

BIBLIOGRAPHIC DATA SHEET

1. CONTROL NUMBER
PN-AAH-3042. SUBJECT CLASSIFICATION (695)
PA00-0000-0000

3. TITLE AND SUBTITLE (240)

Human rights and population

4. PERSONAL AUTHORS (100)

5. CORPORATE AUTHORS (101)

U. N. Economic and Social Council. Int. Advisory Committee on Population and Law.

6. DOCUMENT DATE (110)

1973

7. NUMBER OF PAGES (120)

107p.

8. ARC NUMBER (170)

9. REFERENCE ORGANIZATION (130)

Tufts

10. SUPPLEMENTARY NOTES (500)

(In Law and Population book series no. 5)

(Proceedings of the Second Annual Meeting of the Int. Advisory Committee on Population and Law, Tokyo, 1972)

11. ABSTRACT (950)

12. DESCRIPTORS (920)

Population policy
Human rights
Policies
Family planningPopulation law
Law
Organizations

13. PROJECT NUMBER (150)

14. CONTRACT NO.(14b)

AID/csd-2810

15. CONTRACT TYPE (140)

GTS

16. TYPE OF DOCUMENT (160)



HUMAN RIGHTS AND POPULATION

**FROM THE PERSPECTIVES OF LAW,
POLICY AND ORGANIZATION**

**Proceedings of the Second Annual Meeting of the International
Advisory Committee on Population and Law Convened at the
International House of Japan, Tokyo October 30-31, 1972**

**Law and Population Programme
The Fletcher School of Law and Diplomacy
Administered with the Cooperation of Harvard University
Tufts University
Medford, Massachusetts 1973**

Law and Population Book Series
No. 5

This book 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. / The conclusions and opinions of this book are the sole responsibility of the authors, and do not necessarily reflect those of their organizations, the Law and Population Programme, or any of the supporting agencies.

Library of Congress Catalog Card Number: 73-90580
Printed in the United States of America

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PREFACE

Responding to the Secretary-General's invitation to non-governmental organizations to lend support for the World Population Year and World Population Conference in 1974,¹ the International Advisory Committee on Population and Law² decided to devote its second annual meeting³ in Tokyo, October 30-31, 1972, to the theme of "Human Rights and Population: from the Perspectives of Law, Policy and Organization." Members of the Committee were invited to present papers on one of the three main topics: (a) The Lawyer and World Population; (b) Human Rights and Family Planning; and (c) Beyond Family Planning: the Role of Law. This volume contains the papers presented and a summary of their discussion at the meeting.

The meeting was held immediately preceding the Second Asian Population Conference (November 1-13), thus enabling the members of the Committee to attend the Conference as well as to organize a special programme at the Conference in the form of a "Simulated Cabinet Meeting." The latter was designed to show how each of the various government Ministries can make a contribution to the implementation of the principle that family planning is a human right, and how these contributions can be coordinated. (Excerpts of statements at the Cabinet Meeting appear in Appendix B.)

The Committee noted the fact that in at least forty countries around the world, both developing and developed, steps are already being taken to respond to the Secretary-General's suggestion that countries examine the effect of legislation upon population.⁴ (These efforts had, in many cases, been stimulated by the work of the Committee itself.) It hoped that this effort at rallying the support of lawyers throughout the world to join in a common attack on the population problem will be followed by similar efforts by such other professional groups as economists, political scientists, journalists, educators, public administrators, communication experts, etc., who have thus far remained on the sidelines of the population field. For

¹See *Proposed Measures and Activities for the World Population Year: Report of the Secretary-General*, U.N. Doc. E/CONF. 60/PC/R.5 (1971), p. 9.

²Acting under ECOSOC resolution 1296 (XLIV), para. 19, the Secretary-General of the United Nations placed the Committee on the Roster as a Non-Governmental Organization accredited to ECOSOC. See U.N. Doc. E/5282, 17 April 1973.

³The first meeting was held at the OECD Development Centre in Paris, April 1-2, 1971. For its programme and part of the proceedings, see *Law and Population Monograph Series No. 2*.

⁴See *World Population Year 1974: Proposed Programme of Measures and Activities, Report of the Secretary-General*, U.N. Doc. E/CN.9/245 (1971), p. 10.

only by a concerted action by all concerned not merely the demographers, doctors or health personnel - could the population problem be satisfactorily resolved.

Luke T. Lee
Executive Secretary
International Advisory Committee
on Population and Law

PART I

THE LAWYER AND WORLD POPULATION

AN INTRODUCTION

Mrs. Helvi Sipilä, Moderator

The title of the discussion, namely, "The Lawyer and World Population" would surprise lawyers in many countries, who would ask what lawyers have to do with population problems and programs. However, consideration of the effect which recent amendments to abortion laws have had on population will provide the answer. Moral and legal attitudes toward abortion have led to illegal abortion in many countries. An amendment to present laws, which would authorize abortions under certain conditions, could be expected to lead women, who previously had held back on account of legal scruples, to take advantage of the new law.

The people of the world need a common forum for discussion if they are to understand that there is a population problem, which has to be dealt with. The population problem, like the environment problem, has suddenly become apparent and has drawn international attention. It is extraordinary that we and other people around the world have only now realized that we should have been behaving differently and that certain risks have been developing around us, without our knowledge, which endanger the future of the world. Apparently, men need either a common interest or a common danger, if they are to take positions and act on a coordinated basis. This is brought out by the Partan study,¹ which shows how recently it was that most of the UN agencies were authorized to study population questions.

The United Nations has enunciated two principles. One is, that it is a human right of the couple freely and responsibly to decide on the number and spacing of their children. The other is the principle, enunciated even recently in connection with the Second Development Decade, that each sovereign state has the right freely to decide on its own population policy. The United Nations, in going directly to the family, appears to have gone within the field covered by the rights of states. How does a lawyer deal with this? Who is to decide what the right of the couple is and what shall influence their decision?

As I pointed out at the 1971 meeting in Paris,² I was asked to visit a

¹Daniel G. Partan, *Population in the United Nations System: Developing the Legal Capacity and Programs of UN Agencies* (Law and Population Book Series No. 3; Leiden: A.W. Sijthoff and Durham, North Carolina: Rule of Law Press, 1973).

²The first meeting of the International Advisory Committee on Population and Law was held on 1-2 April 1971 at the Development Centre of the OECD in Paris. For its programme and part of its proceedings, see Law and Population Monograph Series No. 2.

number of countries as Special Rapporteur on Family Planning for the Commission on the Status of Women. I found out that only a few Governments were able and willing to undertake national surveys on the relationship between Family Planning and the Rights of Women. Many Governments had qualified their lack of interest in doing the job with alleged lack of time, or of financial aid or of qualified personnel. However, after my consultations with a number of Governments, such as India, Thailand, Indonesia, the Philippines, and Japan in Asia, and Ethiopia, Kenya, Nigeria, Senegal and Tunisia in Africa, Jordan and Lebanon in the Middle East, these Governments were willing to study the question in their countries. Before my visit these Governments had been apparently unaware of the significance of the Status of Women in this regard even when they were members of the Status of Women Commission. I was regarded as some representative of the American "Women's Lib" movement rather than as a representative of the United Nations, concerned with human rights. In many countries, it had also been difficult to explain, what the Ministry of Justice of the Faculty of Law had to do with the question.

Finally, after I had explained the extent to which law is actually involved, a genuine interest has been stimulated and each Government has reacted positively and agreed to make studies, some of which have already been completed. Good in-depth national studies are expected from India, Indonesia, Egypt and Nigeria, financed by UNFPA. Some of the reasons behind the relationship between family planning and the status of women are being brought out. However, in a majority of countries, a lack of understanding of the Status of Women still exists. Differences between men and women appear particularly in the four fields of: education; employment opportunities and treatment of women workers; political rights, including decision-making; and family legislation. Women's participation in decision-making is particularly important, where family planning is involved.

I welcome the speakers on this panel who will speak on the various aspects of the subject, "The Lawyer and World Population."

ROLE OF THE GOVERNMENT LAWYER

Mr. Philander Claxton, Jr.

Although lawyers in all spheres have for years been concerned with laws which affect fertility on specific subjects related--generally quite indirectly to population matters, such as those listed in the Law and Population Classification Plan,* it has been only recently that lawyers in a national Government have been confronted with population law in the over-all demographic sense of national population policy. However, the basic legal duties are the same: to identify and analyze relevant legislation and to interpret it. In addition, the government lawyer, in connection with proposed new legislation, must: draft changes in existing laws and recommend them to policy officials, assist in presenting them to the legislature, assist in creating the "legislative history" needed for interpretation later, interpret the new law to policy and programme officers as the law comes into operation, and advise these officers on the law and organization involved in implementing a large-scale programme of this kind. The impact of his work is visible in Turkey, for example, where it was necessary to repeal the older laws against the importation and use of contraceptives, and in Singapore and India, where legislation was drafted and enacted to modify the abortion laws.

As for government lawyers in those developing countries which receive foreign assistance, they must also advise their Governments on how their population/family planning programmes can be carried out without violating their existing laws.

Instead of discussing categories of theoretical legal activities on a world-wide basis, I will cite some actual experiences in the population/family planning programmes conducted by the United States. Possibly the first U.S. government lawyer to be involved in the "population" aspects of a U.S. government aid programme was the lawyer of the Economic Cooperation Administration who, in the late 1940's, drafted a regulation on U.S. Marshall Plan assistance to European countries. That regulation placed contraceptives in a category with toothpaste and deodorants on a list of non-essential commodities not to be supplied under the European Recovery Program. Contraceptives were barred from U.S. aid thereafter until 1967 as being non-essential.

When "Title X" of the American AID legislation came to be drafted, it was the lawyers for the Senate Foreign Relations Committee and the House Foreign Affairs Committee who had the responsibility. The lawyers

*Law and Population Monograph Series No. 5.

for the State Department and Agency for International Development made two successful suggestions. One of these was to change the name of the programme from "Family Planning" to "Population Growth." The latter phrase is far more acceptable in many countries who still find family planning an unacceptable government activity. Moreover, the change showed that the help is not for narrow family planning purposes, but is designed to deal with the far broader problems of growth.

The second suggestion was to change the law so that money for population assistance could be taken from funds appropriated for any economic purpose, and not merely from funds appropriated for *grant* aid. This made the program workable since the AID funds available for grants were quite limited and were needed for many technical assistance activities. It was unlikely that, in light of the low priority which most developing countries give to population programmes, they would have been willing to *borrow* money for population purposes. Thus, by making *loan* money available for *grants* for population programmes, the legislation made the programmes feasible.

The lawyers also helped the legislators in clarifying the report on Congressional intent in adopting the legislation. This included the intention to make a major amount of the funds available to international agencies such as the United Nations and the International Planned Parenthood Federation. The lawyers were also able, through assisting the Conference Committee (between the Senate and the House) to obtain the elimination of certain negative limitations.

The next step was to advise on the handling of the many requests for assistance which the U.S. Government had received under the Act. For example, most requests dealt with demographic or family planning subjects which were clearly authorized. Some, however, though including a clearly authorized element, went much further. As an illustration, a family planning project might involve maternal and child health or broad health programmes, of which family planning was only a small part. The General Counsel of AID had then to interpret Title X. In so doing, he made three points: 1) When a project is principally for a population/family planning purpose, Title X funds may be used for substantially anything relevant to the objective; 2) When a project is for general purposes, such as improving literacy or general education, health, or agriculture, the funds cannot be used even though the raised standards would help in reducing fertility; 3) a "middle type" of programme designed to alter traditional attitudes in families favoring many births by reducing infant mortality may qualify. These three principles became basic to U.S. aid responses to requests for assistance.

Legal problems other than the interpretation of Title X were raised by other American laws controlling State Department activities generally. As an example, there is the legal requirement that new funds not be used to generate local currencies for family planning programmes in countries where there were excess amounts of local currencies which had already been generated by earlier American assistance, particularly food aid. This question proved particularly difficult in the case of India, where the U.S. already had an enormous accumulation of rupees generated under the Food for Peace Program and other earlier programmes. Although these rupees were theoretically available for family planning, the Indian Government opposed their use on the ground that it would be inflationary. The legal officers were necessarily involved in the analysis of the problem which led to the determination that the old rupees could not be used effectively for this purpose and that the authorization to grant \$20,000,000 of the new Title X dollars be made for specific family planning programmes. Some aspects of this project were, in turn, questioned by the General Accounting Office, and there would be discussions for some time into the future on the matter.

Accounting questions create legal problems, and this had made it difficult to gain procurement flexibility and to reduce restrictions to a minimum. A recent example of this was the problem raised in connection with a grant to IPPF, which can be asked by the General Accounting Office to account for its use of the funds. But the IPPF normally passes the money on to its constituent local family planning associations. To what degree should the American accounting office seek to follow their funds to this next step?

Another recent legal problem had been raised by the Congressional requirement that grants not be made to more than 40 countries outside Latin America. For this reason, the U.S. had had to terminate its small grant programmes in a number of African countries. However, Title X funds are legally exempt from the 40 country limitation. Nevertheless, the question was raised as to the wisdom of granting money for family planning programmes in a country from which general development grants on a bilateral basis were excluded -but could be made available to regional programmes. The U.S. has been hesitant to make bilateral grants of Title X funds in a number of African countries on account of the political implications of providing assistance in this delicate field to the exclusion of others. It has turned, therefore, toward regional projects or programmes, and lawyers have been called on to help establish the criteria for this approach. Another problem is raised by the legal requirement that assistance be rendered only to "friendly" foreign countries. Does this

exclude help under Title X from countries where the U.S. has no diplomatic relations? The General Counsel has so ruled in other cases. So far, this ruling has been followed for Title X funds, but the question of research in such a country is raised. The General Counsel had said that research would be allowable if it were for the benefit of a third and "friendly" country.

A final legal problem was raised by the ban on obligating AID funds beyond the needs of one fiscal year. This had prevented AID from helping IPPF to keep a stable staff and a steady flow of supplies. The problem has been settled by the legal decision that IPPF's needs for one fiscal year require it to plan continuous activities beyond that year.

In conclusion, these are obviously only examples from the American scene. In countries undertaking population growth control programmes, government lawyers should have a leading role in identifying the whole complex of laws and customs which encourage high fertility or inhibit the ability of individual couples to exercise their human right to control this fertility and in recommending the new laws and regulations needed to encourage and assist attitudes and practices of lower fertility.

Discussion:

The Moderator commented that, in her experience, it was frequently necessary to convince a developing country that a donor country or agency was prepared to help with maintaining general health of the children before that country would accept family planning projects. Mr. Claxton replied that this had been particularly true in Africa. The U.S. had felt it is important to give help for general programmes related to population size such as demographic surveys and M.C.H. projects. General M.C.H. programmes are very expensive and it would not be possible to provide such services throughout a country financed by Title X funds alone. Therefore, demonstration projects had been used. These might eventually be extended to general health programmes (including family planning), using paramedical personnel and reaching into the rural areas, if consortia of other national donors and U.S. agencies can be developed to help those countries which wish to undertake them.

THE INTERNATIONAL ORGANIZATION LAWYER

Dr. Jean de Moerloose

I wish to confine my discussion on the topic assigned me within the framework of public health, which is WHO's main responsibility. Two types of law are involved in public health: The first is the type of law which establishes technical standards, *e.g.*, in respect to communicable disease control, water and air pollution, and protection against ionizing radiations. The second concerns laws on family health and population, in which religious, moral, ethical, social, cultural and economic factors play a large part.

As to the second category, the medical and public health professions must collaborate with lawyers, demographers, sociologists, and economists, among others, since the field is complex and politically delicate. Experience has shown that new legislation in this field may conflict with deep-rooted opinions and sometimes antiquated legislation. Even when the need is understood, obstacles remain. In the United States, for example, it was only in 1965 that the Supreme Court declared that the right to decide whether and when to have a child is a fundamental human right.¹ The situation is similar in other WHO Member States. As a result, only a beginning has been made in dealing with family health and population. The same applies to WHO, which cannot act without the specific mandate of its members—a mandate obtained only in 1965.

Although law occupies a most important role in the formulation and implementation of national and international population projects, only a start has been made. The huge task of adjusting each country's laws, regulations, decisions, and administrative structures to the goals of the projects remains to be done. A recent report showed that few Governments, if any, had systematically compiled their laws in this field.

WHO had, however, begun in 1948 a programme which closely affects the population problem, namely, the compilation and publication of the *International Digest of Health Legislation*. This covers legislation on abortion, sterilization, family planning, contraception, etc. Since 1948, 22 volumes containing 10,000 items of health legislation have been published in full or in summary form. It is the only publication which regularly publishes health legislation of all countries of the world. Without the *Digest*, research workers would have a difficult task in getting at the original and official sources. The material is also used by Governments

¹*Griswold v. Connecticut*, 381 U.S. 479 (1965), declaring as unconstitutional the Connecticut law forbidding the use of contraceptives, on grounds of violating the right of privacy.

which wish to amend their own health legislation and therefore want to see what other countries have done (as far as population is concerned). In addition, the *Digest* published a survey of abortion legislation as of 1970.² It should be cautioned, however, that the *Digest* cannot give top priority to *population* law; the *Digest* must cover the whole field of *health* legislation.

Mention should be made of the important role which the International Labour Organisation, for instance, plays in the drawing up of international conventions in such fields as maternity benefits, status of women, and social security. The extent of the impact which such conventions have on fertility, however, remains to be studied.

²WHO, *Abortion Laws: A Survey of Current World Legislation* (Geneva: WHO, 1971).

**THE LAWYER FOR CONCERNED PUBLIC
INTEREST GROUPS**
Mrs. Harriet F. Pilpel

In the United States there are a number of organizations that have worked in the field of family planning and I have been fortunate enough to be connected with some of them. Among them are the Planned Parenthood Federation of America, Inc., also known as Planned Parenthood-World Population, the Association for the Study for Abortion and the Association for Voluntary Sterilization.¹ All of these private public interest organizations are concerned with the practice of what I would call "aiding the development of the law" - i.e., they are "movers and shakers." Almost everything these organizations deal with are areas which at one time or another were frowned upon by the law. When the time comes that they are certain that everything they think needs doing is well within the law, they will know that they are not doing their jobs, for pioneering is their "thing."

In connection with the activities of Planned Parenthood, I have been working on a publication which I think will mesh into the work of the Law and Population Programme. Two years ago Planned Parenthood entered into a contract with the United States Department of Health, Education and Welfare for the preparation of a study of the laws relating to contraception, voluntary sterilization and medical services to minors of the Federal Government, the fifty states, the District of Columbia and the several territories. I was the director of this study, which has been delivered to the United States Government and is now in the process of publication by the Government Printing Office. It should be off the press soon, and we have been concerned about how to keep the study up to date. To meet this need, Planned Parenthood, through its Center for Program Policy and Development, is going to publish every other month a Family Planning Reporter, which will cover legal developments as they occur, with reference to contraceptives, voluntary sterilization and service to minors in the United States.

In addition, the Family Planning Reporter will cover the subject of abortion and, probably, women's rights and sex education. To the extent

¹Largely because of my connection with concerned public and private organizations, I have just been asked to be the chairman of an American Bar Association Committee, with the unfortunate name of "Committee on Overpopulation." My first official act was to request that the name of the Committee be changed at once, and I believe it will be changed to "Committee on Family Planning and Population Problems." The Committee is a division of the Association's Section on Human Rights.

that funds and personnel are available, its coverage might extend beyond these. It will eventually be on a key-number basis, and I am hoping, in this connection, that we can correlate it with the *Classification Plan* that the Law and Population Programme has developed.

The study itself will be the "base-line" on contraception and voluntary sterilization, including the question of the rights of minors in these fields. There will also be a base-line article in an early issue about abortion, so that henceforth the updating can also cover developments in that field. It will be more difficult to deal with the many developments affecting the status of women, because of the enormous canvas which that takes in.

I have also become much interested in model codes and believe that they are desirable. However, I am convinced that they must go beyond family planning generalities. From what I know of the United States today and of a few other countries of which I have detailed knowledge (that would include Great Britain and Israel), the need is to be extremely specific. I am not now addressing myself to countries which are not yet committed to the proposition that family planning is a human right, but I am referring to those countries which either in practice or in law have taken that first step. I think it is important that we supplement any model code with detailed regulations in the manner that the United States Bureau of Internal Revenue has supplemented its code. Talking generally about family planning and human rights is a necessary first step but, after that, I think it is important to spell out specific concrete factual entitlements.

I would like to mention two issues which in my opinion require immediate and special attention in the United States if we are to achieve the goal of every child being a wanted child, *i.e.*, the meaningful implementation of the principle that family planning is a fundamental human right. First is the question of the employment of para-professionals. Planned Parenthood has authorized our office to study the question of how para-professionals can best be used in a family planning programme. Both the State of New York and the State of California have enacted "Physicians' Assistants" Acts but, generally speaking, there is a great deal of confusion as to what can be done with para-professionals in United States family planning programmes. This is true despite the obvious fact that any important family planning programme, even in the United States, will need to use para-professionals to an extent that may or may not be legally authorized at the present time.

The second issue which needs prompt clarification is the whole matter of pharmacy and drug regulations. Despite appearances, these do have an enormous impact on family planning. Closely related to this is the entire activity of our Food and Drug Administration which has recently been

accused in the United States by medical groups, including the National Medical Advisory Committee of Planned Parenthood, of acting unreasonably in not permitting the distribution under prescription, for family planning purposes, of certain drugs which the physicians on the Committee feel are extremely helpful for family planning and which are licensed for other purposes. We are also still plagued with many laws prohibiting the advertising and display of contraceptives which clearly inhibit their availability and which are inconsistent with the need for public awareness of their family planning rights and how to exercise them.

In discussing the law as it affects public interest family planning organizations, it may be helpful to see the legal implications under three main headings, which reflect the way in which the applicable law developed in the United States.

First the law was a prohibition: "You Must Not." This was the original meaning of most of the laws on family planning in the United States.

Gradually the law on the subject changed from being a prohibition and became a permission: "You May." This, in turn, subdivided into three subdivisions. First, a total *laissez-taire*, where there is no prohibition against family planning but the Government will have nothing to do with it one way or the other. This is an improvement over prohibition, but not enough. The second subdivision under "permission" arises when a particular Government deliberately refrains from making it possible by public funds for its poorer citizens to choose family planning even if they want to, often merely by saying nothing. The final subdivision is more and more coming to be the situation in the United States where public agencies, particularly state departments of health and welfare, use funds, including liberal federal funds, affirmatively to make it possible for those who choose family planning to practice it.

Third is the drawing of the recognition that the law must make access to family planning a human right. If it is a human right, the law can neither prohibit it nor require it, nor is it enough for the law to stay out of the situation entirely. An obligation must be recognized for the Government to make the exercise of this right possible. Some years ago, there was great excitement about *forcing* people to use family planning devices. Since the recent data in our country shows that the population growth rate is declining, we have heard less of this suggested coercion. All of us interested in family planning must continue to fight against every effort to force people to choose family planning. The idea is to let them choose family planning freely, and make it possible for them to use it if they do so choose.

Turning now to our function as "creative lawyers," I shall try to sketch

what happened in connection with one particular family planning doctrine in the United States which is evolving right before our eyes. Until the *Griswold* decision in 1965, there was no such thing in the United States as a constitutionally guaranteed right of privacy in the area of family planning. In that decision, which sounded as if it was a rather narrow one, the United States Supreme Court said that married couples had the right to use contraceptives within the privacy of their home. Obviously, this is a somewhat restricted use of the word "privacy." Gradually it has been recognized by our law not only that married couples have the right to do what they please in matters of family planning, but also that the right of privacy must be extended to all aspects of family, sex and marriage. Many lower courts have extended the right of privacy beyond the protection of the right of married couples to use family planning to include the right to make decisions on all intimate matters affecting marriage, family and sex. The United States Supreme Court recognized this development when it extended the right to use contraceptives to the unmarried. The State of Massachusetts convicted William Baird for handing a contraceptive to a woman student at one of the universities in Boston. Baird argued that the Massachusetts statute, which prohibited the distribution of contraceptives to the unmarried and which required a doctor's prescription even for non-prescription contraceptives for the married, was unconstitutional. The United States Supreme Court, in March of 1972, held for Mr. Baird and said that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether or not to bear or beget a child."

We are now awaiting the United States Supreme Court's forthcoming decision in the first abortion cases to be argued before that court.² On October 11, 1972, in fact, argument was heard for the second time with reference to the abortion laws of the States of Georgia and Texas. The Texas abortion law provides that abortion may be performed only to preserve the life of the woman. The Georgia abortion law permits abortion to be performed, not only to save the life of the woman, but also to protect her mental and physical health, in cases of rape and incest, and to avoid the birth of defective offspring. The Georgia law also requires a number of physicians to concur in any decision that an abortion is to be performed, and requires that the abortion be performed only in a hospital accredited by the Joint Commission on Accreditation of Hospitals, which is a private agency.

²See Postscript at the end of this article.

The most interesting question at the argument was asked by Mr. Justice Thurgood Marshall, the only black Justice on the Supreme Court. He asked the attorney for the State of Texas whether in his opinion a fetus is a human being. To this the attorney said "yes." Justice Marshall then asked, "If the fetus is a human being, how can the law authorize its destruction even to save the life of the mother?" And when the Texas attorney acknowledged that this was the state's contention, Justice Marshall asked: "Why doesn't the law then authorize the destruction of the husband in any case where he is a threat to the woman's life?" This did not elicit any very clear answer. (We have a number of recent cases in the United States involving the question—really a philosophic one—whether or not a fetus is a person.)

A further aspect of the development of the right of privacy, which still remains to be evolved, is the constitutional right of young persons, *i.e.*, persons under the age of majority, to choose whether or not to have children. After the abortion issue, this is probably the most significant open question in the United States in the field of the law relating to human reproduction. It is an extremely important issue because the illegitimacy birth rate among teenagers is going up steadily, while the general illegitimacy rate is going down. The Population Commission of the Federal Government has recommended that contraceptives be made available to all teenagers under conditions properly responsive to their needs. (The President of the United States has indicated disagreement with that position.) The Commission's report is being supported by a citizen's group headed by John D. Rockefeller, who was the Chairman of the Commission. They are hoping to educate the public with reference to the provisions of the Commission's report among which the recommendation dealing with contraceptive services to teenagers is perhaps the most important. It is interesting that recent polls indicate that 73% of the people in the United States support contraceptive services for teenagers, although this opinion has not yet been reflected in the legislatures of a number of states.

However, new laws responsive to the teenagers' needs are coming into effect in many states. It is becoming recognized that persons of all ages have a constitutional right of privacy. There are now venereal disease laws in 49 of the 50 states which provide that people of any age—or of ages as low as 12 or 14—may have venereal disease services on their own initiative without parental involvement or consent. This was the result in part of a "civil disobedience drive" by the American Medical Association, an organization which is not usually involved in such activities. The Association urged doctors to consider that meeting the VD needs of their

patients of all ages was their duty and a high priority, regardless of what the legal restrictions might seem to be. In many states now the age of majority has in any event been reduced by law to 18 for all purposes. Some states, such as Colorado and Tennessee, have adopted model comprehensive family planning acts. These specifically provide that young persons have the right to family planning services on request and without parental involvement. A number of other states, Pennsylvania for instance, have passed "Comprehensive Medical Treatment of Minors" statutes, which permit young people to have all kinds of medical services if, in the opinion of the doctor, the refusal to give such services without prior parental consent would result in detriment to the minor. We also have specific laws in some states applicable to contraception only, which provide that any person who, in the opinion of the attending physician, is in need of family planning services, that withholding of such services would result in a health hazard, may have such services without parental consent. Kentucky and Illinois have such contraceptive statutes.

If these developments continue, it may well be that at last the furnishing of needed medical services to minors will be legal in all 50 states. When that happens, however, I am sure that there will be other issues which will need the activity of the "movers and shakers" the Planned Parenthood Movement and its lawyers, the Bar Association Committees and other concerned groups will continue to "move and shake" in this area at least until every child in the United States is truly wanted.

POSTSCRIPT

[Note prepared by Mrs. Pilpel and furnished to Law and Population Programme after Supreme Court Decisions on Texas and Georgia Abortion Cases.]

On January 22, 1973 the United States Supreme Court decided two abortion cases: (1) The "Texas" case (*Roe v. Wade*) and (2) the "Georgia" case (*Doe v. Bolton*). Both decisions were by a majority of 7-2, with Justice Blackmun writing the majority opinions.

In the "Texas" case, the Court held that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The Court also said that the right is not absolute and is subject to some limitations, which the Court spelled out and which are summarized below.

The Court held that the word "person" as used in the Fourteenth Amendment does not include the unborn. It ruled that the fetus has no

constitutional rights.

Beyond this, the essence of the "Texas" case is that criminal abortion statutes, such as the Texas statute, which permit abortion only to save the mother's life violate the right of privacy protected by the Due Process Clause of the Fourteenth Amendment.

The Court said that up to approximately the end of the first trimester, the State can have no voice in the decision to have an abortion and that the performance of the abortion must be left to the medical judgment of the woman's physician.

Following the first trimester of pregnancy, the State in promoting its interest in the health of the mother may in the second trimester, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health but may not limit the grounds for abortion. The Court held that in the second trimester the State has a legitimate interest in seeing to it that abortions are performed under circumstances that ensure maximum safety for the patient. This interest includes such factors as the performing physician and his staff, the abortion facility itself, the availability of after-care, and adequate provision for any emergency or complication that might arise.

In the third trimester, after the fetus becomes capable of "meaningful" life outside the mother's womb, a State, in promoting its interest in the "potentiality of human life," may regulate or even forbid abortion except when it is necessary to preserve the life or health of the mother. (It seems clear that health includes mental health.)

With reference to all three trimesters, the State may define the word "physician" to mean only a physician currently licensed by the State and may forbid abortions from being performed by any other person.

The Georgia law permitted abortion to protect the life or health of the woman, or where the fetus was likely to be born with a serious defect, or where the pregnancy resulted from rape. These limitations are invalid for the first and second trimesters under the principles enunciated by the Court in the Texas case. In the "Georgia" case, the Court also struck down the following requirements: that abortions be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals; that abortions be approved by a hospital committee; that two additional physicians confirm a woman's need to have an abortion; that abortions be restricted to residents of the state. The Court held that all of these requirements were invalid at any time during pregnancy.

The Court also said that after the first trimester, upon a proper showing of the need therefor to protect maternal health, a state may require that abortions be performed in a licensed hospital.

What the Decisions Mean to Other States

The Texas decision invalidates all state laws which prohibit abortions except for those necessary to preserve the life of the mother. Statutes of this type were on the books in 30 states besides Texas (although in some of these states lower courts had already declared some of them unconstitutional). The laws in effect in these states which apply generally to medical practice would in any event remain in effect with respect to abortion.

Thirteen states had laws patterned after Georgia's. The parts of those laws which limited the grounds for abortion in the first two trimesters are now invalid. Some other provisions of these statutes are also inconsistent with the Supreme Court's ruling.

Alabama and the District of Columbia had laws generally permitting abortion for reasons of the life and health of the woman. These statutes also are inconsistent with the Supreme Court's decisions regarding at least first trimester abortions, and may be inconsistent with the Supreme Court decisions in other respects as well.

The statutes in the four so-called repeal states (Alaska, Hawaii, New York and Washington) are more consistent with the Supreme Court's decisions, but in some respects they, too, do not comply with the decisions.

States may enact new laws regulating abortion, but such laws must be consistent with these decisions of the Supreme Court.

[End of postscript]

**LAW TEACHING AND RESEARCH:
THE GHANA LAW AND POPULATION PROJECT**
Professor K. Bentsi-Enchill

The Ghana Law and Population Project is a two-year undertaking established in the Faculty of Law of the University of Ghana in 1972. It is staffed by six members of the Faculty and a social anthropologist of the Institute of African Studies, all working part-time on the project. It has been aided by graduate students in the LL.M. programme working as research assistants.

The first year of the project has been devoted primarily to the work of surveying all existing Ghanaian law with a view to determining and describing such parts of this law, whether statutory, decisional or customary, as can be said to have some impact on population trends. Obviously relevant areas of law are fertility regulation, family law, the law concerning children and child welfare, criminal offences and penology, the law concerning public welfare, public health, education, property and other economic factors.

On the basis of available personnel, the wide area to be covered was divided up and assigned as follows: Dr. Atta-Mills was assigned the areas of Fertility Regulation and Property and Economic matters; Dr. Date-Bah, Criminal Offences and Penology; Dr. Fiadjoe, Children and Child Welfare; Dr. Otuteye, Family Law and Public Welfare; Dr. Turkson, Public Health and Education. The one sociologist in the team, Dr. Christine Oppong has undertaken a two-sample study of patterns of family decision-making in the framework of the existing law relating to family planning. The present writer assumed responsibility for miscellaneous issues and for the direction of the project.

The purpose of this initial work of law compilation is to assemble provisions of the various branches of our law, written and unwritten, which actually affect or purport to affect population trends, and to present a summarising monograph describing this law. Knowledge as to what the law actually provides is obviously a prerequisite step towards the work of assessing the impact of the law on patterns of decision-making relevant to population trends. Such an assessment of actual impact is by no means an easy matter, dependent as this necessarily is on the functioning and effectiveness of law-enforcement machinery and on social and cultural norms and predispositions, conditioned by custom, beliefs and conventions.

It is no less obvious that such an assessment of the impact of law on population trends cannot be undertaken without prior knowledge of the

actual provenances of the law. Nor are the prospects bright for any national family planning programme, such as that undertaken in Ghana, if it is prosecuted in disregard of laws and practices which operate in a contradictory manner nullifying and frustrating the objectives of the programme.

Thus it is a central objective of this preliminary work of law compilation to generate and disseminate knowledge regarding the actual provisions of our law, to reveal any contradictory policies implied in them as regards population trends, and thus to provide a basis for conscious harmonisation and reform of our law to support rather than frustrate declared national policy.

For it has to be borne in mind that a state speaks officially through many channels; and that mere official declarations such as the important paper announcing its population policy which was published by the Government of Ghana in March 1969 are seldom enough, however vigorously prosecuted. A nation also speaks officially through the laws it enforces and through the language of its conduct in declining or failing to enforce other laws; through the practices it tolerates and through the prohibitions it imposes on other practices. And the fact that law can be intelligently formulated and applied as a conscious tool of social change is one of the working hypotheses of our modern age.

Thus while the need for a sound population policy has been well recognised in Ghana for some time now, and a far-sighted national policy proclaimed in 1969 under the heading of *Population Planning for National Progress and Prosperity*, and many important practical and administrative measures taken towards the implementation of this policy, it has to be observed that this national policy is being prosecuted in a climate of substantial inattention to obviously relevant legal arrangements, some of which can be shown to operate, and therefore to "speak officially," in a manner unhelpful and even contradictory to the national policy on population declared in the policy paper of 1969.

It is therefore at least pertinent to investigate and ascertain the provisions and probable impact on population trends of our law in all relevant areas and to reform and harmonise any contradictions in it as part of the process of declaring and implementing national policy.

The area of enquiry is obviously extensive. Questions have to be asked concerning our tax laws, the provisions made or not made which may be shown to favour or hinder large families such as tax allowances in respect of children, inheritance taxes, etc.; concerning the legal framework of medical practice and public health administration ranging from the regulation of medical practice, the licensing of doctors, nurses, pharmacists

and other personnel, the quality control of drugs and medical supplies, the effect of our import regulations on the availability of various medical supplies; concerning welfare legislation, regulating such matters as maternity leave and benefits, child or female labour, old age pensions, housing, family and child allowances; concerning our legal requirements and provision for basic elementary education through sex education to medical and paramedical education; concerning the relevance to our public education schemes of our criminal legislation regarding obscenity, or of the law regarding abortion and sterilization to the concern for population control and family planning. And no less pertinent is an investigation into the provisions and operation of our law regarding the family and personal status. What consequences on our declared population policy are we to expect from the prevalence and toleration of polygamy in our society? What is the legally permitted age or ages for marriage, and could any change in this have relevance to our population policy? Is our traditional system of extended families neutral in its impact on population trends or does it tend to foster or retard population growth? Our systems of inheritance and succession to property? And so on.

The law on this wide range of matters is extensive, and not all of it is directly relevant to population trends. The more directly relevant portions of this law are found scattered in many enactments, decrees, customs and judicial decisions. The initial phase of law compilation now nearly completed has the very modest aim of collecting and describing the actual provisions of those parts of our law that are directly relevant to population and fertility trends.

The next phase will be one of critical appraisal. The design is to arrive at proposals for legislative and administrative reform of a kind that will assist the implementation of the national population policy. It is planned to sift and sharpen the critical appraisal of the relevant existing law and to improve the relevance and acceptability of the consequential reform proposals through the aid of a series of interdisciplinary seminars planned for the Michaelmas term of 1973.

For these seminars there will be available not only a comprehensive compilation of the relevant existing law but also a monograph summarising the varied provisions of the relevant law and a very tentative legislative proposal based on the results of an initial critical appraisal of the law.

Hopefully this seminar will be followed by a searching study of procreative behaviour in relation to law in Ghana.

A DEMOGRAPHER'S VIEW

Professor Dudley Kirk

A demographer is primarily concerned with the end product of family planning *i.e.*, whether or not the birth rate falls. A demographer talks about how birth rates actually do get reduced rather than about human rights. He respects the latter but is primarily concerned with the former.

First, I would discuss "where," and then "what." As to "where," the most important places are those countries in which there has not been any significant reduction, such as India and other countries which contain half of the world's population. In contrast to these, some of the smaller and more progressive countries like Taiwan, Korea, and Singapore have already achieved falling rates and have a "progressive inertia" which would probably solve their problems over a long term. The problem is that at least one-half of the world's people have not yet achieved this situation.

As to "what to do," history shows that the two proven ways of getting started are postponed marriage and abortion. The first technique delays first births and the second reduces the number of fourth, fifth, and sixth children. History shows that the initial drop in birth rates in Europe, the USSR, Japan, Hong Kong, Malaysia, Singapore, Taiwan, and Korea, was the result of these two factors.

Although many people attribute the progress in Taiwan and Korea to their family planning programmes, the birth rate had already started down before the programmes began, owing principally to postponed marriage and abortion. I expect to see initiation of declines in the birth rate in many countries of the developing world in the relatively near future, not necessarily from family planning. The availability of abortion, legal or not, is what counts, as Romania has demonstrated. There the birth rate rose two and a half times after abortion had been suddenly made illegal, but is falling near its previously low figure as illegal abortion and contraception become available. The two methods precede contraception and are the principal means now being used in Central America and Venezuela. One-third of the beds in the maternity hospitals are taken by abortion cases, although the hospital record always states that the doctor has merely treated the patient for the sequelae of an attempted abortion.

I have just come from India where I attended a conference commemorating the first census of that country in 1872. The family planning campaign has been intelligent and imaginative and the sterilization camps in a few states have been successful. However, in the Punjab and Harajana, where the birth rate has, in fact, gone down, only a quarter of the women even claimed to use contraception (this, incidentally, being

a very high figure for India). The demographic transition is occurring but that is because the marriage age is going up as much as because of the family planning programme.

As to abortion, priority should be given to legislation making it readily available. Admittedly this raises moral issues, but it is a very important step in any realistic programme to reduce the birth rate. In Latin America, as an exception, the best thing might be for the legal issue *not* to be raised, since if you discuss a change in the law in a Catholic country the results might be the contrary of what is desired.

As to marriage age, this rises automatically with social and economic development, but the legal problem is how to accelerate the trend. In the Punjab, the agricultural revolution has raised wages, fostered middle class values, and made female education desirable. Middle class values make dowries important and marriage is postponed until they have been saved. Legislation has been passed favoring women's employment and economic independence. The scarcity of housing has also helped in postponing marriage. In tropical areas of Latin America, it is the age of mating rather than the age of marriage that counts, and law could not have much effect on that.

The next step I would advocate is to get contraception out of the monopoly of the physicians. In India, where it is now required that female physicians be used, family planning is hamstrung. Paramedical personnel and the general market should be made use of. Mexico has an experience which proves this. Antitibiotic medicines are effectively uncontrolled and are available everywhere. Despite occasional bad side effects, the Mexican peasants had previously had so many endemic illnesses that the antibiotics usually helped regardless of their effect on whatever specific ailment the peasant thought he had when he bought them. Statistics show an overwhelming improvement in general health. The same principle would apply to contraceptives, including the pill, which would help the vast majority of people, even though individual women would surely have unfortunate side effects. Lawyers may be reluctant to restrict the professional empire of another profession but this may be of great value to the cause. Medical standards that are quite appropriate in advanced countries may be out of place in less developed countries.

I do not wish to denigrate the value of family planning programmes but rather to emphasize the importance of the whole economic and social milieu in changing motivations and practices relating to family planning. This calls for the kind of broad approach evidenced by the Law and Population Programme. Lawyers can help create the necessary legal environment to encourage all effective forces tending to reduce the birth rate, of which only one is formal birth control programmes.

REMARKS ON THE LAW AND POPULATION PROJECT

Dr. Rafael M. Salas

The Law and Population project* is of special significance for us because it is the first project directly executed by the Fund rather than through the United Nations system of agencies. Because we are administering the project ourselves as well as supplying the resources we feel a special commitment to it. There is another reason for our concern over this project, which is, that it is not merely an academic study but a dynamic project which will have long-felt effects on the behaviour of countries that respect the "rule of law."

The Fund also takes special note of one particular development in your programme the expansion of the programme to non-Western legal systems. We would like to see the population factor formulated into policies and executed as operationally feasible programmes in all countries if possible. The population problem is universal and all legal systems must address themselves to this problem, whether they are custom-based or highly formalized, whether they are Western or non-Western. It is encouraging that Yugoslavia has indicated interest in setting up a law and population project because of the nature of its political institutions. It may come up with a synthesis of both Western and socialist view points on population.

Another is that 1974 as you know is World Population Year. We would hope that the participants in this project will be able to take part meaningfully in the preparations being undertaken at the national level for the World Population Conference. But we especially hope that the bulk of your studies and findings will be available for consideration by the time of the Conference.

Following the World Population Year is the International Women's Year in 1975. This will undoubtedly involve continued discussion of such population-relevant questions as the minimum age of marriage, access to the means of family planning, and legal rights within marriage. It is foreseeable that the legal profession will become more and more involved in questions of population and human rights as the decade closes.

Because the Fund is concerned closely with two points, first the need for comprehensiveness in law and population studies and second the need to heighten awareness on population in 1974 and succeeding years, I would like to assure members of this Committee that we are prepared to give continued support to projects in this field, especially for those in developing countries.

*Editor's note: For a description of the Law and Population Project, see pp. 93-99.

We also hope that future projects will address themselves to the post-compilation phase of these studies. Having been trained in the legal problems, I am aware that compilation is only a first step. What happens next is more important. In developing countries lawyers are opinion-makers and they can contribute much more to the solution of the population problem if they are better informed on the legal implications of the work. This is an aspect which deserves special attention and any step towards this direction is welcome.

PART II
HUMAN RIGHTS AND FAMILY PLANNING
AN INTRODUCTION

Dean Peter F. Krogh, Moderator

I would like to introduce the subject for this panel by pointing to the need for a definition of family planning as a human right. Is it a goal rather than a right? Is it the right of the child to be born wanted? Is the right of equal importance with other longer-established rights? Is it a social and cultural right, or a political and civil right, or possibly merely an aspect of self-determination?

I hope the discussion which follows will include the approaches from many angles and vantage points. May I introduce the following members of the panel to speak on this subject: Professor Leo Gross, Dean Irene Cortes, Dr. Jean Bourgeois-Pichat, Miss Julia Henderson and Father Arthur McCormack.

FAMILY PLANNING AS A HUMAN RIGHT: SOME JURISPRUDENTIAL REFLECTIONS ON NATURAL RIGHTS AND POSITIVE LAW

Professor Leo Gross

I. INTRODUCTION

The persistent rhetoric of inalienable or inherent rights of man in a substantial segment of its activities suggests that the United Nations has committed itself to a revival of natural law, certainly of its language and possibly of its spirit as well. In this respect it differs radically from its predecessor, the League of Nations, which was very much attached to positive international law. One of its objectives, as stated in the Preamble of the Covenant, was "the firm establishment of the understandings of international law as the actual rule of conduct among Governments" and another was "the maintenance of justice and a scrupulous respect for all treaty obligations." It is true that the League was credited with the revival of one of the main concepts of natural law, namely the distinction between just and unjust war. But that was a misunderstanding. Having committed itself to the scrupulous respect of *pacta sunt servanda*, a norm of customary international law, the Covenant distinguished in Articles 12, 13 and 15 between legal and illegal, not just or unjust, resort to war and provided in Article 16 for sanctions against the Member which resorted to war in violation of these legal obligations.

The Charter, by contrast, begins with an ambiguity ("We the peoples of the United Nations"),¹ and after committing itself, not to abolish tyrannical governments, but rather to "save succeeding generations from the scourge of war which twice in our lifetime" was started by tyrannical governments, proceeds "to reaffirm faith in fundamental human rights . . .", that is in natural law. For whenever there is an appeal to such rights, to "the dignity and worth of the human person," there is an appeal to natural law and *vice versa*.² The natural law aspect of the Charter is expressed and elaborated in a series of declarations, resolutions and conventions: in the 1948 Universal Declaration of Human Rights and the 1966 International Covenants, one on Economic, Social and Cultural Rights, and the other on Civil and Political Rights. It singles out a specific human right as in the Declaration on the Elimination of All Forms of

¹This ambiguity is resolved in the final paragraph of the Preamble, the so-called "establishment" clause in which the Governments come into their own, relieve the peoples of any further responsibility and establish the organization to be known as the United Nations.

²H. Lauterpacht, *An International Bill of the Rights of Man* (New York: Columbia University Press, 1945), pp. 26, 31, 35.

Racial Discrimination of November 20, 1963, and the companion Convention of the same title of March 7, 1966. The United Nations also singles out a particular category of human beings, namely women, for particular attention and devoted both conventions and resolutions in order to secure for them a status of equality. One of the most recent and important steps in that direction was taken at the 1968 United Nations International Conference on Human Rights. First, the Proclamation of Teheran in paragraph 15 calls for elimination of "the discrimination of which women are still victims in various parts of the world." It then declares that "an inferior status for women is contrary to the Charter of the United Nations as well as the provisions of the Universal Declaration of Human Rights," and finally that "the full implementation of the Declaration on the Elimination of All Forms of Discrimination Against Women is a necessity for the progress of mankind." The Proclamation goes on to say, in paragraph 16, that "parents have a basic human right to determine freely and responsibly the number and the spacing of their children" and, adds in Conference Resolution XVIII adopted on May 12, 1968, "a right to adequate education and information in this respect." Thus, after some years of gestation, a new basic human right, the right of family planning, was born. It shares with other basic human rights in their character as natural rights. Unlike the political and civil rights of man, it is not rooted in the classic doctrine of natural law although it could be read into it either as an aspect, albeit a modern one, of the dignity of man or as a *sine qua non* for the enjoyment by women of political rights and to some extent of civil rights. No doubt it is a precondition for the equal enjoyment by women of economic, social and cultural rights. As a basic human right, family planning derives its strength and authority from the United Nations as a forum for the proclamation of what might be called modern natural law. What is the object of the frequent, almost perennial appeals to natural law in the United Nations?³

2. NATURAL LAW AS A SOURCE AND CENSOR OF POSITIVE LAW

Natural law has been understood in different ways and invoked for different purposes. According to one definition, "the essence of the natural law movement has been to deduce from human nature or, for that matter, from human reason, ready-made legal precepts, which, because of their source in the universally identical human nature, claim validity for all

³This essay is limited to some aspects of human rights including family planning. The appeal to natural law in other areas of United Nations activity, such as decolonization, must therefore be left out of account here.

times and for all parts of the world."⁴ In another version, natural law was presented as divine law, as flowing from "the eternal law of God" and has survived in this form particularly in the Catholic Church and some Christian writers.⁵ However, the dominant form of natural law has been secular, and Grotius is generally given credit for having separated the law derived from reason from God's command.⁶ It is, of course, assumed that this immutable and universal law must be deduced from "true" or "uncorrupted" and not from "depraved" reason.⁷ Moreover, only if a

⁴G. Radbruch, *Grundzüge der Rechtsphilosophie* (Leipzig: Quelle & Meyer, 1914), p. 3 (author's translation).

⁵Frede Castberg, "Natural Law and Human Rights: An Idea-Historical Survey," in *International Protection of Human Rights* (Proceedings of the Seventh Nobel Symposium, Oslo, Sept. 25-27, 1967; ed. by Asbjørn Eide and August Schön (New York: John Wiley & Sons, 1968)), pp. 15, 26, and literature there cited. See also Kotaro Tanaka, "Some Observations on Peace, Law and Human Rights," in: *Transnational Law in a Changing Society* ed. by W. Friedmann, L. Henkin and O. Lissitzyn (New York: Columbia University Press, 1972), pp. 242-259, at 250-255, and R. Stammler, *Wirtschaft und Recht* (Leipzig: Veit & Co., 1896), p. 170.

⁶Castberg, *supra*, no. 5, pp. 16-17; Lauterpacht, *supra* note 2, p. 34; Julius Stone, *Human Law and Human Justice* (Stanford: Stanford University Press, 1965), pp. 74-75. The references to Grotius are to his *De Jure Belli ac Pacis*, (1625), Prolegomena, par. 11 and Book I, Chap. I, sec. X, par. 5, where it is said: "The law of nature is unchangeable even in the sense that it cannot be changed by God. Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend; . . . Just as even God, then, cannot cause that two time two shall not make four, so He cannot cause that which is intrinsically evil be not evil." *The Classics of International Law*, ed. by J.B. Scott (Oxford: The Clarendon Press, 1925), p. 40. Stammler in his book, *The Theory of Justice* (New York: Macmillan, 1925), p. 78-79, offers a *reductio ad absurdum* of the theory of natural law as derived from reason: "If then the theory of the law of nature is to be discredited because it is based upon reason, the latter must be assumed to be a power which imports empirical matters (in this case concrete legal principles) from a sphere lying outside of reality. How, indeed, reason can do any such thing, and what sort of unknown land it is from which, independently of experience, it is to introduce intelligible ideas, is a matter which remains entirely dark. He who thinks of 'reason' as a magic power by which we conjure something from an unknown sphere into the world of experience has, scientifically speaking, reached a dead-point. For if we think of reason as divorced from all experience, then no man possesses any such magic power. Nor is it true, as some have supposed, that this power of reason arises in every individual "de novo." The idea of a psychic quality of this nature existing in the individual is a chimerical fancy and an obscure word which has no clear meaning. A faculty of reason which stands with one foot in the world of experience and with the other outside, and carries over legal principles from the latter into the former, does not really represent any intelligible idea, no matter how extensive and how fine this fantastic image is conceived to be. Such a faculty could not even (as the opponents of the law of nature have expressed it) 'furnish knowledge that is true subjectively but not objectively.' For it is no faculty at all and has no reality either subjective or objective."

⁷ Stone, *supra* note 6, pp. 76, 78.

“correct conclusion” is drawn from the law of nature is it a rule of natural law and not merely one of positive law.⁸ Whatever may be the subtleties of the differences between the various schools of natural law on the one hand and positive law on the other, they are of no consequence here. The important point is that all normative systems, be they derived from a divine source or from nature or from reason, or whether they be, like positive law, enacted by authority, are mediated by prophets and men. Priests transmit divine or revealed law, and laymen derive precepts from reason or nature, and men, be they kings or legislative assemblies, proclaim or enact positive law. Between the original source and the formulated precepts, man always plays a mediating role.

Natural law has been the target of frequent criticism from lawyers concerned with positive law and philosophers concerned with the purity of method. Lawyers would deny that natural law was law in any meaningful sense of the word. With this criticism, we are not concerned. From the philosophical standpoint, the claim of natural law to immutability and universality has been attacked. Adherents of Kantian philosophy, in particular, have contended that it was impossible to present the contents of a particular legal precept as an immutable ideal and that there were no such precepts with *a priori* validity.⁹ While the category of “right law” or “just law” may claim universal validity, no particular precept may make such a claim as to its content. Therefore, there is only a “natural law with a changing content,”¹⁰ since all content is contingent and derived from experience. We are not here concerned with the philosophical question whether Stammler correctly or incorrectly understood Kant’s distinction between form and substance.¹¹ For even he claimed that there was a universally valid goal of social life and that it was possible to determine whether legal norms under given empirical conditions were conducive to that goal.¹² Thus his concept of “natural law with a changing content” was to be understood as “legal precepts which, under given empirical conditions, contain a theoretically correct law.”¹³ It has been pointed out that by introducing the concept of a universally valid social ideal,

⁸*Id.* at 75.

⁹Stammler, *supra* note 5, p. 184.

¹⁰*Id.* at 185 (“ein Naturrecht mit wechselndem Inhalt”).

¹¹Stone, *supra* note 6.

¹²Stammler, *supra* note 5, p. 185.

¹³*Id.* at 181-183 of the second edition (1906).

Stammler has returned to the old concept of a universally valid natural law.¹⁴

Be that as it may, natural law of the old as well as of the new style has served two main purposes: as a source and censor of positive law. The first function is simple: natural law is seen as a sort of model for legislation, that is, it comprises precepts which should be incorporated into positive law.¹⁵ There is little doubt that positive law, both national and international law, incorporated many precepts which were first postulated as natural rights, such as civil and political rights, and the positive law of some countries incorporates natural law by reference¹⁶ for the purpose of filling gaps or resolving apparent contradictions between rules intended in the code. Properly understood, natural law, as a source, does not claim to have validity in positive law; what it does claim is that the law-making authorities amend the law in accordance with its precepts.¹⁷ Natural law can then be conceived as a sort of water table from which water flows into the mainstream of positive law. Legislatures, judges and jurists influence that flow, accelerating it at some times and closing it off at others.

In the United Nations the appeals to natural law¹⁸ have often been cast in the form of a source or model for positive law. They comprise all

¹⁴Radbruch, *supra* note 4, p. 23. This social ideal is a "community of free men." ("Gemeinschaft freiwollender Menschen").

¹⁵Paul Roubier, *Théorie Générale du Droit* (Paris: Sirey, 2nd ed., 1951), p. 187; Lauterpacht, *supra*, no. 2, p. 34; Stammler, *supra* note 6, p. 78.

¹⁶See Article 7 of the Austrian Civil Code of 1811 and Article 1 of the modern Swiss Civil Code of 1907. Article 7 provides that in cases which cannot be decided by the usual means of interpretation (grammatical, natural construction of law or analogy), the case "must be decided, with regard to the carefully collected and well considered circumstances, according to the precepts of natural law" ("natürlichen Rechtsgrundsätzen"). (Author's translation.) Article 1 of the Swiss Code empowers the judge, in case of a gap in the law, to apply customary law, and in its absence to decide the case "according to rules which he would establish if he were the legislator." (Author's translation.) About the role of equity in English law, see Stone, *supra* note 6, p. 77.

¹⁷Stammler, *supra* note 5, p. 185. Elsewhere, Stammler, *supra* note 6, p. 24, characterized the relation between positive and natural law as follows: "All positive law is an attempt to be just law." But natural law is neither the only nor necessarily the final source of justice. Stone says that while "sometimes, no doubt, in the centuries and millennia of discussions of justice, natural law was the preferred way of talking of justice as a criterion of good law", *supra* note 6, p. 294, "the Hebrew prophets have inspired men's dedication to the highest ideals of justice without resorting to a mediating 'natural law'." *Id.* at 293.

¹⁸Though not necessarily *eo nomine*, as not all members accept the doctrine of natural law. For a Marxist view, see Anita M. Haschitz, "Le Problème du Droit Naturel à la Lumière de la Philosophie Marxiste du Droit," *Revue Roumaine des*

the standard-setting declarations¹⁹ and conventions on human rights. The latter, in particular, are invitations to the Governments to transform the standards into positive law, both domestic and international. The fact that the declarations have been repeated time and again and that the 1966 International Covenants have not yet entered into force indicates that the appeals have not met with a satisfactory response.

The function of "natural law as a censor of the positive legal order"²⁰ is more difficult to describe. Here the immutable and eternal principles of natural law are not a source but the antithesis of positive law. As Roubier put it: "The essential function which has always been attributed to natural law is its political and moral function, a function of supervision (*contrôle*) pursuant to which a fence is erected against the unjust precepts established by public authorities."²¹ The "overriding censorship" and "most dramatic" characteristic of natural law in "its actual social operations," according to Stone, "is that when the criteria of justice are put into the framework of a system of natural law, and used to test the justice of positive law, the duplication of the word 'law' in both phrases has an additional effect rather independently of the criteria of justice themselves. This effect is that a theory of natural law tends not only to criticize positive law by reference to whether it realizes justice; but also to *deny that its norms are valid at all* unless they are in keeping with certain norms of natural law."²² The conflict between the two normative orders, that of positive law and that of natural law, can be overcome by

Sciences Sociales, Série de Sciences Juridiques, vol. 10, pp. 19-41 (1966) and Imre Szabó, "The theoretical foundations of human rights," in Nobel Symposium 7, *supra* note 5, pp. 35-45. In Szabó's view, "The socialist concept is sharply opposed to any kind of natural law," and human rights, in particular, "are neither laws nor rights, but moral ideals, or . . . pretensions conceived of as rights, formulated in respect of the law-to-be-created; accordingly, they should not be called rights at all." *Ibid.*, p. 36. An early clash between the naturalists and the anti-naturalists occurred in 1948 in connection with the text of Article I proposed by the Human Rights Commission for the Universal Declaration of Human Rights which was as follows: "All human beings are born free and equal in dignity and rights. They are endowed by *nature* with reason . . ." GAOR: Pt. I, Third Comm. Annexes, Doc. A/C.3/243, Agenda item 58. Italics supplied. In the debate in the Third Committee several delegations (USSR, Belgium, China, Yugoslavia among them) opposed the words "by nature" and it was decided by a vote of 26:4 with 9 abstentions, to delete them. *Ibid.*, Third Cttee, Summary Records of Meetings, pp. 35-118-125. They do not appear in the final text.

¹⁹ Thus the General Assembly proclaimed the Universal Declaration of Human Rights "as a common standard of achievement for all peoples and all nations . . ."

²⁰ Stone, *supra* note 6, p. 74.

²¹ Roubier, *supra* note 15, p. 188. Author's translation.

²² Stone, *supra* note 6, pp. 76, 291. Italics in original.

the fusion of them into "one governing order" in which natural law is the superior order which "strikes down" positive law when it conflicts with it.²³ Alternatively, the conflict remains and in that case, like justice, natural law precepts appear as "a demand on the law maker, and an appeal to all members of the society to do whatever is necessary to bring about the repeal or other withdrawal of the impugned law."²⁴

If "striking down" objectionable positive law has rarely been attempted by the United Nations,²⁵ its appeals to member States to transform the proclamations and declarations of inalienable rights into positive national and international law, as the case may be, by adding to or reforming existing law have been very frequent and urgent. Although repeated with almost ritualistic regularity in session after session, these invocations of the two functions of natural law as source and censor of positive law have not been notably successful.

3. NATURAL LAW AS A PRINCIPLE OF ACTION

What then may be regarded as the proper or more promising function of natural law in the framework of the United Nations? The third function, it is submitted, is one which combines its function as a source of law with its censorial function with regard to positive law into a principle of action. "Natural law," it has been said, "can dispense with reason, for all reasons marshalled in its support are nothing but constructs of the imagination; as a matter of fact it belongs to the field of praxis and of action. Its ideals have no objective existence; what we call natural law is nothing but our own ideal which we hold up against positive law; thus natural law is the reaction of human personality against a positive order which threatens it with destruction. Without any doubt this is the most significant usefulness (*utilité*) of natural law."²⁶ In this sense, natural law can indeed serve a most useful purpose. Mere appeals to fundamental or inalienable or inherent rights of man will move neither men nor Governments, no matter how solidly they are anchored in the doctrine of natural law and no matter how often they are repeated. Unless the appeals are followed by well-conceived action, they will be of no avail. The field of

²³*Id.* at 292. Elsewhere Stone says: "The assertion of this overriding power is therefore, we believe, better expressed as a separate specific mark of natural law." *Id.* at 295.

²⁴*Id.* at 292. Justice in this context is seen as independent of natural law. See No. 17 *supra*.

²⁵Such attempts are outside the scope of this paper.

²⁶Roubier, *supra* note 15, p. 186. Author's translation.

human rights has the appearance of a wasteland littered with programmatic declarations and resolutions. Their reiteration year after year dulls the sensibilities of men and Governments. The very obvious weakness of remedies in one human rights convention or another illustrates the reluctance of Governments to move from proclaiming programmes to taking action. Even in the few cases where the Assembly has been able to harness the resources of the Security Council, its efforts have not been crowned with success. Perhaps in the present state system, the Westphalian system, based on the sovereignty of territorial states, it would be idle to expect more. But there is no other system in sight.

The time may well have come when the United Nations should review its methods in the pursuit of the ideal of human rights generally and the right to family planning in particular. A proposal to create the post of a High Commission for Human Rights has been shelved from year to year.²⁷ Perhaps this is where action should be concentrated. The population situation is critical and the demands for economic development become increasingly urgent. Vast sums of money are not likely to be forthcoming, and even if they should, they would not keep up with the dynamics of the world's population. Compared with the staggering proportions of the task of economic development in all countries, rich and poor, family planning looks like a modest beginning and within the grasp of nearly every country. In addition to public funds which would be made available, private philanthropy could be mobilized. In fact it has already made significant contribution in the relevant research.²⁸

Family planning, as shown above, is not merely related to human dignity and a condition for many other political, economic, social and cultural rights, it is one vital aspect of the right to information. For reduced to its most basic aspect, it claims the right of families to have access to information. As stated in the Teheran Conference Resolution XVIII, couples have a basic human right "to adequate education and

²⁷The proposal has been on the agenda of the United Nations for a number of years but its consideration was postponed in 1971 until 1973. G.A. Res. 2841 (XXVI) of December 18, 1971. GAOR: 21st Sess., Supp. No. 29 (A/8429), p. 88. As outlined in the ECOSOC Resolution 1237 (XLII) of June 6, 1967, the High Commissioner would have several functions. One of these, of special interest in the context of family planning, was to "render assistance and services to any State Member . . . at the request of that State; he may submit a report on such assistance and services with the consent of the State concerned." E.S.C.O.R.: 42nd Sess., Supp. No. 1, (E/4393), pp. 18-19. See also Roger S. Clark, *A United Nations High Commissioner for Human Rights* (The Hague: Nijhoff, 1972).

²⁸See e.g., *The President's Ten-Year Review and Annual Report 1971*, The Rockefeller Foundation, pp. 35-44.

information” in respect of the basic human right “to decide freely and responsibly on the number and spacing of their children.” The question of a treaty or declaration on freedom of information has been before the General Assembly for nineteen years and was shelved again at the 1971 session.²⁹ This question of freedom of information has obviously political overtones as it touches upon sensitive matters such as freedom of the press, radio and television programs, etc. There is no reason why the freedom of information should not be tackled in stages and in separate instruments. Top priority could then be given to the right to receive and disseminate information relating to family planning. Similarly, the question of creating the post of a High Commissioner for Human Rights could be approached in stages. Top priority could then be given to his function in the field of family planning, and his competence extended to other human rights in subsequent stages. In this way, an important step would be taken towards achieving one of the primary purposes of the United Nations: the transformation of its “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women” into reality on the international plane. Without family planning the faith in equal rights of men and women would be sheer hypocrisy.

However, since contrary to an assumption of the naturalists, human rights are not, and do not become, automatically part of the positive, enforceable law of States, family planning must first be introduced into that law. This has been done in some States, and others can do it on their own or pursuant to a bilateral or multilateral treaty. The action on the national level would have to go in several directions: first, removing existing obstacles; secondly, recognizing the right of families to determine the number and spacing of children; and thirdly, guaranteeing access to information and education. It would be important to ensure the proper observance of these provisions by appropriate remedies. The point need not be labored that access to courts is an essential aspect of these remedies.³⁰ Rights derived from law may be modified or cancelled by another law of the legislature, and therefore rights based on statutory legislation are not solidly entrenched. Human Rights, fundamental human rights, should form part of the constitution, the supreme law of the land,

²⁹ G.A. Res. 2722 (XXV) of December 15, 1970, GAOR: 25th Sess., Supp. No. 28 (A/8028), p. 87, and G.A. Res. 2844 (XXVI) of December 18, 1971, *ibid.*, 26th Sess., Supp. No. 29 (A/8429), p. 90. Reference may be made to the Soviet proposal at the 1972 session of the General Assembly for a treaty on television programmes sent *via* satellites.

³⁰ Hans Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967), pp. 140-145.

which could be changed only by a constitutional amendment. The individual should have the right to appeal to the courts for a determination of the constitutionality of statutory legislation.³¹ This would endow courts with the power of judicial review, the power to declare invalid, because unconstitutional, acts of the legislature and administrative organs. This power exists in some countries and it constitutes an essential cog in the machinery for safeguarding human rights on the national level. The creation of a procedure for individual complaints being channelled to the proposed Human Rights Commissioner of the United Nations or the Human Rights Commission under the European Convention is an essential feature of the machinery for safeguarding human rights on the international level. A Court of Human Rights is the final arbiter in the European system.

As international safeguards must be built on national guarantees, a brief reference may be made to the Basic Law of the German Federal Republic of 1949. Being of fairly recent origin it may serve as a useful model. Article 1(2) declares human rights, listed in subsequent articles, "inviolable and inalienable." These rights "shall bind the legislature, the executive, and the judiciary as directly enforceable law," (Article 1(3)). The meaning of this is relatively simple: the basic rights can be enforced without the necessity of implementing legislation. However, the Basic Law does provide that details regarding rights may be laid down by law, that is statutory law. In this connection the following provision is important which is intended to protect the stipulated human rights against undue restrictions or erosion by statute. Article 19(1) provides: "Insofar as under this Basic Law a basic right may be restricted by or pursuant to a law, such law must apply generally and not solely to an individual case. Furthermore, the law must name the basic right, including the Article." Of equal, perhaps even greater, importance, is paragraph 2 of Article 19: "In no case may a basic right be infringed upon in its essential content." In paragraph 4, recourse to courts is provided for.³² Thus, in virtue of positive law, natural law may exercise its supreme censorial power, namely, strike down positive law which conflicts with a precept of natural law incorporated in the positive law of the constitution.³³

³¹ As Kelsen explains: "A fundamental right (or liberty) represents a right in the sense of a legal power if the legal order confers upon the individual affected by an unconstitutional statute the legal power to initiate the procedure that leads to the annulment of the unconstitutional statute." *Id.* at 143.

³² Ian Brownlie, *Basic Documents on Human Rights* (Oxford: Clarendon Press, 1971), pp. 18-19, 23-24.

³³ Castberg, *supra* note 5, p. 27.

Thus, in conclusion, it may be said that natural law still has its uses, but not in the exaggerated conception of a law hovering above positive law and striking down inconsistent positive law, but as a principle of action purposefully directed towards the modification of old or the creation of new positive law. As a principle of action, its goal should be the enhancement of the quality of life in the pursuit of which men and women should participate on a footing of equality, in law as well as in fact. Equality is not a mechanical concept. As the Permanent Court of International Justice said, the notion of equality in fact "*excludes* the idea of a merely formal equality. . . . Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations."³⁴ Women have achieved equality in law with men in many countries. But being in a different situation from men, family planning is an essential ingredient in the establishment of an equilibrium between the sexes in fact. Equality in fact is the necessary pre-condition for the exercise by women of important political, economic, social and educational rights, formulated by the United Nations and incorporated in the internal law of many States.

³⁴Minority Schools in Albania, Advisory Opinion of April 6, 1935. Publications of the P.C.I.J., Series A/B, No. 64, p. 19. Emphasis supplied.

THE RIGHT OF PRIVACY AND FAMILY PLANNING

Dean Irene Cortes

The accelerated increase in the world's population has produced multifarious problems, not the least of them relating to the right of privacy.

The concept of privacy is multi-faceted.¹ The legal aspect, though only a small part of it, is nonetheless comprehensive. It involves issues of constitutional law, criminal law and tort law. While the idea of privacy may vary in different jurisdictions, it is premised on a recognition of the right of the human person to keep certain matters pertaining to himself free from inquiry or interference whether by the Government or other persons.

How does the right of privacy relate to the population problem? Should the day come when there would be one human being for every square foot of land on earth, the idea of privacy would have long disappeared from the human vocabulary.

At present, the right of privacy is unavoidably linked with family planning. Family planning activities involve an intrusion into matters which not too long ago were considered "out of bounds." The question of whether or not to have children was until lately of private concern. With family planning adopted as state policy, it has become of public moment. As Robert S. McNamara once observed, the population problem is a paradox:

It is at one and the same time an issue that is intimately private--and yet inescapably public.

It is an issue characterized by reticence and circumspection--and yet in desperate need of realism and candor.

It is an issue intolerant of government pressure--and yet endangered by government procrastination.²

Acceptors of family planning methods and respondents in family planning surveys waive, knowingly or unknowingly, part of their privacy; computerization makes the intrusion more sophisticated. But the more significant legal problems of privacy as it relates to family planning spring from the interplay of the asserted right of the individual to decide whether

¹The anthropologist, the sociologist, the psychologist, the philosopher and the lawyer approach the subject of privacy according to their own disciplines.

²"The Population Explosion," 19 *Free World* 4 (Special Issue: Family Planning in Asia).

or not to have children and the exercise of the state power in the adoption and implementation of population policies through measures affecting marriage, the family and child bearing.

The right of privacy is recognized in state constitutions either explicitly³ or by necessary implication from provisions guaranteeing individual liberty, the integrity of the human person, his abode, papers and effects and enumerating specific civil liberties.

The universality of man's striving for privacy is acknowledged both in the Universal Declaration of Human Rights⁴ and the International Covenant on Civil and Political Rights,⁵ thus:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.⁶

The sovereign power to formulate and implement population policies undoubtedly exists, but it touches upon one of the most sensitive of human relationships. As one court has put it: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion, into matters so fundamentally affecting a person as a decision whether to bear or beget children."⁷

Does family planning conflict with the right of privacy?

³The constitutions of Nigeria (Art. 23 [1]), Sierra Leone (Art. 11 [c]), Cyprus (Art. 15), Monaco (Art. 22), Trinidad and Tobago (Art. 1 [c]) and Tanzania (Preamble) guarantee respect for a person's "private and family life." The Venezuelan constitution protects a person "against inquiry to his honor, reputation, or private life" (Art. 59); and that of Yugoslavia provides: "The inviolability of life and other privacy rights of the person shall be guaranteed" (Art. 47). Turkey (Art. 15) and Madagascar (Preamble) have a similar provision. Other constitutions provide for the privacy or secrecy of communication (Guinea, Art. 43; Monaco, Art. II; Republic of Korea, Art. 15; the Philippines, Art. III sec. 1 [5]), the privacy of the home (Uganda, Art. 17 [c]; Zambia, Art. 13 [c]; Barbados, Art. II [b]; Kenya, Art. 14 [c]; Malawi, Art. II [c]), and of both home and correspondence (Tunisia, Art. 9).

⁴Adopted and proclaimed by G.A. Res. 217 A (III) of 10 December 1948.

⁵Adopted and opened for signature, ratification and accession by G.A. Res. 2200 A (XXI) of 16 December 1966.

⁶Article 12, Universal Declaration of Human Rights. Article 17 of the International Covenant on Civil and Political Rights reiterates the provision modifying the first clause to read: "No one shall be subject to arbitrary or unlawful interference . . ." and numbering the two sentences separately.

⁷*Eisenstadt v. Baird*, March 22, 1972, 40 U.S. Law Week 4303.

Family planning and the right to receive information about it are considered basic human rights. The Declaration of Population signed by 30 heads of state⁸ and the Teheran resolution⁹ on the human rights aspects of family planning make it clear that the size of the family should be the free choice of the individual family, that couples have a basic human right to decide freely and responsibly on the number and spacing of their children and a right to education and information in this respect.

These declarations endorse and give impetus to family planning and, in making clear the right of choice of married couples, protect their right of privacy.

Existing municipal laws that bear upon family planning fall into two classes: those which have direct effect on child bearing and those which operate indirectly. In the first class are laws on contraception, abortion or sterilization. In the second group are a variety of measures which may influence the size of families, including laws on taxation, social security, health education, etc. Measures of the first category vitally affect the right of privacy, those of the second touch upon it peripherally.

The relaxation of restrictive laws on contraceptives—their importation, distribution, use or advertisement—is of relatively recent development growing out of the adoption of government population policies. In the statute books of some states penal anti-contraceptive statutes still remain.¹⁰ The application of one such statute in Connecticut, U.S.A., to a married couple was declared in a landmark decision to be a violation of the constitutionally protected right of marital privacy.¹¹ Later the claim of privacy as an independent constitutional right was invoked by an unmarried woman in an abortion case.¹²

The right of an individual to decide whether or not to have children is incontrovertible, but the means that can legally be employed to prevent or terminate pregnancy are not given uniform treatment. There has been a general relaxation of the restrictions concerning contraceptives, but the

⁸Signed December 10, 1966, by twelve heads of states and eighteen others in 1967. Reprinted in *Studies in Family Planning* (January 1967), p. 1.

⁹Adopted May 12, 1968, Resolution XVIII on Human Rights Aspects of Family Planning, United Nations Conference on Human Rights, Teheran, 1968 (U.N. Doc. A/CONF. 32/41).

¹⁰Anti-contraceptive statutes. Spain, Ireland. Lee, "Law and Family Planning," 2 *Studies in Family Planning* (April 1971), p. 83.

¹¹*Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965).

¹²*People v. Belous*, 80 Cal. Rptr. 354, 458 P. 2d 194 (1969). [Editor's note: For subsequent developments, see p. 14 *supra*.]

employment of abortion in family planning remains a debatable issue.

The claim has been made that the right of privacy gives to a woman control of her person and therefore the right to terminate a pregnancy. That this has not gained acceptance is shown by the fact that even in countries where abortion is allowed, certain conditions prescribed by law must first be satisfied.¹³ In the case of abortion, competing interests such as the generally shared moral, religious and ethical views of the community and policies protecting the unborn child have to be taken into account.

Sterilization presents different problems. Eugenic sterilization laws are not new.¹⁴ Mr. Justice Holmes's trenchant statement: "Three generations of imbeciles are enough" comes to mind.¹⁵ Voluntary sterilization is employed in the family planning programmes and has become quite popular in India.¹⁶ Although there are unsettled legal questions regarding its use, no violation of the right of privacy would be involved, as long as the sterilization is voluntary.

So far, population measures adopted by Governments take due account of the right of privacy and accord the ultimate decision on family planning to individuals. But should voluntary methods prove inadequate and population problems become more acute, the possibility of Governments resorting to compulsory methods cannot be discounted. In this event, crucial policy decisions will have to be made on the scope of the right of privacy as it relates to the population problem. The right will then have to be weighed against competing public interests. Where a question of national survival is involved, the individual right will have to yield. The arguments used to support the right to employ contraceptives or to terminate a pregnancy, could equally be used against compulsory measures to check population growth.

Bernard Berelson, in an article entitled "Beyond Family Planning" refers to suggested fertility control measures ranging from compulsory sterilization or required induced abortion to the introduction in water or food of temporary fertility control agents or sterilants (substances yet unknown but believed to be available after field testing after 5 - 15 years of research work) or requiring a license to have children.¹⁷

Any non-voluntary family planning method constitutes an encroach-

¹³ Lee, *supra* note 10 at 84-85.

¹⁴ *Id.* at 87.

¹⁵ *Buck v. Bell*, 274 U.S. 200, 207, 47 S. Ct. 584, 71 L. Ed. 1000 (1927).

¹⁶ Singh, "India" in Lee and Larson, eds., *Population and Law* (1971), p. 119.

¹⁷ *Studies in Family Planning* (February 1969).

ment on the right of privacy. Whether or not the right of privacy can prevail over the assertion by the state of the power to adopt compulsory family planning measures would depend on whether the population problem has become so acute and compelling as to outweigh the individual right. In the balancing of competing claims many factors will have to be considered.

No law operates in a vacuum. A compulsory measure that trenches into so sensitive and emotion-laden an area as that relating to the bearing of children can only produce the desired effect if it takes into account not only the factual situation, but also the values of those on whom the law will operate.

Family planning through voluntary methods has advanced because it is acceptable to people of diverse races, political persuasions and creeds. The international standards discernible from pronouncements accepted by various states and national population policies, emphasize that in family planning the decision belongs to individual families. Compulsory methods to bring down population growth can only become feasible if the people, realizing the urgency of the population crisis, are prepared to accept the compulsion. This acceptance in the final analysis would still rest on the individual's will and conscience, as influenced by the social and cultural values of his own milieu.

ROLE OF INTERNATIONAL ORGANIZATIONS

Dr. Jean Bourgeois-Pichat

As a member of the United Nations Population Commission, I have watched the development of population work within the United Nations System for the past twenty years. There were three phases in this work.

The first phase was the treatment of the population issue as an aspect of *economic development*. Viewed in this light, it was not an end in itself, but was on a par with industrial development and other development factors. In this phase, population was considered as being of concern to the developing countries and not to the developed countries; and to the collectivity of mankind, but not to the individual. The important question was whether a dollar of development money would be more effectively spent on family planning or on industrial development.

The second phase was population and *human rights*. Viewed in this light, the question affects all countries and all people as individuals, rather than merely the collectivity. The economic development aspect becomes a by-product of the principal effort which is aimed at giving each person his basic rights. As a human right, it comes into competition with other rights, such as the right of each Government to choose its own policy.

In the third phase, population was viewed in the light of the *environment and pollution*. So viewed, the smaller populations of the developed countries are more dangerous than the huge populations of the developing countries. Also, the problem becomes global, rather than individual or even national. Brazil declared, for example, that it regarded the Amazon forest as the oxygen supply for the world - hence a matter transcending national concerns. From this global angle, the United Nations may eventually be in a position of having to impose an obligation on the developed countries not to destroy the world's ecological balance.

As to *research*, the United Nations itself cannot act to carry out research (except in exceptional cases). It must rely on national research organizations which the U.N. can of course coordinate.

In 1971, the U.N. helped in creating a Committee for the Co-ordination of National Research in Demography (CICRED) of which I am the chairman. The committee first made a census of the various demographic research centers. A list of more than 600 centers was drawn up, out of which a restricted list of about 150 centers was selected which included those centers which had demographic research as their main concern. The programme work of CICRED presents three main items:

- a) Organization of seminars of centers. It is hoped that each

seminar will establish a plan of research with proposals for a division of the work among the centers. Three subjects have been agreed upon:

- 1) a seminar in Trinidad and Tobago, in April 1973 on *Population Growth Targets*;
 - 2) a seminar on *Infant Mortality in Relation to Fertility*. (Both the right to health and to family planning are involved and they are mutually consistent, since as children remain healthy, parents cut fertility);
 - 3) a seminar on *Population Research in Relation to Migration*.
- b) Preparation by as many countries as possible of national monographs on past, present and future population trends. It is hoped that each country will prepare a booklet of 100 to 150 pages following a common plan. So far 80 countries have agreed to prepare a monograph.
- c) Coordination of demographic research among the 150 centers referred to above.

Discussion:

There was some discussion as to whether the threat created by the demands of developed countries upon the world's environment was the most serious threat under present conditions. Some speakers felt that the demand of the huge populations of the developing countries for food was a more pressing danger. Others thought that the danger lay in the fast consumption of irreplaceable resources.

ROLE OF THE NON-GOVERNMENTAL ORGANIZATIONS

Miss Julia Henderson

I would like to discuss the role which IPPF will be playing over the next few years, particularly in the legal aspects of family planning.

First, I feel that the constituent national organizations would have to act as pressure groups bringing to the attention of their respective Governments the fact that family planning is a human right, and that their Governments are morally, and in accordance with their U.N. obligations, bound to respect it. Experience has already shown that women, even in the most pro-natalist countries, are eager to avail themselves of this right.

Second, the local associations would act as educational agents, informing the public of its rights, and bringing in not only physicians, but lawyers, educators, and others to set up more broadly-based volunteer organizations for population and family planning. All member associations of IPPF were being urged to bring in women's organizations, youth groups, trade unions, industrial organizations as well as professional groups as organizational members of the national Family Planning Associations.

Thirdly, the associations' services would have to be strengthened and broadened to meet the increasing demand in those countries in which Governments were still not assuming their responsibilities in providing family planning advice and supplies. To do this, para-medical personnel will have to be trained and used far more frequently. Commercial channels, mothers' clubs, mid-wife groups will be brought in both to spread the message and to increase availability of service. UNICEF and WHO cooperation in training and equipping midwives will have to be sought. I expect the 1973 IPPF Conference to discuss, in particular, the role of the non-governmental organizations in making human rights effective in this sphere. On the agenda of the IPPF Central Medical Committee would be, in particular, the question of getting the pill off the prescription basis and the question of mobilizing younger people into the movement.

As to the membership question, IPPF is now twenty years old and many of the same people who founded its member associations are still the leaders. Younger people in the reproductive ages should be brought in, including representatives of minority groups who often show higher fertility rates than the rest of the population due to lack of educational opportunities and other disadvantages.

Turning to the activities of the member associations in the legal field, the principal fields of activity have been customs and import laws; laws on the licensing of medical personnel; and laws relating to age of

marriage as well as family and child welfare laws. The national associations are aware that unless infant mortality falls visibly, it is much more difficult to achieve results in family planning. The Law and Population Programme's materials would show how much more the associations can do to facilitate reforms in the laws relating to family planning. The study done in Indonesia, for example, has provided great stimulation to the Indonesian Family Planning Association.

Discussion:

In the discussion of Miss Henderson's remarks, the following points were raised:

First, as to the question of use of pills without prescription, it was pointed out that Indonesia was doing well with letting trained nurses prescribe them, as well as letting them insert IUD's. Dr. de Moerloose suggested that the distribution of conventional contraceptives was the best way to use non-professional help, as in Japan. The degree of control by physicians varied from country to country. In Pakistan, the profession had accepted para-medicals; in others, they guarded their prerogatives jealously. Liberalization would involve changing the law in some countries, *e.g.*, in Latin America and in the francophone African countries.

Second, Mr. Akawumi stressed the need for the local associations to educate women as to their rights, for example, forcing fathers to pay for the maintenance of their children. He also suggested that, at least in Africa, the inheritance laws needed amendment since wives and children sometimes did not inherit property. This could lead to irresponsible pregnancies.

Third, there was a need for non-governmental organizations like the IPPF to cooperate with U.N. organs, *e.g.*, WHO and the Economic Commission for Africa, in sending out advisory teams to consult in the field, with such groups as nurses and midwives.

Fourth, there was general agreement as to the desirability of making maximum use of non-professional and para-professional help, but that this would require a lot more research in order to develop safer techniques, and, if possible, longer lasting techniques.

THE CATHOLIC CHURCH AND POPULATION AND HUMAN RIGHTS

The Reverend Arthur McCormack

I would stress that I speak here in a personal capacity. This is a private Catholic demographer's viewpoint, but one which has profited by my work on the Secretariat of the Pontifical Commission of Justice and Peace since 1967 and, indeed, as a "peritus" or expert at the Vatican II Ecumenical Council.

The Catholic Church could do immense good to mankind which undoubtedly, in many areas of the world, and eventually possibly in all, is facing the serious consequences of excessive rates of population growth. The reason for this growth is largely due to improved medical and sanitary conditions and also greater concern for the welfare of people in the developing countries. The Church can only rejoice in this improvement in the human condition. But these boons can be lost and the trend of social welfare reversed if the population situation is not dealt with in a humane way, keeping the gains of the past while coping with the problems of the present and the future. This is a very great challenge to the Church and a very great opportunity for her. If she neglects it, she will be by-passed in the solution of one of the great world problems with great loss to the world and her own mission in the world. The world will not easily forgive the Church if "she passes by on the other side" to avoid considering one of the great causes of world poverty. Indeed, she would then risk becoming a monumental irrelevancy to the life of the world.

From the beginning of the Pontificate of Pope Pius XII in 1939 a major concern of Vatican policy has been the establishment of peace based on justice and the elimination of the glaring inequalities in the world between the "have" and "have-not" nations: in other words, the elimination of world poverty, the providing of human beings with the basic right of each member of the human race, *i.e.*, the minimum at least of the goods of this world from the bounty of God "to enable each human being to live a life in keeping with his dignity as a human being" (Pius XII). Pope Pius XII, indeed, proposed the then radical theory that this right was even more basic than the right to private property or the right of a state to the integrity of its national soil.

During the Vatican Council the concern of bishops from all over the world in this theme was so manifest, widespread and persistent that it resulted in a request in the Pastoral Constitution *The Church in the World of Today*, Part II, Chapter 5, Art. 90, for the setting up of a body in the central organization of the Catholic Church in Rome—The Curia—to be concerned with problems of the needy regions of the world and the

promotion of international social justice.

The Vatican Council ended its three-year deliberations on December 8, 1965. On January 6, 1967, Pope Paul set up the body called the Pontifical Commission of Justice and Peace. He thereby linked world poverty and peace—the two main themes of his reign which began on the death of Pope John, who himself had shown great commitment to the problems of the developing countries (see *Mater et Magistra* [Mother and Teacher], part III, 1961).

On March 26, 1967, Pope Paul issued his Encyclical *The Development of Peoples* (*Populorum Progressio*). In clear simple language in less than 10,000 words, the Pope exposed the extent of world poverty and inequalities in the community of nations, analyzed some of its main causes with courage and radical insight, recognized some of the obstacles and outlined some solutions based on justice—not merely commutative justice but social justice—and the brotherhood of man.

In the Encyclical, among the obstacles to the elimination of poverty in the developing countries which the Pope recognized, the population increase was frankly listed:

It is true that too frequently an accelerated demographic increase adds its own difficulties to the problems of development: the size of the population increases more rapidly than available resources, and things are found to have reached apparently an impasse. From that moment the temptation is great to check the demographic increase by means of radical measures. It is certain that public authorities can intervene, within the limits of their competence, by favoring the availability of appropriate information and by adopting suitable measures, provided that these be in conformity with the moral law and that they respect the rightful freedom of married couples. (No. 37).

Pope Pius XII had sent a sympathetic and encouraging message to the First World Population Conference held in Rome 1954 and Pope John had referred to population problems in his Encyclical, *Mater et Magistra*. But at the beginning of the sixties there was a feeling that there was no real cause for alarm. Along with quite a majority of experts the view (shaken somewhat by the issue of the U.N. Study No. 18 *The Future Growth of World Population*, 1958) was held that economic growth, the exploitation of the bounty of God, and the resources of the world could cope with any foreseeable growth in world population. The Church stressed positive means: re-distribution of the wealth of the world as well as the creation of new wealth by means of modern technology and the

opening up of the still under-developed riches of the world.

However, by the second half of the decade of the Sixties it was clear, though many in the Church were reluctant to admit it and even opposed in international bodies' attempts to reach agreement on needed population policies and family planning programmes that "positive" measures were not adequate to deal with the situation of rapidly accelerated and accelerating rates of population increase.

It is within this context, that the honest appraisal which has been quoted, was made by Pope Paul in *The Development of Peoples*.

The defence and promotion of human rights, especially the very fundamental human rights of freedom from hunger, from excessive poverty, from preventable ill health, from illiteracy, from slum conditions, have been such a concern of Pope Paul that he willingly approved the extension of the mandate of his Commission to include Human Rights.

It would seem then that one of the best foundations on which action on the part of the Church in the population field could be based would be precisely on the concept of human rights. For the Church these are based on the will of the Creator who created the world for the benefit of all mankind and who intended that all men should live as brothers respecting each other's needs and rights.

In the past, population increase has often been a stimulus to progress. But there are few who would now suggest, except in very special circumstances, that the very rapid population increase of 2.5% - 3% per annum in all regions of the developing world is not making it more difficult for individuals in these regions to achieve the basic human rights.

Or, to put it bluntly, it is extremely unlikely that the basic human rights referred to will be achieved without a reduction in rates of population growth. This does not mean, of course, that population growth reduction, by itself, will result in the economic and social progress needed, but it does mean that this progress will not be achieved without it and that this factor is so important that it might well sabotage efforts which neglected it.

There is a more specific human right relating to population policies. Although it might be difficult to find express references to it, the Church's attitude to woman as a partner in marriage and as a mother is consonant with the newly formulated right¹ of a woman - of the couple - to decide, for serious reasons, the number of children they want to have and the spacing of them.

¹See the Proclamation on Human Rights, Teheran Conference, 1968, Resolution XVIII.

Here right shades into duty, the duty of responsible parenthood. Pius XII stressed this right and duty in his famous address to Italian midwives in 1951. There he made it clear that a couple might postpone having children, in extreme cases even for life, for sufficiently weighty reasons of an economic, social, medical or eugenic nature. He proposed the method of periodic continence as the means to achieve this. He appealed to scientists to make this method more acceptable and more effective. Perhaps if his appeal had been heeded, Catholics today might have been able to make an even more constructive contribution to world efforts to cope with the population situation.

In the Vatican Council a very large majority of the over 2,000 bishops endorsed the teaching on responsible parenthood (See Part II, Chap. I *Christian Marriage*, esp. Nos. 48-51).

Population increase rates in countries with very many millions well below the poverty line mean that we are in a completely different situation than ever before in history. The relation between this and food, family life, employment, education, housing, literacy and health problems shows that Christian principles honestly applied in the second half of the twentieth century should lead to attitudes which are the reverse of those held in previous centuries. In the past, a large family was regarded as the ideal and its undoubted virtues and advantages were rightly extolled. Indeed, in earlier times, when infant mortality was high and epidemics ravaged much smaller numbers of people on earth, they were necessary even for the very survival of mankind.

During the present century, many parents of large families were—still are—Christians of great generosity. In no case should large families even now be discouraged for anti-life or purely selfish reasons. *But we must now recognise that the era of large families is passing—indeed in many situations has already passed—together with the conditions which made them desirable.* A corollary of this is that economic and social conditions especially in developing countries must be created that will make this new ideal feasible. The Church could make a great contribution to the solution of the problem of excessive rates of population growth by getting down to the parish level the teaching of the Church on responsible parenthood and its consequences with regard to small family size.

It must also be stressed that the human right to the possibility of choosing the number of children also includes the human right to be treated as an intelligent human being: to receive sufficient information, not only of a clinical nature, to enable a reasonable choice to be made. There should be no compulsion, no undue influence on poor nations or individuals to adopt certain measures, no neglect in theory or in practice

of the rights of the couple to choose in conscience, the methods for family planning which are in keeping with their religious beliefs and convictions, and wholesome cultural and social traditions. There should not be in the structuring of population programmes possible openings for accusations of genocide or discrimination against certain types of people because of social class, race or creed. Genuine options really such, and seen to be such must be given. Effectiveness must not be regarded as the only or even chief criterion of programmes.

Catholics have the right to insist that the rhythm method should be available genuinely so in any family planning or population programmes. Research into this method should be financed on an equal footing with other methods. There is the reasonable possibility that if this is done, not only will the situation of Catholics be eased but that a method of contraception which is simple, harmless, morally and aesthetically acceptable, cheap and with no need for reversibility, might be discovered with benefit to the whole of mankind.²

Most of what has been said applies to both individual family planning situations on the personal level and population programmes as such--two separate but closely linked things.

There are two special situations relating to population policies and programmes from a Catholic viewpoint. A Catholic Government--or a Government of a "Catholic" country, however one defines it--has the right and duty to provide family planning services according to the consciences of the Catholic citizens even to the poorest members of the community. It has also the right and duty to provide contraceptive services, according to the methods preferred, for those who are not Catholics, or who are not practising Catholics or who are honestly not convinced of the Church's position on methods of birth control. This was affirmed by the Venezuelan Bishops' statement in 1969 and seems to be an application of the Decree on Religious Liberty (Vatican Council) to our subject.

The role of the Church and of Catholics in a minority situation--as in most of Asia--is a matter for the prudent judgment of the hierarchy of each country. It would seem from what has been said above that where needed they should recognize and honestly admit the seriousness of the population situation in their country. They should add the weight of authority to the efforts of the Government in elaborating and implementing population policies and programmes. Where methods are used which they regard as contrary to their religious beliefs, they have every right to

²For one line of such research, cf. *Lancet*, London, (Feb. 5th 1972 and Oct. 14th 1972) on the "Billings" method.

make this clear. It would seem to be a natural corollary that they should provide acceptable methods for Catholics and others who may not find all the methods proposed by the Government desirable. But they should not withdraw their support from the general and laudable aims of the policies and programmes.

A special mention should be made here about the Encyclical *Humanae Vitae* (July 25th, 1968). I have left this to the end because the reference to the Encyclical *The Development of Peoples* shows the very wide area of agreement between the Catholic Church and others who are concerned about population problems and I wished to emphasize areas of agreement and cooperation.

There is very much in the Encyclical *Humanae Vitae* which would meet with agreement and approval of most right-minded people about love, sex, marriage, the status of women and the welfare of children, though it might be expressed in unfamiliar ways and based on philosophical and religious principles that may not be shared by all.

The part which has caused controversy even within the Catholic Church is the small section on methods of birth control where all contraceptive methods, except the method of periodic abstinence, are condemned. Apart from doctrinal considerations for Catholics, which are not relevant here, it is obvious that pragmatically this puts a Catholic population expert or population programme planner at a simple mathematical disadvantage. It is less effective, in this difficult field of family planning, to have only one method, one which is not suitable for a number of people, at one's disposal. It is obviously the duty of a devoted member of the Church to be guided by the Church's teaching and the corollary would seem to be that he should rely on the rhythm method, *as far as possible*, and see to it that all who wish have a chance to practice it. But it would also seem to follow from general Catholic moral principles, that where it is not realistically possible to use the method and the need to practise responsible parenthood is a serious one, in these particular circumstances, it would not be seriously wrong for other contraceptive measures to be used. This would seem to be the sense of the statement of the U.S. Episcopal Conference: "Particular circumstances surrounding an objectively evil human act . . . can make it diminished in guilt or subjectively defensible."

It would be a great loss if the moral values of the Catholic Church and its huge organization throughout the world should be excluded from the consideration and solution of the population problem at national and international levels. Mutual tolerance within and outside the Church could avert this disaster.

It might be thought that the attitude of the Holy See at the U.N. Stockholm Conference on Environment in June 1972 would make such cooperation unlikely. The vote of the Holy See against the Norwegian amendment in favor of family planning programmes disconcerted some people. The fact that the Holy See was part of the minority of 12 while 45 countries voted for the amendment (in other words, the Holy See was with those developing countries whose populations amounted to 150 millions, while it was against 25 developing countries with populations amounting to 1,137 million) made the traditional claim that the Holy See is on the side of developing countries in opposition to family planning programmes in the United Nations, no longer tenable.³ However one may interpret this vote, it does not invalidate what has been said before, that the Church is deeply aware of the population problem and that it is committed to the principle of responsible parenthood and not only in theory. In the Catholic world increasing programmes of family planning are being carried out, e.g., in Mauritius and in the Philippines. Moreover, there are local Catholic efforts in various other areas throughout the world.

We should all take notice of the grim words of Robert McNamara:

What we must comprehend is this: the population problem *will* be solved one way or another. Our only fundamental option is whether it is to be solved rationally and humanely or irrationally and inhumanely. Are we to solve it by famines? Are we to solve it by riot, by insurrection, by the violence that desperately starving men can be driven to? Are we to solve it by wars of expansion and aggression? Or are we to solve it rationally, humanely in accord with man's dignity?

The relation of the population problem to the establishment of peace would require a paper to itself. But the words of U. Thant, former Secretary-General of the United Nations are relevant:

The most urgent conflict confronting the world today is not between nations or ideologies, but between the pace of growth of the human race and the insufficient increase in resources necessary to support mankind in peace, prosperity and dignity.

³The developing countries voting with the Holy See were: Argentina, Brazil, Burundi, Ecuador, Ethiopia, Venezuela, Zaire. Developed countries were Spain, Ireland, Portugal, Romania.

PART III
BEYOND FAMILY PLANNING:
THE ROLE OF LAW
AN INTRODUCTION

Mr. Carl M. Frisé, Moderator

Most of Asia's countries now have family planning programmes. Therefore, they must now go "beyond" and consider additional methods and approaches toward getting a fall in fertility. I need to cite only the pioneering experiments being made by Singapore in the legal field, including new priorities in housing allocations, changes in maternity benefits, etc. It gives me pleasure to call on the following to speak on the various subjects connected with "Beyond Family Planning: The Role of Law": Mrs. Sipilä, Mr. Mathsson, Mr. Gille, Mr. Kellogg and Mr. Lyons.

STATUS OF WOMEN AND FAMILY PLANNING

Mrs. Helvi Sipilä

It is amazing but still true that in many activities in the fields of population problems and Family Planning, the woman - the only one who gives birth to the child and, consequently, at least seemingly, "creates" the population problem - seems to be the most forgotten factor. In the field of Human Rights, the principle of equality between men and women, both *de jure* and *de facto*, and the possible influence of the biological difference in the existing inequalities, seems to be the most forgotten subject outside the Commission on the Status of Women.

This seems to be true to such an extent that even the 193 pages of the Partan Study with 527 notes added to it, completely ignores the activities of the United Nations in the field of Human Rights and Family Planning, as far as the activities of the UN Commission on the Status of Women, an inter-governmental body, equal to the Commission of Human Rights, are concerned.

Nevertheless, it was the Commission on the Status of Women, which *first* drew attention to the question of family planning as a factor, which has an influence on the Human Rights and specifically on the Status of Women. This happened as early as 1963, three years before the General Assembly adopted its first resolution and the heads of the twelve States adopted the Declaration on Family Planning.

It may be of interest that this question was first taken up by the representative of the "Third World" coming from a developing Arab country. She is now considered in many circles to be one of the experts in the field of both Status of Women and Family Planning, Mrs. Aziza Hussein, presently Chairman of the Family Planning Association of Cairo.

Two years later, in 1965, and still almost two years before the General Assembly resolution and the Declaration of the Heads of States, the Commission on the Status of Women at its 18th Session, adopted a resolution sponsored by Austria, Egypt, Finland and USA, asking the Secretary-General to undertake a study on the relationship existing between the Status of Women and Family Planning. The reason for this study was that equality could hardly be achieved, unless the influence of the biological difference was taken into consideration. It was also expected that the exercise of family planning would improve the possibilities of achieving real equality also in fact.

Before the Secretary-General completed the first study, the Declaration on the Elimination of Discrimination against Women was drafted in 1966 and finally adopted by the General Assembly on November 7, 1967.

In this Declaration, Article 9 deals with the access to education saying that "All appropriate measures shall be taken to ensure to girls and women, married and unmarried, equal rights with men in education at all levels and in particular . . . access to educational information to help in ensuring the health and well-being of families." The rather obscure wording of the last sub-paragraph (e) is due to the opposition of some delegations, especially the Soviet delegation, to a more explicit wording of the need for information on family planning.

Professor Leo Gross gave us here in his excellent paper, prepared for this meeting, an account of the further activities of the United Nations in the field of Status of Women and Family Planning. I will not repeat what he so clearly explained on pages 4-5 and 23-26 of this paper. For the benefit of those who might not have seen the said paper of Professor Gross, the following may be mentioned: When the Secretary-General prepared a study, as requested by the Commission on the Status of Women in 1965 based on the material available at the UN, a report was submitted to the Commission at its 21st Session in 1968. This report revealed that very little material existed at the UN on this item, which apparently had not been given special attention in any context.

The Commission decided, therefore, to recommend to the ECOSOC that a special study be made, based on national surveys or case studies, and a Special Rapporteur should be appointed to act as a coordinator for this study. This resolution was adopted by the ECOSOC on 31 May 1968 and I was appointed, on the recommendation of the Commission, to act as the Special Rapporteur.

The first note verbale of the Secretary-General was sent to the Governments of the Member States, to the Specialized Agencies and to some interested nongovernmental organizations in June 1968, asking for national surveys on this subject. Very few complete surveys were submitted before the deadlines to enable the Special Rapporteur to prepare a report for the Commission's 22nd Session in 1970. Many governments, however, submitted some useful information and many others indicated their interest in the study and the reasons why it was not possible for them to undertake complete studies. These reasons were mainly the shortness of the time given by the Secretary-General and the lack of personnel and financial means. It also seems obvious that the governments needed some information and guidelines for a study on a subject matter that was apparently not well known or understood in all its implications.

This was the reason why I recommended to the Commission that the study be continued, guidelines drafted and a new request made to the governments, giving them the guidelines and more time to deal with the

subject. The final report was to be submitted to the Commission in 1974. As I had been in a position to discuss this matter personally with representatives of various governments in connection with my visits to various countries for other purposes, I had discovered that the interest of governments grew when they discovered the benefits, which the Government itself would gain from this study for the further planning of the population policy. Therefore, I recommended that personal consultations with governments be carried out in order to increase their interests in the studies.

All these recommendations were accepted by the Commission. After negotiations with UNFPA, financial support was received for this project in order a) to enable my personal visits to take place in various countries of Asia, Africa and Latin America, b) to finance in-depth studies in two countries in each one of these continents, c) to organize regional seminars in all of them and a worldwide one as well, and d) to employ an expert who would analyze the information received from various sources and assist in the preparation of recommendations for action.

This resolution made it possible for me to visit the following countries: 1971 in August-September: India, Thailand including consultations with ECAFE Indonesia, the Philippines and Japan; 1972 in April: Egypt, Ethiopia including consultations with ECA Kenya, Nigeria, Senegal and Tunisia, and in July: Jordan and Lebanon. As a result of these visits, in-depth studies are going to be prepared in India and Indonesia, Egypt and Nigeria. Now I am going to continue my journey from Tokyo to Peru and Guyana for other purposes, but also for consultations with the Governments of Peru, Trinidad and Tobago and Guyana. Every Government, which I have visited until now, has promised to give us all the information available in the country in addition to those countries where complete studies including the in-depth studies are going to be made. Financial means are still available for in-depth studies in two countries of Latin America. With the assistance of UNFPA, an international Seminar was organized by the UN in cooperation with the Government of Turkey, in July 1972 and regional seminars are already planned to be organized in the Dominican Republic and in Indonesia, in the early part of 1973.)

In addition to the information contained in the paper of Professor Gross, I would like to mention that the right to family planning and necessary information on it was reiterated in 1970 in a General Assembly Resolution 2716 (XXV) on the programme of concerted international action for the advancement of women, which set up Minimum Targets to be achieved during the Second Development Decade.

The above-mentioned study on the Status of Women and Family

Planning was to be concentrated mainly on three main points: a) to what extent is the Status of Women, their equality with men in all fields fact and, consequently, their share in the development of their countries affected by their biological role, taking into account the number and spacing of their children; b) to what extent does the Status of Women (education, employment, equality in private law, participation in political and other decision-making in the society) affect the family size, the number and spacing of the children; and c) what is the influence of the present population trends on the Status of Women.

Although the report is expected to be presented to the Commission on the Status of Women only at its 25th Session in 1974, some of the findings of the national studies may be mentioned already at this stage.

There are the very distinct correlations between the education and employment of women on one hand, and the very small family pattern on the other.

It has become very clear that the education of women is of primary importance in the question of family size and that even a primary school level of education has a significant impact in the developing countries.

It is also clear that education and employment together, and to a certain extent even just employment outside the home as such, have a strong influence on the family size.

One of the arguments against the small family size is the question of social security; parents need their children in order to have supporters in old age. As long as the child mortality remains high, there must be many children in order to be sure that some of them will survive.

If women have their own income, it also means social security for which children are not needed any more. On the other hand, it will be more difficult to combine work at home and outside of it; if women appreciate their own independent income, they may not want to create large families. Work and the raising of a large family will become contradictory subjects and when decisions are made, they may favour a small family pattern.

The status of women in private law has, however, a great importance in the decision-making. A woman who may be faced with divorce, unless she gives birth to a child every year or frequently enough to meet the generally accepted cultural and traditional standards, may not have freedom in her decision-making concerning the family size.

Economic independence gives, however, a better possibility for equality in decision-making within the family. This independence and a smaller family also make the participation in the whole life of the society easier for women and give them opportunities for decision-making in the

community as well.

After these observations, it is natural that certain conditions are of great importance both in order to promote the equality between men and women in spite of the biological difference and in order to give them a better opportunity to exercise their human right in deciding the number and spacing of their children.

In order to make these provisions for education, economic opportunities, equality in private law and for participation in public decision-making, certain legal measures are necessary.

But legal provisions for equality have only little effect, unless they are implemented in practice and unless equal opportunities are offered for the exercise of these rights.

Until now women have been deprived of various opportunities, as their main contribution to the development of the society has been seen in their mother's role. With the longer life span and fewer children, the importance of this role will continue to diminish as compared with the potentialities which women have for contribution in other fields as well.

Unless equal opportunities for the alternative role are provided for, women are deprived of a possibility for equal dignity with men as human beings.

EDUCATION AND FAMILY PLANNING

Mr. Bertil Mathsson

Family planning programmes usually begin on a clinical basis, and then turn to communication and education as an "afterthought." Education is usually viewed as a means of telling people about the availability of the clinical services and how to use them. The experience has been that after the programmes have reached the high-priority women, they stop expanding and need education programmes to support them.

There is, however, a relationship between the levels of education and fertility. People who have had more years of schooling have fewer children than those with fewer years. However, it is not known what kind of education is most effective, what new elements should be added, how these elements can be added to the curriculum, or whether the job can best be done out of school.

There has been a lot of *apparent* progress in education since World War II. Developing countries are now devoting such a high proportion of their budgets to it that they cannot be increased further. In addition to this, adult education, T.V. programmes, etc. have been added, so that, in addition to formal programmes reaching, say, 650,000,000 people, informal programmes are reaching even more. It should be stressed that the "population" explosion is, even more, a "pupil" explosion. In the First Development Decade, the number of children from 5 to 19 years old grew 20% faster than the entire population as a whole. In the secondary schools, student enrollment increased 100% greater than the general population growth.

However, this expansion does not mean that the education problem is on the way to a solution. The figures are deceptive. In fact, in the First Development Decade, the *absolute* number of children out of school increased by two million. Moreover, the expansion of education has not been geographically even; the developing countries are not getting their share. Finally, although the *percentage* of illiterate adults shrank during the Decade, the absolute number grew. By the end of the Second Development Decade in 1980, it is estimated that there will be 230,000,000 children *not* in school and 820 million illiterate adults.

Further harsh realities include the fact that in the developing countries, the children who do get to school are boys, with 50% more boys than girls in primary schools and 100% more in secondary schools. Moreover, the developing countries, with the greatest need, have far more pupils per teacher. On top of this, the drop-out rate is high in these countries because facilities are so inadequate and pressures to go to work

are high.

In view of these facts, new and alternative forms of education are called for. New planning for education is absolutely necessary which will take the actual facts into consideration and will make maximum use of such inputs as are available.

Therefore, since fertility cuts do depend on increased education, the family planners must think in terms of new educational approaches.

INCENTIVES AND FAMILY PLANNING

Mr. Halvor Gille

Family planning programmes usually focus on three successive approaches: first, clinical; second, educational and communicational; and third, incentive. The latter approach has been experimented upon in the ECAFE region more than anywhere else. This may be attributed in large part to the weak administrative structures in most developing countries, and, to some extent, to the costs involved. Costs should not, however, be regarded as a stumbling block since the long-term financial benefits to be achieved by family planning are beyond question. Moreover, the costs could easily be covered, over a short period, by the savings in maternity and family allowances, as well as through reduced pressures on health and education facilities.

Incentives may be direct (*e.g.*, cash payments and rewards for direct participation) or indirect (socio-economic benefits, such as better health, education, or old age security).

There are three types of incentive schemes: First, payments for acceptance. This can include payments to the woman, to the field workers, or to the motivators. Second, payments for results accomplished. This puts its emphasis on continuation of use. The third is the removal of existing disincentives.

In the first category are direct payments to acceptors, compensation for expenses or hardships involved, reduced costs or the granting of subsidies for services and supplies, and payments to certain population groups or to all of the population. Incentives for motivators might be on a piecework basis (fees or rewards) or supplements to regular salaries. They may be in cash or in kind (*e.g.*, the dried milk given to acceptors in Ghana). Payments vary in size sometimes within one country, as between different population age groups (*e.g.*, high-risk women over 30 with existing families might get higher payments).

The results of incentives to field workers have generally been good. For example, incentives form an essential part of the Pakistan and Korean programmes. As to incentives to acceptors, it is more difficult to assess the results, particularly in countries where the incentives are modest. However, recent experiments in India showed that where incentives were suddenly raised ten-fold, the results were spectacular. However, even in this case, the success was not necessarily attributable to the incentives alone, since other favorable factors had been involved.

The second type of incentive, based on results achieved, is the so-called "no birth" incentive. These have clearly proved to be more

effective since they focus on continuation and the achievement of a small family. There have been only a few of these actually tested.

In Pakistan, field workers are paid on the basis of no-births. A small charge to acceptors is made for supplies, and the proceeds used for payments to workers based on the number of years during which acceptors have no births. Although this has been successful, there are problems of record-keeping and supervision.

In Taiwan, education bonds are given to couples who have no more than three children in ten years. If there are only two children, the amount is doubled.

In India, the tea planters make monthly deposits in a savings account for each female worker. If the woman retires with two children, she gets the full deposit with interest. If there are three or four children, the amount is reduced, and if there are five or more, she gets nothing. The experiment has been successful, and the Government is now helping.

As to removing disincentives, Singapore has recently withdrawn maternity benefits and leaves with pay after the first three children. The effects are not yet known (and it could be argued that this step is contrary to welfare principles). Consideration is now being given to the possibility of taking a similar step as to family allowances, which are frequently given in African and Middle Eastern countries.

In evaluating the incentives or disincentives approach, the following advantages may be observed: the promptness of getting programmes started, the possibility of focusing on the most effective contraceptive method, and its contribution as a form of social welfare payment. On the negative side may be listed: the uncertainty in the continuation of acceptance, the great difficulty of supervision and control, its vulnerability to fraud, the ethical issue raised by the fact that it detracts from the voluntary nature of a programme, and the possible distortion of the acceptor's choice if the field workers gain more from one method than from another (*e.g.*, only the pill went well in Egypt since the workers could sell the pill and make more from it than from the IUD).

The question of incentives needs further study and more new approaches and experiments; existing experiences should be given wide publicity; and cross-national social acceptance of each system needs further testing.

The University of Michigan has stated that \$12 million had been spent on incentives in one year, half of it in India. In Egypt, new ideas of using incentive payments to keep girls from marrying until the age of 20 are under consideration.

In conclusion, may I quote Professor Hauser's statement that one of

the main problems today is our lack of ability to motivate and activate the masses for family planning.

SOCIAL AND LABOR LAWS AND FAMILY PLANNING

Mr. Edmund H. Kellogg

Under this title, are included; housing laws; old age and sickness protection laws; women's employment and status laws; child labor and education laws; health services for workers; family allowances; maternity benefits; tax deductions for children; and special services for children. (Abortion and contraception laws, whose effect on fertility is more obvious, are not included.) There is comparatively little material available on the effect of social and labor laws on fertility, but the UN, the ILO, and the IUSSP* have been giving the matter some attention over the past few years. Unfortunately, they have so far been unable to reach any firm conclusions.

Although most of these laws do have an effect on fertility, or are capable of being so designed as to have one, nevertheless, it is almost impossible to quantify the effect of each law. The first five types of law mentioned hereafter have the most obvious effect. The effects of the last four are more doubtful.

First, *housing law*. There is general agreement that housing affects, or can affect, fertility. The effect is, of course, stronger under European urban conditions than in the more rural parts of Asia. In France, Greece, Sweden, and some of the Eastern European countries, housing is now being used as a means of favoring large families. In Germany and the USSR, the opposite effect was produced (unintentionally) since only small apartments were available, and these were hard to get and were allocated on the basis of seniority, thus penalizing young families. In Asia, housing has been intentionally used as a way to discourage large families, as for example: it affects a fraction of the people and that it pre-supposes a minimum threshold of urbanization and income.

Secondly, *old age and illness protection laws*. Both in Europe and Asia, those laws have an effect. The ILO expert, Mr. K. Doctor, stated at the ILO-ECAFE Seminar at Kuala Lumpur, in July - August, 1972, that these laws were essential to the establishment of a "small family norm," and could weaken the hold of the extended family. The seminar reached the same conclusion. A meeting of European experts, convened at Bled, Yugoslavia, by the IUSSP, reached the same conclusion in October, 1972.

On the other hand, it appears that, generally speaking, it takes some time before the significance of such social security laws seeps into the popular consciousness and before confidence in the state's (or the

*International Union for the Scientific Study of Population.

employer's) ability and willingness to provide can be built up. It is understood that the People's Republic of China specifically stresses this willingness and ability in the schools so that the matter will not be left to chance. In most developing countries, labor-negotiated provisions for old age and sickness protection cover only a small percentage of the population, and there is no government-provided facility. It may be a long time before this help can be made available.

Thirdly, *laws raising women's status and employment opportunities* are generally agreed to have a strong anti-natalist effect. In Europe, this has been reflected in various ways. The Yugoslavs reported at Bled that this had been the most important factor in their country. The U.K. reported that when women's wages had been made equal with men's, employers stopped hiring them, with the result that fertility went up. In Asia, the Kuala Lumpur meeting agreed that there was a clear inverse relation between women's status and fertility, and recommended that where a Government's policy is anti-natalist, "particular consideration would be given to the education, independence, and employment of women." Following this principle, Korea and Egypt are changing their inheritance laws to give women equal treatment and more independence, and Ghana is promoting women's employment and education in order to "provide an alternative to the mother's role." Of course, if the women's education includes sex education, it can have an even greater effect.

On the other hand, there is apt to be considerable unemployment or underemployment in most developing countries, and the educating of women to take jobs is not always easy. It involves a change in the way of life, and costs may appear high, particularly if the women "drop out," or can't get jobs.

Fourth, *child labor and education laws*. If the prohibition of child labor is not combined with the provision of educational opportunities, it will not work. However, if such an opportunity is provided, most authorities are prepared to conclude that fertility will go down. It postpones marriage, it enhances women's status, and there is less temptation to produce children for the sake of their labor. In Europe, these laws have been in effect for so long that it is hard to judge now the degree of effect they have produced. In Asia, whereas it is agreed that these laws should be effective, they were rarely fully enforced. In many developing countries there are not enough schools to put the children into so they either have to work or remain idle. Meanwhile the authorities, having sympathy for the poverty of the parents, simply do not enforce the anti-child labor laws. In Nigeria, a Ford Foundation report concludes that the expansion of the education system may be the primary cause for the

growing interest in limiting fertility. The fact that secondary education must be paid for has led parents to limit their families in order to save the money and so as to have fewer to educate.

Fifth, *work-related health services*. Health services provided for workers and obtained by them through their union contracts can be useful if: 1) they provide family planning services; 2) they reach the men as well as the women with propaganda for small families; and 3) they can make parents aware of the increased survival chances of their existing children. These services can carry their message right to the doorstep of the target groups. It has also been commented that, if they provide some sort of recreation activity, they may spread the idea that sex is not the only available form of recreation.

On the other hand, these services, like others mentioned above, reach only a small proportion of the population in the developing countries.

* * *

The next laws mentioned, namely, family allowances, maternity benefits, tax deductions for children, and special services for children, may have some effect on fertility, if carefully designed to accomplish this object, but their effect is apparently minor, and is overshadowed by other considerations.

As to *family allowance laws*, these were not originally conceived of as fertility control laws, and their effect on fertility is by no means clear. Moreover, they do not exist in most Anglo-Saxon countries. In Europe, several pro-natalist Governments have lately been trying to use them to encourage fertility. The effect of the French allowances, which are the highest in Europe, is still being argued. A study comparing Sweden and Norway showed there might be some effect in Sweden, but little or none in Norway. Some of the Eastern European countries are also trying to use them for pro-natalist reasons, but so far can not show unambiguous results. Clearly, they have to be so high as at least to *appear* to cover an appreciable part of the cost of a child.

In the less developed countries, the fertility effects of these allowances, if any, are even less. They are very low, and only a small part of the population is covered (usually organized labor and civil servants). Moreover, it is precisely these groups which are, in any event, subject to "modern" influences and would be the first to think of limiting their fertility. In Colombia a recent study compared two similar groups of workers, only one of which got allowances. It found that the group receiving the allowances had the lower fertility and it was surmised that the existence of the allowances had induced the parents to consider for the

first time what it actually costs to bring up a child.

As to *maternity benefits*, about the same conclusions seem to apply. However, in this case, if a woman must attend a family planning lecture in order to receive the benefits, this may be effective, since a woman is particularly susceptible at that time. On the other hand, in Europe, maternity benefits have been felt to be so expensive to employers that they have avoided hiring women, thus cutting female employment and increasing fertility. In Singapore, the Government charges higher maternity fees after the third child in an anti-fertility effort. The Population Council concluded that it could not measure the effect of this, if any, on the birth rate, but there is some evidence that the higher fees are regarded as a tax, and that this has penetrated the general consciousness.

As to both *family allowances and maternity benefits*, an incentive scheme has been proposed based on the "no claim bonus" idea. It is recognized that the cessation of these payments after a certain number of children could cause resentment and eliminate financial help needed by the population. However, a Government might calculate the total cost to it and to employers of the payments and services for children after the third child. It might then offer to pay the same total amount to those mothers who "stop at three." If resentment is to be avoided and cooperation achieved, then the general population must be made to realize that they are getting as much for *not* having children as they previously got for having them.

One other aspect of these laws should be mentioned, namely, the public opinion and propaganda aspect. If a country such as France frequently increases these benefits, it does create the impression that it is patriotic to have large families. This, in itself, has a certain influence. Similarly, cutting off benefits, if properly handled, can be used as a means of promoting the idea that small families are in the public interest.

Work-connected children's services, such as day care centers, have not been shown to have any significant effect on fertility except to the extent that day care centers make it possible for mothers to work. *Tax deductions*, also, have little or no effect. The deductions only affect the rich, and they do not even affect the rich in a country which raises its revenue by indirect taxes (e.g., France). Tax deductions (unlike affirmative payments) were too sophisticated to have any impact on parents in the developing countries.

Some conclusions as can be drawn are as follows:

- 1) Some of the social and labor laws in effect in many countries can be used to affect fertility, either up or down, if they are carefully designed for the purpose.

2) The effects of these laws (or of the amendment of existing ones) can probably not be clearly measured.

3) Since these laws are usually intended for social rather than for demographic purposes, care must be taken not to jeopardize desirable social effects. Otherwise there will be resentment and other undesired results.

Discussion:

Dr. Bourgeois-Pichat said that, in France, the repeated efforts to encourage fertility through increasing children's allowances had been successful. He cited the fact that, if studied on a cohort basis, a French woman's completed family size had gotten up to 2.8 as compared to 2 for Germany, where the allowances were much lower.

Mr. Akawumi of the Economic Commission for Africa pointed out the degree to which local customs alter the effect of law on fertility. For example, in Ghana, where polygamy is common and men do not necessarily live with their wives, housing laws have little effect on fertility. He felt that the abortion and contraceptive laws were the principal issues in Africa.

POPULATION POLICIES AND WORLD POPULATION YEAR

Mr. Thomas C. Lyons, Jr.

The subject of population policy has confused and confounded more persons that it has helped or enlightened. In my brief remarks here today, I would merely like to draw our attention to some reasons why the very nature of population policy is difficult to deal with. By doing so, I would hope that we might all be more understanding of those who must deal with population policy issues, which, I understand, will loom large in the United Nations-sponsored World Population Year and the World Population Conference in 1974. I have identified six general conceptual problems that present themselves in discussing population policy.

Definitional Difficulty

Someone once remarked that nothing will retard a good conversation quicker than a request for a definition of terms. On the other hand, scholarly discourse within the problem-solving process seldom proceeds very far in the absence of sound, even consensual, definition of key terms and concepts. Population policy is seldom defined and, if it is defined, almost never agreed upon when definitions are offered by a foolhardy few willing to incur the scorn of colleagues. The operational result is that a given definition of population policy has an *ad hoc* utility to be used as the user wishes, at a point in time for a specific set of reasons.¹

I have personally witnessed the definitional difficulty syndrome in numerous settings among a wide spectrum of intellectual, multidisciplinary professionals. Years of observation indicate that population policy means, *inter alia*, the following kinds of things to different persons: (1) a piece of paper with the imprimatur of some legitimate organ of government; (2) the statement of a president, prime minister or cabinet minister; (3) getting a programme to accept a certain kind of contraceptive not presently in the programme; (4) changing a law; (5) *sub rosa* government support of a public or private program; (6) the existence of a birth control programme; and (7) positive attitudes toward family planning on the part of some ill-defined influential group(s). The list is nearly endless.

Almost no one says that (1) a country that has stated it wants more people and/or a faster rate of population growth has a population policy; or (2) a country that has decided not to have a policy has a policy.

¹For a review of definitions that have appeared in the literature, see: Thomas C. Lyons, Jr., "Population Policies: A World Overview," a paper presented at the University of Ife, Nigeria, March 1971.

Pedagogically I have confronted the definitional difficulty in numerous classrooms involving senior level bureaucrats, mid-level bureaucrats, university students, host-country programme administrators, host country legislators, and mixed classes of population professionals. On one occasion in a class of administrators (physicians and nurses in this case), clinic workers, and several politicians (one a governor of a province), I asked each individual to define population policy, and received as many definitions as students.

Identity Crisis

Because it is difficult to define, it therefore becomes difficult to identify policy, *i.e.*, how do we recognize it when we see it. Some writers, devoting entire articles to the subject of population policy, may start out or end up by admitting they cannot define population policy, but proceed to discuss countries that have population policies. We are all familiar with scholarly tomes that explore "Japan's population policy" in the same breath and context as that of India, Korea or Ghana.

Sovereignty and Sensitivity

Within government, and perhaps to some degree within the foundations, academia, international organizations, and elsewhere, the discursiveness of the debate has an added dimension running off in two directions. The first direction is toward the argument that the matter of population policy is so intimate, so sensitive, and so nationally specific that it should not be promoted nor should discussion be initiated by a foreign government. In practice this approaches ludicrous proportions. The most diplomatic, cautious and discriminating approach is often viewed as synonymous with a political sledgehammer. At one point in our deliberations it was suggested that an AID strategy paper expunge all references to population policy, because the subject is much too sensitive to discuss in mixed company.

The second direction or perhaps the opposite direction is more apt follows a line of reasoning thus: all countries must by now agree that population growth rates must be slowed (or stopped), and if by chance a country does not agree, it needs education, enlightenment, wisdom--which we must be altogether happy to provide. If it won't go to our school to be educated, perhaps some sanctions would be in order. Sovereignty is not so sacred, some argue, that it must be protected in the face of a problem that knows no national boundaries.

Metaphorical Fallacy

Perhaps due in a large measure to the fact that there is no clear, acceptable, mutually agreed upon definition of what population policy is, it therefore becomes acceptable to make population policy anything the user wants it to be. In much of the literature, policy is used synonymously or interchangeably (by many who should know better) with programme. If a government contributes in any way to a family planning or fertility control programme, it is assumed by many to have a population policy.

By those predisposed to loose analogy, the human body is sometimes likened to the body politic, without recognizing that we know a great deal more about one than the other.

Policy Effectiveness

The question of whether or not policies make a difference at all in achieving governmental goals (*e.g.*, reducing fertility X percent over Y years to achieve Z growth in GNP per capita) has for years been part of the debate. Some believe that historical experience with pro-natalist policies is a convincing argument that population policies have little impact on the fertility behavior of couples. Others might argue that it does not matter much what the official policy is or how effective the programme emanating from that policy might be, fertility will not drop significantly in the absence of social and economic development. In a word, then, why have a policy at all when the evidence is far from conclusive that policy makes a difference in any event, or that in the event conditions *are* right, it will not make a difference in the absence of other dynamic factors at work in a given society at a given point in time.

The debate over the impact of a population policy has other aspects as well. One might suggest that the difference between an informal and a formal policy is minimal; that is, an informal policy might work as well as a formal one, in some cases even better. For example, a regional population officer argues that soon after one African country established a formal population policy, a negative effect was observed in the bureaucracy in that government workers at all levels withdrew into a very legalistic mode, and approached the entire programme in terms of what the policy allowed and/or intended. The momentum of the informal policy, in effect for several years, stopped.

Others have suggested that ill-designed policies have negative effects built in, rather than stimulating positive response. Or as Illich has written, these policies address "fear of poverty, rather than joy of life."

There is also the confusing matter of the intended and unintended demographic effects of policies designed to address problems other than

population. With the major ingredients in the debate: impact vs. non-impact of policies, formal vs. informal policies, negative vs. positive effects of policies, and, intended vs. unintended consequences of policies, it is little wonder that some of us are confused.

Unclear Utopianism

One of the most confusing aspects of the entire population policy discourse is the matter of what a policy is intended to do, what problem it is intended to address, what purpose it serves. "Who is doing what to whom for which reason," is another way of putting it!

A mixed group of protagonist bedfellows has emerged. A review of the literature in this country and abroad suggests there be population policies and programs because:

- ... reduced fertility will contribute to economic development;
- ... family planning is a basic human right;
- ... family planning increases human choices;
- ... family planning is a major way of contributing to better maternal and child health;
- ... family planning will contribute to a stabilized family structure;
- ... family planning combats the incidence of high-risk, illegal abortion;
- ... family planning will help alleviate the problem of the abandoned child;
- ... family planning will prevent unwanted pregnancies, or unwanted children;
- ... family planning helps fight social ills such as environmental and ecological disruption;
- ... populations grow geometrically, whereas food supply grows arithmetically;
- ... reduced fertility can serve as an adjusting mechanism for migration and urbanization;
- ... reduced fertility can satisfy eugenic or racial motives;
- ... reduced fertility will improve "the quality of life";
- ... internal stability and external violence are a function of high fertility and crowding;
- ... the welfare roles must be reduced; and,
- ... women want fertility control.

To some it might be all of these, or none of these. And to still others it might be some combination of these. To many, these and other arguments are used for purposes of legitimation, masking the real intent of

the policy.

The point is clear: with so many reasons to support population policy, and with support coming from so many directions, it is little wonder the debate rambles on, confused and contradictory; useful to some; not necessarily helpful to all.

The obvious next step, of course, is to clear up the ambiguities and misunderstandings involved in policy conceptualization, but we will have to leave that to others to do at another time. The task I set for myself here is merely to identify difficulties, which hopefully will result in a clearer understanding of population policy problems.

Thank you.

APPENDIX A
List of Members and Guests

**Members of the International Advisory
Committee on Population and Law:**

- Professor Georges Abi-Saab (*Geneva Institute of International Studies*)
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.*)
*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*)
Dr. Arthur Larson (*Duke University*)
*Dr. Luke T. Lee (*Fletcher School of Law and Diplomacy*)
*Mr. Thomas C. Lyons, Jr. (*U.S. Agency for International Development*)
Dr. O. Roy Marshall (*University of the West Indies*)
*Mr. Bertil Mathsson (*U.N. Educational, Scientific, and Cultural Organization*)
*The Reverend Arthur McCormack (*Vatican*)
Mr. Robert Meserve (*American Bar Association*)
*Dr. Minoru Muramatsu (*Institute of Public Health, Japan*)
*Mrs. Harriet F. Pilpel (*U.S. Planned Parenthood—World Population*)
*Dr. Rafael 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*)

*Members present at the second annual meeting.

Guests:

Mr. A.M. Akiwumi (*U.N. Economic Commission for Africa*)

Mr. Kamleshwar Das (*U.N. Human Rights Division*)

General William H. Draper (*Victor Fund Committee for the International
Planned Parenthood Federation*)

Mr. Raymond Gauntlett (*International Planned Parenthood Federation*)

APPENDIX B

A Simulated Cabinet Meeting on Population Policy

[Note: On November 6, 1972, a "Simulated Cabinet Meeting" was held at the 2nd Asian Population Conference by members of the International Advisory Committee on Population and Law under the chairmanship of Mr. Frisén. The meeting was designed to show how each government department can contribute to a coordinated population policy and programme aiming at the full realization of the human rights principles. Each member spoke freely in his or her individual capacity, not necessarily reflecting the views of his organization or Government.

The following members took part in this "Model Cabinet Meeting":

Mrs. Sipilä--Minister of Social Affairs

Dr. Muramatsu--Minister of Health

Mr. Muthsson--Minister of Education

Mr. Gille--Minister of Finance

Mr. Kellogg--Minister of Labor

Dr. Kirk--Minister of Economic Planning

The "Cabinet Meeting" was presided over by Dr. Lee as the Prime Minister. The following is a reconstructed version of the Cabinet discussion:|

Prime Minister: Our country has very serious population problems. The population is doubling every twenty years. Already our schools are overcrowded. There is a great shortage of teachers and doctors. Although the Gross National Product advanced by two percent last year, these gains were more than offset by the three percent population growth. We again have to import costly foreign rice and wheat. Our cities are overflowing. Unemployment is reaching staggering proportions.

In the face of these problems, how can I redeem my election promises to improve the quality of life for all of our citizens? It cannot be done unless our birthrate is reduced. We have millions of new mouths to feed every year.

Our country signed the 1968 Teheran Proclamation and the 1969 U.N. Declaration on Social Progress and Development, which state that it is a basic human right to provide all our people with the *knowledge* and *means* to practice family planning.

I have called this cabinet meeting to find out how to fulfill this objective. Do any laws need to be changed? What should be done? A question for the Minister of Social Affairs: Would raising the minimum age

for marriage help to reduce the birth rate? Are there other ways which your Ministry can initiate toward reaching this goal?

Minister of Social Affairs: It might. Young people are already deliberately delaying marriage to take vocational or other training. If this tendency was confirmed by law, the educational aspirations of our young people might be strengthened and they might be better prepared for family life. We must recognize that as health, educational, and other conditions improve, adult married life may last for 40-50 years.

Another way to ease our population problem might be to provide every couple with a real opportunity to learn about family planning just *before* marriage. We could set up lectures and courses on family life for young couples including family planning. We might even require couples applying for marriage licenses to present a certificate to prove that they have completed such a course.

Also, for many married couples in our country, having children is the only way to assure security in old age. In rural areas especially where three or four generations live in the same house - the younger taking care of the older - high fertility is much valued.

We must break this cycle. Already, young people who have migrated to the city are unable to care for their parents. The housing situation in our cities is so terrible that it is impossible for the grandparents to live with their married children. If we could start a minimum social pension system, then we might encourage couples to have fewer children.

A final social measure to help reduce fertility would be to end the unequal treatment of women. Discrimination against females in schools and employment means that women often have no other choice except marriage and motherhood.

Prime Minister: Can the Minister of Education explain the interrelation between education and fertility and suggest some concrete educational programmes to reduce population growth?

Minister of Education: We all know that there is a strong negative correlation between the level of education of parents and the number of children. Uneducated women especially have many babies. If we could educate our girls and encourage them to find jobs out of the house, perhaps our high birth rates would fall. Now 50 percent more boys are enrolled in primary school than girls. At the secondary level there are twice as many boys as girls. We must provide more opportunities for girls as well as boys if we are to reduce fertility.

In the next few years we face a "pupil boom" as the present babies start going to primary school. Already the schools are crowded and facilities strained, but I am afraid the situation will deteriorate even

further. At the same time, there is a high drop-out rate among students especially in rural areas where children are needed in the fields. The three problems—the pupil explosion, the crowded schools and the high drop-out rates—suggest that we have only a very slim chance to provide each child with even a good primary school education over the next decade.

Therefore, we must also develop other kinds of educational programmes to reach more people. We must use radio, television and other old and new techniques to teach about family planning. A village radio or television set can be just as important as a school or university. Education programmes should all cover family planning and other aspects of family life.

Prime Minister: What does the Minister of Health recommend to slow population growth?

Minister of Health: Health programmes are vitally important to a national population policy. There are many things to be done in the health field to prevent excess or unwanted births. First, we should provide contraceptives free of charge to anyone who wants them. People must have good contraceptives if they are to plan their families effectively. Some may protest that we are encouraging promiscuity in young people, but we have to be realistic. Let us protect the young, who are the most fertile, from unwanted pregnancies which can leave them old and overburdened before their time.

When contraceptives fail, abortion should be available. Legal abortion would cut down on the number of women admitted to our hospitals because of illegal abortions performed in dangerous and unclean conditions. Legal abortion would remove a great present danger to the health and welfare of women as well as prevent unwanted births.

Second, we should step up family planning training programmes for physicians, nurses and especially other paramedical personnel. To make family planning available throughout the country we will need medical practitioners who can get out to the people and explain what family planning is all about.

Third, we can consider other kinds of action. We could provide free deliveries for the first two or three children of a family, but not for the fourth or later births. Another possibility would be to offer incentives to those men and women who motivate couples to practice family planning. An incentive programme could help stimulate fieldworkers to spread knowledge about family planning.

Prime Minister: I would like to ask the Minister of Labor: Do we need new labor laws to help reduce population growth?

Minister of Labor: The labor and social laws which might affect

fertility behavior are concentrated in the following five areas: first, security in old age; second, female employment; third, child labor; fourth, public housing; and fifth, public hospitals and clinics. Changes may be necessary in all five areas if we are to reduce population growth rates substantially. As our society modernizes, other legal changes may also be needed.

In regard to *Old Age Security*, the more parents are convinced that they do not need five and more children to insure security in their old age, the sooner they will reduce their family size. The Chinese are now teaching school children to rely upon the Government or the commune, not their own large families, when they grow old.

As to *Female Employment*, one of the best ways to reduce fertility and add to individual and national income is to bring women into the labor force. This means equal rights, opportunities and duties for women.

Insofar as *Child Labor Laws* are concerned, if we passed legislation requiring children to stay in school through age 16 and prohibiting school-age children from working full-time, we might eliminate one incentive for large families. We also might cut down on the high drop-out rate, but our schools are already crowded and would have to be expanded.

Next, a *Public Housing* policy may help. The Singapore Government, which has made impressive progress in cutting its growth rate, has found that building small apartments instead of large ones and eliminating a provision which gave priority to big families, has been very effective. Of course, Singapore is much more urbanized than we are, but this is a good model to keep in mind while planning our urban public housing. We can also provide more housing at less cost if apartments are small.

Finally, in regard to *Hospitals and Clinics*, all of our medical facilities should provide contraceptive services to all who wish them. It is important to reach men as well as women. Any health programme for employees or civil servants should provide family planning also.

There are a number of other policies which we could consider. We could set up child-care arrangements so that more mothers could work. We could experiment with income tax laws to eliminate deductions after the first three children. This could be important later when more of our citizens pay income tax.

There is another possibility which I wish to suggest. It has the special benefit of involving the commercial sector in population programmes. In parts of both India and Taiwan certain firms establish a trust fund for each married female employee. The firm contributes a certain amount to the fund for every year that the woman does not give birth. The fund is reduced every year that she does give birth. What happens is that the fund'

can serve as a concrete and credible guarantee of an income in old age. The advantage of these schemes is not just that they are apparently successful, but that they pay for themselves from savings in other fields.

Prime Minister: I shall ask the Minister of Finance: Do we need to change any financial or fiscal policies to encourage smaller families?

Minister of Finance: We have considered changes in the income tax laws to eliminate exemptions after the first three children, but it would probably not be an effective deterrent to child bearing.

We believe that some important changes should be made in commercial taxes and import duties. The cost of contraceptives, especially, orals, is too high for most of our citizens. We should consider either granting subsidies to local manufacturers of contraceptives or removing protective tariffs if a particular type of contraceptive cannot be produced efficiently locally. It would be inconsistent to support a large family planning programme without also trying to reduce the price of both local and imported contraceptives.

Prime Minister: As the Minister of Economic Planning, could you tell us whether industrial and agricultural policies have any bearing on population growth and, if so, what would be your recommendation for such policies?

Minister of Economic Planning: Industrial and agricultural policies can have an important effect on demographic change. In the past we emphasized industrialization. Now, fortunately, we are focusing more on the problems of the countryside where most of our people live. In rural areas we should be undertaking land reform, electrification, highway construction, irrigation and so on. Having an acre or two more of land, electric lights, or new access to a town does not automatically mean smaller families, but it does mean people have access to better jobs, can improve their living standards, and decide for themselves to adopt modern practices like family planning. Economic and social development is the greatest contraceptive of all.

Some of my colleagues have suggested restrictive policies, that is, deliberate housing shortages to discourage migration to the cities. Such policies seem to have been successful in the past. Without free access to contraceptives for all and ready recourse to abortion in the event of contraceptive failure, or lack of planning, such policies are very inhumane. We should focus on positive programmes: land reform, equalizing income, more education for all our people. Such policies can reduce fertility and enhance social welfare both at the same time.

Prime Minister: I wish to thank you for a most enlightening and useful discussion.

I note, however, there are conflicting views between the Minister of Labor and the Minister of Economic Planning over the issue of public housing as a means of promoting a small family norm. Undoubtedly, there will be other areas where honest differences of opinion exist.

We will devote our next meeting not only to resolving these differences but also to agreeing on a detailed nation-wide action programme which all the Ministries can, both individually and collectively, undertake to attack effectively our population problem. The Minister of Justice will also be here then to see whether any laws need to be revised or enacted to help implement the programme.

The meeting is adjourned.

APPENDIX C
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 three

*A background paper prepared for the Second Asian Population Conference sponsored by the United Nations Economic Commission for Asia and the Far East, which was held in Tokyo, November 1-13, 1972.

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¹See generally *The World Population Crisis: Policy Implications and the Role of Law* (J. Paxman ed. 1971) (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).

²Thus, 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, *Population in the United Nations System: Developing the Legal Capacity and Programs of UN Agencies*. (Law and Population Book Series No. 3, 1973).

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 conventions⁶ are given legally binding effect,

³Documents 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 Racial 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 on the Elimination of All Forms of 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 7 (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.

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

⁵See *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).

⁶See *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

and then only on 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

(1965); Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A, U.N. Doc. A/810, at 174 (1948); Supplementary 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).

⁷H. Kelsen, *Principles of International Law* 141, 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).

⁸Waldock, "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).

⁹See 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).

domestic legislation and international agreements, finding expression in such basic instruments as the U.N. Charter¹⁰ and 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 law¹² 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 Justice¹⁴ 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

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. 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 renowned 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 Covenant 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).

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 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

¹⁶Southwest 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."

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 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.

¹⁷Partan, *Population in the United Nations System: Developing the Legal Capacity and Programs of UN Agencies* (Law and Population Book Series No. 3, 1973).

¹⁸Stavropoulos, *The United Nations and the Development of International Law 1945-1970*, reprinted in U.N. Doc. OPI/111 (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.

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 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),

¹⁹Partan, *supra* note 17.

²⁰See note 14 *supra*.

and freedom from hunger.²¹ The right to family planning was subsequently incorporated in the Teheran Proclamation on Human Rights²² 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.

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

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).

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.

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 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

²⁷U.N. Population Newsletter, *supra* note 25, at 43.

²⁸Teheran Proclamation on Human Rights, para. 16.

²⁹The additional language is found in Resolution XVIII: Human Rights Aspects of Family Planning.

³⁰2nd Comm., 23 U.N. GAOR, U.N. Doc. A/CONF.32/C.2/SR.5, at 57 (1968).

³¹2nd Comm., 23 U.N. GAOR, U.N. Doc. A/CONF.32/C.2/SR.12, at 143 (1968).

³²U.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.

³⁴Art. 22(b). The Declaration was adopted by the General Assembly by a vote of 119 in favor, none opposed, with 2 abstentions.

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 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.

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).

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 hunger.⁴²
8. The right to an adequate standard of living.⁴³
9. The right to environmental protection.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

³⁶Teheran Proclamation on Human Rights resolution XVIII (1968).

³⁷U.N. Declaration on Social Progress and Development art. 22.

³⁸Universal 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.

³⁹Declaration of the Rights of the Child, principles 1, 4, 6, 9 and 10.

⁴⁰International 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); Declaration of the U.N. Conference on the Human Environment principles 1, 8, 13, 15 and 16.

⁴⁵International 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 education 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 frustrated 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 or measures

⁴⁹This 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.

⁵⁰See text accompanying note 35 *supra*.

⁵¹The 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.

⁵²See the simultaneous promulgation of the following laws to implement the Chinese family planning program: (a) "Guides for Increasing the Supply and Reducing

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 Projects

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.

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 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.

⁵³Such 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.

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.

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.^{5,34} It is offered merely as sug-

^{5,34}For a complete listing see Cohen, "Law and Population Classification Plan" (Law and Population Monograph Series No. 5, 1972).

gestive 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?)
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 plan-

- ning 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 Movement⁵⁴

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

⁵⁴ This is the newest addition to the list of facets of the population problem to be studied. See R. Plender, *International Migration Law* (Law and Population Book Series No. 2, 1972). For an analysis of the issues which bear on population migration in a developing nation, see Odujinrin, "Population Migration Problems in Nigeria," *The World Population Crisis: Policy Implications and the Role of Law* 167 (J. Paxman ed. 1971) (*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).

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
- (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 analyze the laws and draft a proposed set of laws on population and family planning, based on the human rights principles;⁵⁷
- (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) Conducting sociological surveys to measure the impact of laws in selected areas upon human behavior (optional);

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

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

⁵⁷See the proposed Charter on Human Rights and Population, sec. A *supra*.

- (j) 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;
- (k) 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;
- (l) Participating in an International Symposium on Law and Population to be held in 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;
- (m) Assisting United Nations Population Programme Officers, Resident Representatives and governmental and nongovernmental officials in the legal aspects of population and family planning problems;
- (n) Performing such public services as lecturing and writing in order to explain the significance of the project and its findings; and,
- (o) 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.

Institutions in some forty countries have established, or expressed

interest in establishing, the Law and Population Projects.

CONCLUSION

Recognition of human rights as entailing legal, and not just moral, responsibility upon states holds vast potential for opportunity, particularly in the population field. Aided by an "instant" custom-generating process through the United Nations, human rights obligate 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 Charter on Human Rights and Population together with a world-wide law compilation and reform movement will effectively strengthen human rights in the population field.

*Author's note: As of May, 1973, such projects have already been established in Bangladesh, Brazil, Chile, Costa Rica, Egypt, Ethiopia, Ghana, Indonesia, Kenya, Lebanon, Malaysia, Mexico, Morocco, Nepal, Nigeria, Pakistan, the Philippines, Singapore, Sri Lanka, Thailand, Togo and Turkey. The great majority of them are funded by the UNIPA, and the rest principally by the IPPF. It is hoped that similar projects will soon be established in Cuba, India, Jamaica, Trinidad and Tobago, and Yugoslavia.

APPENDIX D PUBLICATIONS OF LAW AND POPULATION PROGRAMME

Law and Population Book Series

1. *Population and Law*, Luke T. Lee and Arthur Larson (eds.) (Durham, North Carolina: Rule of Law Press; Leyden: A.W. Sijthoff, 1971).
2. *International Migration Law*, Richard O. Plender (Leyden: A.W. Sijthoff, 1972).
3. *Population in the United Nations System: Developing the Legal Capacity and Programs of UN Agencies*, Daniel G. Partan (Leyden: A.W. Sijthoff; Durham, North Carolina: Rule of Law Press, 1973).
4. *World Population Crisis: The United States Response*, Phyllis T. Piotrow (New York, New York: Praeger, 1973).
5. *Human Rights and Population: From the Perspectives of Law, Policy and Organization* (Proceedings of the second annual meeting of the International Advisory Committee on Population and Law in Tokyo, October 30-31, 1972) (1973).
6. *The Abortion Experience*, Howard J. Ososky and Joy D. Ososky (eds.) (New York: Harper & Row, 1973).
7. *The United Nations and Population: Major Resolutions and Instruments* (New York: United Nations Fund for Population Activities, 1973).

Law and Population Monograph Series

1. *Law and Family Planning* (1971), by Luke T. Lee.
2. *Brief Survey of U.S. Population Law* (1971), by Harriet F. Pilpel, with an Introduction to Law and Population by Professor Richard Baxter.
3. *Law and Population Growth in Eastern Europe* (1971), by Peter B. Maggs.
4. *Legal Aspects of Family Planning in Indonesia* (1972), by the Committee on Legal Aspects of the Indonesian Planned Parenthood Association.
5. *Law and Population Classification Plan* (1972), by Morris L. Cohen.
6. *Law, Human Rights and Population: A Strategy for Action* (1972), by Luke T. Lee.
7. *Population in the UN System: Developing the Legal Capacity and Programs of UN Agencies* (1972), by Daniel G. Partan (a summary of book by the same author).
8. *The World's Laws on Voluntary Sterilization for Family Planning Purposes* (1973), by Jan Stepan and Edmund H. Kellogg.

9. *Law and Population Growth in Singapore* (1973), by Peter Hall.
10. *Law and Population Growth in Jamaica* (1973), by Robert C. Rosen.
11. *Law and Population Growth in the United Kingdom* (1973), by Diana M. Kloss and Bertram L. Raisbeck.
12. *Law and Population Growth in France* (1973), by Jacques Doublet and Hubert de Villedary.
13. *Medical Considerations for Legalizing Voluntary Sterilization* (1973), by T.L.D. Komotey-Ahulu, M.D.
14. *Brief Survey of Abortion Laws of Five Largest Countries* (1973), by Luke T. Lee.
15. *Anti-Contraception Laws in Sub-Saharan Francophone Africa: Sources and Ramifications* (1973), by Bernard Wolf.
16. *International Status of Abortion Legalization* (1973), by Luke T. Lee.
17. *The World's Laws on Contraceptives* (1973), by Jan Stepan and Edmund H. Kellogg.