness the possibility of her being inherited under some systems under the custom of levirate, or of her family giving up her sister in the event of her earlier death, under the custom of sorrorate. There is also the 'ghost marriage' custom whereby the woman who has lost her original husband is married to a kinsman of the deceased who would then produce children that are legally the children of the deceased although biologically the children of the living kinsman. All these follow from the basic conception that marriage is a relationship between two families; the individual boy or girl have got to accept what has been agreed by their families.

Fourthly, the conception of parental control is still very much part of the traditional system. The parties having been joined through the negotiations of two families cannot separate without the concurrence of the families. The power and control of the parents is still very much part of traditional marriage law and family life in Kenya. There is also customary law succession and inheritance under which the female is heavily discriminated against in favour of the male child. Fortunately,

the Law of Succession Act, 1972 has started a trend which in time will lead to the ultimate eradication of such traditional practices in the law of succession.

2. Potential Amelioration of Modern and Traditional Attitudes

Running counter to the traditional attitudes and rules mentioned above is a growing feeling among the youth that marriage is perhaps an unnecessary institution. In short, they feel that one could get outside the marriage relationship all the satisfaction you might desire without any of the headaches which accompany marriage. This no doubt is an extreme position to take. Surely there are certain aspects of the traditional family life which can be adapted and preserved with no conflict or friction with the right of the state to do what is best for its citizens. For instance, the definition of "family" in Kenya has taken on a scope that is much wider and more convenient than the Euro-centric definition of the nuclear family.[1] A family should, and does, include married couples without children, unmarried couples with children, unmarried mothers, and adults with dependents--either children or such other adults as mothers, fathers, uncles, aunts, etc. There is a feeling in Kenya that the extended family still has a place in the modern state and in a way contributes to the general welfare.

Another facet of the traditional family which would greatly enrich the modern concept is the role of the elders, chiefs and women leaders, all of whom have considerable influence in the community. Quite apart from using them in their traditional role as dispute settlers and as other functionaries, they could quite as usefully be utilized in promoting family planning knowledge and practice. They would be much more effective motivators than the stranger and much younger field worker, whose influence and persuasiveness is rather minimal, in the rural areas where over 90 per cent of Kenya's population still reside.

The potential role of the elders has two perspectives, one negative (disabusing the minds of the others of outmoded theories and beliefs) and the other positive (inculcating in them the right attitudes relevant to the current population needs of the modern state).

On the negative side, there is the common belief among the people

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[1]Editor's Note: During the World Population Conference the competing views regarding the nuclear and extended family structures were explored. It was recognized that the existence of a continuing extended family structure in many countries must be taken into account, and that it must not be assumed that the existence of the nuclear family is the universal rule.

that more children mean more wealth, a source of labour on the farms, a future old-age insurance for the elderly and the feeling that a man who has many children is wealthy, powerful and the head of a strong lineage whose future is ensured. These traditional notions are being modified as countries shift from the agrarian to the more industrial economies. There is also the view, based on the erstwhile high infant mortality rate, that regards high numbers of children as insurance against the possibility of some dying before reaching adulthood. There is also the subsidiary desire, given the division of labour on the farm and in the home, for having male offspring, particularly in cases where the wife has had only female children. Again, this rationale is undergoing changes. Lastly, many people fear becoming sterile as a result of using family planning methods. They regard sterility as a potential punishment. Such a view is not only unscientific but untenable.

On the positive side, there are certain facts that can be brought to the attention of the elders, who in turn could influence the attitudes of others. Such an approach could stress the following:

1. With a smaller or well-planned family, you can afford to educate all your children, provide them with adequate food and house and clothe them comfortably. You can also put away some money towards their future, as well as your own.

2. You and your family will have more time to participate in activities that you enjoy and your social status is financially satisfactory, while your well-dressed, well-educated children will also add to your social position in the community.

3. Personal family relationships--between father and mother, between parents and children, and among the children--will be happy and secure.

4. With the acceptance that there should be fewer births to a family, the woman enjoys better health and remains attractive to her husband as she is not burdened with too many pregnancies.

5. Today, one is ensured of safer births; if proper care is taken, infant mortality is almost nil.

Thus, if you plan your family you can better appreciate the value of life through a few well brought up children, rather than be faced with a dozen half-starved infants. Morally, as a parent you are responsible for the way your children are reared and, therefore, should have only as many children as you can comfortably support.

## C. A Brief History of Government Policies and Actions

The estimates made in the early 1960's concerning accelerated population growth rates caused great concern within the Ministry of Economic Planning and Development. As a result, the Ministry requested a group of experts from the Population Council to study the population trend in the country. A Report entitled "Family Planning in Kenya" was produced in 1965 by the mission.[2] The highlights of the Report were:

(i) That if the current trend of growth in Kenya continued it would accelerate to 4 per cent by the end of the century and would double the population in eighteen years;

(ii) That a population programme for Kenya should be viewed as an integral part of the total social and economic development of the country;

(iii) That a programme designed to decrease the birth rate should have an especially close link with the national health programme;

(iv) That any programme to decrease the birth rate should be voluntary and take cognizance of the wishes and religious beliefs of individual parents;

(v) That a reasonable objective should be to reduce fertility by 50 per cent over a 10-15 year span but recognized that even at this level the population would still double in 35 years with an annual growth rate of 1.8 per cent;

(vi) That, in order to achieve item (v) above, about 150,000 IUD's should be inserted per year by the end of the 5 year period; and provision be made for other contraceptive measures to an additional 50,000 couples. The aim was to achieve a level of 60,000 to 80,000 IUD insertions per year;

(vii) That a national Government Programme with multi-ministry participation be established but the Ministry of Health should play a crucial role in the operation;

(viii) That there should be geographical phasing in the operation of the programme, with priority to high density and developed areas, demonstration pilot projects and heavy reliance on the IUD;

(ix) That Knowledge-Attitude-Practice studies, personnel training logistics, and collection of statistical information should be vigorously undertaken;

(x) That it was desirable to enlist the financial and other cooperation of voluntary agencies and political organizations;

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[2] For an expanded discussion of some of the aspects in development of population policies and programmes in the country see "Kenya", Country Profiles, May 1971 (New York: The Population Council).

(xi) That a programme of public information and education, use of the activities with maternal and child care services should be encouraged.

The costs of the programme were estimated at between K£ 80,000 during the initial stages and increasing to 112,000 by 1971/72.[2a]

The Report was carefully studied by the Kenya Cabinet and later adopted. Before the end of 1965 the Government announced the adoption of family planning as part of its Development Policy, thus becoming the first Government in Africa South of the Sahara (outside South Africa) to adopt and recognize the need for family planning on a national level. Accordingly, in December 1968, the Ministry of Health sent an official circular to medical officers of both central and local governments explaining the implications of population growth and adding that family planning services would be integrated into health services and that the training of medical officers in family planning techniques would commence.[3] The Development Plan (1966-70) which followed the Report of the mission included a Government commitment to make available information and supplies in respect of family planning free of charge through Government and private facilities to those families wishing to avail themselves of the opportunity. In other words, family planning like other medical services was to be supplied free of charge in hospitals. This official commitment to family planning as a strategy for obtaining the desired population growth rate in Kenya has continued through the two other Development Plans since the 1966-70 Plan. The level of both capital and recurrent expenditure on the various aspects of the programme has risen phenomenally, as has aid from voluntary agencies in this area. For the six years 1973-79 the project is estimated to cost K£11.1 million, a figure which includes development and recurrent costs. It is estimated that the Government will provide 27 per cent and the balance is expected through foreign aid. The United Nations Development Program, the Swedish Government as well as the U.S. Agency for International Development have already made substantial aid offers for the Development period with respect to the Family Planning Programme.

Despite the intense interest in curbing the spiralling rate of population growth, the Government is faced with a number of problems. There is

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[2a] K£1=US$2.80

[3] It needs to be mentioned here that as far back as 1952 the colonial Government of Kenya had requested all Government Medical officers to provide family planning services to any couples who sought help. But there was neither information nor education on the subject. The response was rather poor and only a few people came forward for the service.

TABLE 1A

Family Planning Sub-Programme, Total Expenditure and Finance 1974-1978*

KL'000

| | 1973/74 | 1974/75 | 1975/76 | 1976/77 | 1977/78 | Total |
|---|---|---|---|---|---|---|
| Recurrent Expenditure | | | | | | |
| Service Points | -- | 146 | 284 | 428 | 521 | 1,379 |
| Supervision | -- | 75 | 98 | 115 | 138 | 426 |
| Contraceptives | -- | 27 | 53 | 79 | 112 | 271 |
| National Family Welfare Centre | -- | 176 | 193 | 176 | 182 | 727 |
| Training (field) | -- | 57 | 65 | 69 | 62 | 253 |
| Mass Media | -- | 103 | 51 | 62 | 72 | 288 |
| Sub-Total | -- | 584 | 744 | 929 | 1,087 | 3,344 |
| Not covered in other programmes | -- | 103 | 51 | 62 | 72 | 288 |
| Development Expenditures | | | | | | |
| Rural Health Centres | -- | 735 | 1,020 | 717 | -- | 2,472 |
| National Family Welfare Centre | -- | 50 | 115 | 180 | 130 | 475 |
| Nurse Training Schools | 14 | 780 | 611 | 93 | -- | 1,498 |
| Equipment and Vehicles | -- | 188 | 94 | 195 | 59 | 536 |
| Sub-Total | 14 | 1,753 | 1,840 | 1,185 | 189 | 4,981 |
| Not covered in other programmes | -- | 188 | 94 | 195 | 59 | 536 |
| Total Expenditure not covered in other programmes | -- | 291 | 145 | 257 | 131 | 824 |
| Estimated Foreign Aid | -- | 290 | 134 | 231 | 88 | 743 |
| Local Finance | -- | 1 | 11 | 26 | 43 | 81 |
| Import Content | -- | 285 | 142 | 152 | 128 | 707 |

*Underlined figures are not included in other programmes. All estimates excluding physical and price contingencies.

a shortage of the manpower required for organizing and delivering family planning services. And one of the complicating factors is the fact that more than 90 per cent of the population is rural and thus widely dispersed. At present fewer than 12 rural clinics offer such services on a full-time basis. Most clinics do so but once a month. The city councils of Nairobi and Mombasa are also engaged in delivering family planning services, and seem to be successful in getting contraceptives to the populace. In Nairobi the city council operates 39 clinics which account for one-fifth of the acceptors each year.

Tables 2 and 3 give data on the performance of the National Programme between the years 1967 and 1972.

TABLE 2

Attendance at Family Planning Clinics 1967-72

| YEAR | NATIONAL PROGRAMME | | NAIROBI CITY COUNCIL | | TOTAL | | |
|---|---|---|---|---|---|---|---|
| | First Visits | Re-Visits | First Visits | Re-Visits | First Visits | Re-Visits | TOTAL |
| 1967* | 4,840 | 5,985 | 1,519 | 7,878 | 6,359 | 13,863 | 20,222 |
| 1968* | 10,870 | 17,068 | 2,240 | 11,742 | 13,110 | 28,810 | 41,920 |
| 1969 | 24,640 | 47,915 | 5,121 | 24,964 | 29,761 | 72,879 | 102,640 |
| 1970 | 29,440 | 79,122 | 5,696 | 34,573 | 35,136 | 113,695 | 148,831 |
| 1971 | 35,269 | 108,899 | 5,831 | 29,757 | 41,100 | 138,656 | 179,756 |
| 1972 | 36,908 | 133,095 | 8,297 | 39,184 | 45,205 | 172,279 | 217,484 |

* Revised figures from the Family Planning Association of Kenya Records.

There would seem to be some tailing off in growth rate of first visits: 1969--127 per cent; 1970--18 per cent; 1971--17 per cent; 1972--10 per cent.

Though the original proposal for a family planning programme emphasized solely the use of IUDs, the Population Council report was submitted prior to the production of the contraceptive pill. A 1974 study of a random sample of first visits to family planning clinics indicates that the national rate of acceptance of the various methods of contraceptives are as follows: pill, 51 per cent; IUD, 29 per cent; injectables, 4 per cent; other methods, 2 per cent; none, 13 per cent; unknown, 1 per cent.[4]

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[4]"Kenya", Country Profiles, op. cit., p. 8.

TABLE 3

Attendance at Family Planning Clinics by Province 1971-1972

| PROVINCE | FIRST VISITS | | RE-VISITS | | TOTAL | |
|---|---|---|---|---|---|---|
| | 1971 | 1972 | 1971 | 1972 | 1971 | 1972 |
| Central | 11,427 | 10,776 | 36,973 | 42,258 | 48,400 | 53,034 |
| Coast | 4,055 | 3,752 | 12,297 | 13,473 | 16,352 | 17,225 |
| Eastern | 5,484 | 6,803 | 17,673 | 22,299 | 23,157 | 29,102 |
| N. Eastern | - | - | - | - | - | - |
| Nyanza | 2,456 | 2,671 | 5,539 | 6,285 | 7,995 | 8,956 |
| R. Valley | 4,492 | 4,456 | 10,626 | 12,550 | 15,118 | 17,006 |
| Western | 1,901 | 2,104 | 4,621 | 6,967 | 6,522 | 9,071 |
| Nairobi | 11,285 | 14,002 | 50,927 | 67,384 | 62,212 | 81,386 |
| Province Not stated | - | 641 | - | 1,063 | - | 1,704 |
| Total | 41,100 | 45,205 | 138,656 | 172,279 | 179,756 | 217,484 |

Source: Central Bureau of Statistics, Ministry of Finance and Planning, Economic Survey, 1973, p. 195.

It is puzzling to observe that while the Coast Province, a predominantly Moslem area, shows a steady rise in first and re-visits, there is a drop in the figures for the Central Province as well as in the Rift Valley Province in the years 1971 and 1972. It is of interest to note that there was a rise in the number of family planning clinics from 250 to 282 in 1972 exclusive of mobile clinics.

## D. A Brief History of Private Family Planning Activities in Kenya

Voluntary family planning clinics were established in Nairobi and Mombasa as early as 1952. Following the results of the 1948 census, the East African Royal Commission was instructed to make recommendations on the economic and social development of the country with special reference to population. The Commission did recommend that persons wishing to adopt contraceptive methods be permitted to do so. In 1956, the Pathfinder Fund assisted in opening clinics at locations in the provinces. In 1957 the Family Planning Association of Kenya (FPAK) was born and became affiliated in 1962 with the International Planned Parenthood Federation (IPPF). By 1965 up to 25 clinics had been established all over the country.

Before 1968 the Family Planning Association undertook all the three main areas of service to the public, namely: motivation, education and clinical services. Since the Government took over the clinical services aspect in 1968, the Association has concentrated on motivation and education although they still operate a few clinics of their own for those clients who would rather not go to the Ministry of Health Clinics for any reason what-

ever.[5] In light of the growing concern over population growth rates in Kenya, the Family Planning Association performs an essential educational function, which might not be accomplished were it not for its efforts. In this regard, FPAK works hand in hand with the government. Activities of the Association include lectures, seminars, courses, film shows, operating stands at agricultural shows, giving handouts on family planning information, use of mass media, sponsorship of research projects on family planning and running private clinics.[6]

One of the approaches used by the Association is to offer educational institutions and youth groups various sorts of educational programmes related to family planning and population. Lectures are organized through such bodies as the National Christian Council of Kenya, Young Men's Christian Association, Young Women's Christian Association, World Assembly of Youth and various secondary schools. Lectures are also organized at the Nursing Training Centres and at the Medical School of the University of Nairobi. As an example of the scope of contact these programs have, 530,955 persons attended these lectures in 1971.

Moreover, courses lasting about two weeks are organized for field personnel in various provincial headquarters. These personnel help in the motivational and educational work of the Association. Film shows are used to educate the public on the importance of family planning and the available methods that could be used.

Apart from publishing a quarterly journal JAMII, the Family Planning Association has brought out a number of other booklets, all aimed at stimulating public awareness of family planning. The following are a few: A Guide to Family Planning; What Will Happen If Kenya's Population Growth Continues?; List of Family Planning Clinics; Jamaa Yenye Furaha (A vernacular booklet aimed at the widest possible audience); Uzazi Bora Folder (Another vernacular issue); Family Planning Folder; People of Kenya; Plants and People Analogy (English); and Plants and People Analogy (Swahili).

Press coverage on the activities of the Association has been quite liberal. In 1971, 117 articles appeared in the local press, the daily papers, monthly magazines and the Sunday papers. These covered reports on seminars, courses, public meetings, the pill, abortion, vacancies and private clinic timetables.[7]

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[5]The reason normally given for preference for FPA clinics is privacy.

[6]See Family Planning Association of Kenya, Annual Report, 1971, pp. 15 - 17.

[7]1971 Annual Report, op. cit., p. 17.

## II. LAWS DIRECTLY AFFECTING FERTILITY

In view of the official position of the Government of Kenya in respect of reducing the rate of population growth, one is naturally curious to know the extent--if any--to which the law has helped or hindered the implementation of this policy. In order to assuage this curiosity, three types of laws shall be examined: 1) laws that directly affect fertility; 2) laws that have indirect effect on fertility; and 3) laws on migration. It has to be conceded that this division, like many other models of classification, is merely for convenience of analysis and that the inclusion of one topic in one group or the other can be quite arbitrary. A topic like housing law, for instance, would be rather difficult to place. Surely the size of houses and the level of housing aid available to the family could have a direct effect on family size. Yet, it has often been argued that only those topics that relate directly to reproduction qualify for inclusion under laws directly affecting fertility.[8]

One general feature of the Kenya scene which emerged from the author's survey of the laws relating to population matters is the unique absence of an organized body of legislation specifically intended to deal with the question of population growth rate. Provisions relating to the subject are littered over the whole gamut of the Laws of Kenya (11 volumes in 1962 exclusive of the annual volumes since then) and the plethora of Regulations, Orders and By-laws based on the legislation in the volumes. Many of these legal provisions repeat or contradict one another. Though this is not totally surprising, it is a rather unsatisfactory position, given the clear and unambiguous statement of objectives and policy in official white papers.

### A. Contraception: Use, Manufacture, Sale and Advertisement

#### 1. Use

There is no law in Kenya that prohibits the use of artificial or other contraceptive methods. As was noted earlier in this monograph, as early as 1952 the colonial Government had encouraged family planning measures following the 1948 census, which revealed a high rate of population growth. Contra-

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[8]Different authors in the Law and Population Monograph Series adopt different modes of classification. See for instance: Peter B. Maggs, Law and Population Growth in Eastern Europe (Law and Population Monograph Series No. 3); Peter Hall, Law and Population Growth in Singapore (Monograph Series No. 9); Diana M. Kloss and Bertram L. Raisbeck, Law and Population Growth in the United Kingdom (Monograph Series No. 11); The Committee on Legal Aspects of the Indonesian Planned Parenthood Association, Legal Aspects of Family Planning in Indonesia (Monograph Series No. 4).

ceptives were given in clinics run by voluntary but qualified medical practitioners both in Nairobi and Mombasa. These services were later extended to Nakuru and integrated into a national organization in 1957. Since 1968, clinical services have been undertaken in the Ministry of Health hospitals where contraceptives are given free of charge to acceptors. There are neither legal nor other limitations on the use of contraceptives such as exist in some countries, e.g., use permitted solely on medical grounds not for contraceptive purposes. There is, however, the Pharmacy and Poisons Board, established under the provisions of the Pharmacy and Poisons Act,[9] which has power to prohibit or control the use of certain drugs and appliances. Control over availability and therefore the use of contraceptives could be exercised by Regulations made by the Board under this Act.

As to cases on the use of contraceptives in Kenya it is of some interest to speculate on the attitude which Kenya courts might take in respect of the matrimonial law aspects of contraception. Would the persistent use of contraceptives by one spouse against the wishes of the other constitute cruelty for purposes of matrimonial relief? Also, would the use of contraceptives technically prevent the consummation of a marriage? In the English case of Baxter v. Baxter,[10] the House of Lords held that the use of contraceptives did not prevent such a consummation, and in Archard v. Archard,[11] it was held that a husband's refusal to have sexual intercourse with his wife on the ground that she was using contraceptives against his wishes, did not constitute cruelty--a ground for divorce. The fact that she used contraceptives on health grounds and on medical advice did not persuade the court to the contrary. It is hoped that the Kenya courts would follow the former rather than the latter decision.

2. Manufacture

There is no specific statutory or other legal regulation on the manufacture and distribution of contraceptives except in so far as these come within the definition of drugs and appliances under the Pharmacy and Poisons Act, and the Foods, Drugs and Chemical Substances Act.[12] Under Sec-

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[9]Laws of Kenya /1962 Revision/, Chap. 244.

[10]/1947/ 2 All E.R. 886, /1948/ A.C. 274. In Baxter, the House of Lords overturned the short-lived ruling of the Court of Appeal in Cowen v. Cowen, /1945/ 2 All E.R. 197, that there was no consummation where the husband had worn a sheath or practiced coitus interruptus.

[11]The Times (London), April 20, 1972 as cited by D.M. Kloss and B.L. Raisbeck, Law and Population Growth in the United Kindgom, p. 21 (Law and Population Monograph Series No. 11).

[12]Laws of Kenya, Chap. 254.

tion 44(1) (d) of the former Act, the Minister, after consultation with the Pharmacy and Poisons Board can make regulations prohibiting, regulating or restricting the manufacture, sale or advertising of drugs, pharmaceutical preparations and therapeutic substances. Rule 16 of the Rules made under that section specifies that in all establishments in which pharmaceutical preparations are manufactured for the purpose of the treatment of any human or animal ailment, the preparation must be manufactured by and under the supervision of a registered pharmacist, a fellow of the Royal Institute of Chemistry, an Associate of the Royal Institute of Chemistry or a person with similar qualifications recognized by the Board. Though the general regulations of the two statutes mentioned above would apply to the manufacture of contraceptives, presently there is no local manufacture of contraceptives.[13] This means that they must be imported.

With regard to the importation of contraceptives, one again falls back on the general provisions concerning drugs and appliances under the Pharmacy and Poisons Rules. Rule 3 makes it an offence for any person, other than a licensed dealer with a permit issued by the Board, to import any poisons or appliances. Drugs also come within the provisions of the Imports, Exports and Essential Supplies Act which are not on Open General Licence. These come in duty free.

Transportation is regulated under Rule 12 of the Pharmacy and Poisons Rules which specifies that drugs must be transported in containers impervious to the poison therein contained and sufficiently strong to prevent leakage arising from ordinary risks of handling and transport.

3. Sale

When discussing the sale of contraceptives, one must make a distinction between condoms, foams, jellies and creams on the one hand--these are sold across the counter even in grocery stores in Kenya--and pills and IUDs which are subject to stricter control. Pills would come under Part I Poisons which are sold only on prescription under the provisions of Rule 6 of the Pharmacy and Poisons Rules. And Sections 27 and 29 of the Act restrict the sale of Part I Poisons to licensed dealers only (pharmacies). Section 35, however, has a provision which would bar sale of pills by means of automatic machines.

The quality control of contraceptives is covered by the provisions of Section 36 of the Pharmacy and Poisons Act as well as Sections 10, 11 and 12 of the Food, Drugs and Chemical Substances Act.[14] Section 11 of the latter Act makes it an offence to sell drugs not of the quality demanded.

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[13] J. Stepan and E. Kellogg, The World's Laws on Contraceptives, p. 76 (Law and Population Monograph Series No. 17).

[14] Laws of Kenya, Chap. 254.

4. Advertisement

Advertising in matters of contraception may take a number of forms. Two of the most frequently used methods are the dissemination of publications offering contraceptive education and campaigns to introduce the public to the different forms of contraception and the merits of each of the methods advertised. In Kenya both forms of advertisement appear to be subject to the criminal law sanctions which govern obscenity. These limitations are found in three sources: the Penal Code,[15] the Public Health Act[16] and the Pharmacy and Poisons Act.[17] In practice, both forms are widely used by the Family Planning Association of Kenya, the Ministry of Health and the International Planned Parenthood Federation in their efforts to disseminate family planning information. No prosecutions have yet been initiated for what might be regarded as a contravention of any of the statutory provisions. It seems clear to some that most of the activities[18] of the Kenya Family Planning Association in providing motivational and educational services would come squarely within the prohibition of Section 181 of the Penal Code which provides inter alia that any person who for the purpose of or by way of trade or for the purpose of distribution or public exhibition, makes, produces or has in his possession any one or more obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematographic films or any other obscene objects, or any other object tending to corrupt morals, shall be guilty of a misdemeanour and liable to imprisonment for two years or to a fine of seven thousand shillings. It is interesting to note that although this provision of the Penal Code does not provide for any acceptable defences, a similar provision in the Public Health Act makes exceptions for publications by the Medical Department or by any local authority, public hospital or other public body in the discharge of its lawful duties or by any society or person acting with the permission of the Minister of Health or for any books, documents or papers published in good faith for the advancement of medical science.[19] It would seem that the exceptions here are wide enough to cover the activities of the Family Planning Association of Kenya.

B. Abortion

Abortion is one area in which the law as well as the general attitude of the people (rooted of course in traditional or religious beliefs) is most

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[15] Ibid., Chap. 63.

[16] Ibid., Chap. 242.

[17] Ibid., Chap. 244.

[18] See particularly the publications entitled, Sex Education for Better Living and A Guide to Family Planning, both published by the Family Planning Association of Kenya.

[19] Public Health Act, Chap. 242, Sec. 55(4).

in conflict with the declared aims of the Government, both in the Development Plans in respect of population growth rates and in other policy statements. Perhaps this position is understandable, given the dangers under which illegal operations are performed in countries with near-total prohibitions against abortion. It has not often been recognized that those who oppose the legalization of abortion in Kenya on the basis that it is dangerous to the mother's life (in addition to destroying the life of the fetus) are engaging in circular reasoning. It has not been conceded that the danger could be, and is in fact, removed where abortions are permitted in properly supervised settings, and that the existing dangerous situation is itself a creation of the present law which roundly condemns abortion practices by qualified medical practitioners in Kenya. The law has the effect of forcing those who seek abortions to do so under clandestine, unsavory conditions.

Section 158 of the Penal Code makes it an offence for any person, acting with intent to procure the miscarriage of a woman whether she is or is not with child, to unlawfully administer to her or cause her to take any poison or other noxious thing, or use any force of any kind, or use any other means whatever. Section 159 covers cases where a woman takes steps with intent to procure her own abortion, while Section 160 deals with suppliers of abortifacients. Section 228 creates the offence of child-killing which is made a felony and punishable with life imprisonment.

Section 240 does, however, permit the lawful interruption of pregnancy where the operation is performed in good faith to save the life of the pregnant woman.

The courts, until independence, had been quite strict in enforcing the penal provisions against abortion. In Mehar Singh Bansel v. R.,[20] the East African Court of Appeal considered a case involving a charge of manslaughter which arose from an abortion. The case for the Crown centered on the fact that the deceased died by reason of injuries inflicted upon her by the accused doctor in the course of an illegal operation, that is to say, an operation having as its object the termination of the pregnancy otherwise than in a bona fide belief by the accused that the termination of the pregnancy was necessary for the preservation of the life of the deceased, or to save her from serious prejudice to her health. On the alternative the Crown had alleged that even if the operation was admittedly performed in the honest belief that it was necessary for the purpose of saving her life, or of preserving her from serious injury to health, the doctor was negligent in the manner in which he arrived at the diagnosis of her condition, performed the operation and inflicted the two wounds, of which the Crown alleged the woman died.

The case for the defence was that the operation performed by the accused was performed in the honest belief that it was necessary for the preservation

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[20] [1959] E.A.C.A. 813.

of the life of the deceased in as much as she was bleeding from the vagina, resulting from a prior attempted abortion and might have bled to death had not resort been had to surgical intervention to empty her uterus of the products of conception; that the diagnosis was arrived at after an adequate examination and was, in fact, correct; that at least one and possibly both of the wounds which were alleged by the Crown to have been the cause of death were not occasioned by the accused; that the operation was conducted in a proper manner; and that the cause of death as alleged by the Crown--shock and haemorrhage from the wounds--might not, in fact, have been the true cause of death.

The rest of the facts briefly were that the deceased was 20 years of age; had a seven-month-old child when she again discovered she was pregnant; had had some disagreement with her husband and presumably had attempted to procure her own abortion before being rushed to the office (surgery) of the accused doctor. He examined her, found that her condition was very serious, called in an anaesthetist and performed the operation in his own office facilities instead of taking her to a hospital. A few hours after the operation, the patient died.[21]

Expert opinions varied as to whether this was the proper type of operation and on the level of risk in performing such operations in an office setting instead of in a hospital. Two of the conflicting opinions are reproduced here to show the clear lack of certainty in the accused's alleged negligence:

(i) "Mr. Ormrod, Dr. Candler and Mr. Duff alike would seem to regard the use of a curette on a woman who was sixteen weeks pregnant as a matter of grave danger, by reason of the likelihood that scraping the womb, as Dr. Candler put it, 'you might in taking away the placenta, take a bit of the womb itself, and by reason of it, cause excessive haemorrhage'..."

(ii) "...Dr. Eraj, whom I have already mentioned and whom I have no doubt you will remember, seems to regard the use of the curette as a most normal procedure to be adopted in cases of this nature. He would also seem to regard the use of a curette as being not a particularly dangerous matter as it is usually entrusted to the least experienced member of the gynaechological team in any hospital, if he is considered fit by his superiors to do any operation at all at that state."

One would have thought that there was here a clear case of doubt as to the question of gross negligence on which the charge of manslaughter was

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[21]The type of operation performed was a dilation and curretage (D and C).

based. But the first instance judge and the East African Court of Appeal held the accused guilty and sentenced him to 30 months imprisonment with its obvious disastrous consequences to his professional career. His leave to appeal to the Judicial Committee of the Privy Council, which at the time was the last court of appeal for Kenya, was refused, as was his application for special leave from their Lordships of the Privy Council to appeal to their Board.

Obviously, Bausel was a case where both the judge and the jury had a pro-natalist slant strong enough to outweigh the traditional legal position of giving the accused the benefit of any doubt in the prosecution's case. It is significant that this case was decided seven years after family planning had received the official blessing of the colonial administration in Kenya and two years after the formation of the Family Planning Association of Kenya.

In spite of the statutory and judicial position on abortion as stated above, there is still a rather limited recognition of abortion in Kenya based entirely on the practice in England before the passage of the Abortion Act, 1967 (England). The position itself was reached through the case of R. v. Bourne,[22] decided under Section 58 of the Offences Against the Person Act, 1861 (England) but based on the interpretation placed on the mens rea provisions of the Infant Life (Preservation) Act, 1929 (England). Judge Macnaghten, who ruled in the case, used the meaning of "unlawfully" as found in the latter statute in construing the mens rea provisions of the former to mean that under certain circumstances a doctor could "lawfully" decide to perform an abortion on a pregnant woman. In his instruction to the jury Macnaghten stated that a surgeon was not to wait until the patient was in peril of immediate death, but that it was his duty to perform the operation if, on reasonable grounds and with adequate knowledge, he was of the opinion that the probable consequence of the continuance of the pregnancy would make the patient a physical and mental wreck. The jury found that Bourne had performed the operation on a 15 year old girl who had been repeatedly raped for the good faith purpose of preserving her life and acquitted him.

In Kenya, the emphasis seems to be placed on the words "physical" and "mental." Thus, before an abortion operation is performed in any hospital there have to be at least two medical opinions: one from the general practitioner who has treated the pregnant woman and the second from a psychiatrist. When the two opinions and the woman's consent (as well as her husband's if she is married) have been obtained, then a gynaechologist could perform the operation in a hospital. This of course was the English practice on the subject before 1967.[23]

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[22] /1938/ 3 All E.R. 615; /1939/ 1 K.B. 687.

[23] See D.M. Kloss and B.L. Raisbeck, Law and Population Growth in the United Kingdom, op. cit. p. 15; see also, Robert C. Rosen, Law and Population Growth in Jamaica, p. 20 (Law and Population Monograph Series No. 10).

The tables given below which resulted from a 1971 survey on attitudes towards abortion reveal some rather interesting features. As can be seen, the highest number of those interviewed approved of abortion when the pregnancy seriously endangers the mother's health. Fifty-eight per cent of the males interviewed and thirty-two per cent of the females would support abortion in such cases. The second ranking reason for approving of an abortion occurs when there are serious reasons to believe that the child would be deformed or abnormal. The third ranking reason for approval would be when the woman has been raped, though only nineteen per cent of the male respondents and sixteen per cent of the female respondents approved of abortion on this ground. Of particular significance are the instances of serious objections to abortion. Males disapproved of abortion in greatest numbers where the couple does not want another child (56 per cent); where there is a failure of contraceptive methods (56 per cent); where the couple cannot afford another child (52 per cent); where the woman is unmarried (54 per cent); and where the woman has been raped (46 per cent). It is equally interesting to note that even in cases where there are serious reasons to believe that the child would be born deformed or abnormal, 39 per cent of all males interviewed disapproved of abortion as against 27 per cent who approved. Of the females surveyed the strongest instances for disapproving of an abortion were where the couple cannot afford another child (50 per cent); where the woman is unmarried (49 per cent); where contraceptive methods fail (42 per cent); and surprisingly, where the woman has been raped (41 per cent). What the survey does make clear, however, is that there is a limited acceptance of abortion, a position radically different from the present rigid prohibition of the law.

TABLE 4

Attitudes Toward Abortion Under Specified Conditions

| Reasons* | Approve | Disapprove | Don't Know |
|---|---|---|---|
| | % | % | % |
| The pregnancy seriously endangers the mother's health | 32 | 24 | 4 |
| The couple cannot afford another child | 8 | 50 | 3 |
| The woman is not married | 8 | 49 | 3 |
| The woman has been raped | 16 | 41 | 3 |
| There are serious reasons to believe that the child will be born deformed or abnormal | 22 | 32 | 7 |
| Failure of contraceptive methods | 9 | 42 | 9 |
| All reasons mentioned | 1 | 37 | 1 |

*Multiple responses

Base: 1887 Fertile Women

Note: The horizontal summation of any subtitle will add up to 100% (±1) if adding to it the three figures appearing opposite "All reasons mentioned" in the subtitles.

TABLE 5

Attitudes Toward Abortion Under Specified Conditions

| Reasons | Approve | Disapprove | Don't Know |
|---|---|---|---|
| | % | % | % |
| The pregnancy seriously endangers the mother's health | 58 | 8 | 3 |
| The couple cannot afford another child | 16 | 52 | 2 |
| The woman is not married | 14 | 54 | 3 |
| The woman has been raped | 19 | 46 | 5 |
| There are serious reasons to believe that the child will be born deformed or abnormal | 27 | 39 | 4 |
| The couple does not want another child | 12 | 56 | 2 |
| Failure of contraceptive methods | 7 | 56 | 7 |
| All reasons mentioned | 2 | 26 | 1 |

Base: 2236 Adult Males

Note: The horizontal summation of any subtitle will add up to 100% (±1) if adding to it the three figures appearing opposite "All reasons mentioned" in the subtitles.

C. Sterilization

There is no specific legal provision in Kenya in respect of sterilization other than as part of a wider regulation of surgical operations. Section 240 of the Penal Code provides that a person is not criminally responsible for performing, in good faith and with reasonable care and skill, a surgical operation upon any person for his benefit, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case. It has to be stated that this section is only an exemption provision under Chapter 22 of the Penal Code which creates offences for acts endangering life and health. In practice, sterilization operations are carried out in the Ministry of Health clinics, free of charge, on those who consent to it. Normally a woman would only be operated upon if she has had up to four children. Vasectomy has not made any noticeable impact in the family planning scene in Kenya.[24]

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[24]It is unlikely that incentives would alter the vasectomy picture considerably or at all in Kenya. It is just possible that incentives for women who already have at least four children might produce more positive results in the sterilization figures. Lump sum payments such as maternity grants if substantial could be effective, as would free secondary education for the last child. School fees if taken off parents, will produce positive results as well in the sterilization acceptors.

## D. Family Law and Population[25]

Family law, as has been indicated earlier, is an area where the traditional law has been most resistant to change. The case for such a change has been stated and argued under the discussion on customary laws and family planning. Official attitude to the subject is reflected in the setting up in 1967 of a Presidential Commission on Marriage and Divorce in Kenya to study the existing laws on marriage, divorce and other related matters; to make recommendations for a new law providing a comprehensive and, so far as may be practicable, uniform law of marriage and divorce applicable to all persons in Kenya, which will replace existing law on the subject comprising customary law, Islamic law, Hindu law and the relevant Acts of Parliament and to prepare a draft of the new law; and to pay particular attention to the status of women in relation to marriage and divorce in a free democratic society. The Commission reported in 1968 and appended a draft Bill to their Report. The Bill with a few amendments will be presented to the next Parliament in Kenya after the 1974 general elections to the National Assembly. The key-note of the enactment is justice both in the sense of the equality of men and women in matters of marriage and divorce and also in the sense of the equality among the different kinds of marriages in Kenya.

### 1. Minimum Age of Marriage

As has been aptly stated by Luke Lee,[26] the age at which a girl gets married has a direct relation to the number of possible children she could have. The later the age of marriage the fewer the chances of having a very large family. In Kenya seven enactments regulate Marriage and Divorce: the Marriage Act;[27] the African Christian Marriage and Divorce Act;[28] the Matrimonial Causes Act;[29] the Mohammedan Marriage and Divorce Registration Act;[30] the Mohammedan Marriage and Succession Act;[31] the Hindu Marriage and

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[25] See John C. Caldwell, Population Growth and Family Change in Africa. See also U.U. Uche, "Future Trends in Kenya Family Law," in Trends in Kenya Family Law (National Council of Women of Kenya and the Kenya Association of University Women, 1974).

[26] Luke T. Lee, "Law and Family Planning," Studies in Family Planning, Vol. 2, No. 4, p. 90 (1971).

[27] Laws of Kenya, Chap. 150.

[28] Ibid., Chap. 151.

[29] Ibid., Chap. 152.

[30] Ibid., Chap. 155.

[31] Ibid., Chap. 156.

Divorce Act[32] and the Subordinate Courts (Separation and Maintenance Act).[33] It is therefore not easy to talk of a generally applicable minimum marriage age in Kenya. Customary law marriages would tend to accept ages less than sixteen specified in the Marriage Act, while Hindu marriages do specify 18 as the minimum age for males and 16 for females. The bill appended to the Report of the Commission on Marriage and Divorce recommends 18 and 16 as the minimum marriage age for males and females respectively.[34] This appears to be an adoption of the Hindu law position.

In practice most Kenyan girls marry before the age of 25. A 1971 survey indicated that any girl who at the age of 25 was unmarried has only a 1 per cent chance of ever doing so. It may be observed, however, that the education of both men and women up to the university or other professional levels would have the effect of increasing the minimum age of marriage for both sexes and increasing the chances of marriage even at later ages for females. There is a noticeable tendency among advanced students to wait until after the university or other training before embarking on marriage. This propensity to postpone marriage is reinforced by the lack of facilities for married couples in the institutions of higher learning. This postponing has the effect of raising the marriage age among university students to between 23 and 27 years for both sexes.

2. Polygamy

The customary laws of all Kenyan tribes recognize the concept and practice of polygamy, as does Islamic law, which is adhered to by about 4 per cent of the population in Kenya. Because of the somewhat widespread acceptance of the practice, the state has not attempted to abolish polygamy for fear of a public outcry. In the case of polygamy the law appears ready to wait for education to precede legislation. But attempts have been made in the past to curb the excesses of polygamy through the imposition of penal and other measures. Section 37 of the Marriage Act[35] provides that any person who is married under that Act, or whose marriage is declared by that Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom. Sections 49 and 50 of the same Act deal with the offences

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[32] *Ibid.*, Chap. 157.

[33] *Ibid.*, Chap. 153.

[34] Sec. 21 of the Proposed Bill.

[35] Laws of Kenya, Chap. 150.

of mixing the marriage types. It is an offence both to contract a customary (and therefore potentially polygamous) marriage during the subsistence of a valid monogamous marriage and to contract a monogamous marriage while a valid polygamous or potentially polygamous marriage remains undissolved.

Section 13 of the African Christian Marriage and Divorce Act[36] removes one of the humiliating incidents of polygamous marriages, that of wife inheritance. One section provides that any African woman married in accordance with the provisions of that Act, the Marriage Act or under the provisions of the repealed Native Christian Marriage Act, whether before or after the effective date of the present Act, shall be deemed to have attained her majority on widowhood, and shall not be bound to cohabit with the brother or any other relative of her deceased husband or any other person, or to be at the disposal of such brother or other relative or other person, but shall have the same right to support for herself and her children of such marriage from such brother or other relative as she would have had if she had not been married as mentioned above.

The Commission on Marriage and Divorce made some interesting recommendations with respect to polygamy. In Section 18 of the proposed Bill attached to their report there is the following provision:

1. Marriages are of two kinds, that is to say

   (a) those that are intended to be monogamous;

   (b) those that are intended to be potentially polygamous or in fact polygynous.

2. A marriage contracted in Kenya which is subsisting at the commencement of this Act shall

   (a) if contracted in Islamic form (unless the parties were Shia Imami Ismailis) or according to rites recognized by customary law in Kenya be presumed to be polygynous or potentially polygynous; and

   (b) in any other case, be presumed to be monogamous, unless the contrary is proved.

Section 19 of the draft Bill provides for conversion of marriages from polygynous or potentially polygynous to a monogamous form, and vice versa as follows:

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[36] *Ibid.*, Chap. 151.

1. A marriage contracted in Kenya may be converted

(a) from monogamous to potentially polygamous; or

(b) if the husband has one wife only, from potentially polygynous to monogamous;

by a declaration made by the husband and the wife, that they each, of their own free will, agree to the conversion.

2. A declaration under subsection 1 shall be made in the presence of a registrar and shall be recorded in writing, signed by the husband and the wife and the registrar, at the time of making.

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4. No marriage shall be converted from monogamous to potentially polygynous or from potentially polygynous to monogamous otherwise than by a declaration made under this section.

(a) Polygamy Cases

A number of cases have been decided in the Kenya courts on the subject of polygamy, but hardly any of them have any direct bearing on population matters. R. v. Amkeyo[37] was concerned with the admissibility of the evidence of a wife of a polygamous marriage against an accused husband on the basis that a monogamous wife cannot be compelled to testify in a criminal charge against her husband. Gulam Mohamed v. Gulam Fatima and Others,[38] was an action in which the recognition of a polygamous marriage for the purpose of the divorce jurisdiction of the High Court was in issue. In R.S. v. S.S.,[39] one of the parties had purported to contract a monogamous Marriage during the existence of a valid polygamous marriage, while in Ayoob v. Ayoob,[40] the court was concerned with the question of the

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[37] /1967/ 7 E.A.L.R. 14.

[38] 6 E.A.L.R. 119.

[39] /1969/ E.A. 229.

[40] /1967/ E.A. 416; /1968/ E.A. 72 (C.A.).

conversion of a monogamous marriage to a polygamous one where the parties had gone through ceremonies both under the Marriage Act and later in accordance with Islamic Law rites as provided for in the Mohammedan Marriage, Divorce and Succession Act.[41] In the latter case the court held that where a husband and wife are already validly married under the Marriage Act, a subsequent purported marriage ceremony between them under Islamic law is invalid and was devoid of legal effect.

3. Divorce

It has often been suggested that one of the main features of African traditional marriage types is the ease with which a divorce may be obtained.[42] It has also been suggested that since the chief aim of traditional marriage is the procreation of children, each subsequent marriage would increase the number of children born to the woman. Ease of divorce has therefore been cited as a pro-natalist trend in traditional marriages. On the other hand it has been argued that ease of divorce leads to unstable and insecure marriages which, in turn, could have the effect of discouraging the procreation of children, though such an argument may not be applicable to African conditions. In Kenya the law of divorce is as pluralistic as the law of marriage. Each system of marriage tends to be governed by its own law although a kind of matrimonial cross-breeding is easily discernible as far as statutory provisions are concerned.

Divorce under customary law lacks statutory guidance as to what the grounds for dissolution of the marriage are. It has in fact been suggested[43] that there are no customary grounds for divorce, only reasons for dissolution of a customary marriage. This suggestion is, of course, derived from a Eurocentric theory of marriage dissolution, which in the past lay great emphasis on grounds for the dissolution of marriage. Yet this western concept of divorce is fast yielding place to the more realistic concept of total breakdown, which is the whole basis of traditional dissolution of marriages. Mention has to be made of some traditional systems in Kenya where divorce is either highly discouraged or in some cases not allowed, as long as there are offspring of the marriage. The Kikuyu tribe--the largest of the indigenous groups--have often been mentioned as an example of such a system.

Islamic divorces are governed by Islamic law on the subject. Classical Muslim law recognized various kinds of divorce, the most predominant forms were talaq--the unilateral repudiation of the marriage by the husband--and

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[41] Laws of Kenya, Chap. 156.

[42] See among others, Cotran, "The Changing Nature of African Marriage," in J.N.D. Anderson (ed.), Family Law in Asia and Africa (1967) and Phillips and Morris, Marriage Laws in Africa (1971).

[43] Cotran, op. cit., pp. 16-18.

khula--the seeking of marital dissolution by the wife by giving or agreeing to give consideration to the husband for her release. Present Islamic divorce practice is regulated by the provision of the Mohammedan Marriage and Divorce Registration Act.[44]

Other forms of divorce are governed by the provisions of the Matrimonial Causes Act[45] and the Hindu Marriage and Divorce Act.[46] Section 8 of the Matrimonial Causes Act gives four main grounds for divorce, namely: 1) that the husband or the wife since the celebration of the marriage has committed adultery; 2) that the petitioner had been deserted without cause for a period of at least three years immediately preceding the presentation of the petition; 3) that either party has since the celebration of marriage treated the other (petitioner) with cruelty; 4) that the respondent is incurably of unsound mind and has been continually under care and treatment for a period of at least five years immediately preceding the presentation of a petition for divorce. A wife petitioner can also pray for divorce on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

Divorce under Section 10 of the Hindu Marriage and Divorce Act can be based on all of the grounds mentioned above plus a few others peculiar to the religion. For instance, if the respondent, since the celebration of the marriage, has ceased to be a Hindu by reason of conversion to another religion or has renounced the world by entering a religious order and has remained in such order apart from the world for a period of at least three years immediately preceding the presentation of the petition, a ground for divorce arises under Hindu Law. Neither the Matrimonial Causes Act nor the Hindu Marriage and Divorce Act would permit a petitioner to pray for divorce before the expiration of three years from the date of the marriage. However, this time requirement can be waived by a special leave from the High Court.

The Bill proposed by the Commission on Marriage and Divorce includes a provision which makes the irretrievable breakdown of the marriage a ground for divorce.[47] The divorce provisions in the proposed bill simplify the law on the subject considerably. It also introduces a requirement that there be a breakdown in conciliation efforts before a petition for divorce could be filed. This is certainly more conducive to the stability of the family, and it is hoped that in the long run the incidence of divorce will be reduced. It is also hoped that it will lead to better planned families and ultimately smaller family size.

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[44]Note 30, supra.

[45]Laws of Kenya, Chap. 152.

[46]Ibid., Chap. 157.

[47]Sec. 115 of the Bill.

## III. LAWS INDIRECTLY AFFECTING FERTILITY

### A. Tax Laws

The Income Tax Act, 1973 has provisions for deductions both for single and married, as well as allowance for children, but the levels are so low in both cases that the provisions could be said to be neutral in their impact on population growth. Sections 30 and 31 of the Act provide for married and single relief respectively. The married relief, as set out in the Third Schedule to the Act is 720 shillings,* while the single relief is 360/= per annum. Child relief is 180/= per year for up to four children.

TABLE 6

Income Tax Act--Third Schedule, Head B

Rates of Tax

The Individual rates of tax shall be:

| | Rate in each |
|---|---|
| on the first £1200 | 20 /= |
| " " next £ 600 | 2 /= |
| " " " £ 600 | 3 /= |
| " " " £ 600 | 4 /= |
| " " " £ 600 | 5 /= |
| " " " £ 600 | 6 /= |
| " " " £ 600 | 7 /= |
| " " " £ 600 | 8 /= |
| " " " £ 600 | 9 /= |
| " " " £ 600 | 10 /= |
| " " " £ 600 | 11 /= |
| " " " £ 600 | 12 /= |
| " " " £1800 | 13 /= |
| on all total income over £9000 | 14 /= |

A survey carried out by the author in Kenya during 1973-74 revealed that 85.4 per cent of the persons questioned (350) are aware of the child relief provisions. Only 20.3 per cent would still limit their family size if the relief were to be abolished. Thirty-two per cent would definitely have more children if the level of relief in the Act was higher than it is now. Of those surveyed, 49.1 per cent see the relief as an attempt to make funds available to them which are intended to go to benefit the children. It is interesting to note that although only 69.1 per cent of those sampled pay income tax, 61.7 per cent do not take the relief provisions into account when planning the size of their families. However, in view of the fact that up to 16.6 per cent of those sampled preferred not to answer the question of whether they considered the relief provisions in

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*Editor's note: The designation /= is used to denote the basic unit of the Kenyan monetary system, the shilling. There are approximately seven (7) shillings per U.S. dollar.

planning their family size, there seems to be a possibility that higher incentives in the form of child relief would produce a pro-natalist effect and thus affect fertility in a positive way.

TABLE 7

Data on the Impact of the Income Tax Act on Fertility in Kenya

| Questions | Yes % | No % | No Opinion % | Refused Comment % | Other % |
|---|---|---|---|---|---|
| 1. Do you pay tax | 69.1 | 30 | .6 | .3 | - |
| 2. Are you aware of the existence of the Income Tax Act | 80 | 16.3 | 3.1 | .6 | - |
| 3. Are you aware of the provision for child relief for up to 4 children in the Act | 85.4 | 8.9 | 4.3 | 1.4 | - |
| 4. Have you had any child relief under the provisions of the Act | 61.1 | 35.4 | 2 | 1.1 | .3 |
| 5. Do you consider the relief provisions in deciding your family size | 25.4 | 61.7 | 5.1 | 7.1 | .6 |
| 6. Would you consider having more children if the level of relief was higher than it is | 32.3 | 41.7 | 10.3 | 14.6 | 1.1 |
| 7. Would you limit your family size if the Act had no relief provisions | 20.3 | 52.9 | 8 | 16.6 | 2.3 |
| 8. Do you see the relief | | | | | |
| (i) As extra income for your use | 24.6 | 50.9 | 18.9 | 4.9 | .9 |
| (ii) As money intended for the needs of the children | 49.1 | 22.3 | 21.1 | 6.6 | .9 |
| (iii) As savings for the family | 23.1 | 46.3 | 23.7 | 6.6 | .3 |

Base: 350 Adults

B. Succession Laws and Estate Duties

Testate and intestate succession to property in Kenya is now regulated by the Law of Succession Act, 1972.[48] Section 40 of the Act deals with

[48]Although this Act was passed in 1972, no implementing order has as yet been brought out by the Attorney-General to make its provisions effective in Kenya. The reason given for this is that the personnel who would enforce these provisions in the subordinate courts are still undergoing training at the Kenya Institute of Administration.

intestate succession and provides that where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided equally among the houses, each in turn divided according to the number of children it has. Any wife surviving him will be counted as an additional unit to the number of children in the house. Thus, the smaller the size of the decedent's family the bigger the portions that individual members will receive out of his estate. It also means that a member of a monogamous household has a better chance of receiving a larger share of the assets of the deceased than the members of a polygamous family where the portions could become very much fragmented to make it go round.

As to the Estate Duty tax, Section 48 of the Income Tax Act[49] provides for the payment out of the estate of the deceased any tax which accrued before his death. Section 7 of the Estate Duty Act[50] levies estate duty tax on all property which the deceased was competent to dispose of at the time of his death. The First Schedule which gives the levels of the estate tax, was amended in 1971 to include the following rates:

(i) Where the value of the estate does not exceed £1,000, no Estate Duty shall be payable;

(ii) Where the value of the estate exceeds £1000 but does not exceed £1,500, Estate Duty shall be £5;

(iii) Where the value of the estate exceeds £1,500 but does not exceed £2000, Estate Duty shall be £10;

(iv) Where the value of the estate exceeds £2000 but does not exceed £2,500, Estate Duty shall be £15;

(v) Where the value of the estate exceeds £2,500, but does not exceed £5,000, the rate of Estate Duty shall be 1 per cent.

C. Child Labour Laws

One reason normally given in traditional systems as an explanation for having large families is that the children could be used as much needed labour on the farms or in the occupation of the family head. It is important, therefore, to examine the laws regulating child labour in Kenya. The relevant statues are the Employment of Women, Young Persons and Chil-

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[49] Act No. 6 of 1973.

[50] Laws of Kenya, Chap. 483.

dren's Act[51] (and the Regulations made thereunder), the Industrial Training Act,[52] and the Shop Hours Act.[53] The Employment of Women, Young Persons and Children's Act prohibits the employment of children in industrial undertakings (other than those entered into under a deed of apprenticeship); in attendance on any machinery (otherwise than as provided for under the Industrial Training Act); in any shift work; or in any ship (except with the approval of the minister, native vessels being excluded from the definition of "ships"). There are other provisions under the Act against employing any child under the age of thirteen years in circumstances in which the child would have to live away from his parents or other lawful guardian. Rule 3 of the regulations made under the Act lays down stringent requirements for any person employing more than 50 children. The Industrial Training Act sets out the conditions under which a child could bind himself by a contract of apprenticeship.

It would seem, however, that both the Shop Hours Acts and current subsistence agricultural practice still enable the use of a good deal of child labour in Kenya. Large-scale plantations continue to depend to a large extent on children for coffee picking and on the tea, pineapple and other farms.

D. Social Security Laws

Another traditional rationale for having a large number of children is that it acts as a kind of insurance for the family head against his old age needs. Social security laws could, therefore, indirectly affect the decision to have more children, particularly if the state effectively takes over the role that children are supposed to fill in one's later years. It has also been suggested that there is a strong correlation between social security programmes and birth rates in the more developed economies, though the low level of social security in the less developed countries is such that it has not yet supported this conclusion. Friedlander and Silver attribute the situation in the less developed countries to the kind of laws that exist for the enforcement of social security legislation, as well as to the level of the benefits given.[54]

In Kenya social security is regulated under the provisions of the Pensions Act.[55] Section 5 of this Act begins with an ominous note to

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[51] Ibid., Chap. 227.

[52] Ibid., Chap. 237.

[53] Ibid., Chap. 231. There is also a Mombasa Shop Hours Act, Ibid., Chap. 232.

[54] S. Freidlander and M. Silver, "A Quantitative Study of the Determinants of Fertility Behavior," Demography, Vol. 4, No. 1, p. 44 (1967).

[55] Laws of Kenya, Chap. 189. (Revised 1967). There is also the National Social Security Fund, established in 1966, which also acts as a kind of insurance for contributors to it.

the effect that no government employee shall have an absolute right to compensation for past services or to pension, gratuity or other allowance; nor shall anything in the Act affect the right of the Government to dismiss any of them at any time and without compensation. Subsection (2) of the same section attempts to narrow the possible victims of this disclaimer to those guilty of negligence, irregularity or misconduct. In such cases, the pension would either be reduced or entirely withheld. Section 9 of the Act provides that a pension granted under the provisions of the Act shall not exceed two-thirds of the highest pensionable emoluments drawn by the employee at any time in the course of his service under the Government.

Regulation 6 made under the Act covers the cases of women who resigned from employment for purposes of getting married. They are entitled to a gratuity not exceeding one-twelfth of a month's pensionable emoluments at the time of retirement or resignation for each complete month of pensionable service in the service of the Government or one year's pensionable emoluments, whichever is the less.

To what extent, one may ask, could the benefits under the Act be an adequate substitute for the remittances from children in one's old age? The answer to this is that the cost of maintaining their own homes is fast making it increasingly difficult for the children to send remittances to their parents at a level comparable to the benefits allowed for in the Act. It must be remembered that employment and ultimate pension are yet the privilege of a rather select few in Kenya. The present pension set-up serves only those who have served the Government or a para-statal body. Social security benefits are not available for others. It is hoped that in time the welfare state, of which Kenya is one, would include all its people in its social service programmes. This will definitely help reduce the current desire to create a large family in order to underpin one's later years when one is not in any type of employment that allows participation in a pension scheme.

E. Maternity Benefits

Under Section 11 of the Regulation of Wages and Conditions of Employment Act,[56] the Minister has power to make a wages regulation order relating to basic Minimum Wage and other benefits in respect of employees generally in any area of Kenya, or in respect of any particular category of employees either throughout or in any particular area of Kenya. Specific Wages Regulation Orders have been made for the following industries: road transport; building construction; knitting mills; baking flour confectionary

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[56] Laws of Kenya, Chap. 229.

and biscuit-making trade; footwear; agriculture; tailoring, garment making and associated trades; hotels and catering trades; laundry, cleaning and dyeing trades; wholesale and retail distributive trades; and domestic service.[57]

Under Legal Notice No. 34, 1974, paragraph 13, the Minister has made an order to the effect that after twelve months of consecutive service with an employer, an employed woman shall be entitled to three months' unpaid maternity leave, subject to the employee producing a medical certificate signed by a medical practitioner or a person acting on his behalf in charge of a dispensary or a medical centre. The Order further provides that a married woman should not incur any loss of privileges based on the fact that she was on maternity leave.

A field survey recently conducted by the author of this monograph on the impact of the Regulation of Wages and Conditions of Employment Act yielded the following results. Although only 16 per cent of the sample (350 adults) have ever received maternity benefits under the provisions of the Act, 86.6 per cent feel that it is fair for the couple to receive it and 86.3 per cent suggest that the benefit should be extended. Up to 18.6 per cent, however, are not aware of the provision for maternity leave. Another interesting revelation from the data is the close margin between those who would limit their family size if maternity leave were to be abolished and those who would keep their projected family size regardless of the abolition of maternity leave--25 per cent as against 26.6 per cent of the sample. Of course, these figures have to be used with caution in view of the high level of refusals on the part of those questioned to commit themselves to an answer (25.7 per cent) and those who do not bother to express an opinion (4.3 per cent) as shown in the table below. Three fourths of those who have benefited under the provisions of the Act (16 per cent) consider the benefit level adequate. Slightly more than 45.1 per cent of the sample do not know whether it is adequate or not since in any case they have never received the benefit. Nearly three fourths of those questioned felt that it is fair for the state to pay maternity leave benefits, as against 9.4 per cent who felt that the state should not be asked to underwrite maternity leave in any way. It is also noteworthy that 42 per cent of the sample (which included employers) felt that it is fair for the employers of labour to pay for maternity leave benefits.

In March 1974, a delegation of women[58] met with the President of the Republic of Kenya in Mombasa and requested, among other things, that working

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[57]See A Guide to Industrial Investment in Kenya, p. 50 (1972).

[58]These were members of the organization called Maendeleo Ya Wanawake, an organization for the welfare of women.

women be given paid maternity leave. Accordingly, the President announced from Mombasa that all working women were to have paid maternity leave thenceforth.

TABLE 8

Data on the Impact of the Regulation of Wages and Conditions of Employment Act on Fertility in Kenya

| Questions | Yes % | No % | No Opinion % | Refused Comment % | Other % |
|---|---|---|---|---|---|
| 1. Are you aware of the existence of the Act | 64.9 | 25.1 | 8.6 | 1.4 | - |
| 2. Are you aware of the provisions for maternity leave under the Act | 76.6 | 18.6 | 3.1 | 1.7 | - |
| 3. Have you ever benefited/ received any benefit under the provisions of the Act | 16 | 79.1 | 1.4 | 2.3 | 1.1 |
| 4. Do you regard the payment (if any) as adequate for your needs | 12 | 26 | 45.1 | 9.4 | 7.4 |
| 5. Would you have had as many children if there were no statutory/other provisions for maternity leave | 25.4 | 26.6 | 18 | 25.7 | 4.3 |
| 6. Do you consider the payment fair | | | | | |
| (i) To the state | 74 | 9.4 | 10 | 6.6 | - |
| (ii) To the employer | 42 | 28.6 | 19.1 | 10 | .3 |
| (iii) To the couple | 86.6 | 5.1 | 3.4 | 4.6 | .3 |
| 7. Would you like to see maternity leave | | | | | |
| (i) Abolished | 3.7 | 91.7 | .6 | 3.7 | .3 |
| (ii) Extended | 86.3 | 7.7 | 1.4 | 4.6 | - |
| (iii) Reduced | 2.3 | 91.4 | 1.7 | 4.3 | .3 |

Base: 350 Adults

## IV. LAWS AFFECTING MIGRATION

Luke Lee in his article on Law, Human Rights and Population,[59] cites freedom of movement, along with the right to work, the right to freedom from hunger and the right to an adequate standard of living, as a basic human right. The International Labour Organization Report on Employment, Incomes and Equality in Kenya[60] listed some of the causes of rural-urban migration as follows:

TABLE 9

Reasons for Migration Among Male Urban Migrants Aged 15-50, by Educational Attainment and Age Group, 1970 (percentages)

| Reason | Education | | Age | | Total |
|---|---|---|---|---|---|
| | Primary | Secondary | 15-22 | 35-50 | |
| Could not find work | 82.8 | 76.1 | 79.9 | 82.6 | 80.9 |
| Land was not available | 3.5 | 2.1 | 1.4 | 5.2 | 3.2 |
| Could not enter school | 2.9 | 8.1 | 7.3 | 0.9 | 4.4 |
| Schools not avaiable or of poor quality | 0.5 | 0.7 | 0.7 | 0.4 | 0.6 |
| Lack of social amenities | - | 0.7 | 0.4 | - | 0.2 |
| Other | 10.3 | 12.3 | 10.3 | 10.9 | 10.7 |
| Total | 100 | 100 | 100 | 100 | 100 |

Source: H. Rempel, Labour Migration into Urban Centres and Urban Unemployment in Kenya (Unpublished Ph.D. thesis, 1970).

From the table it is clear that an overwhelming majority of rural-urban migrants make the move in search of employment.

The thrust of Government programmes in this field is two-fold. First, there is an effort to develop the rural areas so as to create enough employment opportunities to reduce the attraction of the existing urban centres; and second, the Government has initiated housing and other schemes to improve the quality of life of those already in the urban areas.

In 1967, housing legislation was enacted to enable the Government and local authorities to jointly guarantee parts of the loans for home ownership granted to citizens. Although this programme has so far been limited to Nairobi, it is planned to be extended to other urban centres.[61]

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[59] Virginia Journal of International Law, Vol. 12, pp. 310, 318-319 (1972).

[60] p. 46.

[61] See Kenya: An Official Handbook, pp. 175-78.

In 1966, the Rent Restriction Department was established within the Ministry of Housing to control the sharp rise in rents and to curb eviction of tenants by rack-renting landlords. Rents became controlled for all dwelling premises for which the standard rental was below K£40 per month unfurnished or K£53 per month furnished on January 1, 1965. Rent Tribunals have been established in Nairobi, Mombasa, Nakuru and Kisumu to deal with disputes between tenants and landlords. Despite the Rent Restriction Act, the more desirable residential areas still command very high rents. The table below shows the average annual requirements for housing in urban areas 1968-74.

TABLE 10

Average Annual Requirements for Housing in Urban Areas, 1968-1974

| Urban Centre | Population (Est.) 1968 | Population (Est.) 1974 | Annual In-crease | Households 1968 | Households 1974 | Housing Units Req'd. Annually | Ave./ Yearly % of Total |
|---|---|---|---|---|---|---|---|
| Nairobi | 480,000 | 668,000 | 5.7 | 102,000 | 131,400 | 5,880 | 58.0 |
| Mombasa | 235,000 | 305,000 | 4.5 | 50,000 | 60,000 | 2,000 | 19.8 |
| Nakuru | 53,400 | 74,500 | 5.7 | 11,400 | 14,600 | 640 | 6.3 |
| Kisumu | 32,600 | 45,200 | 5.6 | 6,900 | 8,900 | 400 | 3.9 |
| Eldoret | 28,300 | 41,200 | 6.4 | 6,000 | 8,100 | 420 | 4.1 |
| Kitale | 10,900 | 13,000 | 2.8 | 2,300 | 2,600 | 60 | 0.6 |
| Thika | 22,700 | 37,200 | 8.5 | 4,800 | 7,300 | 500 | 4.9 |
| Sub-Totals | 862,900 | 1,184,100 | 5.4 | 183,400 | 232,900 | 9,900 | 97.5 |
| Urban Area Councils | 98,100 | 117,100 | 3.0 | 20,700 | 22,700 | 360 | 2.5 |
| Total Urban | 961,000 | 1,301,200 | 5.2 | 204,300 | 255,600 | 10,260 | 100 |

Average: 4.7 persons per household in 1968
5.15 persons per household in 1974

Source: Kenya, An Official Handbook, p. 175, (1973).

The strategy of restricting the drift to the towns by penal provisions as contained in the Vagrancy Act (enacted during the colonial days) does not seem to have produced any positive results. A survey carried out by this author on the impact of the Act on migration in Kenya revealed that only 0.3 per cent of the sample are aware of the existence of the Act and only 0.6 per cent have ever been prosecuted under any of its provisions. The responses in respect of the repeal or amendment of the Act leaves no doubt at all as to the total lack of interest in its existence and operation.

The better strategy would seem to be that of developing the rural areas.[62] This has been approached both through agricultural settlement schemes and through business loans to small-scale businessmen in the rural areas. Moreover, one would like to see a better rationalization of the laws relating to ownership fixation and land tenure generally. The licensing laws also need considerable streamlining to suit the kinds of businesses that the rural areas engage in, their scale of operation and other modalities of carrying on business on a small scale. The building codes also require drastic modification to suit local and locational circumstances.

The strategies briefly outlined above deal with the internal aspects of migration. The population growth rate can also be affected by migration in the international sense--emigration and immigration. The law on this is found in the Immigration Act, 1967. Emigrants have to be cleared for tax and foreign exchange purposes under the Income Tax Act and the Exchange Control Act, respectively, while immigrants have to obtain residence permits under the Immigration Act. The total arrivals and departures as indicated by the figures from the Central Bureau of Statistics, show that visitors constitute the largest block of both immigrants and emigrants. It would therefore seem that migration in the international sense does not constitute any sort of stimulation to the population growth rate in Kenya. If it did before 1967, the Immigration Act of that year appears to have brought the position under very firm control.

TABLE 11

Total Reported Arrivals and Departures, 1968-1971

| Year | ARRIVALS | | | | | DEPARTURES | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Returning Residents | Permanent Immigrants | Persons in Transit | Visitors* | Total | Temporary Emigrants | Permanent Emigrants | Persons in Transit | Visitors | Total |
| 1968 | 98,097 | 16,975 | 74,420 | 185,663 | 375,153 | 123,870 | 11,497 | 69,667 | 187,424 | 392,458 |
| 1969 | 108,923 | 19,082 | 72,381 | 219,328 | 419,714 | 135,305 | 13,526 | 63,770 | 212,200 | 424,801 |
| 1970 | 110,085 | 19,879 | 76,261 | 266,325 | 472,550 | 139,052 | 14,020 | 69,454 | 269,319 | 491,845 |
| 1971 | 119,594 | 1,421 | 68,115 | 342,956 | 532,086 | 116,386 | 15,840 | 47,907 | 351,798 | 531,930 |

Source: Central Bureau of Statistics.

*Excluding visitors becoming permanent immigrants.

[62]See P. Mbithi, "Legal and Law-related Issues in Rural Development," paper read at the Socio-Legal Workshop, Nairobi, June, 1974. See also Okoth-Ogendo, "Property Theory and Land Use Analysis," I.D.S. Working Paper No. 164, 1974.

## V. CONCLUSION

In conclusion it can be argued that a study of family planning has to be done in the context of these changing patterns and functions of the African family and an understanding of its traditional structure as well as its evolving modern role. The role which the family takes in Kenyan society is undergoing a transition. It is being altered by several cultural, physical and technological factors, the impact of which can no longer be handled by the family or the clan and therefore must be absorbed by the state. Increasingly, it is to the state that people look for the planning of their welfare.

Traditional land tenure systems have bent to the greater economic requirements of the state, as have traditional commercial barter practices, not to mention subsistence agriculture fast yielding place to the mechanized form. The Government is as concerned with family life and its welfare as it is in all other areas. The quality of life of the individual cannot be improved if the question of the welfare of the individual is not tackled effectively.

Family planning, although a radically changed form, is just another adaptation of the traditional system of child spacing by abstinence. It is in accord with the needs of modern society. The extent and degree of adaptation is not any more radical than it is in such areas as tort, contract, land law and matrimonial causes, where the traditional notions have been either altered or adapted to accord with the developmental demands of the modern state.

What emerges from this brief survey of Kenyan laws relating to population is a recognition that the state of the law has been taken completely by surprise by the developmental targets and needs of the state. It creates a situation in which the law finds itself using the hoe and the pickaxe in an age of electronics and automation.

In the area of regulation of fertility, the existing laws formulated during the days of Queen Victoria no longer seem to serve the present-day needs of Kenya. The law on contraceptives should be made specific and clear as to who can use them, how they should be manufactured, imported, prescribed and distributed. Under present circumstances one has to assume that contraceptives are included in the category of Part I Poisons, under the Pharmacy and Poisons Act. This is totally unsatisfactory.

As to abortion, the position is even more confused. The provisions of the law (all of them penal) sit rather uneasily on the professed policies of the Government to reduce Kenya's population growth rate. Yet, illegal abortions still proliferate and the professional abortionist flourishes at the outrageous disregard of the dangers to health and life

of women. Here, like in the areas of succession law, land law and matrimonial law, the legislature has a duty to protect the population from the dangers of illegal abortion and to carry through the developmental programmes of the country. Abortion in Kenya ought to be granted on demand. Merely permitting therapeutic abortions is not enough. The slogan that no baby should be born unwanted should be made to sound and appear real. In short, what is required is a comprehensive Family Planning Act for Kenya that would embrace and rationalize all the law on the subject so as to complement the policies set by the Development Plans from 1966 to 1978.

With regard to those laws that have some indirect effect on fertility and family size, there is a lot to be said for increasing the level of pensions and widening the coverage of the National Social Security Fund. Even people who are unemployed or self-employed (and many of these people seem to have very limited choices) should be able to look to the future with some confidence and hope, not based on the contributions that a large family can make towards their subsistence in their late years but to the contributions that a welfare state can and would give. This will have the effect of reducing family size and, at the same time, improve the quality of life both of the children (who would concentrate their resources on their own family) and for the older parents, and, ultimately, for the state. It will also improve the saving power of the children, a practice from which the state is sure to derive benefit.

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