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by Luke T. Lee

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Law, Human Rights and Population: A Strategy for Action*

LUKE T. LEE**

It is entirely possible that the most urgent conflict confronting the world today is not that between nations or ideologies, but rather between the pace of growth of the human race and the disproportionate increase in the production of resources necessary to support mankind in peace, prosperity and dignity. Oddly, it has been only within the past decade that the problems associated with population growth have seemed to be a proper subject for legal concern. Similarly, the conscious relating of basic human rights to the subject of world population in general and family planning specifically is of comparatively recent origin.[1] That any attempt to control population growth touches on certain aspects of human rights is obvious. Yet the subject matter is relatively unexplored.[2] Even in its unexplored state the potential for contributing to an increased understanding of not only the population problem but of the issue of human rights as well is significantly high to merit the shift in attention. Because research in this area is of so recent an origin, this article is designedly exploratory in nature. It seeks simultaneously to stimulate and provoke further research, thought, and discussion on the subject. To this end it is divided into

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* This article will be presented as a background paper for the Second Asian Population Conference sponsored by the United Nation's Economic Commission for Asia and the Far East, which will be held in Tokyo, November 1-13, 1972.

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1. *See generally* THE WORLD POPULATION CRISIS: POLICY IMPLICATIONS AND THE ROLE OF LAW (Proceedings, Regional Meeting of American Society of International Law at the University of Virginia, Mar. 12, 13, 1971, published by the John Bassett Moore Society of International Law, University of Virginia School of Law).

2. Thus, the U.N. Committee for Program and Coordination in 1968 cited the human rights aspects of family planning as an area not yet adequately explored. 45 U.N. ECOSOC, Supp. G, U.N. Doc. E/4493 (1968). For a hint of the relatively meager literature in this field see Lee, *Law and Family Planning*, 6 STUDIES IN FAMILY PLANNING (Apr. 1971) (originally a background paper commissioned by the World Health Organization's Expert Committee on Family Planning in Health Services for its meeting November 24-30, 1970); Lee, *Population Laws and Human Rights*, AFRICAN POPULATION CONFERENCE, Doc. Pop. Conf. 2/5 (Dec. 9-18, 1971); Partan, The Legal Capacity of the United Nations System in the Field of Population (Law and Population Book Series No. 3, 1972).

three parts: first, a review of the status and relevance of the concept of human rights; second, a discussion of the link between human rights and population control; and third, a proposal for a research strategy of action.

I. STATUS OF HUMAN RIGHTS

The status of human rights has traditionally been linked to the types of instruments into which they are incorporated. Thus, the answer to the question whether human rights are legally or only morally binding upon states usually hinges upon the fulfillment or nonfulfillment of the various requirements under the law of treaties. As is often the case, where human rights are dealt with in such instruments as declarations,[3] proclamations,[4] or unratified covenants,[5] they are considered morally, but not legally, binding. Only duly ratified conventions[6] are given legally binding effect, and then only on

3. Documents A/CONF. 32/6, at 114 (1967) and Add. 1, at 5 (1968) list the following "declarations" on human rights adopted by the General Assembly through 1967:

Universal Declaration of Human Rights (1948); Declaration of the Rights of the Child (1959); Declaration on the Granting of Independence to Colonial Countries and Peoples (1960); Declaration on the Elimination of All Forms of Discrimination (1963); Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect and Understanding Between Peoples (1965); Declaration on the Elimination of Discrimination Against Women (1967).

A "declaration" may be codified into a convention which enters into force upon receiving a requisite number of ratifications, as in the case of the Declaration Against Racial Discrimination (1963), which was codified in 1965 and entered into force in 1969, G.A. Res. 2106, 20 U.N. GAOR Supp. 14, at 47, U.N. Doc. A/6181 (1965), or it may be codified but lacks the requisite number of ratifications to enter into force, as in the case of the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948), which was codified into two international covenants in 1966, see note 5 *infra*, but has not yet entered into force. A declaration may also, of course, stand alone unaccompanied by codification, as in the case of the great majority of declarations cited above.

For the complete language of declarations, proclamations and conventions adopted prior to 1967, see UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS (1967); *see also* BROWNLIE, BASIC DOCUMENTS ON HUMAN RIGHTS (1971). Moreover, for a report on the status of multilateral agreements in human rights concluded under U.N. auspices, see U.N. Doc. E/CN. 4/907/Rev. 5 (1969); *see also* A/CONF. 37/7/Add. 1 (1968) for a report of agreements concluded under the auspices of specialized U.N. agencies.

4. *See e.g.*, Teheran Proclamation on Human Rights, U.N. Doc. A/CONF. 32/41 (1968).

5. *See e.g.*, Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. 16, at 49-58, U.N. Doc. A/6316 (1966).

6. *See e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, 20 U.N. GAOR Supp. 14, at 47, U.N. Doc. A/6181 (1965); Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A, U.N. Doc. A/810, at 174 (1948); Supple-

the countries which have ratified them. This treaty-oriented approach to human rights has been subscribed to by many jurists.[7]

It is submitted by this author that human rights, to the extent that they have met the conditions prescribed below, are *ipso facto* legally binding upon states, regardless of the existence of a duly ratified treaty, for human rights, by definition, are "rights which attach to all human beings equally, whatever their nationality." [8] As such, the legal validity of their application cannot be rooted solely in a mere piece of paper signed and ratified by states.

By emphasizing the formal or procedural aspects of human rights treaties, the traditional approach seems to confuse the *instruments* stipulating human rights with the substantive *human rights* themselves. Rather, the analysis of the binding force of human rights must be approached also from their non-treaty sources: natural law, customary international law and general principles of law as recognized by civilized nations. Each of these sources has contributed to the development of human rights. These sources of human rights will be briefly discussed in the ensuing space, with special emphasis on the formation of customary international law in the light of developments in the twentieth century.

A. *Natural Law*

Whether in their manifestation as "inherent rights," "fundamental freedoms," or "natural justice," human rights are synonymous with the law of nature. Except for those extreme positivists who would deny *in toto* the existence of natural law,[9] the latter is deemed to underlie both domestic legislation and international agreements, finding expression in such basic instruments as the U.N. Charter [10] and

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mentary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 7 Sept. 1956, 266 U.N.T.S. 3 (1957); Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, G.A. Res. 317, U.N. Doc. A/1251, at 33 (1949).

7. H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 144, 145 (1952); H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 397-417 (1950); Schwelb, *The Influence of Universal Declaration of Human Rights on International and National Law*, AM. SOC'Y INT'L L. PROCEEDINGS 217 (1959); P. DROST, HUMAN RIGHTS AS LEGAL RIGHTS 32 (1951).
8. Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, 11 INT'L & COMP. L.Q. 3 (Supp. 1965) (the paper was delivered at The European Convention on Human Rights).
9. *See, e.g.*, Kelsen, *The Pure Theory of Law*, 51 L.Q.REV. 517 (1935); Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV.L.REV. 44 (1941); H. KELSEN, GENERAL THEORY OF LAW AND STATE (A. Wedberg transl. 1949); H. LAUTERPACHT, MODERN THEORIES OF LAW 105-38 (1938); W. EBENSTEIN, THE PURE THEORY OF LAW (1945).
10. Thus, the U.N. Charter makes seven references to human rights in addition to using such terms as "fundamental freedoms" and "inherent rights." An example of the latter provides that "nothing in the present Charter shall impair the *inherent right* of individual or collective self-defense." U.N.

national constitutions.[11] Yet even for these positivists, to the extent that human right-natural law has already been incorporated into these basic laws, it is already binding upon states regardless, or even in spite, of a treaty.

B. *Customary International Law*

The recent trend of codifying customary rules of international law into conventional international law [12] is reflected in recent attempts at codifying human rights into treaty form.[13] It should be noted, however, that in the absence of a binding treaty, the validity of international custom as the second source of international law in the criteria of the International Court of Justice [14] remains undiminished. Thus, those human rights based on international custom continue to be binding upon states, notwithstanding the latter's failure to ratify or adhere to such treaties.

The importance of custom-based human rights assumes growing proportions in light of the increasingly active involvement of the United Nations in the field of human rights.[15] That the United Nations has clear authority to discuss and make recommendations on human rights matters is specifically provided for in Articles 10, 13, 55 and 62 of the Charter. While it is not contended that individual General Assembly resolutions have a legally binding effect upon members of the United Nations, repeated and near-unanimous resolutions or declarations may achieve such an effect through accelerating the custom-generating process. Judge Tanaka describes well the working of such process:

> According to traditional international law, a general practice is the result of the repetition of individual acts of States

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CHARTER art. 51. (emphasis supplied). The basic nature of the Charter is evidenced in Article 103, under which obligations under the Charter shall prevail over those demanded by any other international agreement, past or future.

11. *See, e.g.*, U.S. CONST. amend. I-X, especially the Due Process clauses. *See also* the American Declaration of Independence of 1776, which contains the reknowned passage:

    > [W]e hold these truths to be self-evident—That all men are created equal; that they are endowed by their Creator with certain *inalienable rights;* that among these are life, liberty and the pursuit of happiness. . . .

    (emphasis supplied).

12. Lee, *International Law Commission Re-examined*, 59 AM.J.INT'L L. 545-46 (1965).
13. The codification of the Universal Declaration of Human Rights into the 1966 International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights and the codification of the U.N. Declaration on the Elimination of All Forms of Racial Discrimination into the International Convention on the Elimination of All Forms of Racial Discrimination are examples of this practice.
14. I.C.J.STAT. art. 38, para. 1.
15. For an excellent review of United Nations activity in the field of human rights see J. CAREY, UN PROTECTION OF CIVIL AND POLITICAL RIGHTS (1970).

> constituting consensus in regard to a certain content of a rule of law. Such repetition of acts is an historical process extending over a long period of time . . . The appearance of organizations such as the League of Nations and the United Nations, with their agencies and affiliated institutions, replacing an important part of the traditional individualistic method of international negotiation by the method of "parliamentary diplomacy" . . . is bound to influence the mode of generation of customary international law. A State, instead of pronouncing its view to a few States directly concerned, has the opportunity, through the medium of an organization, to declare its position to all members of the organization and to know immediately their reaction on the same matter. In former days, practice, repetition and *opinio juris sive necessitatis*, which are the ingredients of customary law might be combined together in a very long and slow process extending over centuries. In the contemporary age of highly developed techniques of communication and information, the formation of a custom through the medium of international organization is greatly facilitated and accelerated; the establishment of such a custom would require no more than one generation or even far less than that. This is one of the examples of the transformation of law inevitably produced by change in the social substratum.[16]

The question of when the recommendatory power of a General Assembly resolution is transformed into a legally binding nature would hinge upon the intent of the resolution, the extent of the consensus supporting it, and the repeated endorsements it receives both in and out of the United Nations. Once completed, the metamorphosis would endow the General Assembly resolution with customary law obligations for member states which would be as binding as if incorporated in a ratified treaty.[17] Mr. Constantin A. Stavropoulos, the U.N. Legal Counsel, aptly stated:

> The effect of a resolution may vary from case to case and even from State to State, but it seems undue conservatism

16. Southwest Africa Cases (Ethiopia v. South Africa, Liberia v. South Africa), Second Phase, [1966] I.C.J. 17, 291-92 (Judge Tanaka's dissenting opinion). In this case, Ethiopia and Liberia sought to establish nondiscrimination as internationally binding on grounds of repeated resolutions and declarations of the General Assembly and other international organs. Without going into the merits of the issue, however, the Court dismissed the case on procedural grounds in that the applicant states failed to establish a "legal right or interest" in the subject-matter. Judge Tanaka dissented from the Court's holding on "legal right or interest" and proceeded to consider the question of whether "resolutions and declarations of international organs can be recognized as a factor in the custom-generating process."

17. Partan, The Legal Capacity of the United Nations System in the Field of Population 28 (Law and Population Book Series No. 3, 1972).

> to suggest that Assembly resolutions have not, in fact, become one of the principal means whereby international law is now moulded, especially in those instances . . . [as with] the Universal Declaration of Human Rights of 10 December 1948, where the resolution has enjoyed the support of virtually all States Members, both at the time of its adoption and subsequently.[18]

The comparative effectiveness of General Assembly resolutions or declarations over that of treaties as vehicles for realizing family planning as a human right is well summarized as follows:

> As to governments that are willing to accept the family planning right as stating a binding obligation, the definition of the scope of that obligation can come into being equally as effectively through customary law generated through careful development of an Assembly declaration as through . . . careful development of a draft treaty. The UN process and Assembly declaration would lack the immediacy of formal effect achieved through the ratification of a treaty, but considering that the treaty is not likely to be accorded self-executing status in municipal law, the implementation of the right in the municipal law of the parties would depend upon affirmative action by the government regardless of whether the right is framed in a treaty or in an Assembly declaration.
>
> As to governments that appear unwilling to acknowledge an international law obligation to respect the family planning right, the UN process leading to an Assembly declaration holds promise of having a greater impact in shaping the views of the government than the treaty process. For example, where a government is divided on a human rights issue, a draft treaty might be dismissed as formulating new obligations that may be accepted or ignored, whereas an Assembly declaration is likely to be cast as the recognition of existing customary law obligations and may strengthen the hand of the proponents of human rights within the government. The force of the declaration would of course be limited by the care and attention given to it in the United Nations and the degree to which governments are in fact willing to accept the declaration as framing human rights

18. Stavropoulos, The United Nations and the Development of International Law 1945-1970, *reprinted in* U.N. Doc. OPI/411 (1970). *See also* the following statement of Dr. Edvard Hambro, President of the 25th Session of the U.N. General Assembly and a distinguished jurist in his own right:

> The fact is that the wide and pervasive international acceptance of the Declaration allows us to state that it has become, or at least is becoming, international law.

Address before the United Nations Association of the United States in New York, Nov. 10, 1970.

that they consider themselves under an obligation to respect.

Finally, UN experience in the human rights area shows that governments have been unwilling to accept international implementation procedures. If governments remain unwilling to submit any aspects of their observance of human rights obligations to international adjudication, there seems little purpose in casting those obligations in solemn treaty form. The effective "realization of human rights and fundamental freedoms for all" might more readily be advanced through the UN process of review, study and debate, leading to periodic reiteration of particular human rights as obligations of governments.[19]

C. *General Principles of Law*

Certain additional rights may be implied in express rights by reasoning or application of the general principles of law—the third source of international law in the World Court's criteria.[20] Such inferred rights may in time ripen into express rights through the U.N. custom-generating process. Thus, although the right to family planning was not explicitly included in the Universal Declaration of Human Rights or the two 1966 International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, such a right may be inferred from the rights to equality of the sexes, privacy, conscience, work, adequate standard of living, health and well-being (physical, mental, and environmental), education (including that for the full development of the human personality), and freedom from hunger.[21] The right to family planning was subsequently incorporated in the Teheran Proclamation on Human Rights[22] and the U.N. Declaration on Social Progress and Development.[23] Likewise, although the right to freedom from hunger was not specifically included in the Universal Declaration of Human Rights, it was later stipulated in the International Covenant on Economic, Social and Cultural Rights.[24]

Summarizing from the foregoing discussion, this author considers the traditional treaty approach to human rights as too restrictive as well as jurisprudentially unsound. Once a right has met any of the above conditions, it is automatically a *legal* right and carries with it all the implications of that status.

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19. Partan, *supra* note 17, at 31-2.
20. *See* note 14 *supra*.
21. Lee, The Unique Role of UNESCO in Promoting the Teaching, Study, Dissemination and Wider Appreciation of International Law (background paper prepared for the U.S. National Commission for UNESCO, Doc. SEM/LAW (67)6, at 15).
22. *See* note 4 *supra*, para. 16 and Resolution XVIII of that Conference, titled Human Rights Aspects of Family Planning.
23. G.A. Res. 2436, 23 U.N. GAOR Supp. 18, at 45, U.N. Doc. A/7388 (1961).
24. G.A. Res. 2200, 21 U.N. GAOR Supp. 16, at 49, U.N. Doc. A/6316 (1966).

II. HUMAN RIGHTS ASPECTS IN POPULATION

Family planning was formally accepted as a basic human right in the Declaration on Population by World Leaders, signed by twelve Heads of State on Human Rights Day, December 10, 1966:

> *We believe* that the majority of parents desire to have the knowledge and the means to plan their families; that the opportunity to decide the number and spacing of children is a basic human right.[25]

In the following year, eighteen more Heads of State joined the list.[26] Summarizing the rationale for linking human rights to family planning, Secretary General U Thant wrote:

> The Universal Declaration of Human Rights describes the family as the natural and fundamental unit of society. It follows that any choice and decision with regard to the size of the family must irrevocably rest with the family itself, and cannot be made by anyone else. But this right of parents to free choice will remain illusory unless they are aware of the alternatives open to them. Hence, the right of every family to information and to the availability of services in this field is increasingly considered as a basic human right and as an indispensable ingredient of human dignity.[27]

Official U.N. recognition of the principle that family planning constitutes a basic human right did not come until May 1968, when the U.N. Conference on Human Rights in Teheran proclaimed that "parents have a basic human right to determine freely and responsibly the number and the spacing of their children." [28] A unanimously adopted resolution added the language "a right to adequate education and information in this respect" for all "couples." [29]

An examination of the conference proceedings reveals that the term "couples," instead of "parents" or "families," was used in the resolution in order to insure that couples may "decide to have no children at all." [30] While the Yugoslav delegation stressed "the fundamental right of women to conscious motherhood," [31] the Belgian and French delegations assumed that the "right to adequate education

25. U.N. Population Newsletter, Apr. 1968, at 44 (published by the Population Division of the United Nations).
26. The thirty states were: Australia, Barbados, Colombia, the Dominican Republic, Finland, Ghana, India, Indonesia, Iran, Japan, Jordan, Republic of Korea, Malaysia, Morocco, Nepal, Netherlands, New Zealand, Norway, Pakistan, the Philippines, Singapore, Sweden, Thailand, Trinidad and Tobago, United Arab Republic, United Kingdom, United States and Yugoslavia.
27. U.N. Population Newsletter, *supra* note 25, at 43.
28. Teheran Proclamation on Human Rights para. 16.
29. The additional language is found in Resolution XVIII: Human Rights Aspects of Family Planning.
30. 2nd Comm., 23 U.N. GAOR, U.N. Doc. A/CONF.32/C.2/SR.5, at 57 (1968).
31. 2nd Comm., 23 U.N. GAOR, U.N. Doc.A/CONF.32/C.2/SR.12, at 143 (1968).

and information" included the right to "available services" [32] or "the means for birth control" [33]—an assumption not generally supported by other delegations.

The 1969 U.N. Declaration on Social Progress and Development is significant because it is the first U.N. resolution to require governments to provide families with not only the "knowledge," but also the "means necessary to enable them to exercise their right to determine freely and responsibly the number and spacing of their children." [34]

The question may be raised as to whether the language of the Teheran Proclamation would allow couples to have as many children as they want (or do not want). The Proclamation specifically provides that family planning must be made not only "freely," but also "responsibly." Involved in a responsible parenthood is the balancing of the "individual" with the "collective" right—i.e., from the right of children to that of the society at large. Just as the "individual" right to freedom of speech must take into account the "collective" right whether in time of peace (e.g., libel, defamation, nuisance, obscenity) or during war or emergency (e.g., treason, sedition, censorship), so must the "individual" right of family planning be harmonized with the "collective" right, particularly in certain circumstances where the resources, both actual and potential, of a country dictate the limitation of the size of its population in the interest of all. The question of when exactly does the "individual" right give way to the "collective" is always difficult to answer—even in the case of freedom of speech notwithstanding its century-old development and refinement.[35] However, it is equally clear that inability to define with exactitude the relationship between the two rights does not negate their existence.

III. STRATEGY FOR ACTION

Since "right" and "duty" are two sides of the same coin, there is a corresponding duty on the part of all concerned not only to refrain from activities which would impede the exercise of the family planning right, but, positively, to undertake the necessary measures for the realization of such a right. Section III is devoted to a proposed strategy for action which is meant to speed the establishment of an environment in which family planning will be effective. Two broad areas of action are proposed for the realization of the family planning right: creation of a Charter on Human Rights and Population

32. U.N. Doc.A/CONF.32/C.2/L.19 (1968) and 2nd Comm., 23 U.N. GAOR, U.N. Doc.A/CONF.32/C.2/SR.12, at 142 (1968).
33. *Id.* at 144.
34. Art. 22(b). The Declaration was adopted by the General Assembly by a vote of 119 in favor, none opposed, with 2 abstentions.
35. The recent litigation involving the publication of the Pentagon Papers by the New York Times and the Boston Globe are cases in point. *See* New York Times Co. v. U.S., 403 U.S. 713 (1971).

and an in-depth, world-wide study and reform of laws which inhibit family planning.

A. *Charter on Human Rights and Population*

It may be seen that the Teheran Proclamation and the Declaration on Social Progress and Development have laid down certain minimum conditions for the exercise of the family planning right. Still other conditions may be implied as being necessary to enable couples to determine "freely and responsibly" the number and spacing of children. The following is a composite list of fourteen such conditions, without which the family planning right would prove illusory:

1. The right to adequate education and information on family planning.[36]
2. The right of access to the means of practicing family planning.[37]
3. The right to the equality of men and women.[38]
4. The right of children, whether born in or out of wedlock, to equal status under the law and to adequate support from natural parents.[39]
5. The right to work.[40]
6. The right to an adequate social security system, including health and old-age insurance.[41]
7. The right to freedom from hungar.[42]
8. The right to an adequate standard of living.[43]
9. The right to freedom from environmental pollution.[44]
10. The right to liberty of movement.[45]
11. The right of privacy.[46]
12. The right of conscience.[47]
13. The right to separation of Church from State, law from dogma.[48]

36. Teheran Proclamation on Human Rights resolution XVIII (1968).
37. U.N. Declaration on Social Progress and Development art. 22(b).
38. Universal Declaration of Human Rights art. 2; International Covenant on Civil and Political Rights art. 3; International Covenant on Economic, Social and Cultural Rights art. 3; and Declaration on the Elimination of Discrimination Against Women arts. 1, 4, 6, 9 and 10.
39. Declaration of the Rights of the Child principles 1, 4, 6, 9 and 10.
40. International Covenant on Economic, Social and Cultural Rights art. 6.
41. *Id.* art. 9.
42. *Id.* art. 11(2).
43. *Id.* art. 11(1).
44. *Id.* art. 12(2)(b).
45. International Covenant on Civil and Political Rights *art.* 12.
46. *Id.* art. 17.
47. *Id.* art. 18(1).
48. *Id.* arts. 18 and 26.

14. The right to social, economic and legal reforms to conform with the above rights.[49]

Fulfillment of each of the above rights requires in turn the fulfillment of certain preconditions. The first right, for example, presupposes a universal literacy and compulsory education, thus necessitating a revision of education law toward that end as well as permitting or requiring sex or family planning instruction in schools. Existing laws on obscenity need to be changed if they forbid the publication, broadcasting, televising or mailing of family planning material. Regulations of publicly owned mass communication media should be re-examined with a view to determining their obligation to disseminate family planning information.

Also to be studied is how the individual's right to adequate education can harmonize with the collective demands especially in the face of a shortage in resources, both actual and potential.[50] How may the conferment of certain benefits, like the family or child allowances, while meeting the actual needs, not constitute a "bonus" for increased fertility? Conversely, how may the withdrawal of certain benefits, while furthering the aim of a population policy, not constitute a penalty for the innocent or the needy, thereby impinging upon their basic rights? What controls must be established to prevent the effects of a law from being contradicted in purpose by another law or fustrated in its implementation by inadequate or inconsistent administrative decrees?[51] What should be the relations between municipal and international law through the medium of human rights, which includes the family planning right?

It is obvious that a systematic approach to the above problems calls for a joint and coordinated effort on the part of all government agencies concerned.[52] The hitherto adoption of piece-meal legislation

49. This right flows logically from the fact that human rights are *ipso facto* legal rights, entailing legal obligations on the part of governments to undertake the necessary reforms to conform with such rights.

50. *See* text accompanying note 35 *supra*.

51. The effects of the French legalization of the sale and distribution of contraceptives in 1967, for example, must be weighed against yearly increases in family allowance payments, on the one hand, and the nonenactment of administrative decrees to implement the 1967 law, on the other. As of this writing, many French gynecologists still refuse to either counsel or prescribe contraceptives to patients in the absence of such administrative decrees. Similarly, despite the recent liberalization of an abortion law in the State of New York, confusion reigns in New York City because of local health regulations restricting the performance of abortions on an outpatient basis. N.Y. Times, Oct. 20, 1970, at 1, col. 5.

52. *See* the simultaneous promulgation of the following laws to implement the Chinese family planning program: (a) Guides for Increasing the Supply and Reducing the Prices of Contraceptives, adopted by the Ministry of Commerce, the Ministry of Health, and the Chinese National Association of Marketing Cooperatives, CHUNG-HUA JEN-MIN KUNG-HO-KUO KUO-WU-YUAN KUNG PAO [PEOPLE'S REPUBLIC OF CHINA, STATE COUNCIL BULLETIN], Mar. 23, 1957, at 259-62; (b) Notice by the Ministry of Finance concerning

or measures focusing generally on the availability of contraceptives to the end-users must be seriously reconsidered.

A systematic elaboration of each of the fourteen rights as listed above may well form the object of a "Charter on Human Rights and Population," to be drafted by an International Symposium on Population and Law,[53] with the cooperation of UNESCO, WHO, ILO, FAO, UNICEF, the Commission on Human Rights, the Commission on the Status of Women and the Population Commission. The draft Charter would be submitted to the World Population Conference in 1974 for deliberation and possible adoption as its recommendation to the General Assembly. The resultant Charter would not fail to provide effective guidance for governments to implement the family planning rights.

B. *Law and Population Project*

The second area of action involves the establishment of a worldwide network of Law and Population Projects to be funded by the U.N. Fund for Population Activities (UNFPA) or the International Planned Parenthood Federation (IPPF). The purpose, methods and funding arrangements are set forth below.

1. Purpose

The relating of law to population and family planning seeks to add a new dimension to existing programs stressing the sociological, economic, political, religious, psychological, ideological, medical-pharmaceutical, demographic, and cultural aspects of population and family planning. It starts from the premise that law does have an impact upon the behavior of people, although the exact extent of the impact varies from state to state and according to the subject matter. Furthermore, while law often reflects contemporary social norms and mores, its potential as a catalyst for social change should not be underestimated.

Three recent events lend particular urgency to the legal approach: first, the declaration by thirty Heads of State in 1967 that family planning is a basic human right; second, the unanimous adoption of a resolution by the United Nations Conference on Human Rights in Teheran in 1968 that family planning, including the right to information and instruction thereon, is a basic human right; and third, the declaration by the United Nations General Assembly that 1974 will be World Population Year, with the World Population Conference planned for August of that year.

Exemption from Commodity and Business Taxes on the Manufacture and Importation of Contraceptive Devices and Chemicals, *Id.*, Apr. 2, 1957, at 308; and (c) Notice Issued by the Ministry of Health Stressing the Protection of Women and Youth Engaged in Rural Labor, the Intensification of the Campaign for Women's and Infants' Hygiene, and the Improvement of Health Service in the Nursery System, *Id.*, Apr. 2, 1957, at 313-15.

53. Such a symposium is planned to be held in early 1974 by the Law and Population Programme of Fletcher School of Law and Diplomacy possibly in cooperation with the IPPF and a United Nations organ.

Since reference to a "human right" imposes a legal, and not merely a moral, responsibility upon states, there is a legal duty on the part of each state to see that laws and policies which conflict with the implementation of the right be amended or abolished and that new laws and policies be adopted to conform with and further this right.

However, official recognition that family planning is a basic human right has seldom been followed by systematic legal reforms to bring the existing laws into line with that recognition. Restrictions continue to hamper the importation, manufacture, advertisement and transportation of contraceptives. Education laws continue to forbid the teaching of population dynamics, family planning or human reproduction in schools; public health services remain unresponsive to the need for birth control counsel and clinics. The social welfare and income tax systems may favor large families. And abortion codes contribute to high-cost, high-risk illegal operations. Even where legal reforms have been instituted, important gaps exist owing to the lack of coordination. Low priority accorded to law codification in many emergent countries means retention of archaic laws inherited wholesale from former colonial powers, which often defeats the official policy favoring population and family planning.

In light of the above, there is need for two major activities:

Law Compilation. Legal reform will be impossible without an adequate knowledge of existing statutes, regulations, decrees, and customary laws having a direct (or frequently an indirect) bearing on population and family planning. It is also important to know whether a certain law is in fact enforced and obeyed, or whether it has, by custom, become a dead letter. Compilation of the relevant materials is rendered more difficult by the fact that they may appear under a great variety of headings. In addition to laws and regulations in existence, the absence of laws or regulations in certain fields may also be significant.

The following list is incomplete.[53a] It is offered merely as suggestive of the types of law which should be considered. Only those portions of the law bearing directly or indirectly upon fertility need to be compiled.

1. Laws Specifically Concerned with Family Planning
   - Contraceptives (distribution, use, sale, advertising, and display)
   - Sterilization
   - Establishment or prohibition of services
2. Criminal Code
   - Obscenity
   - Abortion (Is it forbidden? Is consent of husband required? On what grounds permitted? Who may perform? Where?)

53a. For a complete listing see Cohen, Guide for Compiling Population Law (Law and Population Monograph Series No. 5, 1972).

3. Family and Personal Status Law
   - Minimum marriage age
   - Divorce and re-marriage
   - Polygamy
   - Adoption
   - Artificial insemination
   - Voluntary and involuntary sterilization (requirement of consent of spouse)
   - Succession
   - Extended family (customary or tribal law)
4. Social Welfare
   - Family and child allowances
   - Maternity leave and benefits
   - Child or female labor
   - Old age security
   - Housing (including eligibility for public housing)
5. Education
   - Compulsory education (Availability to what age?)
   - Education for women
   - Sex education and population education (forbidden or assisted)
   - Medical and para-medical education (including mid-wife education)
   - Religious control of education
6. Public Health and Medical
   - Regulation of medical practice, including authorization of para-medical personnel to provide family planning services; medical ethics; malpractice liability
   - Licensing of pharmacists, clinic and hospitals
   - Religious control of hospitals and clinics
   - Quality control of drugs and medical supplies, often used as an excuse to ban new and effective techniques)
   - Minors (age of consent for family planning services)
7. Commercial Code and Customs
   - Ban on import of certain medical supplies or literatures
   - Effective block on imports from certain sources, or favoring certain sources
   - Over-strict control on sales of drugs and medical supplies
8. Tax
   - Income tax exemptions
   - Tax provisions favoring large families
9. Land Tenure
10. International Migration and Internal Movement[54]

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54. This is the newest addition to the list of facets of the population problem to be studied. For an analysis of the issues which bear on population migration in a developing nation, see Odujinrin, *Population Migration Problems in Nigeria*, THE POPULATION CRISIS: POLICY IMPLICATIONS AND THE ROLE OF LAW 167 (Proceedings, Regional Meeting of American Society of Inter-

It may be noted that an item, such as sterilization, may appear under a number of headings. The compilation of all the above-mentioned laws in one place and a description of the procedure for legal change would enable all interested people to know the state of the existing laws, to judge their compatibility with the principle of human rights and to follow the procedure for legal reforms.

Model Codes. An important arm of the legal approach to population and family planning is the formulation of a model code or proposed revisions aiming at the full realization of the "human rights" ideals but taking into account also the existing laws as well as the political, social, economic, religious, and cultural factors which give rise to such laws. The resultant synthesis of practice and theory, and of realism and idealism, could generate the necessary momentum for legal reforms as well as provide a basis for concrete action.

The ascertainment of common features in national laws and proposed legislation would enable the formulation of model codes or proposed legislative revisions for national or regional adoption and, ultimately, a world-wide model code, which might well serve as a basis for action on an international basis. This program is so designed as to be an integral part of the U.N. General Assembly's plans for 1974. The Secretary General's official suggestions for the Year include the work envisaged herein.[55]

2. Methods.

To perform the law compilation and model code activities described above, two-year projects on law and population will be established in selected countries to be staffed by members of Law and Sociology Faculties of leading local universities and institutions. They will be aided by Research Assistants in the discharge of the following functions:

(a) Searching out, compiling and bringing up-to-date all the laws, statutory decrees and decisions which affect, or may affect, population and family planning, as exemplified under "Law Compilation" above;

(b) Describing customary laws if different from above;

(c) Translating or supervising the translation of the above into official U.N. working languages (English, French or Spanish);

(d) Preparing a monograph on *Population and Law* in their countries following a standard outline;[56]

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national Law at the University of Virginia, Mar. 12, 13, 1971, published by the John Bassett Moore Society of International Law, University of Virginia School of Law). *See also* R. Plender, International Migration Law (Law and Population Book Series No. 2, 1972).

55. *See* Report of the Secretary General: World Population Year, 1974 (Proposed Programme of Measures and Activities), 26 U.N. ECOSOC, U.N. Doc.E/CN.9/245 (1971).

56. This outline form was used in the first volume of the Law and Population Book Series, POPULATION AND LAW (L. Lee & A. Larson eds. 1971).

(e) Describing the procedure for changing the laws of their countries;
(f) Offering an interdisciplinary Seminar on Law and Population at their universities during the second year of the project;
(g) Requiring the Seminar students to draft a proposed set of laws on population and family planning, using as the point of departure the principle that family planning is a basic human right;
(h) Submitting the proposed set of laws to a local Board of Advisors, made up of distinguished jurists, including high court judges, law professors and leading practitioners, for comment which will be incorporated into the final draft;
(i) Sending copies of the above mentioned materials to key individuals and organizations in their countries, particularly the Ministries of Justice, Education, Health, Social Affairs, Finance, Commerce, as well as the Attorney General, legislators and educators, as may be appropriate;
(j) Forwarding copies of all the documents mentioned from (a) to (h) to the UNFPA or the IPPF and the Fletcher School of Law and Diplomacy;
(k) Participating in an International Symposium on Law and Population to be held in early 1974 to discuss the experience in different countries and to consider the possibility of formulating model legal provisions suitable for adoption in various countries as well as a draft Charter on Human Rights and Population, for transmission to the U.N. World Population Conference in August 1974;
(l) Assisting United Nations Population Programme Officers, Resident Representatives and governmental and nongovernmental officials in the legal aspects of population and family planning problems;
(m) Performing such public services as lecturing and writing in order to explain the significance of the project and its findings; and
(n) If, as is hoped, it proves possible to establish under United Nations auspices a permanent "Legislative Series" giving the laws of every country which affect population, then sending in to the Series periodic reports on changes made in the laws.

3. Funding

The budget for the Law and Population Programme of the Fletcher School provides not only for the salaries and expenses of the Programme's personnel, but also for four in-depth studies on the relationship between law and behavior to be undertaken in four countries in different regions of the world, the holding of meetings of an International Symposium on Law and Population, publication of the Law and Population Book Series and Monograph Series. Both the UNFPA and the IPPF will consider applications for grants to fund the Law and Population Projects described in the above sections.

As of this writing, institutions in some forty countries have expressed interest in establishing the Law and Population Projects. Of these, nineteen applications for funding have been presented, formally or informally (Brazil, Ceylon, Chile, Costa Rica, Ethiopia, Ghana, India, Indonesia, Lebanon, Malaysia, Mexico, Morocco, Nepal, New Zealand, Nigeria, Pakistan, The Philippines, Thailand and Turkey). Those from Chile, Ethiopia, Ghana, Indonesia, Lebanon, Morocco and Turkey have already been approved by the UNFPA, in addition to those from Mexico and New Zealand by the IPPF and one from Malaysia by the Ford Foundation. The IPPF has made available funds for the establishment of several other projects in Latin America and Africa, and the Pathfinder Fund has one in China.

CONCLUSION

Recognition of human rights as entailing legal, and not just moral, responsibility upon states holds vast potential for opportunity, particularly in the family planning field.[57] Aided by an "instant" custom-generating process through the United Nations, the family planning right obligates governments to match deeds with words—heretofore generously given but with scant regard to compliance.

On the action front, it is to be hoped that a proposed U.N. Charter on Human Rights and Population together with a world-wide law compilation and reform movement will make family planning a realizeable and effective human right.

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57. Even so, whether or not the application of international law will be effective in dealing with this problem is a difficult inquiry. For a positive answer to the question, see Nanda, *Can International Law Cope with the Population Crisis?*, THE POPULATION CRISIS: POLICY IMPLICATIONS AND THE ROLE OF LAW 113 (Proceedings, Regional Meeting of American Society of International Law of the University of Virginia, Mar. 12, 13, 1971, published by the John Bassett Moore Society of International Law, University of Virginia School of Law). *See also* Falk, *World Population and International Law*, 63 AM. J. INT'L L. 514 (1969).

International Advisory Committee on Population and Law

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

Professor Georges Abi-Saab *(Institute of International Studies, Geneva)*

Professor Richard Baxter *(Harvard University)*

Professor K. Bentsi-Enchill *(University of Ghana)*

Mr. Robert Black *(Organization for Economic Cooperation and Development)*

Dr. Jean Bourgeois-Pichat *(Comité International de Coordination des Recherches Nationales en Démographie)*

Mr. Philander Claxton, Jr. *(U.S. Department of State)*

Lic. Gerardo Cornejo M. *(Fundación para Estudios de la Población, A.C., Mexico)*

Dean Irene Cortes *(University of the Philippines)*

Dr. Jean de Moerloose *(World Health Organization)*

Mr. Carl M. Frisén *(U.N. Economic Commission for Asia and the Far East)*

Ambassador Melquiades J. Gamboa *(University of the Philippines)*

Mr. Robert K. A. Gardiner *(U.N. Economic Commission for Africa)*

Professor Richard Gardner *(Columbia University)*

Mr. Halvor Gille *(U.N. Fund for Population Activities)*

Professor Leo Gross *(Fletcher School of Law and Diplomacy)*

Dean Edmund A. Gullion *(Fletcher School of Law and Diplomacy)*

Miss Julia Henderson *(International Planned Parenthood Federation)*

Mr. Edmund H. Kellogg *(Fletcher School of Law and Diplomacy)*

Professor Dudley Kirk *(Stanford University)*

Dean Peter F. Krogh *(Georgetown University)*

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Dr. Rafael M. Salas *(U.N. Fund for Population Activities)*

Mr. Marc Schreiber *(U.N. Human Rights Division)*

Mrs. Helvi Sipilä *(Assistant Secretary-General for Social and Humanitarian Affairs, U.N.)*

Mr. Leon Tabah *(U.N. Population Division)*