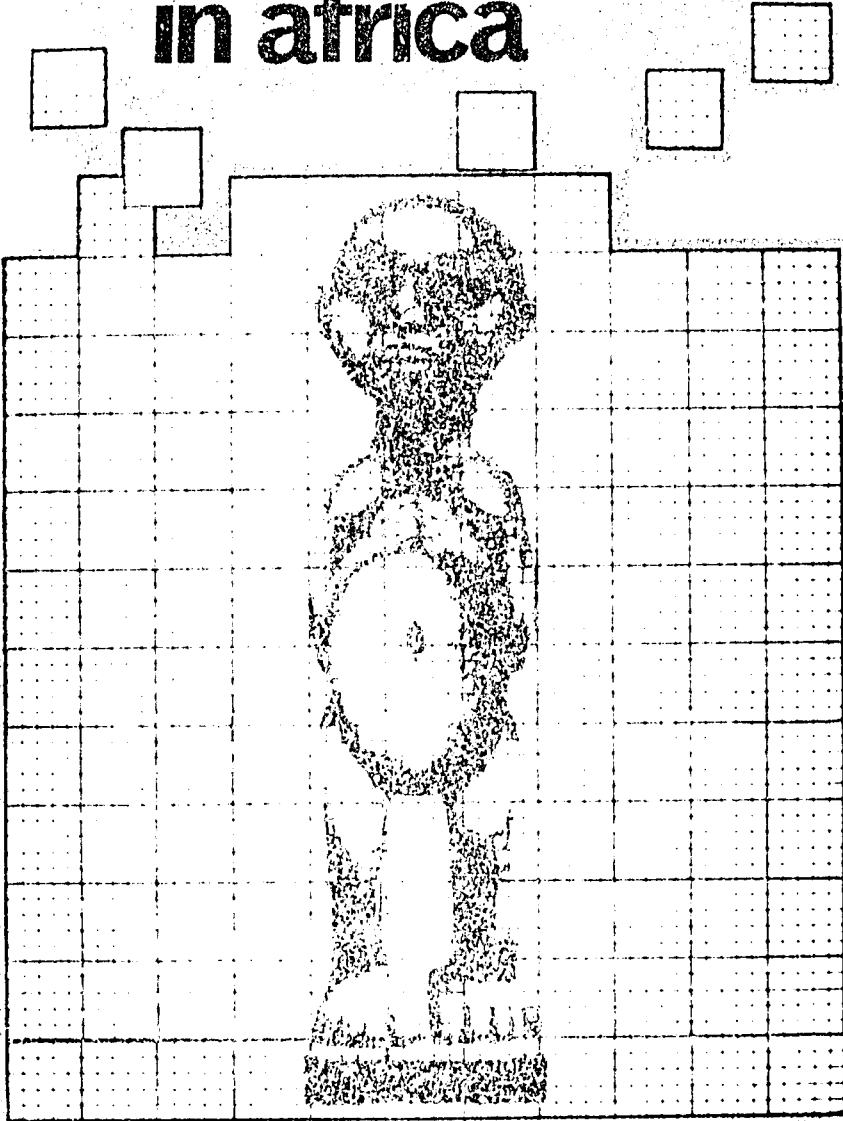


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law and population change in africa



edited by u.u.uche

Law and Population Change in Africa

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Edited by

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EAST AFRICAN LITERATURE BUREAU
NAIROBI DAR ES SALAAM KAMPALA

Preface

The Workshop on the teaching of population dynamics in African Law Schools was held in Nairobi (Kenyatta Conference Centre), Kenya, from 24th-30th November, 1974 under the co-sponsorship of the Law and Population Programme of the Fletcher School of Law and Diplomacy and the University of Nairobi, Faculty of Law. This Workshop was, of course, the Regional follow-up on the global Workshop on the same subject sponsored by the U.N.E.S.C.O. and held in Paris in February, 1974.

The Nairobi Workshop was attended by thirty-five experts from eleven African countries. The papers in this volume represent most of those presented at the Workshop. Discussions on the papers have also been summarized for the reader in the introductory chapter following. The editor would like to crave the indulgence of the reader in at least one respect, namely, the overlapping that is discernible in many of the papers included here. The incompleteness that would have resulted from editing out the overlaps would have done the whole effort a lot more damage than was desirable. Secondly, the interrelated nature of the subject itself made it difficult, indeed undesirable, to attempt to examine the respective aspects of it in water-tight compartments.

It is left for me to thank all those who in various ways made the Workshop and the publication of its proceedings possible. First on the list is Professor Luke T. Lee, the Director of the Law and Population Programme of the Fletcher School of Law and Diplomacy. Professor Lee is the pioneer in the expanding field of Law and Population. It was his encouragement and suggestion in Paris in February, 1974 that set the ball rolling in the direction of regional Workshops on the subject. The ultimate funding for the Workshop came partly from the Organization for Economic Co-operation and Development, again through Professor Lee's initiative. It is fair to say that the Workshop would not have had a chance to happen but for support from the Fletcher School of Law and Diplomacy Population Programme. Thanks are also due to the University of Nairobi, Faculty of Law and the Diplomacy Training Programme who not only made their facilities available to the Workshop during its preparatory stages, but also underpinned its success with the services of many of their staff during the more trying days when in session.

Last but not least, I am eternally grateful to Mr. N. G. Ngulukulu, Mrs. Rose Mwangi and Agnes Nkya, all of the East African Literature Bureau, for the sympathy and interest they showed in seeing the manuscripts through to ultimate publication.

U. U. UCHE

Nairobi,
July, 1975.

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Introduction

The main thrust of this book (and of the Workshop which brought it about), is the teaching of population dynamics in African Law Schools. It is important to stress the theme in view of the ease with which it could be and has often been confused with population law. The former includes all those aspects of population dynamics which are essential for the training of a lawyer to sharpen his perception and awareness of population matters and thereby make him a more useful member of the society of which he is part, given that population studies is a micro-system in a macro-development strategy of any country. Population law, on the other hand, is the lawyer's input into population studies, his contribution to the discipline which indisputably is multi-disciplinary. It stresses the role of the law and lawyers in formulating and implementing whatever population policy is adopted by any given system. By definition therefore it would seem that the teaching of population dynamics in law schools will include population law.

Hitherto the role of the law and lawyers in population studies has not been an obvious one, either to the other disciplines who have given more time to it or indeed to the lawyers themselves. This is of course understandable, given the specialized nature of demography (which dominated population studies) and the unilinear approach of lawyers to legal education. But Resolution 1838 (XVII) of the General Assembly of the United Nations of 18th December, 1962, in relating population growth to economic development, had among other things reminded "member states that in formulating their economic and social policies, it is useful to take into account the latest relevant facts on the interrelationship of population growth and economic and social development. . .".¹ The World Population Conference held in New Delhi, India in December, 1963, devoted a good bit of time examining the interrelationship of population and development. This trend was followed in the next World Population Conference held in Belgrade, Yugoslavia in 1965; and the same theme dominated the deliberations of the Conference held in Bucharest in August, 1974 to mark the World Population Year.

In the light of this development in the emphasis of population studies it would be a regrettable lapse in the performance of their duty to society if the lawyers did not join their cousins of the other social and medical sciences in the formulation and implementation of population policies. This lapse will even be more obvious in the developing economies into which most African Governments are conventionally categorized. In such systems, inherited or imported (even imposed) laws, if not restated and repealed (or amended) could quite easily become obstacles to development. A lawyer whose perception of the law is limited to the imperative theory is more likely

1. Discussions held between Luke T. Lee and Dudley Kirk at this Conference made possible the first ever grant made to start a study on law and population.

to be a misleading sign-post to the implementation of development objectives, a trend that any system should pay any price to avoid. It is undoubtedly true to say (although lawyers are the last set of people to admit it) that he who has the power to interpret the laws is the ultimate law-maker. It becomes crucial therefore to development programmes in Africa and population studies in particular that the lawyers who both draft and interpret the laws should be involved in the formulation of policies so that the legal enforcement of such policies will be reasonably consistent with the objectives that they were intended to serve.

To relate this more specifically to more practical areas, Macura's² definition of population policy goes as follows:

"... a set of measures by society or government designed to contribute to the achievement of humanitarian, economic, social and demographic and other related goals, by affecting critical demographic variable namely, the size and growth of the population, its regional distribution both national and international, and its demographic characteristics such as age, sex, structure, family size and the like. . . . The intermediate variables that would be affected would in principle include fertility, mortality, internal migration and international migration".

From this definition which has been widely accepted, it would seem that the broad areas that come to mind in the formulation of population policy will include fertility, mortality and migration (both internal and international).

Now, there appears to be no disputing the position that public health laws are vital to the attainment of lower mortality rates; to the improvement in the morbidity rates and to stabilizing crude birth rates. Nor is there any serious objection to the use of the law to regulate international migration since this is consistent with the international law theory of sovereignty and eminent domain. The same unanimity does not seem to emerge in the area of international migration but it is here contended that the law has a unique role to play in spatial distribution whose main object is the improvement of the quality of life of the population. Urbanization and rural development are, therefore, aspects of population studies in which the role of the law and lawyers will not only be welcome but sought. The papers contributed at the Workshop reflect this concern for these areas.

There is the more controversial subject of fertility regulation. The acrimony engendered by writers in discussing the topic has not at all been helped by the frequent use of such banners as 'Family Planning' with its twin areas of abortion and contraception. Here, Robert Thomas Malthus and his disciples, more popularly called neo-Malthusians, have had to fight a rear-guard battle against Colin Clark and others like him. The whole debate assumes the character of the Darwinian theory of creation and its antagonists. The remarkable thing about the Malthusian debate so far is that neither side would seem to deny the relevance of numbers to resources. The Malthusians

2. M. Macura, components of an international approach to population policy. *International Social Science Journal*, Vol. XXIV, No. 2, 1972 pp. 195-206—cited by S. H. Ominde—below.

and neo-Malthusians argue with penetrating lucidity that any rise in numbers should be related to available resources since the latter is limited. Failure to maintain a reasonable balance between numbers (population) and resources would be tantamount to courting disaster, a situation that could be avoided only by planned growth. Planned growth in turn means or could mean reducing fertility rates.³ Opponents of the Malthusian position on the other hand argue with a tenacity verging on religious fanaticism that as numbers (population) increase, so does the resourcefulness of man to cope with the consequences of the increase. This resourcefulness has so far ensured that man has always had enough to sustain him at every state of human civilization. Statistical projections about the limits to growth are chaffed away as prophesies of doom. All that man should concern himself with is not the scare of man-resources relationship to force him to limit his numbers but the challenge of creating enough resources to meet the demands of his times. As applied to Africa, this latter school of thought argue that the re-distribution of available resources as well as generating the right kind of development policies (including investment policies) should be the primary occupation of African governments. Population control programmes are irrelevant. Basically, therefore, the two schools are in agreement on the dialectical relationship between numbers (population) and resources. Their divergence is, however, discernible in the anti-natalists' contention that there is a limit to growth, and the pro-natalists' position that man's ingenuity is limitless in manipulating his resources to suit his needs.

Without necessarily endorsing in full the position of the neo-Malthusians, one takes leave to doubt the soundness of some of the slogans bandied about by the pro-natalists in the debate. One of them is that fertility regulation programmes in Africa and indeed in the third world as a whole, is a neo-colonialist/white imperialist trick to rob African governments of much needed human resources essential for their rapid industrialization and ultimate greatness. The second slogan, which is very much connected with the first is that fertility regulation programmes, in particular, family planning programmes, take up human and other resources that would more effectively have been deployed in increasing the G.N.P. and ultimately the quality of life for the generality of the population. Let us start with the first slogan. One danger of this approach is that the whole discussion appears to be based on a kind of mental fixation on the bogey of imperialism and its relationship to fertility regulation. Its primary position is to regard every proposal from esoteric sources as not only suspect but positively misconceived and dangerous. At the next level of abstraction, even one's colleagues, whom otherwise one would hold in high esteem, would be stigmatized as neo-colonialists if they dare hold views different from those of the proponents advocating the particular position. It has to be conceded that there is merit in the view

3. Planned growth can also mean increasing fertility rates for given periods, e.g. as in East Germany and Rumania (after 1966). This factor would seem to give the lie to an attempt to brand the Malthusians and neo-Malthusians as anti-natalist.

that proposals from extraneous sources, particularly those from very highly industrialized economies, should be carefully examined before they are rejected or indeed adopted. There might well be hidden dangers in a number of such proposals. One way of ensuring that one was making an independent appraisal of external proposals before adopting or rejecting same is to have mapped out what one's priorities are. In such a position one would be able to weigh any other proposal against one's existing set of priorities. To give a concrete example, most African systems still rely heavily on agriculture; yet less and less food is being produced for local consumption and great reliance is placed on imported food. Many of these governments go cap in hand begging for food from the industrialized countries who in many cases grudgingly oblige. The food given is not an imperialist trick in any way, it is aid. Even the most progressive of African governments accept this from the most capitalist of systems. It is another story when the benefactors in addition to the food aid (not in substitution for it) suggest measures to marry numbers to available resources—the whole concept of planned growth. At this point imperialism and neo-colonialism are easily discernible. Yet there appears to be no shame at all in asking for increased food aid every year to cope with our rising numbers. It is the author's contention that planned growth involves the ability and inclination to cut one's coat to suit one's size. Fertility regulation is as relevant to economic planning as other dependent variables such as capital and managerial know-how. It is therefore not an imperialist device to keep the black man in his place. We can still maintain our vigilance over our independence with or without family planning.

The other slogan is that of deploying all available resources, human and material, in improving the quality of life of the common man rather than on family planning. This on the face of it would sound very plausible; after all if you have limited resources you have to choose which projects to carry out first. Yet this is what all African governments have been attempting to do since independence by drawing up very thick and comprehensive Development Plans. It has however been discovered by all these governments that each of the projects specified in the Plans turned out to be a lot more expensive than was envisaged not only because of inflation but because of the lacunae in knowing how many people the Plan was intended to serve. Social services are based on numbers—schools, hospitals, etc. Employment opportunities are also based on numerical projections as are energy and other services that keep the state going. Even urbanization and rural development require numbers for effective planning and execution. It is crucial therefore that a choice be made by the state as to what attitude they would adopt towards the rate of population growth in order to realistically draw up and successfully execute Development Plans. Human and other resources deployed in fertility regulation satisfy as crucial a need as those actually engaged either in rural electrification or on duty in a hospital ward. Both those who strive to keep the rate of population growth at a level stipulated by the Development Plans and those actually engaged in executing Plan Projects are helping improve the quality of life of the generality of the population. International aid in

one sector will help release funds for other sectors. It is naive in the extreme to argue that a benefactor who is making noticeable efforts to control his own population growth rate should continue to supply us with food and other aid while we made no plans to stabilize our population growth. The position is very analogous to the extended family system in Africa where the successful family member cuts down his family size but still has to maintain numberless children of his sister, cousin, aunt, etc. in the rural areas, all of whom have no intention to limit the number of children they would have. The only difference will seem to be in the scale of the aid given and the race of the benefactor.

Now, where do the law and lawyers come into all these? Luke Lee's and A. M. Akiwumi's papers as well as the author's contribution below have all looked at the question of the role of the law and lawyers in fertility regulation in Africa. Luke Lee's now famous human rights approach has listed fourteen rights in the family planning area which will serve as the basis of the lawyer's entry point in the fertility regulation debate.⁴ Referring to the Teheran Proclamation and the U.N. Declaration on Social Progress and Development, Luke Lee had this to say:

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

- (i) The right to adequate education and information on family planning;
- (ii) The right of access to the means of practising family planning;
- (iii) The right to the equality of men and women;
- (iv) The right of children, whether born in or out of wedlock, to equal status under the law and to adequate support from natural parents;
- (v) The right to work;
- (vi) The right to an adequate social security system, including health and old-age insurance;
- (vii) The right to freedom from hunger;
- (viii) The right to an adequate standard of living;
- (ix) The right to freedom from environmental pollution;
- (x) The right to liberty of movement;
- (xi) The right of conscience;
- (xii) The right of privacy;
- (xiii) The right to separation of church from state, law from dogma;
- (xiv) The right to social economic and legal reforms to conform with the above rights.

Lee successfully tied each of the above rights (i-xiii) to existing Resolutions of the U.N. or some of its agencies; concludes by stressing that right no. xiv "flows logically from the fact that human rights are ipso facto legal rights,

4. Luke T. Lee, *Law Human Rights and Population: A Strategy for Action*, (Law and Population Monograph Series, No. 6, 1972).

entailing legal obligations on the part of governments to undertake the necessary reforms to conform with such rights".⁵

The lawyer's role would seem to be at two levels, namely, the policy level and the individual level. At the policy level the lawyer should ensure that the state of the law reflects the true position in the nation's international obligations either in the form of treaties or conventions as indeed in the policy as laid down in both the Development Plans and in other documents. The author's researches in the laws of Kenya have revealed vast areas of conflict between the law as it exists in the Statute Books and official policies as announced by the Kenya Government, particularly in the three Development Plans to date. The lawyer should, having restated the laws as they exist, go the next step of ensuring that necessary amendments and repeals are carried out to bring the law more in line with policy and international obligations. Such areas as marriage laws, tax laws, social welfare laws, to name only a few, can be used to promote any given policy on population growth rate.

At the individual level, the lawyer's role is also crucial. As a judge the lawyer's interpretation of the provisions of the law could promote or frustrate any given population policy objective. His attitude to social security legislation, abortion, contraception, etc., can have very far-reaching consequences on population policy. If either spouse uses contraceptives against the profound or conscientious objection of the other, would this be matrimonial cruelty for purposes of divorce? If the husband uses condoms each time they go through the sex act, has there been a consummation of the marriage? If the local authority abolishes the giving of free or subsidized milk to a family after the third child, would this be considered discriminatory legislation against poor families? Would the scope of discriminatory legislation under the Kenya or any other African Constitution be stretched to cover such cases? If a doctor performs an abortion operation on a girl who is a minor, without the consent of her parents, would this be treated as a case of indecent assault on the girl? These and other questions would seem to give the courts a unique place in the implementation of population policy. It is therefore crucial that the lawyer should have developed sufficient perception of population dynamics in his legal education at law school or should have picked it up to be able to adjudicate on these matters in accordance with the policy objectives of any system of which he is part. One comes to the conclusion that the law and lawyers have an important role to play in all aspects of population dynamics. In both mortality and internal as well as international migration the law's contribution is crucial. The case for the place of law in fertility regulation has also been stated and argued.

DISCUSSION

The Workshop was declared formally open by Mr. Francis Tuva, M.P.; Honourable Assistant Minister, on behalf of the Honourable Minister for

5. Lee; *op. cit.*, p. 319.

Finance and Planning in the Republic of Kenya. The full text of his speech is subjoined to this section of the report.

After the ceremonial opening the Workshop settled down to an examination of the topic, namely, the teaching of population dynamics in African Law schools. This was subdivided into five themes, that is to say:

- (i) Law and population; a general introduction;
- (ii) Law and family planning;
- (iii) Population laws and development in Africa;
- (iv) Population laws and the Environment in Africa;
- (v) Demography and the law.

Workshop papers covered the above themes as did discussions by participants.

I. LAW AND POPULATION: A GENERAL INTRODUCTION

This theme was examined under four sub-headings, namely, the answers to the questions:

- (a) What role should the law and lawyers play in population studies?
- (b) What is population law?
- (c) What is the lawyer's plan of action in population studies?
- (d) What should be the content of a syllabus on law and population for African Law schools?

On the first question the dangers of lawyers not taking part in population studies were fully aired. These included the obvious one of the law becoming an obstacle to the implementation of policy and the archaic received laws lagging behind development in Africa. Special mention was made of ex-colonial territories who had imported laws that had long become obsolete in their countries of origin but had held on to such laws due to the inaction of lawyers in such countries. Gabon and most Anglophone African countries (with the recent exception of Zambia) were quick examples. This was a reference to the law on the area of fertility regulation in these countries. It was also felt that a lot more research was needed in customary laws with a view to bringing out model laws based on the circumstances of each country.

Workshop was in general agreement with Luke Lee's thesis on the use of human rights as the lawyer's entry point in the debate. The fourteen rights listed by him are set out in his paper below. These range from the right to adequate education and information on family planning to the right to social, economic and legal reforms to conform with those rights. It was felt that the areas listed by Lee are comprehensive enough to include the whole field of population studies, be it mortality, morbidity, migration or fertility.

The second question dealt with what is population law. This was defined as the body of law which relates directly or indirectly to the population growth, distribution and those aspects of well-being affecting, as well as affected by population size and distribution. Law in the context was defined to include the constitutional, statutory, administrative and decisional as well as customary. Workshop agreed that the above definition would seem to

include all the relevant aspects of the subject that would be of interest to the lawyer.

A discussion on the plan of action to be adopted by lawyers who are engaged in population studies followed. The first step was said to be the collation and recording of all laws (as defined above), judicial decisions, orders, by-laws, etc, that have a bearing on population matters directly or indirectly. This will be followed by research of a socio-legal character to determine both legal impact studies and customary law rules. The third stage will be a seminar stage when the data in the two earlier stages are fully discussed and compared with the human rights principle. The final stage will be the drafting of model laws based on the data as collated above. Workshop participants were agreed that the plan of action should be initiated in all African countries and that lawyers should co-operate with the other social and medical sciences to make the plan effective. Results would be made available to policy-makers with a view to being given legislative force.

The fourth and final section of this theme dealt with the syllabus for teaching population dynamics in law schools. There was heated discussion of the desirability of carrying out a new field of study, namely, Population Law as a separate option in law schools, as distinct from teaching the population component of existing law options. The consensus was that population law should be taught as an option but that teachers in the programme need not be all lawyers. Demographers, statisticians, public health personnel and sociologists should all be involved at the introductory stages of any series of lectures or seminars. The Workshop congratulated itself on its success in bringing together a generous sprinkling of those of interested disciplines—lawyers, sociologists, family planners, medical personnel, demographers and statisticians to discuss the topic of law and population. The syllabus set out in Luke Lee's background paper and touched on in Akiwumi's paper, was generally adopted as adequate for the needs of any law school in Africa that intended to include the subject as one of its options for undergraduate and postgraduate offering. Participants from Law Schools were reminded of the desirability of following up the matter when they got back to their Faculties.

II. LAW AND FAMILY PLANNING

This theme was discussed under two sub-headings, namely:

- (a) Medico-legal aspects of contraception, sterilization and abortion; and
- (b) Socio-legal considerations and family planning programmes in Africa.

On the medico-legal aspects of contraception, sterilization and abortion, the unique absence of laws specifically intended to regulate these matters was noted and deplored. It emerged that such countries as had family planning programmes, either officially sponsored or by voluntary agencies, had to rely on the general provisions in legislation regulating drugs to deal with contraceptives. In Kenya for instance, reliance for oral contraceptives derives its legality from the Pharmacy and Poisons Act, as well as from Food,

Drugs and Chemical Substances Act. The position is similar in Ghana, Uganda and Nigeria, as indeed in the Gambia and Sierra Leone. Pills in Kenya have to be prescribed by a duly registered medical practitioner, although condoms could be purchased in chemist stores as well as in supermarkets and confectionaries. Except the Zambia who in 1974 enacted the Termination of Pregnancy Act in similar terms to the English 1967 Act, no other African country has bothered to legislate specifically on abortion since independence. Abortion provisions that exist are those found in Penal Codes roundly condemning the act and imposing heavy penalties on defaulters. This is so in spite of publicly announced policies to reduce the rate of growth of the population in many of these countries. A strong case was made for reforming the law regulating fertility in these countries to accord with policy objectives. Note was taken of the need for legal regulation to help fertility in areas of sub-fertility in Africa. These were said to include the Foutbe, the Gounde and the Dourou in the Cameroun Republic; the Kanuri of Niger, the Nzakara and the Zande of Central African Republic, the Mongo and Mangbetu of Zaire, to mention only a few examples. The importance of this aspect of the discussion lies in the attempt to correct the impression that family planning programmes are concerned only with fertility control.

On the medical aspect of the discussion, note was taken of the kinds of contraceptives available in African countries and their relative safety to health. The pill, the condom, the jelly and the intra-uterine-device (I.U.D.) are the most common. The I.U.D. can only be inserted by a registered medical practitioner. Although no specific legislative provision governs the matter, it is read into the provisions of the Medical Practitioners and Dentists Act. Both the pill and the injectable type of contraceptives have to be prescribed by a medical practitioner under the Pharmacy and Poisons Acts.

In medical parlance abortion implies the expulsion of the products of conception before the 28th week of pregnancy. Expulsion after that period is referred to as premature labour. In some cases it is found necessary to expel the products of conception on medical grounds. In such cases consideration is given to the woman's life and health. On purely medical grounds the number of health conditions necessitating abortion are very few. These are mainly conditions of the heart, serious kidney diseases and psychiatric disorders.

Figures on illegal termination of pregnancy are not easy to obtain since those involved can hardly come forward to report their own breaches of the law. Still, from the cases that reach the casualty wards in hospitals it is quite clear that the practice is on the upward trend and will continue to be so for as long as the law on the subject remains at the best obscure. Most African countries (except the Francophone countries where abortion is roundly prohibited, e.g. Gabon) accept the pre-1967 English law position based on the principle laid down in the case of *R. v. Bourne*. This allows for termination of pregnancy if two doctors, one of whom must be a psychiatrist, are convinced and testify that carrying the pregnancy to term would be harmful

to the life or health of the mother. The principle has been given very strict interpretation in many Anglophone African countries as witness the Kenya case of *Bansel v. R.* decided in 1959, where a doctor was convicted of manslaughter for performing an abortion operation on conditions strikingly similar to those in the *R. v. Bourne* case. Yet the grim and ugly truth is that a good many of the victims of criminal abortion suffer irreparable damage to their reproductive systems resulting from infection. Many even die due to overdose of abortifacients or of excessive bleeding. This is rather a sad commentary on the state of the law. A case for reform was recognized here.

Another facet of the discussion of abortion which engaged the attention of the Workshop is the right of the unborn child. Are his basic rights to life not being jeopardized and sacrificed to satisfy all those interests that support the legalization of abortion? Secondly, if family planning programmes include provision for sperm banks and artificial insemination as well as test-tube babies, is the child not entitled to a father as a basic human right? Is he not entitled to being born legitimate? Workshop was in general agreement in respect of abortion that the unborn child did not have any legal rights against the mother. There did not seem to be any unanimity on a logical basis as distinct from a legal one as to when life began in the child. It is a mute legal point whether a child born deformed as a result of an attempted illegal miscarriage can have a right of action in tort against an abortionist other than his mother.

Socio-legal considerations and family planning programmes in Africa was the next sub-head discussed. The Workshop addressed itself to three main questions raised in Okediji's background paper, namely:

- (i) How effective are governmental population policies and social legislation in changing pro-natalist behaviour or reproductive habits within particular countries in Africa?
- (ii) If the effectiveness of these population policies and social legislation are in doubt, to what extent can we say that general improvements in nutrition, economic well-being, educational standards, health, social justice and status of women will create conditions for the regulation of individual and national fertility levels?
- (iii) To the extent that the interconnections between law, population matters and social change are so complex can we say that particular legislation or particular components of population policies cause a decline in fertility levels?

On the effectiveness of measures intended to promote given population policies, Workshop narrowed the discussion to an examination of the effectiveness of family planning programmes in Africa. It was however recognized that family planning is not co-terminous with population policy although it could constitute an aspect of such policy. To determine the type of services rendered; who are the recipients of such services; who should administer the services and under what conditions. The kind of services provided should not be limited to birth control measures but should include advice and other help to families that badly need a child but have none, particularly in areas

of sub-fertility in Africa. It should also include advice on child care. On who should receive the services, there was agreement that individuals had a right both to practise family planning and to receive information on it. In this respect both the spouses had equal right to a decision on the use of contraceptives, on the persons to administer the service and under what conditions. Workshop agreed that medical and para-medical personnel should continue to give the service under clinical conditions but that there should be a continuing re-appraisal of such programmes to determine their effectiveness on a cost-benefit basis.

Related to the question of effectiveness is the problem of drop-outs in family planning programmes. Drop-outs are people who have once practised family planning methods as clients of clinics but have for any reason ceased to practise. A number of reasons were given for dropping out as found by Gachuhi in a research carried out in Kenya. These range from social and psychological ones to rural communication difficulties. The type of personnel involved in the motivation of family planning was also given as one reason for drop-outs. Older people baulk at being talked to on sex matters by young un-married girls. Workshop emphasized the importance of education and communication in family planning matters and the necessity for privacy. The need for bringing the clinics nearer the acceptors was also noted as a necessary step to make the programmes more effective.

Alternatives to family planning programmes in reducing fertility levels will be discussed under population and economic development below, as will the third sub-head, namely, the extent to which existing legislation on population matters affect fertility levels in Africa.

Two other issues discussed in relationship to family planning were the status of women and the place of Muslims in existing programmes in Africa. On the former, note was taken of series of legislation which are either *prima facie* discriminatory to women or whose operation and enforcement produce the same effect. The vagrancy laws, social legislation and education were given as examples. The inferior status of women in almost all African customary law systems was also noted and deplored. In family planning matters simpliciter, it was suggested that a woman should have the same right as her husband (if married) or any man, to decide to have or not to have children. Since she is the one carrying the child in cases of pregnancy, her say should be decisive in abortion matters. In other words no woman would have to carry a child to term by reason only that it is her husband's wish that she did so.

In view of the large Muslim population in Africa, Workshop felt it necessary to look at the attitude of Muslims to family planning programmes. Discussion was focused on a background paper prepared by Farouk Muslim. Note was taken of the fact that crude birth rates are high in many Muslim communities all over the world, with Kuwait and Pakistan leading with 52 per thousand. Kuwait has a phenomenal growth rate in population terms of 7.6 per cent, more than double the Kenya figure which has been said to be very high. Muslim countries have therefore shown great concern for and

interest in measures to reduce the rates of population growth. Egypt, Malaysia and Tunisia have for instance adopted measures to limit the growth rate of their population. Basically, the Qur'an is not against birth control in principle except in the express prohibition of abortion. As early as 1936 the movement for birth control in Islamic societies succeeded in getting a 'Fatwa' (the opinion of the *Ulama* on a point of Islamic law) from the *raufti* of Egypt, permitting the use of preventive measures, and in 1952 the former Rector of Cairo Al-Azhar University announced that he was in favour of birth control. In recent years Sheikh Abdulla, Al-Qualqili, the Grand Mufti of Jordan has given an opinion in favour of family planning. There is also the Islamic law rule that marriage should be disallowed if the would-be husband is not capable of meeting the expenses of married life. Birth control measures should be aimed at relieving hardship and producing a just society, not just to satisfy the lust of a woman who would like to have sex but no children. Even the abortion position is not as rigid as has often been thought. Since abortion in Islamic law is a crime against a being that is already accepted as 'alive' there is the question as to when life begins. Some Islamic law thinkers hold that life does not begin until four months after the sperm has been in the ovary. On this basis an abortion performed within the first trimester would not be a violation of the provisions of the Qur'an. Workshop noted the importance of making the above position of Islamic law on birth control more widely known, particularly among African Muslims.

III. POPULATION LAWS AND DEVELOPMENT IN AFRICA

This theme was discussed under the following broad sub-headings:

- (a) The political economy of population policies in Africa; and
- (b) The relevance and effectiveness of existing measures in the implementation of population policy objectives in Africa.

The two background papers prepared on the first sub-head by Ndem and Baffoe, respectively, appeared to be a restatement of the neo-Malthusian and the Colin Clark positions with one unique difference, namely, the anxiety shown in both papers to seek a genuinely African solution to the problem of development. Both papers accepted the relevance of numbers in the provision of resources.

The two positions crudely stated were as follows: On the one part, that population and resources are two dependent variables with which society either as individuals or as a state has got to content. While man has the power to control his population by adopting the right kind of measures, his control over resources is limited because of the finite nature of the latter. If man does nothing to control his population the resultant pressure in resources will ultimately and inevitably lead to hardship and the lowering of the quality of life for everybody. This position is as true for Africa as it is the world over. Africa should therefore devise policies to stem population growth as one means of economic development. Planned growth will increase the number of the effective population (those who produce more than they

consume). This in turn will increase the available resources and therefore the quality of life of the generality of the population.

The other position is that if existing resources in African countries were equitably re-distributed and more enlightened investment policies pursued, this would produce the effect of increasing the total resources, improving the quality of life, and render the population bogey irrelevant in the African context. In Africa therefore, it is the exploitation of the available resources by the right kind of investment policies, not population explosion, that is the threat to the quality of life.

Workshop conceded that correct investment priorities and more equitable re-distribution of existing resources will improve on the present quality of life of the generality of the people. Workshop also felt that in the long term it is essential to plan one's growth of population to ensure that equitable distribution does not end the people up in shared poverty, which means lowering the quality of life. There was therefore a felt need for population planning and the formulation and implementation of measures to ensure that population growth rate did not take resources by surprise.

On the relevance and effectiveness of measures to implement policies, Workshop noted the various direct measures aimed at the fertility level, for example family planning programmes, while the indirect measures include rural development schemes, labour and social welfare laws, marriage and divorce laws, succession and inheritance laws and tax laws. Rural development schemes will greatly create employment in the rural areas, arrest the drift of population to the urban centres and intensify a need even in the rural areas to keep family size small so as to maintain a good level of life. Kenya has embarked on an extensive rural development programme as set out in Mette Monsted's background paper. The effect of suitable labour and social welfare laws will be to ensure maximum employment and benefits as well as social security provisions. These will in turn trivialize the argument that large families will ensure protection for the parents in their old age. Smaller-size families will gradually but ultimately arrive. Note was made of the possible pro-natalist implication of large maternity benefits for more than a given number of children in one family, say three children. It was agreed that the levels should be kept modest. The importance of raising the minimum age of marriage was discussed. Note was taken of the automatic effect on age of marriage for women brought about by higher education now available to them. The trend was to be encouraged in the interest both of the status of women and population growth rates. Tax laws are also used to effect population policy. Large child relief provisions in the income tax Acts would have a pro-natalist effect while modest provisions would tend to have a neutral effect on fertility levels. On the effectiveness of family planning programmes, Workshop felt that the apparent upward trend in population growth rates in Africa in spite of the family planning programmes were attributable to three main factors. One of these is the state of the law on abortion, which is still roundly prohibited with minor qualifications, in all Africa except Zambia. The second reason had already been examined under

the discussion on drop-outs (personnel involved in motivation and transport difficulties). The final reason is that most people in the rural areas do not yet see large families as a burden because of the mortality rates, unemployment, and disparities between the urban and rural areas. These conditions will of course improve as the rural development schemes catch on and the mortality levels decline further. Under such conditions family planning programmes will have a lot more acceptors and less drop-outs:

IV. POPULATION LAWS AND THE ENVIRONMENT IN AFRICA

Discussion on this theme was based on background papers prepared by Osman Mardi (Sudan) and John Monic (Cameroun) which dealt with social pollution resulting from urbanization in the Sudan and land law reform to help the re-distribution of population density in the Cameroun, respectively. Workshop noted the causes of rapid urbanization in Africa, namely, rural unemployment and under-employment, concentration of amenities such as social services and industries in the urban centres and in some cases, landlessness. These conditions lead to a rapid drift to the urban centres. Note was also made of the fact that rural-urban migration creates social problems in both urban and rural areas. The cities are often unable to absorb the migrants at the pace at which they arrive, and the new arrivals pile up in mushroom settlements made of the flimsiest materials and sometimes without any form of municipal administration or public services. Living conditions in these settlements are often materially worse than in the villages from which the migrants came. This concentration of unassimilated migrants tends to encourage crime, disease and political instability. The rural areas from which the more talented and better educated young people have migrated tend to become economically stagnant and socially unattractive. A recent trend in African urbanization was noted, namely, the practice of one or two very large and rapidly growing cities containing a high proportion of the total urban population, while smaller cities tended to stagnate or to grow rather slowly. On the periphery of the largest cities are often to be found two geographically separated and entirely different types of settlement; on the one hand, new housing developments for the wealthier groups moving out of city centres to less congested residential areas, and on the other, the shanty towns in which urban administrative rules either did not apply or were not enforced, and housing standards were exceedingly low. Workshop felt that the type of urbanization that has developed in the Soviet Union (namely, as a consequence of planned decentralization of industry and other institutional establishments the urban population had been dispersed over a large number of cities other than the biggest ones, including several of modest size) was preferable in Africa. This type of development will minimize the incidence of crime by removing the shanty towns where the migrants from rural areas live in shared poverty. It will also generate employment for a great proportion of the labour force of each country. These in turn will increase the number of the effective population and the quality of life.

In this connection the problems of acquiring land for new settlement

schemes due to customary notions of land tenure were said to constitute an obstacle to the creation of new growth points in African countries. Many African governments are finding ways round this obstacle. In the Cameroun, for instance, Ordinance No. 71/11 of 6th July, 1974 repeals all legislation dealing with land in the country and made the state the guardian of all lands. In this capacity the state can intervene, and has in fact done so, to ensure rational use of land in the interest of defence or economic development. The latter basis would seem to include settlement schemes to ensure the effective re-distribution of the population. The same process is observable in both Kenya and Tanzania as well as in Uganda. Workshop noted that the above approaches were preferred to the current practice of attempting to keep down the population of the existing urban centres by such measures as vagrancy laws and legislation that have similar effect. Equitable re-distribution of the population by the creation of incentives in both the rural areas and other new growth centres, coupled with intensive education on the importance of rural areas to the economy, will stem the rural-urban drift and arrest pollution both in the social and physical sense.

V. DEMOGRAPHY AND THE LAW IN AFRICA

Ominde in his background paper to the Workshop set out four main areas of immediate concern for lawyers in the examination of demographic questions, namely:

- (a) The need for research and an early review of the legal framework for an integrated population policy;
- (b) The importance of a broader conception of population policy as part of the national, social and development planning;
- (c) The importance of an urgent attention to the service infrastructure for regulation of fertility and;
- (d) The urgency of a system of priorities in the legislative strategy for African population.

Under research and the legal framework, it was stressed that the challenge facing the lawyers need not be seen in terms only of salvaging scraps of legislation affecting demographic trends, but that legal experts should work with demographers within a multi-disciplinary framework to project progressive legislation more in line with integrated development objectives. On the scope of population policy for Africa it was recognized that this is wider than a mere determination of family size. Lawyers should involve themselves in all aspects of population policy, namely, mortality, migration and fertility. Since population policy is an integral part of socio-economic development, it is important that African governments should provide services to reach as large a part of the population at risk as possible. Provision of the necessary infrastructure will help the effectiveness of family planning programmes. The machinery for the provision of the necessary infrastructure is a job for lawyers in collaboration with demographers. Since resources are limited it is important that African governments make a careful choice of their priorities, a choice in which the help of the lawyers will be

most welcome. Workshop were in general agreement with the scheme set out. On vital registration the discussion was based on Kpedekpo's background paper. Workshop noted the need for the revision of the vital registration laws and regulations to adapt them to new conditions in and requirements of the various African countries. Steps should be taken to ensure strict adherence to legal requirements about registration of events, e.g. births, deaths, and other occurrences. The need for the simplification of formalities for the registration of these events was also emphasized as was uniform legislation on the subject. Comparative research in vital registration should be initiated to identify common problems and to recommend possible solutions. Rationalization of the allocation of power among governmental institutions was seen as one area where the law could promptly intervene to ensure the least possible inconvenience to the citizen in registration matters. There is a good deal of merit in making legislative provisions reasonably flexible but certain.

SUMMARY OF CONCLUSIONS

Although the Workshop did not set out to pass resolutions, the following conclusions can be said to flow from the discussions:

I. LAW AND POPULATION: A GENERAL INTRODUCTION

Both the law and lawyers in Africa have a crucial role to play in population studies. The entry point for lawyers is the concept of human rights which spans the whole gamut of population dynamics.

Population law is that body of law which relates directly or indirectly to the population growth, distribution and those aspects of well-being affecting, as well as affected by, population size and distribution. Law in this context includes constitutional, statutory, administrative and case as well as customary laws.

The lawyers' plan of action shall be, firstly, a collation and recording of all laws as defined above, then customary and other sociological data compared with the recorded laws in a series of seminars and tested against the human rights principle; and finally the drafting of model laws based on the collated data.

The subject 'law and population' should be included as an option in African law schools. The syllabus as set out in Luke Lee's background paper was adopted as the correct approach.

II. LAW AND FAMILY PLANNING

The unique absence of legislation specifically intended to regulate the subject in Africa is very much to be deplored. There is need for legislation on contraceptives, sterilization and abortion to reflect publicly proclaimed policies on fertility regulation.

In particular there is need for a clear statement of the position on abortion. The law on the subject needed to be liberalized outside the narrow confines of Penal Codes. Zambia's Termination of Pregnancy Act is a step in the right direction. Other countries in Africa should follow Zambia's examples, except areas of sub-fertility or infertility.

Family planning programmes can become more effective than they currently appear to be. This will be the case if motivators become more acceptable to the acceptors than they now are; if the clinics respect the acceptor's right of privacy and if more clinics are made available especially in the rural areas. Acceptors are resistant to travelling long distances to obtain contraceptives or other family planning advice. There is also the need to include in the programmes a place for couples who would like to have a child but do not in fact have any or have only one when they would prefer at least two.

Finally, family planning programmes will become a lot more effective when the people, especially those in rural areas, are persuaded that they no longer need to have large families. This will be so if rural development, resettlement schemes and social security measures reduce the dependence on children during old age and improve the quality of life of the generality of the population.

Discriminatory laws against women, in particular marriage and divorce laws, customary laws and inheritance laws, do detract profoundly from the status of women. Lawyers should embark on research schemes to expose laws that are discriminatory to women with a view to the repeal of such laws. In family planning matters, women should have the same right as men. A woman should be able and allowed by law to decide whether or not to have children and whether or not to carry any pregnancy to full term.

Islamic law is not opposed to family planning. Many Muslim countries have adopted family planning programmes. Information on the true position on Islamic law attitude to family planning should be made available to African Muslims. It is in fact an aspect of the Teheran Proclamation.

III. POPULATION LAWS AND DEVELOPMENT IN AFRICA

There is need for the correct attitude towards investments to ensure equitable re-distribution of existing resources in Africa. This will have the effect of raising the quality of life of the people at the present time. It is also very essential to plan the growth of population in African countries to ensure that equitable re-distribution is not another name for shared poverty. Population planning will help guarantee that population growth did not take resources by surprise.

Indirect measures aimed at achieving definite population policy objectives have to be made to work. These include labour and social welfare laws; social security laws; age of marriage; tax laws and rural development schemes, among others. These will trivialize the contention that large families are an unflinching guaranty for parents during their old age.

IV. POPULATION LAWS AND THE ENVIRONMENT IN AFRICA

Rapid urbanization in Africa creates both economic and social problems. The main explanation for the rural-urban drift is however economic. Decentralization of industry and other institutional establishments will lead to a dispersal of the population over a large number of cities, not only the

large ones but creating a good number of other growth points of modest size. Employment opportunities and other amenities will be found in such centres, thus removing the attraction of the large cities. This in turn will reduce crime and other social evils.

Lawyers should help African governments to enact legislation to get round the inhibitions of customary law titles to land which would tend to stand in the way of re-settlement schemes, a measure desirable in the policy of population distribution in spatial terms. The Cameroun, Kenya, Tanzania and Uganda have already taken steps in the right direction in this matter. Lawyers should help in the whole area of ownership rights in land settlement schemes. This creates security for the settlers. New schemes inevitably help the physical environment.

V. DEMOGRAPHY AND THE LAW IN AFRICA

There is need for research and an early review of the legal framework for an integrated population policy wider in scope than fertility control.

It is also important to advert to the provision of service infrastructure for the regulation of fertility, as it is indeed urgent to devise a system of priorities in the legislative strategy for African population.

There is a felt need to revise laws on vital registration to adapt them to new conditions in Africa today. There is also need for comparative research to identify common problems and to recommend possible solutions.

U. U. UCHE

Address by the Honourable Francis Tuva, M.P.

ON OPENING THE WORKSHOP ON THE TEACHING OF POPULATION DYNAMICS IN LAW SCHOOLS IN AFRICA

Kenyatta Conference Centre

25th November, 1974

Mr. Chairman, Ladies and Gentlemen:

I would like to welcome you all to this Workshop and particularly those of you who have come from other countries. I hope that you will enjoy your stay here and will have the opportunity of seeing more of our country when your time is not taken up by Workshop discussions. I see that your programme includes a visit to our flamingoes in Nakuru and a reception at the Bomas of Kenya. You could of course see a lot more during your spare moments and after the Workshop. I am particularly pleased about your choice of Nairobi as the venue for this first Regional Workshop on the teaching of population dynamics in African law schools.

The Kenya Government has over time set up long-term objectives for improving the over-all standard of living of all Kenyans. The main objectives are:

- (i) To provide employment for every Kenyan within the working age;
- (ii) To provide education for all Kenyans;
- (iii) To provide adequate health services;
- (iv) To provide adequate housing for all Kenyans;
- (v) To provide electricity, water and adequate transportation;
- (vi) To control the growth of population so that the number of people is commensurate with resources available for providing a decent standard of living;
- (vii) To enable Kenyans to control the economy;
- (viii) To secure maximum per capita income;
- (ix) To achieve an equitable distribution of income.

The achievement of these objectives demands a high rate of economic growth which depends more on a high rate of investment. Kenya's present growth of population estimated at about 3.5% is too high to guarantee the diversion of resources into productive investment. The trends in the three important variables—mortality, fertility and international migration which affect population growth have been as follows:

- (i) The crude birth rate has remained relatively constant at about 50 live births per thousand population over the period 1948-1969 and it is assumed to be the same now.
- (ii) Both the crude death rate and infant mortality rate have declined over the period due to improvements in health services, maternal and child welfare plus improvements in nutrition. Over the period

1948-1969 it was estimated that the crude death rate declined by 32% from 25 to 17 deaths per thousand population. The infant mortality rate declined by about 40% from 200 to 120 infant deaths per 1000 live births over the same period.

- (iii) International migration has remained insignificant and its future pattern expected to remain the same.

Given these trends in mortality and fertility the Kenya Government has embarked on various programmes to reduce both mortality and fertility. The reduction in mortality has demanded the extension of health services and special rural development programmes. To control fertility, the Government has initiated a voluntary family planning programme which is aimed at improving maternal and child welfare. The Government has decided to intensify this programme during the current development plan (1974-1978) and recruit 640,000 new acceptors and avert about 150,000 births. At the same time the Kenya Government recognizes that in addition to family planning, socio-economic development efforts would also contribute to reduction in fertility. It is very reassuring that the lawyers are now waking up to the challenge of numbers and the implications for development. I have often been told that lawyers are loyally conservative and are therefore primarily concerned with their unilinear discipline and its technicalities. The subject of this Workshop, however, would seem to indicate a change of heart, I must hasten to add, a refreshing and welcome change. I believe that we need the lawyers not as technicians who draft our policy options but as partners in the formulation and implementation of policy; partners in the development process. This is because I am only too aware of how obstructive the law and lawyers can become to the development effort if such co-operation is not forthcoming. This can become one of the main dangers of the insensitivity of development studies to law and legal institutions.

But by incorporating the teaching of population dynamics as part of the curricula of law schools, you will produce lawyers who are fully aware of the current needs of society. That is not to suggest that the present crop of lawyers have limited perception in this area of our lives but it is rather to emphasize the importance of starting early to involve the law student not only in the technicalities of the law but in the problems of society of which he is part. In this way he will be a lot better informed than he would otherwise have been, and what is even more important he will be much better equipped to serve the dynamic needs of the society.

I see from your list of participants and from your Workshop papers that there are among you a generous sprinkle of non-lawyers, sociologists, economists, statisticians, demographers, medical doctors, etc. It is very encouraging to notice this level and degree of collaboration among your various disciplines. It is of course true that development planning, of which population planning is but a part, is a multi-disciplinary subject, the successful study and execution of which requires team work. It is my hope that your Workshop will address itself to the ways in which co-operation in Africa could be enhanced Multi-

disciplinary recommendations always attract the attention of policy-makers.

You have on your programme a variety of interesting topics including law and family planning, population laws and development in Africa, population laws and the environment and the legal aspects of demography. From your papers on these topics I have no doubt at all that you will have many stimulating sessions. I hope that you will make the outcome of your Workshop here available to as wide an audience as possible and that this will be but the beginning of this kind of dialogue. It is my great pleasure therefore to declare the Workshop open and wish that the Kenyan spirit of Harambee will prevail during all your deliberations.

Thank you.

Population Law a New Curriculum for Law Schools

LUKE T. LEE

Family planning should not be viewed as a goal in itself, but rather as a means to an end—opportunities for adequate food, health, clothing, shelter, education, work, recreation, old-age security, etc.—all of them basic human rights which family planning affects.¹

Since the population problem is multi-dimensional, the path to solution must lie in the involvement and co-ordination of many fields whose effectiveness has heretofore been hampered by strict compartmentalization.² No longer should the population problem be viewed as essentially one of numbers or census-taking (as emphasizing the statistics or demography might imply), for even in the United States, with its advanced technique and century-old experience, the margin of error in its census for 1970 reached the proportions of 5,300,000, and the black population was apparently under counted by as much as 7.7 per cent.³ Nor should the provision of contraceptives and services be regarded as a panacea for the population problem. Even if the population problem could be reduced to one of over-population, which the provision of contraceptives and services may help alleviate, the creation of an effective demand is at least as important as the supply factor in the equation. But, as noted above, decreasing the rate of population growth will only affect superficially the deeper problems associated with population.

Because of his training in the consideration of all sides of a problem, the lawyer can render an invaluable service in the population field through the use and co-ordination of all branches of law. So long as "law is an instrument of social policy,"⁴ its potential as catalyst for social reform should be fully utilized.⁵

I. PAST DEVELOPMENT

A quarter of a century ago, Jacques Doublet made this succinct observation:

The attitudes of a state always have a hold on the development of its population, whatever the end pursued by law, and that, even when the law pretends indifference.

1. Larson, "Introduction," in Lee and Larson, *Population and Law* (Leiden: A. W. Sijthoff, and Durham, N.C.: Rule of Law Press, 1971), p. vii.
2. Ehrlich, "The Sociology of Law," 36 *Harvard Law Review* 130, 133 (1922).
3. *New York Times*, April 26, 1973, p. 1, col. 1.
4. E. M. Vorozheikin, "Population and the Law," in *USSR-Papers on Population* (Moscow, 1973), p. 89.
5. Lee, "Law and Family Planning," in *Studies in Family Planning*, April 1971, p. 82 (originally a background paper prepared for the Expert Committee on Family Planning in Health Services of WHO on 24-30 November 1970).

In its turn, the population, by its very structure exercises an influence on every sort of law; constitutional, organic and statutory.⁶

It may be noted that early legal codes dating back to the Babylonian Code of Hammurabi and the legislation of Augustus already contained pronatalist clauses. Thomas Jefferson, in his draft for the Declaration of Independence, accused King George III of the following:

[H]e has endeavoured to prevent the population of these states; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migrations hither; and raising the conditions of new appropriations of lands.

His draft was incorporated intact into the final text of the Declaration of Independence.⁷ These facts show the significance of population law in human history.

Notwithstanding the role which law has played in population matters, the conscious relating of law to population is of comparatively recent origin. Due to low priority often accorded to the law compilation and reform tasks, the population laws of most countries continue to reflect the prevailing social orders and values of earlier generations or those of erstwhile colonial powers whose legacy of "legal imperialism" remains much in evidence despite "political" independence and self-determination. Only in a few countries are population laws designed to cope with the realities of existing social and economic conditions.⁸

Lawyers themselves may not be unblameworthy: Directing themselves to more technical aspects of the law, both in their training and in practice, they have, with but a few exceptions, been inactive regarding the challenge of a problem of serious proportions. In 1965, out of some one thousand participants and observers at the United Nations World Population Conference in Belgrade, there was only one lawyer, and none of the hundreds of papers presented at the Conference dealt with the legal aspects of the population problem and family planning.

The year 1966 appears to have been the turning point. Following the Belgrade Conference, a grant by the Population Council made possible the undertaking of a pilot project by Duke University Rule of Law Research Centre to compile population-related laws of six countries.⁹ Additional grants culminated in the publication of a book, *Population and Law*, co-edited by Arthur Larson and this author.¹⁰

Systematic promotion of Population Law as an independent field of study, however, did not take place until 1970, when the Fletcher School of Law and Diplomacy established the Law and Population Programme, with the

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6. "Des Lois dans Leurs Rapports avec la Population," *Population*, 4 (1): 39-56 (1949). Translation by the Law and Population Programme staff.
 7. Cited in Cyrus Means, "The Constitutional Aspects of a National Population Policy," 15 *Villanova Law Review* 785 (1970).
 8. John Peel and Malcolm Potts, *Textbook of Contraceptive Practice* (New York: Cambridge University Press, 1969), p. 210.
 9. These were: Japan, South Korea, Thailand, Egypt, Tunisia and the Soviet Union.
 10. *Supra* note 1.

appointment of the author as its Director and an International Advisory Committee on Population and Law as its supervisory body.¹¹

II. HUMAN RIGHTS AND POPULATION

Since 1966, three major events have lent particular urgency to the study of Population Law: (1) the Declaration on Population by twelve heads of state in 1966 (increased to thirty in 1967) that family planning is a basic human right;¹² (2) the unanimous adoption in 1968 by the United Nations Conference on Human Rights of the Teheran Proclamation that family planning is a basic human right, and of a resolution that couples also have the right to be sufficiently instructed and informed on family planning;¹³ and (3) the U.N. General Assembly Declaration on Social Programmes and Development in 1969, containing a provision that the right to family planning includes not only the "knowledge," but also the "means necessary" for the exercise of this right.¹⁴

The question may be raised concerning the status of human rights: Are human rights imbued with a legal quality thus imposing legal responsibility upon states, or are these merely moral rights—hortatory in nature, but not legally binding? Since the role of the lawyer in population matters hinges very much upon the answer to this question, it is necessary to discuss this in some detail.

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,¹⁵ proclamations,¹⁶ or unratified covenants,¹⁷ they are considered morally, but not legally, binding.

11. Acting under ECOSOC resolution 1296 (XLIV), para. 19, Secretary-General Waldheim 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.
 12. U.N. *Population Newsletter*, April 1968, p. 44 (published by the Population Division of the United Nations).
 13. For texts of the Teheran Proclamation on Human Rights, and resolutions, see U.N. Doc. A/CONF. 32/41 (1968).
 14. Resolution 2542 (XXIV) 11th December, 1969.
 15. Documents A/CONF. 32/6, at 114 (1967) and Add. 1, at 5 (1968) list the following "declarations" on human rights adopted by the General Assembly through 1967: Universal Declaration of Human Rights (1948); Declaration of the Rights of the Child (1959); Declaration on the Granting of Independence to Colonial Countries and Peoples (1960); Declaration on the Elimination of All Forms of Discrimination (1963); Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect and Understanding Between Peoples (1965); Declaration on the Elimination of Discrimination Against Women (1967).
- A "declaration" may be codified into a convention which enters into force upon receiving a requisite number of ratifications, as in the case of the Declaration Against Racial Discrimination (1963), which was codified in 1965 and entered into force in 1969, G. A. Res. 2106, 20 U.N. GAOR Supp. 14, at 47, U.N. Doc. A/6181 (1965), or it may be codified but lacks the requisite number of ratifications to enter into force, as in the case of the Universal Declaration of Human Rights, G. A. Res. 217A, U.N. Doc. A/810, at 71 (1948), which was codified into two international covenants in 1966, see note 17 *infra*, but has not yet entered into

Only duly ratified conventions¹⁸ are given legally binding effect, and then only on the countries which have ratified them. This treaty-oriented approach to human rights has been subscribed to by many jurists.¹⁹

It is submitted, however, 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."²⁰ 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

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 1973, see United Nations, *Human Rights: A Compilation of International Instruments of the United Nations* (1973); 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.

16. See *e.g.*, Teheran Proclamation on Human Rights, U.N. Doc. A/CONF. 32/41 (1968).
17. See *e.g.*, Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, G. A. Res. 2200, 21 U.N. GAOR Supp. 16, at 49-58, U.N. Doc. A/6316 (1966).
18. See *e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, G. A. Res. 2106, 20 U.N. GAOR Supp. 14, at 47, U.N. Doc. A/6181 (1965); Convention on the Prevention and Punishment of the Crime of Genocide, G. A. Res. 260A, U.N. Doc. A/810, at 174 (1948); Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 7 September 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).
19. H. Kelsen, *Principles of International Law* 144, 145 (1952); H. Lauterpacht, *International Law and Human Rights* 397-417 (1950); Schwelb, "The Influence of Universal Declaration of Human Rights on International and National Law," *Am. Soc'y. Int'l. L. Proceedings* 217 (1959); P. Drost, *Human Rights as Legal Rights* 32 (1951).
20. Waldock, "Human Rights in Contemporary International Law and the Significance of the European Convention," in *International and Comparative Law Quarterly*, Supp. publication No. 11, p. 3 (1965). Sir Humphrey Waldock went on record as stating that the constant and widespread recognition of the principles of the Universal Declaration of Human Rights "clothes it, in my opinion, in the character of customary law." *Id.* at 15.

nature. Except for those extreme positivists who would deny *in toto* the existence of natural law,²¹ the latter is deemed to underlie both domestic legislation and international agreements, finding expression in such basic instruments as the U.N. Charter²² and national constitutions.²³ 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 law²⁴ is reflected in recent attempts at codifying human rights into treaty form.²⁵ 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 Justice²⁶ 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 the light of the increasingly active involvement of the United Nations in the field of human rights.²⁷ That the United Nations has clear authority to discuss and make recommendations on human rights matters is specifically provided for in Articles 10, 13, 55 and 62 of the Charter. While it is not contended that all General Assembly resolutions have a legally binding effect upon members of the United Nations, those resolutions which are declaratory

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21. See, e.g., Kelsen, "The Pure Theory of Law," 51 *L.Q. Rev.* 517 (1935); Kelsen, "The Pure Theory of Law and Analytical Jurisprudence," 55 *Harv. L. Rev.* 44 (1941); H. Kelsen, *General Theory of Law and State* (A. Wedberg transl. 1949); H. Lauterpacht, *Modern Theories of Law* 105-38 (1938); W. Ebenstein, *The Pure Theory of Law* (1945).
 22. 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-defence." 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.
 23. See, e.g., U.S. Const. amend. I-X, especially the Due Process clauses. See also the American Declaration of Independence of 1776, which contain 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.)
 24. Lee, "International Law Commission Re-examined," 59 *Am. J. Int'l L.* 545-46 (1965).
 25. The codification of the Universal Declaration of Human Rights into the 1966 International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights and the codification of the U.N. Declaration on the Elimination of All Forms of Racial Discrimination into the International Convention on the Elimination of All Forms of Racial Discrimination are examples of this practice.
 26. I.C.J. Stat. art. 38, para. 1.
 27. For an excellent review of United Nations activity in the field of human rights, see J. Carey, *U.N. Protection of Civil and Political Rights* (1970).

of customary international law cannot detract from the pre-existing law, and through incorporation of that law may be cited as if they themselves have legally binding effect.²⁸ In addition, it is submitted that 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 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 for less than that. This is one of the examples of the transformation of law inevitably produced by change in the social substratum.²⁹

The question of when the recommendation in a General Assembly resolution is transformed into a legally binding prescription would hinge upon the intent of the resolution, the extent of the consensus supporting it, and the repeated endorsements it receives both in and out of the United Nations. Once completed, the metamorphosis would endow the General Assembly

28. Thus, Professor G. I. Tunkin refers to the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples as declaratory of customary international law. Article 7 of the Declaration provides that "all States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration. . . ." See Tunkin, *Droit International Public: Problèmes Théoriques* 101 et seq. (1965); John P. Humphrey, "Human Rights and World Law," at 4 (Work Paper presented at the Abidjan World Conference on World Peace Through Law, August 26-31, 1973).

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

resolution with customary law obligations for member states which would be as binding as if incorporated in a ratified treaty.³⁰

As Professor John P. Humphrey noted:

What is required is consensus. Time is not an essential element. There have, indeed, been some recent examples—for example, in the matter of the continental shelf and air space—of customary rules which have come into being almost instantly; instant custom, if you will.³¹

Mr. Constantin A. Stavropoulos, the U.N. Legal Counsel, also 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.³²

C. *General Principles of Law*

Certain rights may be inferred from express rights by reasoning or applying by analogy the general principles of law—the third source of international law in the World Court's criteria.³³ 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 environments), education (including that for

30. Daniel G. Partan, *Population in the United Nations System: Developing the Legal Capacity and Programmes of U.N. Agencies* (Leiden: A. W. Sijthoff, and Durham, N. C.: Rule of Law Press, 1973), p. 34.

31. Humphrey, *op. cit.*, *supra*, note 28 at 3.

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

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

Address before the United Nations Associations of the United States in New York, November 10, 1970.

33. See note 26 *supra*. Commenting on Oppenheim's interpretation of Art. 38 (1)(c) as authorizing "the Court to apply the general principles of municipal jurisprudence, in particular of private law" (1 *International Law*, 29 (8th ed. 1967)) Brownlie stated: "What has happened is that international tribunals have employed elements of *legal reasoning* and private law analogies in order to make the law of nations a viable system for application in a judicial process." Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1966), p. 13. (Emphasis supplied.)

See also Wolfgang Friedman, "The Uses of 'General Principles' in the Development of International Law," *Am. J. Int'l L.* 279, 287 (1963); H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, Green and Co., 1927).

the full development of the human personality), and freedom from hunger.³⁴ The right to family planning was subsequently incorporated in the Teheran Proclamation on Human Rights³⁵ and the U.N. Declaration on Social Progress and Development.³⁶ 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.³⁷

In several countries, the right of privacy has recently been interpreted to include the right to use^{37a} or import^{37b} contraceptives or even to have abortion upon request during the first trimester of pregnancy.^{37c} Since these newly discovered derivative rights are based upon a more fundamental, pre-existing right, their legal quality must be considered as having originated contemporaneously with that of the parent right.

It is submitted that whether a right is "expressed" or "inferred," its legal validity remains the same. Thus, not all population laws need be explicitly categorized as part of natural law, customary international law or as human rights before partaking of their legal character.

Based on the foregoing discussion, the traditional treaty approach to human rights must be considered too restrictive. Once a right has been accepted with the requisite consensus, whether or not expressly set out in a formal treaty, it is automatically a *legal* right and carries with it all the implications of that status.

But even assuming a failure on the part of a country to accord full legal status to human rights, that country's vote on a General Assembly resolution or a human rights declaration must be taken as reflecting its official opinion with all the implications that go with it. As Professor Humphrey propounded:

How, indeed, could that opinion be more officially or more formally reflected? There is, it will be noted, an element of estoppel in the creation of customary law. How can a State be heard to say on one occasion that the law is such-and-such and later deny that this is the case?³⁸

34. 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).

35. See note 16 *supra*, para. 16 and Resolution XVIII of that Conference, titled Human Rights Aspects of Family Planning.

36. G. A. Res. 2436, 23 U.N. GAOR Supp. 18, at 45, U.N. Doc. A/7388 (1961).

37. G. A. Res. 2200, 21 U.N. GAOR Supp. 16, at 49, U.N. Doc. A/6316 (1966).

37a. See *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965).

37b. For a summary of the Irish Supreme Court's ruling in the McGee case that part of Section 17 of the Criminal Law (Amendment) Act of 1935 banning the importation of contraceptives was unconstitutional for invasion of the right of privacy, see *The Times* (London), December 20, 1973, p. 4, col. 1. For a background of the case, see *The Irish Times*, June 9, 1972, p. 7, col. 1.

37c. See *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973). For a new Tunisian law authorizing the artificial interruption of pregnancy "when performed during the first three months in a hospital, a health centre, or an authorized clinic by a duly authorized practitioner," though without specifying the right of privacy as the basis thereof, see Décret-loi no. 73-2 du 26 Septembre 1973, portant modification de l'article 214 du Code Pénal.

38. Humphrey, *op. cit.*, *supra*, note 28 at 4. The "Hlen Declaration," in Eastern Greenland Case (*Denmark v. Norway*), P.C.I.J., Ser. A/B, No. 53 (1933), 3 Hudson, *World Court Reports* 148 (1938), is instructive. An oral declaration by

Such official opinion, if it were not to be treated flippantly, must be taken to indicate the country's *intention* to conform its laws to the human rights standard. This in itself would justify the initiation of steps toward the review and reform of the law.

Since "right" and "duty" are two sides of the same coin, acceptance of human rights entails a corresponding duty not only to refrain from activities which would impede the exercise of the right, but, positively, to undertake the necessary measures for the realization of such a right.

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

1. The right to adequate education and information on family planning.³⁹
2. The right of access to the means of practicing family planning.⁴⁰
3. The right to the equality of men and women.⁴¹
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.⁴²
5. The right to work.⁴³
6. The right to an adequate social security system, including health and old-age insurance.⁴⁴
7. The right to freedom from hunger.⁴⁵
8. The right to an adequate standard of living.⁴⁶
9. The right to freedom from environmental pollution.⁴⁷

M. Ihlen, the Norwegian Minister for Foreign Affairs, in regard to Eastern Greenland having been relied upon by the Danish Government, was held by the Permanent Court of International Justice to be binding upon Norway. The Court concluded:

The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs...

Might not the same reasoning apply equally to recorded voting at the U.N. General Assembly or specially convened diplomatic conferences by duly accredited representatives of governments?

39. Teheran Proclamation on Human Rights resolution XVIII (1968).
40. U.N. Declaration on Social Progress and Development art. 22 (b).
41. Universal Declaration of Human Rights art. 2; International Covenant on Civil and Political Rights art. 3; International Covenant on Economic, Social and Cultural Rights art. 3; and Declaration on the Elimination of Discrimination Against Women arts. 1, 4, 6, 9 and 10.
42. Declaration of the Rights of the Child principles 1, 4, 6, 9 and 10.
43. International Covenant on Economic, Social and Cultural Rights art. 6.
44. *Id.* art. 9.
45. *Id.* art. 11 (2).
46. *Id.* art. 11 (1).
47. *Id.* art. 12 (2) (b); Declaration of the U.N. Conference on the Human Environment principles 1, 8, 13, 15 and 16.

10. The right to liberty of movement.⁴⁸
11. The right of privacy.⁴⁹
12. The right of conscience.⁵⁰
13. The right to separation of Church from State, law from dogma.⁵¹
14. The right to social, economic and legal reforms to conform with the above rights.⁵²

Fulfilment of each of the above rights requires in turn the fulfilment of certain preconditions. The first right, for example, presupposes a compulsory education, thus necessitating a revision of education law toward that end as well as permitting or requiring sex or population instruction in schools. A law on compulsory education, however, cannot be enforced in the absence of a compulsory registration of births. Also, 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.⁵³ 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?⁵⁴ 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 co-ordinated effort on the part of all government agencies concerned.⁵⁵ The hitherto adoption of piece-meal legislation or measures

48. International Covenant on Civil and Political Rights art. 12.

49. *Id.* art. 17.

50. *Id.* art. 18 (1).

51. *Id.* arts. 18 and 26.

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

53. See text accompanying note 66 *infra*.

54. The effects of the French legalization of the sale and distribution of contraceptives in 1967, for example, must be weighed against yearly increases in family allowance payments, on the one hand, and the non-enactment 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, notwithstanding liberalization of an abortion law in the State of New York, confusion reigned in New York City because of local health regulations restricting the performance of abortions on an out-patients basis. *N. Y. Times*, October 20, 1970, at 1, col. 5.

55. See the simultaneous promulgation of the following laws to implement the Chinese family planning programme: (a) Guides for Increasing the Supply and Reducing the Prices of Contraceptives, adopted by the Ministry of Commerce, the

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

The foregoing discussion shows the complexity of tasks confronting the socially conscious lawyer.

III. PRESENT STATUS

Convinced that it is time for lawyers and law schools to contribute positively and creatively to the solution of a population problem, the United Nations Fund for Population Activities, the International Planned Parenthood Federation and a few private organizations have since 1971 funded a number of Law and Population Projects.⁵⁶ Each of these projects contains a seminar component in law and population during the second year of its operation.⁵⁷ The seminars are to be conducted by law professors in co-operation with sociologists. Guest lecturers from such disciplines as public health, public administration, demography, economics, and political science are invited to acquaint the students with the interrelationship between Population Law and these fields.

A pilot seminar was offered at the Fletcher School of Law and Diplomacy in the Spring Semester of 1973,⁵⁸ and several seminars are being conducted or planned at this writing, including those at Universities in Ghana, Indonesia, Costa Rica, Lebanon, Philippines, Sri Lanka and Turkey.

Based on the rather limited experience at the Fletcher School, the following recommendation as to the methodology for a Population Law curriculum is offered.

IV. PROPOSED METHODOLOGY

A. *Delimitation of Scope*

The first task for the new curriculum is to delimit the scope or categories of the law deemed relevant to the country's need for compilation and research purposes. Just as the impact of law upon the behaviour of the people varies from state to state and according to the subject matter, the categories of law

Ministry of Health, and the Chinese National Association of Marketing Cooperatives, *Chung-Hua Jen-Min Kung-ho-kuo Kuo-wu-yuon 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.*, April 2, 1957, at 308; and (c) Notice Issued by the Ministry of Health Stressing the Protection of Women and Youth Engaged in Rural Labour, the Intensification of the Campaign for Women's and Infants' Hygiene, and the Improvement of Health Service in the Nursery System, *Id.*, April 2, 1957, at 313-15.

56. As of January, 1974, work on Law and Population Projects is being carried out in the following countries: Brazil, Chile, Costa Rica, Egypt, Ethiopia, Ghana, Indonesia, Kenya, Lebanon, Malaysia, Mexico, Morocco, Nepal, Nigeria, Pakistan, the Philippines, Singapore, Sri Lanka, Thailand, Togo, Tunisia, and Turkey.
57. For the purpose and activities of these projects, see Lee, "Law, Human Rights and Population: A Strategy for Action," 12 *Virginia Journal of International Law* 320-25 (1972) (background paper presented at the U.N. Second Asian Population Conference, 1-13 November 1972, Tokyo).
58. Lectures and reading materials for the Seminar on Law and Population are compiled into two volumes and distributed to participants of the UNESCO Workshop.

which have significant bearing on population growth, distribution and well-being also vary from country to country.

Take inheritance law, for example. Despite the Hindu Succession Act of 1956 which puts male and female heirs on equal footing,⁵⁹ the continued dominance of customary law in limiting succession to only males has exerted a pronatalist effect. A family with already several daughters will continue to want more children in the hope of producing a son, thus keeping the property within the family. On the other hand, in countries where succession is in fact shared equally by sons and daughters, inheritance law would not loom large in population matters. For India, therefore, both the statutory and customary laws on inheritance need to be compiled and studied.

Migration law provides another example of how the law can serve as a vehicle for some countries more than others in deliberately influencing the size, sex ratio and national composition of their population.

The following is a list of laws which might be considered for inclusion in a Population Law study.⁶⁰

1. Fertility regulation
 - a. Sterilization
 - b. Contraception
 - c. Abortion
2. Family status and welfare
 - a. Marriage
 - b. Termination of marriage
 - c. Extended family obligations
3. Children and child welfare
 - a. Registration of births
 - b. Support of children generally
 - c. Protection of children
 - d. Artificial insemination
 - e. Legitimacy of children
4. Criminal offences and penology
 - a. Criminal law treatment of sexual activity
 - b. Penology (as affecting ability of prisoners to continue family relations)
5. Public welfare
 - a. Family allowance generally
 - b. Housing assistance programmes
 - c. Maternity leaves and benefits
 - d. Old age and retirement benefits
 - e. Death benefits to survivors
 - f. Labour protection and employment standards
 - g. Personal status and integrity
 - h. Personal mobility (intra- and international migration)

59. Act No. XXX of 1956; Saran Gurdev Singh, "India," Lee and Larson, *Population and Law*, p. 119.

60. For detailed breakdowns, see Morris L. Cohen, *Law and Population Classification Plan* (Law and Population Monograph Series No. 5, 1972).

6. Public health
 - a. Health insurance and medical assistance
 - b. Hospital insurance and public clinics
 - c. Control of medical facilities
 - d. Medical profession (licensing, education, and regulation)
 - e. Drugs and pharmaceuticals
 - f. Disease control programmes
 - g. Food distribution and control
 - h. Environmental protection programmes (efforts to control population growth as a means of protecting the environment)
7. Education
 - a. Compulsory education
 - b. Literacy programmes
 - c. Adult education programmes
 - d. Financial assistance to education
 - e. Educational opportunities for women
 - f. Education affecting population directly (health, sex, marriage, contraception, and population)
8. Property and economic factors
 - a. Income distribution measures generally
 - b. Taxation
 - c. Land tenure and land improvement programmes
 - d. Distribution of decendants' property
 - e. Employment guarantee and public works programmes
 - f. Guaranteed wage and income subsidies
9. Miscellaneous
 - a. Military service
 - b. Religious law
 - c. Other

B. *Compilation*

The compilation phase follows logically upon the delimitation of scope. It is self-evident that legal reform is impossible without the knowledge of what the existing law is. Indeed,

Knowledge as to what a law actually provides is obviously a prerequisite step towards the work of assessing the impact of a law on patterns of decision-making relevant to population trends. . . . Nor are the prospects bright for any national family planning programme . . . if it is prosecuted in disregard of laws and practices which operate in a contradictory manner nullifying and frustrating the objectives of the programme.⁶¹

61. K. Bentsi-Enchill, "Law Teaching and Research: The Ghana Law and Population Project," *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, 30-31 October 1972, Tokyo; Law and Population Book Series No. 5, 1973), pp. 17-18.

However, the compilation task may be more difficult than it at first appears. For statutes and decrees are often scattered throughout the body of the law, and administrative and judicial decrees are usually buried and in many instances not generally known.

The following are the suggested source materials which a compiler may consult:⁶²

SUGGESTED SOURCE MATERIALS

PRIMARY SOURCES

1. Constitutional Provisions
2. Collections of Laws (including Codes)
3. Separate Laws and Ordinances
4. Judicial Decisions
5. Legislative Documents (including Legislative Reports, Debates, Hearings, etc.)
6. Administrative Regulations (including Rules and Orders, Instructions, etc.)
7. Administrative Decisions, Rulings and Opinions
8. Local Law (of governmental units smaller than national and state entities)
9. Treaties, Covenants and Other International Agreements
10. Resolutions, Reports and Declarations of International Organizations
11. Customary Law

SECONDARY SOURCES

1. Commentaries and Treatises
2. Encyclopedia Articles
3. Texts and Manuals
4. Loose-leaf Services
5. Periodical and Festschriften Articles
6. Conference Proceedings

Only those provisions of the laws should be included which the compilers believe to have a significant effect on population. In the case of a federal state, it may not be feasible to collect all the significant laws of each component political sub-division. In such cases, the laws of the federal government should be covered, plus those of major representative sub-divisions.

C. *Analysis of the Law*

An indispensable component of Population Law is the determination of the degree of compliance therewith, the reasons for the divergence between law and practice, and its conformity with human rights.

Even in countries with relatively developed legal institutions, differences between the law on the books and the law in actual practice inevitably exist. The differences are much greater in the majority of the countries. A study on compliance will be useful in ascertaining the impact of formal laws on the

62. Cohen, *op. cit.*, *supra* note 60 at 13.

practice of the people and vice versa, the reasons for such impacts, and the methods by which changes of formal laws can be made to influence the behaviour of the people.

An adequate methodology would involve an analysis of the formal legal framework and a very considerable amount of empirical investigation of what people are in fact doing under it. An important part of the study would involve systematic interviewing with such groups as medical doctors, nurses, pharmacists, public health and welfare officials, educators, prosecutors, judges, lawyers and legislators, as well as a sample survey of public opinion classified according to age set, religion, education, occupation, race and geographic region.⁶³

Needless to say, a successful investigation of this kind would hinge upon close co-operation with sociologists who are trained in the preparation of questionnaires, the conducting of field surveys and the evaluation of results. A pilot project undertaken at the University of the Philippines in 1972 demonstrates the feasibility as well as desirability of such interdisciplinary co-operation.⁶⁴

A central objective of the compliance study is to explore the reasons for the divergency between law and practice. Why are laws ignored or deliberately violated? At what social cost? Only after these questions are satisfactorily answered could a meaningful legal reform be undertaken.

Reference has already been made to the legal status of human rights and the minimum obligation on the part of states to initiate steps toward aligning their laws with the human rights standard. It follows logically that population laws must be reviewed to see whether they conform with the principles of human rights, in particular, the fourteen rights enumerated earlier in this paper.⁶⁵

D. *Formulation of Model Codes*

The final phase of the Population Law curriculum is the formulation of a model code or revisions recommended for each country studied, 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 help generate the necessary interest in legal reforms as well as provide a basis for concrete action.

V. CONCLUSION

Recognition of human rights as entailing legal, and not just moral, responsibility upon states holds vast potential for opportunity, particularly in the field of Population Law. Aided by a custom-generating process through

63. Lee, "In-Depth Study on Law and Behaviour," Lee and Bulatao, *In-Depth Study on Law and Fertility Behaviour: Preliminary Observations* (mimeographed 1972), pp. 55-56.

64. *Ibid.*

65. See text accompanying notes 39-52 *supra*.

the United Nations, the human rights aspects of population obligate governments to match deeds with words and affords law schools an excellent opportunity to supplement their conventional instructional activities by an innovative research and action-orientated programme that would at the same time render an invaluable service to their countries. The new curriculum would also involve lawyers in some of the most critical social issues, in addition to affording them a well-rounded legal education.

But many problems remain to test the inventiveness and ingenuity of lawyers. To give but one example: 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 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.⁶⁶ However, it is equally clear that inability to define with exactitude the relationship between the two rights does not negate their existence.

Perhaps the first step to the solution of the above dilemma is the undertaking of a systematic study of Population Law as proposed in this paper.

66. 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).

Legal Uniformity in Pluralistic Societies

DANIEL HAILE

CONCEPT OF PLURALISM

"Pluralism is a condition in which members of a common society are internally distinguished by fundamental differences in their institutional practice. Where present, such differences are not distributed at random, they normally cluster and by their clusters they simultaneously identify institutionally distinct aggregates or groups and establish deep social divisions between them. The prevalence of such systematic disassociation between the members of institutionally distinct collectivities within a single society constitutes pluralism."¹ In other words the phenomenon can be viewed as involving differentiation at three levels. First at the base there are the units of cleavage however they may be defined (racial, tribal, ethnic as the case may be); then associated with the cleavages there are cultural pluralism, or diversity in basic patterns of behaviour, and social pluralism or separation in social organization.²

Except for Lesotho and Swaziland which are formally monoethnic³ all African countries within their national boundaries contain a variety of ethnic, religious and linguistic groups. A major colonial legacy in this regard, as Allott points out, is the artificial aggregation and segregation of indigenous systems. "The laws of people without a common culture or way of life were thrown together as in the case of lacustrine kingdoms and the Nilotic chiefless societies in Uganda; while people of similar laws were artificially divided by territorial frontiers, as in the case of the Masai distributed between Kenya and Tanganyika, and the Mossi between the then Gold Coast and Haute Volta. Whatever territory acquired was thus a ragbag of indigenous legal systems having no more real connection with each other than the languages these people spoke."⁴ Moreover, European political partition and administration in Africa abruptly arrested the growth of the indigenous systems. "The traditions and institutions of the indigenous systems in varying degrees were suppressed. European type institutions were established and European law together with European tradition became paramount. Where for reasons of necessity and expediency the continued existence of tribal courts and tribunals was officially sanctioned by the Europeans, those tribal courts were reinstated under colonial statutory authority and allowed to administer the prevailing

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1. Kuper and Smith, *Pluralism in Africa* (1971), p. 21.
 2. Kuper, H., "Some Aspects of Urban Plural Societies," in Lystad (ed), *The African World: A Survey of Social Research* (1965), p. 113.
 3. Allott, A., "Towards the Unification of Laws in Africa," *16 A.M.S. of Comp. Law* (1968), p. 61.
 4. *Ibid.*, p. 54-55.

tribal laws and customs only so long as the same were not repugnant to natural justice, equity, and good conscience.⁵

The artificial aggregation of different ethnic groups and the imposition of new sets of norms intensified the already existing social pluralism. For in addition to the already existing cleavages, colonials, in particular the French, with their policy of assimilation, added a new stratification based on the acceptance of the new values. We thus have not only a conglomeration of ethnic and religious groups but peoples living with the traditions of millenia of indigenous civilization and others who have adopted ways of "modern" living whose different value systems is reflected in the various cultures and patterns of behaviour and "the side by side presence of one or more indigenous legal systems (with or without intrusion of problems of the Islamic law) and of non-indigenous legal systems accommodated to local circumstances."⁶

In this paper we shall be considering a set of very important patterns of behaviour—marriage and divorce—taking the plural societies of Africa as our perspective. We shall critically analyze the validity or the idea of standardizing or having uniform laws in these two areas. The question of what shall and shall not be regulated uniformly for all members of the nation irrespective of group membership is, of course, exactly the question of how far pluralism will continue to exist.

In an era of nation-states every feature of society which divides group from group is viewed as a potential source of weakness and thus even though the plural legal system still exists in most of the emerging nations of sub-Saharan Africa the trend is clearly in the direction of integration and unification. A certain amount of integration of customary law takes place by national evolution. With increased urbanization and contact between peoples of different tribal groups, changes in customary practice occur, and this may be reflected in the customary law of the various groups.⁷ But this self-generating approach is considered as being too slow for the taste of most African countries and this dissatisfaction was expressed in 1963 when the African conference on the role of customary law resolved the necessity for positive action.⁸

5. Robert, T., *Judicial Organization and Institutions of Contemporary West Africa: A Profile* (1966), p. 1.

6. Schiller, A., "Law" in Lysted (ed.), *The African World: A Survey of Social Research* (1965), p. 176. For a new type of pluralism created as a result of the eclectic approach to codification adopted by some African states and the side by side existence of two European laws—common and civil law—e.g. Somali Republic, see Sand, P., "Current Trends in African Legal Geography," *5 African Law Studies* (1971).

7. Cotran, E., "The Place and Future of Customary Law in Africa," *East African Law Today*, p. 72.

8. It is worth noting the commitment to have uniform laws made back in 1953 when the judicial advisors conference recognized as a general proposition that "in principle any country shall have one body of general law and one judicial system applicable to all persons."

UNIFORMITY

Up to this stage we have been talking of uniformity and the movement towards unification as though it was a single notion or process. However, at this point "we would suggest that a distinction be made between organic and structured unity. The former would indicate a notion closer in its meaning to 'uniformity' or identity."⁹ It can either consist of unification of the various customary laws or the unification of the customary and received law. Various terminologies have been used to describe the methods¹⁰ but we shall use the terms used by Allott. He has postulated three degrees in the unification of the laws of a particular country. First, there is harmonization, which is defined as "the removal of discord, the reconciliation of contradictory elements, between the rules and effects of two legal systems which continue in force as self-sufficient bodies of law." The next stage is integration, defined as "the making of a new legal system by combining the separate legal system into self-consistent whole. The legal system thus combined may still retain a life of their own as sources of rules, but they cease to be self-sufficient autonomous systems".

Finally, there is unification, which is "the creation of a new uniform legal system entirely replacing the pre-existing legal systems, which no longer exist, either as self-sufficient systems, or as bodies of rules incorporated in the larger whole although the unified law may well draw its rules from any of the component legal systems which it has replaced."

Structural unification on the other hand does not imply uniformity. "Parallelism in its pure form meant distinct judicial systems with no connecting link at any level of the judicial hierarchy and at its most formal level can be accomplished merely by having a uniform court system which superimposes an extraneous uniform procedure and machinery of enforcement but leaves the substantive law of the different ethnic or other legal units basically unaltered."¹²

Even though as late as 1953 Kenya and Sierra Leone had pure parallel legal systems, generally no basic legislation substantially re-organizing the judicial structure was introduced in any country until 1960.¹³ Since then most African countries have integrated their courts at least by integrating the chain of appeal.¹⁴

Although closely connected and having repercussions on each other, the integration of courts and the integration of laws may be viewed as two separate problems, for ordinarily the question of why different bodies of law

9. Cotran and Rubin, *Readings in African Law* (1970), Vol. 1, p. xxii-xxiv.

10. Other terms used include terms such as rationalization, assimilations, merger and suppression, etc. See Cotran and Rubin, cited supra at note 9.

11. Allott, A., "Towards the Unification of Laws in Africa," *14 Intl. and Comp. L.A.* (1965), p. 366.

12. Cotran and Rubin, cited supra at note 9, p. xxiii.

13. Melain, W., "Recent Changes in African Local Courts and Customary Law," *1 Howard L.J.* (1964), p. 192.

14. The integration of courts in Ghana and Tanganyika dramatically illustrates the direction in which policy has been moving in the new states with respect to the administration of justice.

are applied to different classes does not arise until at least the courts are integrated by creating a chain of appeal.¹⁵ As most African countries have achieved this level of integration of their courts we shall not be concerned with integration of courts as such except to the extent that integration of courts brings up questions of procedure, practice, and evidence, i.e. the question of whether the rules which heretofore prevailed in the ordinary courts are extended to the tribunals newly integrated into the national legal system.¹⁶ In short our focus of attention will be organic rather than structural unity.

ARGUMENTS FOR UNIFORM LAWS. GENERAL

The idea of legal development which is the underpinning of the movement towards uniform laws rests on the simple assumption that some legal systems are better than others with respect to a particular dimension that can be called modernity or advancement or progressiveness. Legal missionaries must have, in the back of their minds, the notion that modern legal systems are better suited to economic, social and political development than non-modern ones.¹⁷ We shall hereunder briefly state the arguments in order to give us a framework for our analysis in the next section.¹⁸

The economic arguments against the plural legal system are directed against the nature of customary law and the family institutions which it supports. As Seidman states, "Development demands transformation away from the plural economy and society. . . . By definition customary law cannot lead to development because it arises and supports a subsistence economy."¹⁹ We shall not be concerned with the wider implications of this view but we shall examine it within the context of the present African family structure and its implications for modernization and economic development—to be more specific, the problems presented by the extended family, polygamous marriage and customary patterns of relationship between spouses and between family members.²⁰

15. Allott, A., "Future of African Law," in Kuper and Kuper (ed.), *African Law and its Adaptations* (1965), p. 224.

16. Schiller, A., "The Changes and Adjustments which should be brought to the present legal systems of Africa to permit them to respond more effectively to the new requirements of the development of the countries," in Andreas Tunc (ed.), *Legal Aspects of Economic Development* (1917), p. 197.

17. Friedman, L., "On Legal Development," *24 Rutgers U.L. Rev.* (1969-70), p. 53.

18. In addition to these major reasons there is one additional reason—religious. Among the Muslim countries there is a strong pressure to adopt a law which is clearly Islamic, and to reject that part of western and traditional legal inheritance which contradicts Muslim beliefs and customs. On the other hand, Ethiopia has gone the opposite way. The almost complete suppression, at least in the letter, of Islamic law in the civil code and the compulsory requirement of monogamy represent the assertion of Christian paramountcy. For detailed treatment see: Allott, A., cited *supra* at note 3. Guttman, "The Reception of the Common Law in the Sudan," *6 Intl and Comp. L.A.* (1957), p. 415. Anderson, J., "Conflict of Laws in Northern Nigeria: A New Start," *8 Intl and Comp. L.A.* (1959).

19. Seidman, R., "Law and Development: A General Model," *6 Law and Society Review* (1972), p. 314.

20. Sedler, A., "Law Reform in the Emerging Nations of Sub-Saharan Africa: Social Change and the Development of the Modern Legal System," *13 St. Louis Un. L.J.* (1968), p. 233.

The generally stated political reason is that uniform laws assist the process of nation-building and the creation of national consciousness. "The capacity to define and integrate social relationships is necessary for developing political systems characterized by pluralism, since they must be able to increasingly organize and integrate into the national system individuals whose roles in the diverse social subsystems may hinder continuing development and uniform laws by redefining some of the social relationships in favour of national goals helps the process of nation-building."²¹

When applied to the African scene this general argument has been restated basically in terms of the centrifugal tendencies of tribalism. It has been argued that laws that are national in scope are essential in African countries due to the fact that their boundaries did not follow tribal lines. A number of tribes, sometimes hostile to one another, are found within the same boundary and customary laws based on tribal or geographical groupings would hinder the effort towards national consciousness.²²

In addition to nation-building we shall also consider the process of democratization or movement towards equality which in this context is the alleviating of the status of women.

The legal reasons for having uniform laws are varied and range from the idea of having uniform laws simply as a symbol of development to the simplification of the task of the lawyer.²³ We shall consider the rationales put forward to support each point, symbolism, certainty, conflict of laws, and problems of traditional judicial process, and attempt to critically analyze their premises and their implications.

ECONOMIC REASONS

The desire to modernize as soon as possible has been given as a major justification for the legal reforms that are being undertaken by African countries. The desire for modernization when projected to the marriage area has been an attempt to use the laws to promote the nuclear family structure which is thought to be an essential ingredient of an industrialized society.²⁴ The essentiality of nuclear family seems to be one of loose association with the stereotype picture of an entrepreneur as an "innovating and primarily as strong individuals whose leadership, willingness to assume risk, to break through and patterns of finance, production and distribution have been emphasized to such an extent as to make him look like a rebel against

21. Sperry, D., "Law as a political process in a plural society and problems of personal and community response: a case study of directed politico-legal development among the Galla of Gimbi District, Wellega Province, Ethiopia," Ph.D. Dissertation, University of Minnesota.

22. Sedler, cited *supra* at note 20, p. 209.

23. In this connection Dr. T. O. Elias said, "Our concern [for the unification of laws] arises out of the fact that practitioners, foreign investors and students of our laws would find it very much easier to cope with a legal system or a series of legal systems that were based on at least fairly uniform principles than for them to have to grapple with competing and often complex jurisdictions within the country." Elias (ed.), *Law and Social Change in Nigeria (1972)*.

24. Lloyd, C., *Africa in Social Change (1972)*, p. 171.

society."²⁵ Nuclear family as the social arrangement that less fettered this individualism was automatically grabbed as the most conducive social structure.

However, this stereotype characterization gives only half the picture. For in addition to the creativity first mentioned, another component involving the ability to engineer agreement among all interested parties, such as the inventor of the process, the partners, the capitalists, the suppliers of parts and services,²⁶ the distributors, etc. or the co-operative factor is totally missing.

The attacks on customary law and the family structure and the relationships which it supports is basically a result of this undue emphasis on the creativity aspect of enterprise at the almost total exclusion of the co-operative aspect. As regards the extended family, for example, it was noted that "it tends to discourage individual enterprise and initiative as the burden of the family obligation rises with the degree of an individual's success. A big man in the family is expected to be generous in helping others with school fees, doctors' bills, brideprice, financing weddings and funerals and hospitality to all relatives. Consciously or unconsciously, the knowledge that a greater income will mean correspondingly greater burdens must inhibit the effort an individual puts forth."²⁷

This of course is nothing but an application of the "conception commonly expressed in western writings of a generation or more ago, that an individual will function efficiently in economic endeavours only if he is working in a private enterprise to further his individual interests, an idea which has been proven false by history, for the entrepreneur may act to advance himself, his family, his community, his country, some other social group, or the business organizations to which he is attached."²⁸

Other drawbacks of the extended family systems such as its tendency to prevent the accumulation of capital and the proliferation of small enterprises²⁹ are double-edged and cut both ways. True it may have these drawbacks but on the other hand small contributions from many family members may be pooled to finance the education of a bright child and the family's assets can serve as security for small loans given to individual members and help the family to pool its credit to borrow money.³⁰

After an analysis of the economic implications of the African extended family system, Kamarck concluded that "on balance the extended family system in Africa so far has probably inhibited economic development more

25. Hirschman, A., *The Strategy of Economic Development* (1958), p. 16. The extent to which this individualism can be out-stretched can be inferred from the story of John D. Rockefeller. When he was asked the secret of business success he replied, "Never let your wife know how much money you are making." And as a matter of fact, his wife was still doing her own laundry when he was already a millionaire many times over. See Kamarck, *Economics of African Development* (1971 ed.), p. 69.

26. Hirschman, cited supra at note 25, p. 17.

27. Kamarck, *Economics of African Development* (1971 ed.), p. 64.

28. Hagen, E., *The Economics of Development* (1968), p. 225-226.

29. Kamarck, cited supra at note 27, p. 64-65.

30. *Ibid.*, p. 64-65.

than it has helped."³¹ Kamarck does not provide any concrete data by which he reached his conclusion and one's feeling is that this is again a reflection of the tendency to abstract from levels and models of living, attitudes and institutions of the developed countries and to apply them to the "under-developed" countries without careful consideration.³²

Not only does the evidence as shown by the case of the Japanese industrial corporation, which with its emphasis on the "co-operative" rather than the "competitive" factor is very similar to the African extended family system, seem to point to the contrary³³ but, moreover, ego-focused strategy which he espouses is inimical to development.³⁴ In addition "where one can neither trust a stranger or an acquaintance as a business associate, or persuade him to lend money, then the extended family may be a necessary source of capital and a necessary bond between business associates. Its abolition would not modernize the society, in the circumstances it would merely paralyze large-scale relationships."³⁵

But despite all the above, the misconceptions about the nature and role of the extended family have led many African countries to pass laws to break the institution and to create a nuclear family structure, and the basic thrust, as can be seen from the Ivory Coast, has been the creation of the institution of monogamy and the abolition of the institution of bride-price—which is the institution for the perpetuation of the structure. A lot of things have to be known before such drastic actions must be taken for it would be very simplistic to assume that a particular set of provisions imported from a European country which itself is economically highly developed will automatically stimulate or facilitate economic development in the African country.³⁷

31. *Ibid.*, p. 66.

32. Myrdal, G., "The use of Law in Emerging Society: the Soft State in Under-developed Countries," *15 UCLA L. Rev.* (1968), p. 1119.

33. The loyalty and the lifetime commitment between an individual and his company: the fact that an employee will not move to accept a better job and the company is committed to retaining him until retirement except in instances of the most extreme provocation, and will not lay him off during economic slack causing a downturn in sales, do bear great similarity with the extended family system of Africa.

34. The reasons why the ego-present image of change is inimical to development are several. In the first place, success is conceived not as a result of the systematic application of effort and creative energy, combined perhaps with a little bit of luck, but as due either to sheer luck or to the outwitting of others through careful scheming. The immense popularity of lotteries in the Latin American countries and the desperate intensity of the political struggle testify to the strength of the belief in, and desire for, change through sheer luck or through scheming, respectively. These attempts to reach success through various shortcuts obviously diminish the flow of energies into activities that will stimulate economic development. But an exclusively ego-focussed conception of progress will act as a drag on economic growth in several ways. Most fundamentally it tends to obstruct a series of progresses that are part of the entrepreneurial function. Hirschman, cited *supra* at note 25, p. 16.

35. Hagen, cited *supra* at note 28, p. 26.

36. The Ivory Coast in 1964, comprehensively revised its marriage laws in an attempt to promote the nuclear family structure in the nation. Included in its legislation was the abolition of polygamy and brideprice. See Salacuse, J., *An Introduction to the Law of French West Africa* (1969).

37. Dunning, H., "Law and Economic Development in Africa: The Law of Eminent Domain," *68 Col L. Rev.* (1968), 1287.

POLITICAL REASONS

POLITICAL UNITY

The crucial elements of political development can be succinctly presented in terms of four sets of categories which recur continuously: rationalization, national integration, democratization, and participation.³⁸

National integration and democratization, i.e. by alleviating the status of women, have been the realms where law has been constantly used in Africa. Most African leaders desire to increase their political capacities and have thus placed the goals of unification and modernization high on the list of political priorities and to the extent that politico-legal pluralism hinders their realization, political leaders will endeavour to reduce the pluralism to legal uniformity.³⁹ This general attitude towards uniformity was expressed by the Kenya commission on marriage and divorce when it said, "whilst our Constitution permits differentiation in treatment of sections of the community in regard to legislation dealing with marriage, divorce and other matters of personal law, that is not to say that such radical distinctions as exist at the present time in Kenya are desirable if we are to integrate the various communities in the interest of building one nation."⁴⁰

There are two main reasons which explain this ardent belief on the part of many African countries. The first one seems to lie in the confusion between national unity, which means single culture, history, language and political unity which is the shared commitment to a set of rules and procedures through which binding final decisions in the political realm are resolved.⁴¹ Uniform laws can symbolically represent national unity but more than this symbolism is needed to achieve political unity.

The second factor for the belief is a result of historical western reaction to the non-western world. "The demand for extra-territorial rights in such countries as China, Japan and the Ottoman Turkey reflected the belief that the critical difference between the modern state and the traditional systems was the existence of a universal legal system."⁴²

A universal legal system will certainly have to have the attribute of uniformity, and even though as Elias points out, "there are surprising

38. Huntington, P., *Political Development and Political Decay* (1967), p. 287.

39. Sperry, cited supra at note 21, p. 20-21. In one case this would have been achieved by adoption of the customary law. In the case of the Somali Republic, the northern and southern halves of the country were divided by differences in the general law, yet they were united by a common subjection to the Sharia and to Somali customary law and the indigenous laws would accordingly provide the basis of a national law. See Allott, cited supra at note 11, p. 380.

40. Republic of Kenya, Report of the Commission on the Law of Marriage and Divorce (1968), p. 14-15.

41. Twining, W., *Place of Customary Law in the National Systems of East Africa* (1964), p. 19. A similar view was expressed by Castelnovo when she said, "Some sixty years of colonial rule and seven years of independence have produced a limited in-put in terms of penetrating these societies with respect to developing kinds of beliefs and views (regarding authority, delegation, representative bodies) which are needed to support this larger political unit."

42. Pye, L., *Aspects of Political Development* (1966), p. 116. In this connection see Morreim, N., *The Ethiopian Empire—Federation and Laws* (1954) for a discussion of the role of consular courts.

similarities at least in important essentials in bodies of African customary law as divergent as those of the Yorubas, the Bantus, the Sudanese, the Ashantis, and the Congolese,"⁴³ one can hardly claim that customary law is uniform.⁴⁴

It is true that due to the nature of plural societies the role of law in theory will generally be greater in these societies than in societies with a greater degree of cultural homogeneity and consensus as regards fundamental ideas. For in culturally homogeneous societies, the state (that is, the central political institutions) is, like law, a derivative, expressive of secondary structure, while in the plural societies the state pre-exists society and provides the legal framework for the new society.⁴⁵ But in reality, as the case studies from Ethiopia and Tanzania—two nations that emphasize politico-legal development as the road that leads to nationhood—reveal, the impact of uniform laws in the process of nation-building has, if at all, been very negligible.

As regards the Ethiopian project, D. Sperry said, "Generalizing from my research in Gimbi, I believe that the Ethiopian experience has not yet demonstrated that a unified system of law can unqualifiedly contribute to national unification."⁴⁶ As a matter of fact, the same author proceeds to say that "the centripetal forces of unity, forged from an increasing capacity for political development, and the centrifugal forces of disunity, forged from public discontent over a host of economic, political, social and administrative factors, are in a state of precarious balance."⁴⁷

Similarly, in connection with the Tanzanian project, S. Castelnovo said, "It would seem that the anticipated contribution to the reinforcement of national unity, which it was assumed would occur as a by-product of the codification process itself, was not borne out."⁴⁸

The impact of uniform personal laws is even weaker since "cultural diversity in family institutions may have little relevance for the political structure or it may have political significance under certain social conditions

43. Elias, T. O., *The Nature of African Customary Law* (1956), p. 3.

44. Similarly Allott, cited supra at note 3, mentions that there were two factors that diminished legal disunity. At the territorial level the variations between different customary laws were not so great in many instances as to cause serious difficulty, as with the dialects of a single language, so sub-species of customary laws tended to merge or agglomerate into larger units under pressure of a common external administration and the weakening away of tribal difference by inter-tribal contact and mobility.

45. Smith, M. G., "The Sociological Framework of Law," in Kuper and Kuper (ed.), *African Law and its Adaptations* (1965), p. 26. There are two wide antithetical traditions as regards the nature of societies characterized by pluralism. According to the first—conflicting model—the stability of plural societies is seen as precarious and threatened by sharp cleavages between different plural sections. The second traditional—equilibrium model—offers a conception of the pluralistic society, in which the pluralism of the varied constituent groups and interests is integrated in a balanced adjustment which provides conditions favourable to stable government. The role of law will to a great extent depend on which of these two views one adopts.

46. Sperry, D., cited supra at note 21, p. 314.

47. *Ibid.*, p. 99.

48. Castelnovo, S., *Legal and Judicial Integration in Tanzania* (1970), p. 186.

and not others.⁴⁹ On the contrary, standardization of an area of law, which by no means is peripheral to the people, may help to intensify local identification—the problem which they are designed to solve.

DEMOCRATIZATION

The second major reason in this area that is prompting the new governments in Africa to take a bolder stand on reform is the democratization of their societies by alleviating the status of women.

It is said that, "Under customary law women are in perpetual minority. Prior to marriage they are under the control of the male head of their family, during marriage under the control of the husband; when the marriage terminates by death or divorce, they are either forced into levirate marriage or revert to the control of their own family. They may be forced to enter into marriage sometimes at a very young age. And of course polygamy is widespread, which may further aggravate the disadvantaged status of the wife."⁵⁰ However, although marriage at young age, levirate marriage, and polygamy are considered to be problems, as the experience of Moslem Societies shows, it was the Islamic law of divorce and not polygamy which was the major cause of suffering of women⁵¹ and we shall thus focus our attention on this factor.

There are two conflicting views about divorce under customary marriage; one which holds that "customary marriage is usually capable of being dissolved without the limitations imposed by a rigid set of grounds for divorce and views it as a relationship that is neither enduring nor endearing."⁵²

The other view, on the other hand, states that, "under ancient customary law, marriage was almost always indissoluble, as it was looked upon as a permanent social and spiritual bond between man and wife on the one hand and their respective families on the other. It was for this reason that a woman who lost her husband by death stayed as a member of her husband's household and might choose, or be chosen by, an eligible member of it."⁵³

This latter view seems to be the one supported by empirical research. As Cotran states, "Certainly my own detailed researches into the marriage laws of several tribes in East Africa have revealed that, far from being an easy matter, divorce was traditionally either unknown altogether or only resorted to in very exceptional circumstances, e.g. where there are no children of the union. . . . The suggestion therefore that customary marriage can be dissolved at the will of the husband could scarcely be further from the truth."⁵⁴

The relative stability of the African family pattern even within the polygamous structure bears this point very well.⁵⁵

49. Kuper and Smith, cited supra at note 1, p. 15.

50. Sedler, cited supra at note 20, p. 237-38.

51. Anderson, J. N., *Islamic Law in the Modern World* (1959), p. 63.

52. Twining, cited supra at note 41, p. 19-20.

53. Elias, T. O., *The Nigerian Legal System* (1963), p. 298.

54. Cotran, E., "The Changing Nature of African Marriage," in Anderson (ed.), *Family Law in Asia and Africa* (1968), p. 19-20.

55. Sedler, cited supra at note 20, p. 240.

The misconceptions about African divorce seems to lie on the fact that its procedures are different from those of the western world. As a noted authority put it, "There are however, two factors which certainly distinguish divorces in customary law and the English or European law. The first is the provisions in customary law for conciliatory machinery and arbitration and the fact that if this fails the marriage can be dissolved by interfamily arrangement without judicial pronouncement. The second is the fact that in most customary laws, although there must be grounds for divorce, the grounds are not as rigid and clear-cut as those recognized in English law."⁵⁶ Not only have there been misconceptions as regards the nature of African divorce in particular and African marriage⁵⁷ in general but the degradation of the status of women in traditional African societies has been greatly inflated. As Paulme said, "In fact research into actual practices may indicate that the position of the woman in the traditional African society is not so disadvantaged as is generally believed."⁵⁸ Lloyd even goes further and states that "the traditional rights of Yoruba women—to enter into contracts, (easy divorce), for instance—exceed those granted in most western societies until very recently."⁵⁹

If the position of women is not as disadvantaged as has often been stated one wonders why it is stated as one of the major reasons for reform of the marriage and divorce laws. One theory, which appears to be sound, is that the whole concern with the emancipation of women is simply a concern to find a means to undermine the prevailing patterns of the traditional chiefs by the new elites.⁶⁰

LEGAL REASONS

The legal justification given to support the movement towards uniform laws are varied and wide ranging and we have extracted those that are basic: symbolism, conflict of laws, uncertainty, and traditional judicial process—and shall deal with each separately.

SYMBOLISM

In the last section we saw how the fervent movement towards uniform laws in Africa was politically motivated. But in addition to any political value of uniformity the new nations of Africa look upon unity (uniformity) and rationality as Rene-David looked upon them as valuable not for political

56. Cotran, E., cited *supra*, at note 54, p. 20.

57. African marriage was described as wife purchase, concubinage or customary union and the very fact that it was a form of marriage was doubted. It is thus not amazing to hear Cotran state, "I make no apology that African marriage has sufficient in common with marriage in other parts of the world (including European) to warrant the usage of describing it by the same general term marriage."

58. Paulme, D., *Women of Tropical Africa* (1962).

59. Lloyd, C., cited *supra* at note 24, p. 179.

60. For a discussion of how emancipation has been used to undermine the backbone of a traditional community's political cohesion and hasten the grafting and assimilation of the new Soviet authority—see Massel, "Law as an Instrument of Revolutionary Change in a Traditional Milieu: The Case of Soviet Central Asia," 2 *Law and Soc. Rev.* (1967-68).

reasons, but as ends in themselves. As Rene-David said in connection with the codification in Ethiopia, "The decision to codify was based on the idea held in Ethiopia that codification in itself was progress, a desirable and even a necessary thing for the country."⁶¹ This notion which I shall refer to as "symbolism" is shared by many governments and even though it is not clearly formulated, if it were made explicit it would consist of the following proposition: "The more a legal system is uniform, orderly and systematic, the more highly developed it is."⁶²

This theory implies that one can identify higher and lower stages in the growth of law, and second that one can assert about these stages a natural sequence or order.⁶³

Evolutionary theoreticians such as Sir Henry Maine and Max Weber share this fundamental belief of natural sequence but differ as regards the criteria to be used.

Sir Henry Maine bases this natural sequence on the "movement from status to contract."⁶⁴ Max Weber on the other hand traced this evolution in rationality. To Max Weber modern law is both formal and rational, that is it takes into account only unambiguous general characteristics of the facts of the case and it is explicitly based on general principles.⁶⁵

Since under customary law most of a person's rights and obligations depend on his family status, the implication of Sir Henry Maine's theory is that African customary law is underdeveloped. Similarly, even though Weber does not boldly state that the rational is superior to the irrational (primitive: customary) or that the irrational is a lower form of justice, as the irrational cannot be reduced to general principles there is room for a strong inference that the irrational is less suitable to the needs of the modern world.⁶⁶

The view that customary law is underdeveloped is reinforced by legal scholars who describe or purport to describe the "modern" or developed legal system. Galanter, for example, among the eleven traits which he lists as being characteristics of the modern legal system, includes uniformity. He states that "modern legal norms are uniform and unvarying in their application, the incidence of these rules is territorial rather than 'personal,' that is they are applicable to members of all religions, tribes, classes, castes and localities."⁶⁷

These notions seem to add more fuel to the desire of many African nations "to create an illusion of progress and of doing something,"⁶⁸ and to propel them into launching massive codification projects.

61. David, R., "A Civil Code for Ethiopia," 37 *Tul. L. Rev.* (1962-63), p. 188.

62. Friedman, cited supra at note 17, p. 53.

63. *Ibid.*, p. 16.

64. Maine, H. *Ancient Law* (1st ed., 1890), p. 169-70. For criticisms of this view see Elias, *Nature of African Customary Law* (1956), p. 6, p. 282.

65. Weber, M., *On Law in Economy and Society* (Rheinstein, ed., 1954), p. 63-64.

66. Friedman, cited supra at note 17, p. 19-20.

67. Galanter, M., "The Modernization of Law," in Friedman and Macaulary (ed.), *Law and the Behavioural Sciences* (1969), p. 970. The listing has been criticized by several authors. Seidman cited supra at note 19 made a rather succinct criticism when he said, "Had he (Gallanter) found that all of them used a decimal system in numbering statutes, would that become a characteristic of a 'modern' system?"

68. Allott, cited supra at note 3, p. 52.

CONFLICT OF LAWS

The second legal reason for the unification of law arises from the "particularistic" nature of customary law. As Sedler puts it, "If the pluralistic legal system is to be retained, problems in the internal conflict of laws will be frequent, that is, what customary law is to be applied to those involving persons susceptible to different systems of customary law which at present is intensified by increasing migration and contact between members of different tribal groups."⁶⁹ Similarly, Allott considers choice of law problems as the strongest argument in favour of unification.⁷⁰

True, there are many potential situations which could well give rise to internal conflicts problems. Conflicts can arise between territorial law and customary law, between customary law and Islamic law and so on.⁷¹ However, despite all these potential areas most African countries do not have a serious problem caused by multiplicity of laws. Twining, for example, remarked, "I was surprised when I came to East Africa to find local advocates and judges denying that conflicts of law presented many practical difficulties. In fact so unimportant do they consider the matter that the Kenya Council of Legal Education has refused to prescribe conflicts as even an optional subject in the Local Advocates Examination."⁷² Twining proceeds to point out that the attitude was justified as shown by the few cases which were treated as raising conflict problems.⁷³ This view as regards the insignificance of conflict problems in East Africa seems to be also true for Nigeria. As Smith stated, "My own experience with the customary courts of Northern Nigeria in the period 1963-65 suggests that, with regard to choice of law problems, the medium is the message. In the mixed courts (which heard disputes between litigants of different tribes) one would have expected 'rules of law' to have been clearly articulated. . . . But not only did one not find choice of law rules for resolving such conflicts, one seldom encountered a situation where rule was pitted against rule."⁷⁴

Some reasons have been put forward to explain this rather paradoxical situation. Twining states, "I find it difficult to get a satisfactory explanation as to why these problems do not thrust themselves more obviously on the courts; I should surmise that partial answer is as follows: If an African and a non-African are disputing over e.g. a contract or tortious matter, the dispute cannot go before the local courts, unless the non-African consents to jurisdiction which is rare. In the non-African court territorial law applies unless both parties are Africans. This cuts out a lot of potential conflicts problems as far as the non-African courts are concerned. The general practice of the local courts seems to be to apply the *lex fori*, willy nilly, the *lex fori* often being better characterized as the *lex iudicis*—the law the judge is

69. Sedler, cited *supra* at note 20, p. 209.

70. Allott, A., *New Essays in African Law* (1970).

71. Twining, cited *supra* at note 41, p. 24.

72. *Ibid.*, p. 74.

73. *Ibid.*, p. 74.

74. Smith, D., "Man and Law in Urban Africa: A Role of Customary Courts in the Urbanization Process", 20 *Am. S. of Comp. Law* (1972), p. 240.

familiar with.”⁷⁵ Smith, on the other hand, submits that “the operation and conflict of law rules is only made possible by a mode of procedure in which pleading has become a technical and refined art,”⁷⁶ and since this is not present in the customary courts the problem does not arise.

If the conflict of law problem is as insignificant as the above discussion suggests, we find it difficult to make it the “strongest argument for unification.”

LACK OF CERTAINTY

Another legal reason that has been submitted is the fact that the uncertainty of customary law leads to unnecessary and dilatory litigation and it has been argued that, “there is an immediate need for greater certainty to facilitate judicial administration, ease the problem of ascertainment and provide accurate information upon which litigation may be based.”⁷⁷

A number of factors have contributed to the problem of uncertainty of customary law. The staffing of the superior courts with expatriate judges with little or no knowledge of customary law was one factor. As Lucian Pye put it, “The fact that bewigged Englishmen could sit enrobed in a tropical climate and with all earnestness and patience seek to explain to natives the essence of their ancestral or tribal rules must have contributed in some degree to the universal reputation that British culture was singularly lacking in a sense of humour.”⁷⁸

However, even though it lessens the process, the appointment of African judges does not in every case solve the problem. “The existence of various bodies of customary law, substantially different, or even with only minor variations, made ascertainment of the law difficult, particularly in the absence of authoritative legal treatises and sizable body of case law. In addition the very nature of customary law, unwritten, flexible and changing in response to new conditions and attitudes, required a continuing ascertainment in some areas of customary law.”⁷⁹ Finally there was a major difficulty in sifting traditional standards and merely social norms in some areas.⁸⁰

These characteristics were, however, overstated, and at the early stages, for purposes of proof, customary law was treated as custom and courts applied the test of antiquity to it. But it soon became evident “that customary law is in very important respects different from English local customs and the test of antiquity for its ascertainment has therefore been abandoned. Nevertheless, examination of the validity of the recorded cases poses some problems that are not amendable to easy reconciliation with the view that

75. Twining, cited *supra* at note 41, p. 24-25.

76. Smith, cited *supra* at note 75, p. 238. In “Native Courts of Northern Nigeria: Technique for Institutional Development,” 48 B.U. Law Review (1968) the same author mentions that until 1943 the conflict between the individual's expectation that his personal law would be applied and the native courts' inability to apply it was generally avoided because most strangers tended to settle in special quarters of the larger towns.

77. McLain, cited *supra* at note 13, p. 220.

78. Pye, cited *supra* at note 42, p. 120.

79. McLain, cited *supra* at note 13, p. 212.

80. Elias, T. O., “Law in a Developing Society,” in *Nigerian Law Journal* (1970), p. 20.

customary law is law per se and not just a mere custom. For the courts, in their further attempts to grapple with the problem of ascertainment of customary law took the view that customary law, if law at all, is foreign law and must be proved as fact".⁸¹

But as President Kwame Nkrumah said, "No law can be foreign to its own land and country, and African lawyers, particularly in the independent African states, must quickly find a way to reverse this judicial travesty."⁸²

We certainly agree that this is a judicial travesty and moreover we are of the opinion that all the above-mentioned difficulties with ascertainment and lack of knowledge on the part of expatriate lawyer or judge are weak bases from which to reject the law under which most of the population regulate their marriage, divorce, inheritance and land tenure.⁸³

Besides, the difficulties of ascertainment can be corrected without taking such drastic action as unification. A short-term answer would be the establishment of a machinery, as was done in Ghana and Nigeria, for the authoritative declaration or modification of customary law,⁸⁴ or in the alternative to empower the superior courts to follow the findings of traditional courts as to the existence of customary law.⁸⁵

Possible long-term solutions include the recording of customary law⁸⁶ or its incorporation into the main body of the law by the process of the taking of judicial notice.⁸⁷

Although not a sufficient reason for the rejection of the various customary laws and the adoption of uniform laws, the unification of laws will definitely help to cut down judicial waste caused by the plurality of customary laws. However, it is very dubious whether the adoption of uniform laws, given the present structure of African societies, will help to stabilize the human relationship which is more fundamental than the question of ascertainment. Apparently, the adoption of uniform laws, at least those based on western legal systems, seem to create more instability by intensifying the uncertainty. As Lucian Pye stated, generally "the more the Europeans insisted upon westernized legal systems the more uncertainty there was in human relations and the more disputes there were which could not be readily managed."⁸⁸

81. *Ibid.*, p. 20.

82. McLain, cited at note 13, p. 212.

83. Castelnuovo cited supra at note 48, stated that "80% of the local case law [in Tanzania] were decided according to customary law."

84. Woodman, R., "Some Realism about Customary Law: the West African Experience," *Wisc. L. Rev.* (1964), p. 128.

85. Daniels, E. W. C., *The Common Law in West Africa* (1964), p. 356.

86. McLain, cited at note 13, p. 225.

87. Elias, cited supra at note 53, p. 28-29. In this connection see Art 14 (2) of the Evidence Act of Nigeria which provides: "A custom may be judicially noticed by the court if it has been acted upon by a court of superior co-ordinate jurisdiction in the same area to the extent which justified the court asked to apply it in assuming that the person or class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration."

88. Pye, cited supra at note 42, p. 117. This experience seems to be borne out to a certain extent in the case of Ethiopia where the adoption of the civil code designed to end the uncertainty created by customary law appears to have intensified it. See David, cited supra at note 61, p. 203-204. Shack, W., "Guilt and Innocence: Problem and Method in the Gurage Judicial System," Gluckman (ed.), *Ideas and Procedures in African Law* (1969).

This has been even more so in the area of marriage and divorce laws where the introduction of European substantive and procedural laws, as was done in the case of the Ivory Coast,⁸⁹ created more instability in the traditionally stable African family structure⁹⁰ by increasing the rate of divorce.⁹¹

TRADITIONAL JUDICIAL PROCESS

"Generalizing about the traditional judicial process is dangerous, not only because there was variation depending on whether or not a particular society was one with strong central authority or was acephalous (without chiefs), but because the traditional rules of procedure and evidence varied even between similarly organized societies."⁹² But features such as informality and reconciliation are not only frequently found but are its remarkable characteristics.

The main reason for the traditional judicial process emphasis on reconciliation is the prevalence of face to face or what is known as the multiplex relationship.⁹³ The parties are often entwined in several relationships and in order to prevent the breaking of such relationships and thereby prevent extensive damage to the other activities of the disputants and continue the community solidarity and equilibrium, the courts tend to be reconciling.⁹⁴

Reconciliation, especially in the area of marriage and divorce is essential, and the traditional judicial process with its absence of a highly technical procedural rules and written pleadings gave the traditional courts a free hand to probe into the sources of the litigation and gave the parties and witnesses more than a fleeting opportunity to express themselves on the issues.⁹⁵ It thus appears that the traditional process by its emphasis on informality and flexibility facilitated this process rather than hindered it and ought to have been commended rather than be criticized.

The criticisms made against the traditional judicial process in most instances have been based on overexaggerations of this emphasis on reconciliation and the misunderstanding of its role in the western legal systems. As Van Velsen said, 'the majority of writers on this topic would appear to start from the assumption that judgment by agreement and judgment by decree are mutually exclusive alternatives. And by concentrating on the conciliatory aspects of African courts, they tend to ignore the judge's task of applying laws.'⁹⁶ On the other hand, by creating this artificial dichotomy and by their almost exclusive concentration on the superior courts, ignoring the courts at

89. Salacure, J., *The Legal System of French West Africa* (1969).

90. Cotran, cited supra at note 54, p. 16.

91. *Ibid.*, p. 20.

92. McLain, cited supra at note 13, p. 196-97.

93. Van Velsen, J., "Procedural Informality, Reconciliation and False Comparisons," Gluckman (ed.), *Ideas and Procedures in African Customary Law* (1969), p. 148-49.

94. Castelnuovo, cited supra at note 48, p. 199.

95. McLain, cited at note 13, p. 197. In this connection the absence of trained lawyers is a major factor contributing to flexibility of the process. See Gibbs, J., "The Kpelle Moot: A Therapeutic Model for Informal Settlement of Disputes," *33 Africa: Journal of International African Institute* (1963), p. 5-6.

96. Van Velsen, cited supra at note 93, p. 144.

the bottom of the hierarchy such as the magistrates courts, the small claims courts, and so forth,⁹⁷ intensifies the contrast even more.

To get the proper perspective one should more clearly distinguish between the various stages of the African and any other judicial process. "In both African and European societies pressure tends to be applied to disputants to compromise over their disagreements and not to worsen and disrupt social relationships by going to court."⁹⁸

The fact that a dispute has resulted in a court is not only an indication that the parties want to fight it out and are therefore less amenable to reconciliation but depending on the hierarchy of the court, i.e. the higher it is the less the judges are likely to be involved in the litigants' relationships and therefore the less likely they are to feel the pressure for reconciliation.⁹⁹

In addition one must bear in mind that the aim of litigation may vary from one society to another. For example, the frequency of disputes, which are such a striking feature of Tonga society, rather than being a sign of social disintegration, serves, like ritual and ceremonies elsewhere, to analyze and publicly reassert, personal relationship and rights.¹⁰⁰

Put in its proper perspective, we believe that the emphasis of the African traditional judicial process on reconciliation is generally beneficial to the whole legal system but even more so in the area under consideration—laws of marriage and divorce.¹⁰¹

CONCLUSION

In this paper we have attempted, very briefly, to discuss the major reasons for unification and to examine their validity within the limited scope of marriage and divorce laws.

We focused our attention mainly on the issue of the desirability of unification and for this reason our analysis was mostly theoretical. To the objections which we have already submitted one may add a rather pervasive theoretical objection—Africanization. Today when the new elites proclaim the African personality and heritage it would not only be ironic but a great loss to the heritage of African nations to halt the flowering of the cultural diversity with which they are endowed by standardizing their marriage and divorce laws.

But in addition to the theoretical objections that we discussed, proposals for uniformity pose the question of how far it is possible to impose and operate a unified law in societies which are diverse and fragmented. It is generally agreed that the more the law attempts to deal with expressive activities the greater the resistance which it will encounter. Marriage and divorce are a reflection of perhaps some of the most deeply ingrained mores

97. *Ibid.*, p. 139.

98. *Ibid.*, p. 146.

99. *Ibid.*, p. 149.

100. *Ibid.*, p. 147.

101. It was in realization of the advantages of informality that the participants at the conference "on the future of law in Africa" suggested the maintenance of the traditional courts and process.

and any directed change in this area is hence bound to create strong resistance. The abortive history of the Ghana Bill clearly demonstrates the difficulties of trying to introduce revolutionary changes in the laws of marriage.

In view of the theoretical objections and the immense problems of implementation we are inclined to suggest that in the area of marriage and divorce, rather than uniformity, the achievement of certainty should be sought.

The Relevance of Population and Law

A. M. AKIWUMI*

THE CRISIS OF NUMBERS¹

Until recently the question of population was considered personal and intimate. The family—the basic social unit—is still regarded sacred, and the call to avoid interference with it has been based on religion. Even today in predominantly catholic countries one can notice a very cautious attitude to the consideration of the need for change. In most African countries where the infant mortality is high, any discussion of family planning comes up against suspicion and resistance. A large family is supposed to be a source of security for its members. In some quarters there still lurks a suspicion that family planning has political implications because population has been considered a source of manpower for war. In both tribal and international conflicts of the past, large communities had tended to regard themselves as having a population advantage and the demographic factor was considered an important element in the preparedness and capability for war.

In the 19th century, the population of Europe doubled. The proportion of Europe's population to the world's total population rose from one-fifth to one-quarter and Europe was able to send out 40 million emigrants.² Such developments were possible, it is claimed, because of the industrial revolution and the introduction of better sanitary and medical services. In other words, Europe experienced a decline in mortality rates similar to that which is happening in most African countries today. There were opportunities, however, in the 19th century to send people from the allegedly over-populated areas to the under-populated continents. It was in the 1890s that a decline in the birth rate in industrialized countries was noticed. At the same time, it appeared that modern medical and sanitary services were helping the populations of Africa to register higher growth rates. These developments caused a panic. It was regarded "as a dramatic shift in the balance between white and coloured races." In Germany the Emperor took up the ideas of Chamberlain and the white races started to think and write about the "Yellow Peril". Several demographic studies were undertaken and the theme which ran through them was "the Dwarfing of Europe". Some writers presented the image, especially after the defeat of Russia by Japan, of the hordes from Asia

*Views expressed by the author are not necessarily those of the UNECA.

1. The title and much of the substance of this chapter are derived from *Issues Facing Mankind*, Keynote Address by Robert K. A. Gardiner, Executive Secretary, UNECA, at the World Conference on Education, University of Keele, Staffordshire, England, 9 September 1974.
2. Barraclough, Geoffrey, *An Introduction to Contemporary History*. C. A. Watts and Co. London, 1964, Chapter III: *The Dwarfing of Europe—the Significance of the Demographic Factor*.

and Africa descending upon Europe and destroying its people and civilization. Sir Leo Chiozza Money thought that there was no need:

“for weapons to destroy European life and civilization if the white in Europe and elsewhere were set upon race suicide”.

Australians were convinced that unless Australia doubled her population in a generation their children would be pulling rickshaws. It is against this background that a network of immigration laws and regulations were introduced into Australia, New Zealand, Canada, South Africa and the United States. It is even believed that the “population of the Western seaboard of North America would have been largely Asiatic” but for these regulations.³

Parochial, nationalist and racist attitudes to population size are giving way to new international perspectives. The demographic interest now is on the size of the population of the world as a whole, and how fast the numbers are growing. There are two important features about this new concern for global population. The first is that the world is divided into rich nations and poor nations. Ever since the ending of the last world war, a vast development programme has been mounted to improve the standards of living of the people in the poor countries and what this has demonstrated is that no real social progress can be made if:

“each year the number of persons to feed, clothe, shelter, educate, find jobs for, and keep healthy, increases over the previous year.”

Some countries had registered remarkable economic growth but the net gain per head has been insignificant, and in some countries there has even been a decline. Robert McNamara, the President of the World Bank, once aptly described this situation where population growth cancelled out economic growth as “treadmill economy”. The other reason is the need to avoid overloading the biosphere with wastes and pollutants, and for the conservation of natural resources. Prices of raw materials and energy have caused attention to be paid to the matter of future supplies. Increasing population will require increasing supplies, and catering to this increased demand will result in further overload of the biosphere with wastes and pollutants, thereby lowering the quality of living.

Available figures and projections seem to indicate that the species is reproducing itself too fast and some believe that the:

“world may very well be on the verge of one of the great discontinuities of human history—economic, demographic, and political.”⁴

The probability of population pressure on resources, living space and food cannot be ignored; it can cause:

“a deepening and spreading trend toward violence and anarchy in the wake of growing resentment and disappointed hope”.⁵

3. Barracloagh, Geoffrey, *An Introduction to Contemporary History*. C. A. Watts and Co. London, 1964, Chapter III: *The Dwarfing of Europe—the Significance of the Demographic Factor*.
4. Brown, Lester, R., *op. cit.* In *the Human Interest*. Overseas Development Council/Aspen Institute for Humanistic Studies. W. W. Norton and Co., New York, 1974.
5. Ward, Barbara J., Dubois René. *Only One Earth: The Care and Maintenance of a Small Planet*. W. W. Norton, New York, 1972. Page 211.

Let us, however, look a little closer where and how these prognostications might be fulfilled. The demographers tell us that in the 30 years between 1970 and 2000 A.D. another 2,862 million people will be added to the world's total. The developing countries will account for 2,498 million of the increase, and the developed 364 million. Within the same period the African continent would have increased its population by another 458 million and the total at the end of the century, at a medium rate of growth, would be about 818 million. For the developed countries, the main problems would be an increasingly ageing population, urban congestion and environmental stresses, and a high density of population in general against the availability of resources. For the developing countries the problems are manifold and the overall situation could mean a further lowering of living standards. By the end of the century the population would have doubled, and the problems would be related to providing basic necessities such as food, shelter, consumer goods and other components of standards of living. Here one should remember that about 40 per cent of the peoples are already living below the poverty line. In order to maintain the present standards of education, educational facilities must be increased by 80 per cent but that would leave even larger absolute numbers out of school. Vocational training facilities, which are already insufficient, would have to be found for a larger potential work force. The most critical problem would be to create 1600 million new jobs, when the problem of unemployment and underemployment is even now a recalcitrant problem, especially amongst the youth. Furthermore, in developing countries too, the number of ageing persons will increase and bring up problems of caring for them. The overall population density will be excessively high, especially in the agricultural areas. As for urban growth, it is already 2 to 3 times higher than the rate of population growth, and so overcrowding and slums are likely to become worse, and measures for controlling the influx from the country areas may have to be considered. The population-resources balance is likely to be upset even more. Taken in combination, serious political difficulties are likely to arise and the skill of governments to maintain order and stability under these circumstances would be greatly taxed. 'Blind demographic forces' must be brought under proper control.

Several governments in the world have adopted population policies and support official family planning programmes to limit the size of families by means of regulating fertility. In Africa six countries (Egypt, Ghana, Kenya, Mauritius, Morocco and Tunisia) have adopted official population policies, and two others (Botswana, Nigeria) have included programmes in their current development plans,⁶ and, 20 other governments permit voluntary agencies to operate, with some government grants-in-aid. But the general feeling in Africa is that family planning programmes can only be effective if they are made an integral part of overall development plans. Strategies for stabilizing the population must be closely tied to strategies for raising the standard of living of peoples, especially in the rural areas, through vigorous

6. *The New York Times*, April 30, 1972. Supplement on "Population, the U.S. Problem and the World Crisis". Statement by R. K. A. Gardiner.

economic measures and social policies. Without the simultaneous improvement in the socio-economic conditions of peoples there would be no incentive to raise small families.

THE AFRICAN BACKGROUND

Population is one of the basic instruments of development; at the same time, all development is or should be geared towards improving the way of life of the population. It may be true that in some developing African nations, the main cause for concern regarding growth is not the threat of over-population in the short run. In fact, some leaders in the region base their argument on this notion and maintain that, at the present stage of Africa's development, the demographic factor should not be regarded as a priority concern, even though the impact of rapid population growth on economic and social development including mass poverty, unemployment and education are subjects of importance. Indeed one might be tempted to subscribe to this line of thinking when it is realized that as a general rule, the Third World countries are faced with mounting difficulties in their attempt to find solutions to the various and complex problems of development which call for urgent attention. But this cannot be successfully accomplished without paying attention to the population whom economic and social developments are supposed to benefit.

The problem encountered in the various fields of economics and social welfare tend to throw up in Africa a number of basic considerations concerning population, namely: that the mere size of a country's population is not necessarily an absolute criterion of its greatness, that the rate of growth of population is more important than its size and that Governments have a responsibility towards the well-being of their citizens. The responsibility of Governments is not merely to secure for their citizens a minimum standard of living, but constantly to aim at something better; to ensure a constantly rising standard of living. The efforts so far made by African Governments to raise the living standards of their respective countries have not been insubstantial, but while the 1960s were particularly marked by experiments in plan formulation, it must be admitted that their implementation often fell far short of the set objectives and targets. This, from the population development point of view, was because population was regarded by many in Africa as not being a factor which had any immediate decisive effects on a country's socio-economic pattern. There is now, however, a growing interest among the economists and planners of the region in assessing the impact of population on the future economic and social development of their countries.

This trend has brought into prominence the problems of population and with it, an upsurge in the study of the body of laws, which is being referred to these days as population law, that affect the population directly and indirectly.

As African Governments increasingly recognize the need for an interdisciplinary approach to economic planning, population factors are being incorporated into development plans in a more systematic manner than before.

This new tendency seeks to acquire a better understanding of the growth of population itself, and attempts to undertake a more objective analysis of the way in which the variables in the African economies are interdependent. This is an efficient approach which anticipates and attempts to contain the many constraints which are likely to impede development and thus frustrate the aspirations of the peoples for well-being and progress.

Africa's accelerated rate of population growth is relatively a recent phenomenon. Africa's total population is estimated to have remained at 100 million persons for the years 1710-1850. During this period, the region was subject not only to natural disasters such as droughts but also to the slave trade, which depopulated Western Africa considerably. Only from the outset of the twentieth century did the population of Africa begin to grow first at a moderate rate of less than 1 per cent yearly. Subsequently, the rate of population growth has, as already indicated, accelerated substantially as a result of the fall in mortality rates, mainly among infants and children below five years old. In most tropical African countries, persistent declines in the death rates coupled with fairly stable fertility rates account for accelerated rates of population growth which have been particularly noticeable during the past two decades. With the projected rapid decline in mortality and continued high fertility rates, the present average annual growth rate around 2.8 per cent is projected to accelerate to about 3.0 per cent during the next two decades. It is only in the 1990s that fertility rates are projected to decline faster than the mortality rates and, thus, the annual rate of population growth would gradually fall back to the present level of 2.8 per cent by the end of the century. If the United Nations medium term assumptions turn out to be true, Africa would then have the highest rates of population growth among all the major areas of the world and would remain at that level from 1980 onwards, perhaps well into the twenty-first century. Correspondingly, Africa's share in world population will increase. The birth rate in Africa, which is at present 47 per thousand, is expected to fall to 38 near the end of the century: it would still be 10 points higher than that of all the developing countries combined, which, in turn is another 10 points higher than that of all the developed countries combined. The region seems to have the highest gross reproduction rate in the world, about 3.1 per cent.

The death rate, at present 21 per thousand persons, may continue until the mid 1980s, with its present lag of 5 per thousand points behind that of the developing countries combined. Probably two causes of recent mortality decline in most of the countries of the region have been increasing control of some diseases such as smallpox, yellow fever, malaria, etc., and improvements in basic health conditions in general through the expansion of social services such as mother and child care services, the development of personal sanitation practices through mass education. Life expectancy at birth, i.e., the number of years a baby born now can expect to live on the average, is at present 45 years in Africa. As the continent is gradually emerging from generations of very high mortality rates, the present life expectancy of about 45 years at birth is projected to rise continuously in the foreseeable future. Despite the

decline in mortality rates the crude birth rate has decreased modestly because of the corresponding changes in the age structure, which is reflected in the increase in the proportion of children resulting from the decline in mortality. As a result of the present fertility and mortality trends, the population of Africa will continue getting younger during the next 15 years or so. Africa seems to be the only major area in the world where the average age structure is expected to become lower in the course of the next few years, with the proportion of children under 15 years old becoming higher and the proportion of the population in the working age groups becoming lower. This could pose serious unemployment and underemployment problems in Africa. With the spread of the traditional system of education (i.e. primary, secondary and university), much larger proportions of the unemployed will be composed of the educated youth; a serious problem that confronts Africa. Another serious problem connected with unemployment is the accelerated trend towards urbanization, although very large proportions of the population of most African countries still live in rural areas. A major cause for concern from the high rate of urban growth is the cost of developing towns and cities and tackling the social problems that are created. Economic development leads to concentrations of population in particular areas, but at a certain stage the movement of persons from the rural areas into these urban areas looking for work which may not exist becomes non-productive, and steps have to be taken to limit or reverse the movement. In any event, town planning considerations which call for minimum standards of housing and services make the cost of dealing with unlimited immigration prohibitive.

Essential elements generally taken into consideration in planning are fixed capital formation, production, domestic savings, foreign trade, education, employment, health, etc. All these elements depend primarily on the levels, trends and structure of the populations. Thus the implications of population growth in Africa are of the utmost importance for planners both in terms of attempts to provide the increasing populations with their essential needs and to raise the levels of living of the peoples of the continent. Family planning at this point assumes particular importance if it could be applied more generally to African families at this stage of their development. Laws alone are not enough. Families must be convinced that they must restrict their children in their own interests to 2 or 3 per family. Until this basic point is established, family planning in Africa will make very slow progress. Education, the emancipation of women and higher levels of living will help to promote a transition to lower levels of child bearing in Africa, as once happened in Europe and other parts of the world. It is within the context of the problems of population in Africa outlined above that African laws should be examined to see what role they play and can play in solving the problems of population in Africa.

FAMILY PLANNING LAWS

Of all the laws affecting population, those on abortion and other family planning deserve treatment on their own, not simply because of the contro-

versy they engender but because of the beneficial effects which their reform would patently lead to and the important landmark in social development which this would bring about.

The first thing that strikes one about the laws on family planning is the inconsistency to be found between the then and present-day conditions, and the lack of enthusiasm for reforming the law into a more effective tool for development. As an element for change in the field of population, the performance of the law has been poor. The Declaration on Population (1966) and the Teheran Proclamation (1968) both of which pronounced that family planning was a basic human right, had introduced a fundamental legal approach in the consideration and study of population problems. However, as noted by Professor Luke T. Lee:

“On the national level, 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. Thus, restrictions continue to hamper the importation, manufacture, advertisement, and transportation of contraceptives; the minimum marriage age remains low; educational laws continue to forbid the teaching of family planning or sex education in schools; public health services remain unresponsive to the need for birth control counsel and clinics; the social welfare and income tax systems may favour 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 co-ordination. 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 favouring family planning.”⁷

But legal reforms which remain only on paper do more harm than good. Acceptable legal reform must, among other things, be compatible with:

“socio-cultural milieu, its innate merits, timeliness and enforceability, and the traditional respect for authority”.⁸

Professor Lee, one of the few to make a substantial study on the influence of laws on demographic development, has also pointed out that the extent of this problem varies from country to country, from subject-matter to subject-matter and that this may well be the reason why lawyers and sociologists who should be interested in a realistic approach to legal reform, have been slow in accepting the challenge.⁹

The population problem in Africa should be studied within its socio-cultural context. In this way, the historical and social origins of the problem could be examined and appropriate solutions found. In matters that may impinge on the traditions, culture and religions of peoples, the law has always been a poor instrument for change, but in many parts of the region, economic

7. Lee, Luke T., *Law and Family Planning*, *Studies in Family Planning*, Volume 2, Number 4, April 1971, 82.

8. Lee and Bulatao, *In-Depth Study on Law and Fertility Behaviour: Preliminary Observations*, First Draft, September 1972, 2.

9. Lee and Bulatao, *op. cit.*, 2.

development, the drift of the rural population to the towns, increased modern medical facilities and the wider spread of education and information, to name a few factors, have all in some measure assailed and will no doubt continue to assail the hidebound traditions and cultures of Africa and make it easier now than before for the introduction of family planning laws that would promote the effective tackling of the present-day population problems of Africa.

As noted already, African governments are committed to the raising of the living standards of their people and when this objective is analyzed, it should include the ability of a woman to determine how many children she would like to have and how often. If this notion requires justification then the medical, economic and social ones usually proffered may be repeated here. Man has from the moment that God said, "Go forth and multiply",¹⁰ obeyed that divine injunction, but man has for reasons of convenience, most frequently of necessity, made changes in his way of carrying out the divine order.¹¹ Among the reasons of necessity, medical reasons constitute the most accepted justification in the most conservative circles for the termination of pregnancy where continued pregnancy endangers the life of a woman. Even where abortion is allowed by the law the necessary conditions under which it may be undertaken vary from country to country and, on the whole, remain restrictive. The fact that a woman because of her poor economic circumstances cannot afford to have a child or an additional child has been accepted in countries in the developed world as a valid reason for the termination of pregnancy. Where the "risk to the standard of living in cases where predominant economic responsibility for the maintenance of the family devolves upon the woman",¹² seems to be the criterion used in some cases to justify abortion. One may well ask why this should not be extended to the economic standing of the father as well. Tunisia, notably, of all African countries, and following the example of some countries outside Africa, permits for socio-economic reasons, abortion where the woman has had 'at least five living children'.¹³ The performance of abortion by qualified persons for health or socio-economic reasons would not seem to be contrary to the objective of African governments to continually promote a better way of life of their citizens or the notion expressed above that the quality of a population is more important than its sheer size. A fundamental social question which also arises is that, whether, no matter what the social or cultural stagnation or feelings of a people are, a woman should not have the basic right to terminate her pregnancy simply because she wants to.

Health, economic and social considerations all seem to support the view that the right to family planning including abortion is a basic right, yet in Africa it is the law that remains illiberal and backward. Those who want an

10. Genesis, Ch. 1, Vol. 28.

11. See also Pariso, Alexandre. *Legislation and Demographic Changes*, Background paper prepared for the Symposium on Law and Population, Tunis, 17-21 June, 1974.

12. Roemer, Ruth. *Abortion Law: The Approaches of Different Nations*. American Journal of Public Health, 57 (II): 1906, 1911 November 1967, quoted by Lee, *op. cit.*, 85.

13. Law No. 24 of 1 July 1965 of Tunisia.

abortion badly will have it clandestinely even if it is a crime but often run the risk of injury to themselves; and those to whom abortion is a taboo because of their culture, religion or other sensibilities will not have one even if it were allowed. In these circumstances it would seem that the more tolerant and sensible view would be to have liberal abortion laws even in African countries with small populations.

Like most of the laws in Africa on abortion, African laws on the sale, advertisement and information on contraceptives are 'archaic laws inherited wholesale from former colonial powers, which often defeat the official policy favouring family planning'. For instance, among the 12 Francophone African States only Mali has repealed the old French law of 1920 which forbids the advertisement of contraceptives and permits in its new law "practice for the purpose of regulating birth". Whilst the advertisement of contraceptives is permitted in Ghana,¹⁴ the archaic law which prohibits abortion except where performed by a doctor solely for the purpose of preserving the life of a pregnant woman remains almost a dead letter being flouted by those who have never fully accepted that law. In Ethiopia where no doctor's prescription is required for the purchase of poisonous drugs, the law forbids the public dissemination of information about contraceptives. There are several other African countries where the anachronism shown above reigns and the laws bestowed on them by former colonial regimes linger on in spite of the fact that no such laws exist any more in the countries of the former colonial powers. The inappropriateness of the laws of family planning, by far the most important of all other population problems, has also arisen out of the fact that in most cases the legislature, colonial and post-colonial, has not concerned itself with influencing population trends when it considered laws.

ECONOMIC AND SOCIAL LAWS AFFECTING POPULATION

Whilst the family planning laws discussed earlier are concerned with the number of children that one may have and thus the growth of population, the laws which will be considered in this part relate to what you do with your population when you have got it, in other words, to the quality of life. The economic and social problems of population in Africa have already been outlined and they centre around increasing population and mass poverty, mounting unemployment, especially of school leavers, and the drift of the population from the country into the towns and cities. But there are hardly any laws designed specifically to deal with these very important problems. Perhaps no law can be devised to deal with some of them; there are, however, in existence some laws which indirectly affect them.

Some of these laws relate to family allowances which may be paid by the State for the number of children in a family up to a certain number. In this respect, there are hardly any African laws which provide for this. Maternity

14. See *Pleasure*, September 1974, Ghana's Sunshine Magazine, where 'Sultan Condoms' have been advertised at about US\$0.10 and *Ideal Woman* (OBAA SIMA), October 1974, Accra, Ghana, where Emko contraceptive Foam at about US\$0.50 is advertised for ladies who want to space their children.

benefits commonly granted consist of ante- and post-maternity leave with pay, which usually applies only to working mothers in the employment of Government or established big businesses, and the number of women in an African country affected by this sort of benefit must be very small indeed. In many African countries income tax laws provide for income tax relief on taxable income earners according to the number of dependents. But in nearly all African countries the vast majority of the people are so poor that their incomes do not reach the taxable level and therefore cannot take advantage of any tax relief in respect of their many children. Most income tax laws in Africa are relics of colonial laws which were designed to apply only to expatriate residents, business concerns and the odd wealthy African caught in the income tax dragnet. In recent years some African Governments have amended their income tax laws solely so as to bring within them the growing number of Africans now earning higher incomes, and in a country like Ghana, relief for dependents has been abolished altogether. The existing income laws are not really intended to have any impact on the development of population in Africa. Contributory national social security schemes are beginning to be established in African countries. They have still to be developed so as to extend benefits to the disabled, aged and sick who have not, through poverty, been able to contribute under a scheme.

In the purely social field, the laws of marriage, divorce and polygamy need to be examined to see how they affect population. African customary laws do not generally favour late marriages, and whilst it is true to say that women dwelling in the towns and cities do not normally enter into child marriages, it is not rare to find such women mothers of several children sired by more than one man. The practice of polygamy must have a significant effect on the population problems of Africa. Whilst its practice is, for instance, restricted in Egypt,¹⁵ there are many African countries where it is freely practised and where it is motivated by the economic need to have more hands to work on the family holding, or to put it in a religious setting: "Wealth and sons are the allurements of life . . . and children are the gifts of God".¹⁶

The absence of laws and regulations enforcing the registration of births and deaths and customary marriages, and polygamous marriage, including the ease with which they can be dissolved, generally unaccompanied by enforceable alimony or maintenance orders, have led to lowering of the protection of women and children and the undermining of family life. Abandoned wives and children—giving rise in the former case to prostitution and in the latter case to juvenile delinquency—are commonplace in our towns and cities.

Another social ill which has recently become the subject of public debate in Ghana is one that applies to many other African countries, namely, customary inheritance laws which affect most of the populations in Africa, especially the rural populations. The Law Reform Commission in Ghana is working on a uniform law of intestate succession, the provision of which

15. See Lee, *op. cit.*, 92.

16. Haile, Daniel, *Compilation of Ethiopian Population Laws*, November 6, 1974 unpublished, 125.

would benefit all sections of the community, irrespective of tribe, religion or form of marriage. To assist in its work, the Commission recently outlined the following proposals aimed at bringing a change that would give surviving spouses and children of intestate persons some share of their spouses' or parents' property:

- (a) There should be a unified system of intestate succession throughout Ghana, irrespective of one's ethnic group, religious belief or form of marriage.
- (b) The new law should apply to all Ghanaians and also to non-Ghanaians who are married to Ghanaians or have issue by Ghanaians and die intestate.
- (c) The new rules of intestate succession should apply only to the self-acquired property of a deceased person. The new rules will not apply to family property, stool property, skin property or society property or, to any rank or office in these institutions.
- (d) Where a deceased person is survived by spouse/spouses and children (if any), then all the self-acquired household chattels, for example, refrigerator, television set, radiogram, furniture, furnishings, crockery, cooking utensils, books, etc., should go to the surviving spouse/spouses and children (if any) and in equal shares absolutely.
- (e) The rest of the deceased person's property (both movable and immovable) should be shared as follows:
 - (i) One-fourth of the whole residue shall go to the deceased family. (Family in this sense in view of existing customary laws, means family depending on whether the deceased is a member of matrilineal or patrilineal community).
 - (ii) One-fourth of the whole residue to the surviving spouse/spouses and one-half of the whole residue to all the surviving children of the deceased equally.
 - (iii) Where the deceased has left spouse/spouses but no children, the surviving spouse/spouses should take one-half of the whole residue and the remaining one-half should go to the family of the deceased.
 - (iv) Where the deceased has left surviving children but no spouse, then three-fourths of the whole residue should go to the children and the remaining one-fourth should be given to the family of the deceased.
 - (v) Where a deceased person has no spouse or children at the time of his death, the whole of his estate including the household chattels shall devolve on the family of the deceased person absolutely.
 - (vi) Where the deceased has left no spouse or child and his family cannot be traced within a period of twelve months then his estate shall devolve upon the state.
 - (vii) Where the deceased person is entitled upon his death to any insurance benefits, e.g. life policies, social security contributions,

superannuation and other provident funds, but during his lifetime has made nominations so as to prejudice the rights of his spouse/spouses or children, then the court may, on application by any of these persons, order that certain portions of these funds should be paid to the applicant unless the court is satisfied that the applicant will not suffer undue hardship if the order were to be refused.¹⁷

CONCLUSIONS

The foregoing makes it imperative for lawyers in Africa to widen their horizons and break away from their narrow traditional role of interpreting laws in an aloof manner. In the last analysis the wealth of a country and its priorities are the factors that will count most, but lawyers should be in the forefront of the fight for reform that would bring about a more realistic legal framework for the promotion of the welfare of the people, and their very training should be oriented to fit them for this role. They must be more aware of the economic and social conditions of society.

The basic question is how do the legal features which have been identified affect the solution of the population problems of Africa. Some of them perhaps cannot be made to achieve much; on the other hand, some others have great potential if the necessary legal studies and solutions are undertaken and applied. Research, however, must not be confined to those legal fields already discussed. Education, unemployment, the emancipation of women, child care,¹⁸ more realistic social and economic benefits, economic actions that would promote urban and rural development, the development of labour-intensive industries can help abolish mass poverty; these and many more must be legally investigated if the objectives of African Governments for their citizens are to be achieved. Daniel Haile in his compilation of Ethiopian population laws,¹⁹ has identified well over thirty subjects of the law affecting population which include injury to the person, sexual offences, marriage, divorce, alimony and maintenance, the medical profession, sale of poisonous drugs, pharmacists, public health, epidemics, burials and cremation, hospitals, protection of children, orphans, affiliation proceedings, legitimacy of children, inheritance, artificial insemination, abortion, sale of contraceptives, housing, labour laws, employment, unemployment, pensions, education, including sex education, citizenship, taxation and minimum wages. The law has an important role to play in the development of population which can fairly be said to mean everything that affects the well-being of mankind. However, this role can only be fully discerned after an analysis of the urgent African problems of population and the laws or absence of laws affecting them.

17. See *News from Ghana*, Vol. 2, No. 10, Late May, 1974, Information Section of the Ghana Embassy, Addis Ababa, Ethiopia.

18. The Ghana Department of Social Welfare and Community Development is seeking legislation to control the establishment of Day-Care Centres so as to ensure that children are not subjected to "unwholesome practices but are given positive opportunities for their future development". *Daily Graphic*, Accra, Ghana, Tuesday, November 5, 1974.

19. *Op. cit.*

Law and Population Growth in Kenya

U. U. UCHE

INTRODUCTION

CHARACTER OF THE POPULATION PROBLEM

Kenya's first national population census was taken in 1948. At that point in time, Kenya was found to have 5½ million inhabitants. In 1962 another census indicated an annual growth rate of 3 per cent. In that year the population was 8½ million. At that time, it was forecast that at the annual growth rate of 3 per cent the population would double in the next 23 years. Between 1962 and 1969 the annual growth rate jumped to 3.3 per cent. The 1969 census put the population of Kenya at 10,942,705. The current figures given for 1974 indicate that the population will reach 12,934,000, a growth rate of 3.5 per cent. This is a rather disturbing level of growth for a country with limited resources. Table 1 below shows the increasing rate of growth since the 1948 census. This high and accelerating population growth rate, coupled with a large dependency rate and increasing rates of rural-urban migration, act to slow and reduce Kenya's potential for economic and social development.

Table 1 Population Growth Rate in Kenya

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

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

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

SOCIAL, RELIGIOUS AND CULTURAL ELEMENTS

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

have all been said to emphasize the child-centred nature of customary law marriages, which therefore leaves no room for family planning. But the suggestion that family planning is inconsistent with traditional customary law notions can be quite misleading.

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

Traditional Attitudes Affecting Fertility

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

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

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

Fourthly, the conception of parental control is still very much part of the traditional system. The parties having been joined through the negotiations of two families cannot separate without the concurrence of the families. The power and control of the parents is still very much part of traditional marriage law and family life in Kenya. There is also customary law succession and inheritance under which the female is heavily discriminated against in favour of the male child. Fortunately, the Law of Succession Act, 1972 has started a trend which in time will lead to the ultimate eradication of such traditional practices in the law of succession.

Potential Amelioration of Modern and Traditional Attitudes

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

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

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

On the negative side, there is the common belief among the people that more children mean more wealth, a source of labour on the farms, a future old-age insurance for the elderly and the feeling that a man who has many children is wealthy, powerful and the head of a strong lineage whose future is ensured. These traditional notions are being modified as countries shift from the agrarian to the more industrial economies. There is also the view, based on the erstwhile high infant mortality rate, that regards high numbers of children as insurance against the possibility of some dying before reaching adulthood. There is also the subsidiary desire, given the division of labour on the farm and in the home, for having male offspring, particularly in cases where the wife has had only female children. Again, this rationale is undergoing changes. Lastly, many people fear becoming sterile as a result of using

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

family planning methods. They regard sterility as a potential punishment. Such a view is not only unscientific but untenable.

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

- (i) With a smaller or well-planned family, you can afford to educate all your children, provide them with adequate food, and house and clothe them comfortably. You can also put away some money towards their future, as well as your own.
- (ii) You and your family will have more time to participate in activities that you enjoy, and your social status is financially satisfactory, while your well-dressed, well-educated children will also add to your social position in the community.
- (iii) Personal family relationships—between father and mother, between parents and children, and among the children—will be happy and secure.
- (iv) With the acceptance that there should be fewer births to a family, the woman enjoys better health and remains attractive to her husband as she is not burdened with too many pregnancies.
- (v) Today, one is ensured of safer births; if proper care is taken, infant mortality is almost nil.

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

A BRIEF HISTORY OF GOVERNMENT POLICIES AND ACTIONS

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

- (i) That if the current trend of growth in Kenya continued it would accelerate to 4 per cent by the end of the century and would double the population in eighteen years;
- (ii) That a population programme for Kenya should be viewed as an integral part of the total social and economic development of the country;
- (iii) That a programme designed to decrease the birth rate should have an especially close link with the national health programme;
- (iv) That any programme to decrease the birth rate should be voluntary and take cognizance of the wishes and religious beliefs of individual parents;

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

- (v) That a reasonable objective should be to reduce fertility by 50 per cent over a 10-15 year span but recognized that even at this level the population would still double in 35 years with an annual growth rate of 1.8 per cent;
- (vi) That, in order to achieve item (v) above, about 150,000 IUD's should be inserted per year by the end of the 5 year period; and provision be made for other contraceptive measures to an additional 50,000 couples. The aim was to achieve a level of 60,000 to 80,000 IUD insertions per year;
- (vii) That a national Government Programme with multi-ministry participation be established but the Ministry of Health should play a crucial role in the operation;
- (viii) That there should be geographical phasing in the operation of the programme, with priority to high density and developed areas, demonstration pilot projects and heavy reliance on the IUD;
- (ix) That Knowledge-Attitude-Practice studies, personnel training logistics, and collection of statistical information should be vigorously undertaken;
- (x) That it was desirable to enlist the financial and other co-operation of voluntary agencies and political organizations;
- (xi) That a programme of public information and education, use of the activities with maternal and child care services should be encouraged. The costs of the programme were estimated at between K£80,000 during the initial stages and increasing to K£112,000 by 1971/72.^{2a}

The Report was carefully studied by the Kenya Cabinet and later adopted. Before the end of 1965 the Government announced the adoption of family planning as part of its Development Policy, thus becoming the first Government in Africa south of the Sahara (outside South Africa) to adopt and recognize the need for family planning on a national level. Accordingly, in December 1968, the Ministry of Health sent an official circular to medical officers of both central and local governments explaining the implications of population growth and adding that family planning services would be integrated into health services and that the training of medical officers in family planning techniques would commence.³ The Development Plan (1966-70) which followed the Report of the mission included a Government commitment to make available information and supplies in respect of family planning free of charge through Government and private facilities to those families wishing to avail themselves of the opportunity. In other words, family planning like other medical services was to be supplied free of charge in hospitals. This official commitment to family planning as a strategy for obtaining the desired population growth rate in Kenya has continued through the two other Development Plans since the 1966-70 Plan. The level of both capital and recurrent expenditure on the various aspects of the programme has risen phenomenally, as has aid from voluntary agencies in this area. For the six years 1973-79

2a. K£1=US\$2.80.

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

the project is estimated to cost K£11.1 million, a figure which includes development and recurrent costs. It is estimated that the Government will provide 27 per cent and the balance is expected through foreign aid. The United Nations Development Programme, the Swedish Government as well as the U.S. Agency for International Development have already made substantial aid offers for the Development period with respect to the Family Planning Programme.

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

Table 1A Family Planning Sub-Programme, Total Expenditure and Finance 1974-1978*

	1973/74	1974/75	1975/76	1976/77	1977/78	Total
<i>K£'000</i>						
Recurrent Expenditure						
Service Points	—	146	284	428	521	1,379
Supervision	—	75	98	115	138	426
Contraceptives	—	27	53	79	112	271
National Family Welfare Centre	—	176	193	176	182	727
Training (field)	—	57	65	69	62	253
Mass Media	—	103	51	62	72	288
Sub-Total	—	584	744	929	1,087	3,344
Not covered in other programmes	—	103	51	62	72	288
Development Expenditures						
Rural Health Centres	—	735	1,020	717	—	2,472
National Family Welfare Centre	—	50	115	180	130	475
Nurse Training Schools	14	780	611	93	—	1,498
Equipment and Vehicles	—	188	94	195	59	536
Sub-Total	14	1,753	1,840	1,185	189	4,981
Not covered in other programme	—	188	94	195	59	536
Total Expenditure not covered in other programmes	—	291	145	257	131	824
Estimated Foreign Aid	—	290	134	231	88	743
Local Finance	—	1	11	26	43	81
Import Content	—	285	142	152	128	707

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

a shortage of the manpower required for organizing and delivering family planning services. And one of the complicating factors is the fact that more than 90 per cent of the population is rural and thus widely dispersed. At present fewer than 12 rural clinics offer such services on a fulltime basis.

Most clinics do so but once a month. The city councils of Nairobi and Mombasa are also engaged in delivering family planning services, and seem to be successful in getting contraceptives to the populace. In Nairobi the City Council operates 39 clinics which account for one-fifth of the acceptors each year.

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

Table 2 Attendance at Family Planning Clinics 1967-72

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

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

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

Table 3 Attendance at Family Planning Clinics by Province 1971-1972

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

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

Though the original proposal for a family planning programme emphasized solely the use of IUDs, the Population Council report was submitted prior to the production of the contraceptive pill. A 1974 study of a random sample of first visits to family planning clinics indicates that the national rate of acceptance of the various methods of contraceptives are as follows: pill,

51 per cent; IUD, 29 per cent; injectables, 4 per cent; other methods, 2 per cent; none, 13 per cent; unknown, 1 per cent.⁴

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

A BRIEF HISTORY OF PRIVATE FAMILY PLANNING ACTIVITIES IN KENYA

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

Before 1968 the Family Planning Association undertook all the three main areas of service to the public, namely: motivation, education and clinical services. Since the Government took over the clinical services aspect in 1968, the Association has concentrated on motivation and education although they still operate a few clinics of their own for those clients who would rather not go to the Ministry of Health Clinics for any reason whatever.⁵ In the light of the growing concern over population growth rates in Kenya, the Family Planning Association performs an essential educational function, which might not be accomplished were it not for its efforts. In this regard, FPAK works hand in hand with the government. Activities of the Association include lectures, seminars, courses, film shows, operating stands at agricultural shows, giving handouts on family planning information, use of mass media, sponsorship of research projects on family planning and running private clinics.⁶

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

4. "Kenya", *Country Profiles*, *op. cit.*, p. 8.

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

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

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

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

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

LAWS DIRECTLY AFFECTING FERTILITY

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

One general feature of the Kenya scene which emerged from the author's survey of the laws relating to population matters is the unique absence of an organized body of legislation specifically intended to deal with the question of population growth rate. Provisions relating to the subject are littered over the whole gamut of the Laws of Kenya (11 volumes in 1962 exclusive of the annual volumes since then) and the plethora of Regulations, Orders and By-laws based on the legislation in the volumes. Many of these legal provisions

7. 1971 *Annual Report*, *op. cit.*, p. 17.

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

repeat or contradict one another. Though this is not totally surprising, it is a rather unsatisfactory position, given the clear and unambiguous statement of objectives and policy in official white papers.

CONTRACEPTION: USE, MANUFACTURE, SALE AND ADVERTISEMENT

Use

There is no law in Kenya that prohibits the use of artificial or other contraceptive methods. As was noted earlier in this monograph, as early as 1952 the colonial Government had encouraged family planning measures following the 1948 census, which revealed a high rate of population growth. Contraceptives were given in clinics run by voluntary but qualified medical practitioners both in Nairobi and Mombasa. These services were later extended to Nakuru and integrated into a national organization in 1957. Since 1968, clinical services have been undertaken in the Ministry of Health hospitals where contraceptives are given free of charge to acceptors. There are neither legal nor other limitations on the use of contraceptives such as exist in some countries, e.g., use permitted solely on medical grounds not for contraceptive purposes. There is, however, the Pharmacy and Poisons Board, established under the provisions of the Pharmacy and Poisons Act,⁹ which has power to prohibit or control the use of certain drugs and appliances. Control over availability and therefore the use of contraceptives could be exercised by Regulations made by the Board under this Act.

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

Manufacture

There is no specific statutory or other legal regulation on the manufacture and distribution of contraceptives except in so far as these come within the

9. Laws of Kenya [1962 Revision], Chap. 244.
10. [1947] 2 All E.R. 886, [1948] A.C. 274. In *Baxter*, the House of Lords overturned the short-lived ruling of the Court of Appeal in *Cowen v. Cowen*, [1945] 2 All E.R. 197, that there was no consummation where the husband had worn a sheath or practiced coitus interruptus.
11. *The Times* (London), April 20, 1972 as cited by D. M. Kloss and B. L. Raisbeck, *Law and Population Growth in the United Kingdom*, p. 21 (Law and Population Monograph Series No. 11).

definition of drugs and appliances under the Pharmacy and Poisons Act, and the Foods, Drugs and Chemical Substances Act.¹² Under Section 44 (1) (d) of the former Act, the Minister, after consultation with the Pharmacy and Poisons Board can make regulations prohibiting, regulating or restricting the manufacture, sale or advertising of drugs, pharmaceutical preparations and therapeutic substances. Rule 16 of the Rules made under that section specifies that in all establishments in which pharmaceutical preparations are manufactured for the purpose of the treatment of any human or animal ailment, the preparation must be manufactured by and under the supervision of a registered pharmacist, a fellow of the Royal Institute of Chemistry, an Associate of the Royal Institute of Chemistry or a person with similar qualifications recognized by the Board. Though the general regulations of the two statutes mentioned above would apply to the manufacture of contraceptives, presently there is no local manufacture of contraceptives.¹³ This means that they must be imported.

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

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

Sale

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

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

Advertisement

Advertising in matters of contraception may take a number of forms. Two of the most frequently used methods are the dissemination of publications

12. Laws of Kenya, Chap. 254.

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

14. Laws of Kenya, Chap. 154.

offering contraceptive education, and campaigns to introduce the public to the different forms of contraception and the merits of each of the methods advertised. In Kenya both forms of advertisement appear to be subject to the criminal law sanctions which govern obscenity. These limitations are found in three sources: the Penal Code,¹⁵ the Public Health Act¹⁶ and the Pharmacy and Poisons Act.¹⁷ In practice, both forms are widely used by the Family Planning Association of Kenya, the Ministry of Health and the International Planned Parenthood Federation in their efforts to disseminate family planning information. No prosecutions have yet been initiated for what might be regarded as a contravention of any of the statutory provisions. It seems clear to some that most of the activities¹⁸ of the Kenya Family Planning Association in providing motivational and educational services would come squarely within the prohibition of Section 181 of the Penal Code which provides *inter alia* that any person who for the purpose of or by way of trade or for the purpose of distribution or public exhibition, makes, produces or has in his possession any one or more obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematographic films or any other obscene objects, or any other object tending to corrupt morals, shall be guilty of a misdemeanour and liable to imprisonment for two years or to a fine of seven thousand shillings. It is interesting to note that although this provision of the Penal Code does not provide for any acceptable defences, a similar provision in the Public Health Act makes exceptions for publications by the Medical Department or by any local authority, public hospital or other public body in the discharge of its lawful duties or by any society or person acting with the permission of the Minister of Health or for any books, documents or papers published in good faith for the advancement of medical science.¹⁹ It would seem that the exceptions here are wide enough to cover the activities of the Family Planning Association of Kenya.

ABORTION

Abortion is one area in which the law as well as the general attitude of the people (rooted of course in traditional or religious beliefs) is most in conflict with the declared aims of the Government, both in the Development Plans in respect of population growth rates and in other policy statements. Perhaps this position is understandable, given the dangers under which illegal operations are performed in countries with near-total prohibitions against abortion. It has not often been recognized that those who oppose the legalization of abortion in Kenya on the basis that it is dangerous to the mother's life (in addition to destroying the life of the fetus) are engaging in circular reason-

15. *Ibid.*, Chap. 63.

16. *Ibid.*, Chap. 242.

17. *Ibid.*, Chap. 244.

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

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

ing. It has not been conceded that the danger could be, and is in fact, removed where abortions are permitted in properly supervised settings, and that the existing dangerous situation is itself a creation of the present law which roundly condemns abortion practices by qualified medical practitioners in Kenya. The law has the effect of forcing those who seek abortions to do so under clandestine, unsavory conditions.

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

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

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

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

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

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

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

- (i) "Mr. Ormord, Dr. Candler and Mr. Duff alike would seem to regard the use of a curette on a woman who was sixteen weeks pregnant as a matter of grave danger, by reason of the likelihood that scraping the womb, as Dr. Candler put it, 'you might in taking away the placenta, take a bit of the womb itself, and by reason of [it, cause] excessive haemorrhage'..."
- (ii) "... Dr. Eraj, whom I have already mentioned and whom I have no doubt you will remember, seems to regard the use of the curette as a most normal procedure to be adopted in cases of this nature. He would also seem to regard the use of a curette as being not a particularly dangerous matter as it is usually entrusted to the least experienced member of the gynaecological team in any hospital, if he is considered fit by his superiors to do any operation at all at that state."

One would have thought that there was here a clear case of doubt as to the question of gross negligence on which the charge of manslaughter was based. But the first instance judge and the East African Court of Appeal held the accused guilty and sentenced him to 30 months imprisonment with its obvious disastrous consequences to his professional career. His leave to appeal to the Judicial Committee of the Privy Council, which at the time was the last court of appeal for Kenya, was refused, as was his application for special leave from their Lordships of the Privy Council to appeal to their Board.

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

In spite of the statutory and judicial position on abortion as stated above, there is still a rather limited recognition of abortion in Kenya based entirely on the practice in England before the passage of the Abortion Act, 1967 (England). The position itself was reached through the case of *R. v. Bourne*,²² decided under Section 58 of the Offences Against the Person Act, 1861

21. The type of operation performed was a dilation and curettage (D and C).

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

(England) but based on the interpretation placed on the *mens rea* provisions of the Infant Life (Preservation) Act, 1929 (England). Justice Macnaghten, who ruled in the case, used the meaning of "unlawfully" as found in the latter statute in construing the *mens rea* provisions of the former to mean that under certain circumstances a doctor could "lawfully" decide to perform an abortion on a pregnant woman. In his instruction to the jury Macnaghten stated that a surgeon was not to wait until the patient was in peril of immediate death, but that it was his duty to perform the operation if, on reasonable grounds and with adequate knowledge, he was of the opinion that the probable consequence of the continuance of the pregnancy would make the patient a physical and mental wreck. The jury found that Bourne had performed the operation on a 15-year-old girl who had been repeatedly raped, for the good faith purpose of preserving her life, and acquitted him.

In Kenya, the emphasis seems to be placed on the words "physical" and "mental." Thus, before an abortion operation is performed in any hospital there have to be at least two medical opinions: one from the general practitioner who has treated the pregnant woman and the second from a psychiatrist. When the two opinions and the woman's consent (as well as her husband's if she is married) have been obtained, then a gynaecologist could perform the operation in a hospital. This of course was the English practice on the subject before 1967.²³

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

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

and surprisingly, where the woman has been raped (41 per cent). What the survey does make clear, however, is that there is a limited acceptance of abortion, a position radically different from the present rigid prohibition of the law.

Table 4 Attitudes Toward Abortion Under Specified Conditions

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

*Multiple responses

Base: 1887 Fertile Women

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

Table 5 Attitudes Toward Abortion Under Specified Conditions

Reasons	Approve	Disapprove	Don't Know
	%	%	%
The pregnancy seriously endangers the mother's health	58	8	3
The couple cannot afford another child	16	52	2
The woman is not married	14	54	3
The woman has been raped	19	46	5
There are serious reasons to believe that the child will be born deformed or abnormal	37	39	4
The couple does not want another child	12	56	2
Failure of contraceptive methods	7	56	7
All reasons mentioned	2	26	1

Base: 2236 Adult Males

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

STERILIZATION

There is no specific legal provision in Kenya in respect of sterilization other than as part of a wider regulation of surgical operations. Section 240 of the Penal Code provides that a person is not criminally responsible for performing, in good faith and with reasonable care and skill, a surgical operation upon any person for his benefit, if the performance of the operation

is reasonable, having regard to the patient's state at the time and to all the circumstances of the case. It has to be stated that this section is only an exemption provision under Chapter 22 of the Penal Code which creates offences for acts endangering life and health. In practice, sterilization operations are carried out in the Ministry of Health clinics, free of charge, on those who consent to it. Normally a woman would only be operated upon if she has had up to four children. Vasectomy has not made any noticeable impact in the family planning scene in Kenya.²⁴

FAMILY LAW AND POPULATION²⁵

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

Minimum Age of Marriage

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

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24. It is unlikely that incentives would alter the vasectomy picture considerably or at all in Kenya. It is just possible that incentives for women who already have at least four children might produce more positive results in the sterilization figures. Lump sum payments such as maternity grants, if substantial, could be effective, as would free secondary education for the last child. School fees if taken off parents, will produce positive results as well in the sterilization acceptors.
25. See John C. Caldwell, *Population Growth and Family Change in Africa*. See also U. U. Uche, "Future Trends in Kenya Family Law," in *Trends in Kenya Family Law* (National Council of Women of Kenya and the Kenya Association of University Women, 1974).
26. Luke T. Lee, "Law and Family Planning," *Studies in Family Planning*, Vol. 2, No. 4, p. 90 (1971).
27. Laws of Kenya, Chap. 150.
28. *Ibid.*, Chap. 151.

Matrimonial Causes Act;²⁹ the Mohammedan Marriage and Divorce Registration Act;³⁰ the Mohammedan Marriage and Succession Act;³¹ the Hindu Marriage and Divorce Act³² and the Subordinate Courts (Separation and Maintenance Act).³³ It is therefore not easy to talk of a generally applicable minimum marriage age in Kenya. Customary law marriages would tend to accept ages less than sixteen specified in the Marriage Act, while Hindu marriages do specify 18 as the minimum age for males and 16 for females. The bill appended to the Report of the Commission on Marriage and Divorce recommends 18 and 16 as the minimum marriage age for males and females respectively.³⁴ This appears to be an adoption of the Hindu law position.

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

Polygamy

The customary laws of all Kenyan tribes recognize the concept and practice of polygamy, as does Islamic law, which is adhered to by about 4 per cent of the population in Kenya. Because of the somewhat widespread acceptance of the practice, the state has not attempted to abolish polygamy for fear of a public outcry. In the case of polygamy the law appears ready to wait for education to precede legislation. But attempts have been made in the past to curb the excesses of polygamy through the imposition of penal and other measures. Section 37 of the Marriage Act³⁵ provides that any person who is married under that Act, or whose marriage is declared by that Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom. Sections 49 and 50 of the same Act deal with the offences of mixing the marriage types. It is an offence both to contract a customary (and therefore potentially polygamous) marriage during the subsistence of a valid monogamous marriage and to contract a monogamous marriage while a valid polygamous or potentially polygamous marriage remains undissolved.

29. *Ibid.*, Chap. 152.

30. *Ibid.*, Chap. 155.

31. *Ibid.*, Chap. 156.

32. *Ibid.*, Chap. 157.

33. *Ibid.*, Chap. 153.

34. Sec. 21 of the Proposed Bill.

35. Laws of Kenya, Chap. 150.

Section 13 of the African Christian Marriage and Divorce Act³⁶ removes one of the humiliating incidents of polygamous marriages, that of wife inheritance. One section provides that any African woman married in accordance with the provisions of that Act, the Marriage Act or under the provisions of the repealed Native Christian Marriage Act, whether before or after the effective date of the present Act, shall be deemed to have attained her majority on widowhood, and shall not be bound to cohabit with the brother or any other relative of her deceased husband or any other person, or to be at the disposal of such brother or other relative or other person, but shall have the same right to support for herself and her children of such marriage from such brother or other relative as she would have had if she had not been married as mentioned above.

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

1. Marriages are of two kinds, that is to say
 - (a) those that are intended to be monogamous;
 - (b) those that are intended to be potentially polygamous or in fact polygynous.
2. A marriage contracted in Kenya which is subsisting at the commencement of this Act shall
 - (a) if contracted in Islamic form (unless the parties were Shia Imami Ismailis) or according to rites recognized by customary law in Kenya be presumed to be polygynous or potentially polygynous; and
 - (b) in any other case, be presumed to be monogamous, unless the contrary is proved.

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

1. A marriage contracted in Kenya may be converted
 - (a) from monogamous to potentially polygamous; or
 - (b) if the husband has one wife only, from potentially polygynous to monogamous;
 by a declaration made by the husband and the wife, that they each, of their own free will, agree to the conversion.
2. A declaration under subsection 1 shall be made in the presence of a registrar and shall be recorded in writing, signed by the husband and the wife and the registrar, at the time of making.

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

36. *Ibid.*, Chap. 151.

POLYGAMY CASES

A number of cases have been decided in the Kenya courts on the subject of polygamy, but hardly any of them have any direct bearing on population matters. *R. v. Amkeyo*³⁷ was concerned with the admissibility of the evidence of a wife of a polygamous marriage against an accused husband on the basis that a monogamous wife cannot be compelled to testify in a criminal charge against her husband. *Gulam Mohamed v. Gulam Fatima and Others*,³⁸ was an action in which the recognition of a polygamous marriage for the purpose of the divorce jurisdiction of the High Court was in issue. In *R. S. v. S. S.*,³⁹ one of the parties had purported to contract a monogamous marriage during the existence of a valid polygamous marriage, while in *Ayoob v. Ayoob*,⁴⁰ the court was concerned with the question of the conversion of a monogamous marriage to a polygamous one where the parties had gone through ceremonies both under the Marriage Act and later in accordance with Islamic Law rites as provided for in the Mohammedan Marriage, Divorce and Succession Act.⁴¹ In the latter case the court held that where a husband and wife are already validly married under the Marriage Act, a subsequent purported marriage ceremony between them under Islamic Law is invalid and was devoid of legal effect.

Divorce

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

Divorce under customary law lacks statutory guidance as to what the grounds for dissolution of the marriage are. It has in fact been suggested⁴³ that there are no customary grounds for divorce, only reasons for dissolution of a customary marriage. This suggestion is, of course, derived from a Eurocentric theory of marriage dissolution, which in the past lay great

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

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

39. [1969] E.A. 229.

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

41. Laws of Kenya, Chap. 156.

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

43. Cotran, *op. cit.*, pp. 16-18.

emphasis on grounds for the dissolution of marriage. Yet this western concept of divorce is fast yielding place to the more realistic concept of total breakdown, which is the whole basis of traditional dissolution of marriages. Mention has to be made of some traditional systems in Kenya where divorce is either highly discouraged or in some cases not allowed, as long as there are offspring of the marriage. The Kikuyu tribe—the largest of the indigenous groups—have often been mentioned as an example of such a system.

Islamic divorces are governed by Islamic law on the subject. Classical Muslim law recognized various kinds of divorce, the most predominant forms were *talaq*—the unilateral repudiation of the marriage by the husband—and *khula*—the seeking of marital dissolution by the wife by giving or agreeing to give consideration to the husband for her release. Present Islamic divorce practice is regulated by the provision of the Mohammedan Marriage and Divorce Registration Act.⁴⁴

Other forms of divorce are governed by the provisions of the Matrimonial Causes Act⁴⁵ and the Hindu Marriage and Divorce Act.⁴⁶ Section 8 of the Matrimonial Causes Act gives four main grounds for divorce, namely:

1. That the husband or the wife since the celebration of the marriage has committed adultery;
2. That the petitioner had been deserted without cause for a period of at least three years immediately preceding the presentation of the petition;
3. That either party has since the celebration of marriage treated the other (petitioner) with cruelty;
4. That the respondent is incurably of unsound mind and has been continually under care and treatment for a period of at least five years immediately preceding the presentation of a petition for divorce. A wife petitioner can also pray for divorce on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

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

The Bill proposed by the Commission on Marriage and Divorce includes

44. Note 30, *supra*.

45. Laws of Kenya, Chap. 152.

46. *Ibid.*, Chap. 157.

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

LAWS INDIRECTLY AFFECTING FERTILITY

TAX LAWS

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

Table 6 Income Tax Act—Third Schedule, Head B

Rates of Tax

The Individual rates of tax shall be:

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

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

47. Sec. 115 of the Bill.

sampled preferred not to answer the question of whether they considered the relief provisions in planning their family size, there seems to be a possibility that higher incentives in the form of child relief would produce a pro-natalist effect and thus affect fertility in a positive way.

Table 7 Data on the Impact of the Income Tax Act on Fertility in Kenya

Questions	Yes %	No %	No Opinion %	Refused Comment %	Other %
1. Do you pay tax	69.1	30	.6	.3	—
2. Are you aware of the existence of the Income Tax Act	80	16.3	3.1	.6	—
3. Are you aware of the provision for child relief for up to 4 children in the Act	8.4	85.9	4.3	1.4	—
4. Have you had any child relief under the provisions of the Act	61.1	35.4	2	1.1	.3
5. Do you consider the relief provisions in deciding your family size	25.4	61.7	5.1	7.1	.6
6. Would you consider having more children if the level of relief was higher than it is	32.3	41.7	10.3	14.6	1.1
7. Would you limit your family size if the Act had no relief provisions	20.3	52.9	8	16.6	2.3
8. Do you see the relief					
(i) As extra income for your use	24.6	50.9	18.9	4.9	.9
(ii) As money intended for the needs of the children	49.1	22.3	21.1	6.6	.9
(iii) As savings for the family	23.1	46.3	23.7	6.6	.3

Base: 350 Adults

SUCCESSION LAWS AND ESTATE DUTIES

Testate and intestate succession to property in Kenya is now regulated by the Law of Succession Act, 1972.⁴⁸ Section 40 of the Act deals with intestate succession and provides that where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided equally among the houses, each in turn divided according to the number of children it has. Any wife surviving him will be counted as an additional unit to the number of children in the house. Thus, the smaller the size of the decedent's family the bigger the portions that individual members will receive out of his estate. It also means that a member of a monogamous household has a better chance of receiving a larger share of the

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

assets of the deceased than the members of a polygamous family where the portions could become very much fragmented to make it go round.

As to the Estate Duty Tax, Section 48 of the Income Tax Act⁴⁹ provides for the payment out of the estate of the deceased any tax which accrued before his death. Section 7 of the Estate Duty Act⁵⁰ levies estate duty tax on all property which the deceased was competent to dispose of at the time of his death. The First Schedule which gives the levels of the estate tax, was amended in 1971 to include the following rates:

- (i) Where the value of the estate does not exceed £1,000, no Estate Duty shall be payable;
- (ii) Where the value of the estate exceeds £1,000, but does not exceed £1,500, Estate Duty shall be £5;
- (iii) Where the value of the estate exceeds £1,500, but does not exceed £2,000, Estate Duty shall be £10;
- (iv) Where the value of the estate exceeds £2,000, but does not exceed £2,500, Estate Duty shall be £15;
- (v) Where the value of the estate exceeds £2,500, but does not exceed £5,000, the rate of Estate Duty shall be 1 per cent.

CHILD LABOUR LAWS

One reason normally given in traditional systems as an explanation for having large families is that the children could be used as much needed labour on the farms or in the occupation of the family head. It is important, therefore, to examine the laws regulating child labour in Kenya. The relevant statutes are the Employment of Women, Young Persons and Children's Act⁵¹ (and the Regulations made thereunder), the Industrial Training Act,⁵² and the Shop Hours Act.⁵³ The Employment of Women, Young Persons and Children's Act prohibits the employment of children in industrial undertakings (other than those entered into under a deed of apprenticeship); in attendance on any machinery (otherwise than as provided for under the Industrial Training Act); in any shift work; or in any ship (except with the approval of the minister, native vessels being excluded from the definition of "ships"). There are other provisions under the Act against employing any child under the age of thirteen years in circumstances in which the child would have to live away from his parents or other lawful guardian. Rule 3 of the regulations made under the Act lays down stringent requirements for any person employing more than 50 children. The Industrial Training Act sets out the conditions under which a child could bind himself by a contract of apprenticeship.

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

49. Act No. 6 of 1973.

50. Laws of Kenya, Chap. 483.

51. *Ibid.*, Chap. 227.

52. *Ibid.*, Chap. 237.

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

SOCIAL SECURITY LAWS

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

In Kenya social security is regulated under the provisions of the Pensions Act.⁵⁵ Section 5 of this Act begins with an ominous note to the effect that no government employee shall have an absolute right to compensation for past services or to pension, gratuity or other allowance; nor shall anything in the Act affect the right of the Government to dismiss any of them at any time and without compensation. Subsection (2) of the same section attempts to narrow the possible victims of this disclaimer to those guilty of negligence, irregularity or misconduct. In such cases, the pension would either be reduced or entirely withheld. Section 9 of the Act provides that a pension granted under the provisions of the Act shall not exceed two-thirds of the highest pensionable emoluments drawn by the employee at any time in the course of his service under the Government.

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

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

54. S. Friedlander and M. Silver, "A Quantitative Study of the Determinants of Fertility Behaviour," *Demography*, Vol. 4, No. 1, p. 44 (1967).

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

underpin one's later years when one is not in any type of employment that allows participation in a pension scheme.

MATERNITY BENEFITS

Under Section 11 of the Regulation of Wages and Conditions of Employment Act,⁵⁶ the Minister has power to make a wages regulation order relating to basic Minimum Wage and other benefits in respect of employees generally in any area of Kenya, or in respect of any particular category of employees either throughout or in any particular area of Kenya. Specific Wages Regulation Orders have been made for the following industries: road transport; building construction; knitting mills; baking flour confectionary and biscuit-making trade; footwear; agriculture; tailoring, garment making and associated trades; hotels and catering trades; laundry, cleansing and dyeing trades; wholesale and retail distributive trades; and domestic service.⁵⁷

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

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

56. Laws of Kenya, Chap. 229.

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

included employers) felt that it is fair for the employers of labour to pay for maternity leave benefits.

In March 1974, a delegation of women⁵⁸ met with the President of the Republic of Kenya in Mombasa and requested, among other things, that working women be given paid maternity leave. Accordingly, the President announced from Mombasa that all working women were to have paid maternity leave thenceforth.

Table 8 Data on the Impact of the Regulation of Wages and Conditions of Employment Act on Fertility in Kenya

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

Base: 350 Adults

LAWS AFFECTING MIGRATION

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

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

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

59. *Virginia Journal of International Law*, Vol. 102, pp. 310, 318-319 (1972).

60. P. 46.

Table 9 Reasons for Migration Among Male Urban Migrants Aged 15-50, by Educational Attainment and Age Group, 1970 (percentages)

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

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

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

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

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

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

The better strategy would seem to be that of developing the rural areas.⁶²

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

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

Table 10 Average Annual Requirements for Housing in Urban Areas, 1968-1974

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

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

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

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

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

CONCLUSION

In conclusion it can be argued that a study of family planning has to be done in the context of these changing patterns and functions of the African family and an understanding of its traditional structure as well as its evolving modern role. The role which the family takes in Kenyan society is under-

Table 11 Total Reported Arrivals and Departures, 1968-1971

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

Source: Central Bureau of Statistics.

*Excluding visitors becoming permanent immigrants.

going a transition. It is being altered by several cultural, physical and technological factors, the impact of which can no longer be handled by the family or the clan and therefore must be absorbed by the state. Increasingly, it is to the state that people look for the planning of their welfare.

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

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

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

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

As to abortion, the position is even more confused. The provisions of the law (all of them penal) sit rather uneasily on the professed policies of the Government to reduce Kenya's population growth rate. Yet, illegal abortions still proliferate and the professional abortionist flourishes at the outrageous disregard of the dangers to health and life of women. Here, as in the areas of succession law, land law and matrimonial law, the legislature has a duty to protect the population from the dangers of illegal abortion and to carry through the developmental programmes of the country. Abortion in Kenya ought to be granted on demand. Merely permitting therapeutic abortions is not enough. The slogan that no baby should be born unwanted should be made to sound and appear real. In short, what is required is a comprehensive Family Planning Act for Kenya that would embrace and rationalize all the law on the subject so as to complement the policies set by the Development Plans from 1966 to 1978.

With regard to those laws that have some indirect effect on fertility and family size, there is a lot to be said for increasing the level of pensions and widening the coverage of the National Social Security Fund. Even people who are unemployed or self-employed (and many of these people seem to have

very limited choices) should be able to look to the future with some confidence and hope, not based on the contributions that a large family can make towards their subsistence in their later years but to the contributions that a welfare state can and would give. This will have the effect of reducing family size and, at the same time, improving the quality of life both of the children (who would concentrate their resources on their own families) and for the older parents and, ultimately, for the state. It will also improve the saving power of the children, a practice from which the state is sure to derive benefit.

Medico-Legal Aspects of Family Planning in Kenya

S. KANANI, M.o.H.

The first family planning clinic was opened in Kenya by a private practitioner in Mombasa as far back as 1952. In 1953, after the results of the 1948 census were published, the East African Royal Commission was invited to study and make recommendations on the socio-economic developments of the country with special consideration to population trends. The Commission advocated that persons wanting to adopt methods of birth control should be permitted to do so. However, the Commission also stated that "we are not of the opinion that the rate of natural increase is such in East Africa as to warrant any large scale attempt to introduce these methods [of contraception] with the object of reducing the birth rate for general economic reasons". The medical department of the then Ministry of Local Government, Health and Housing in Kenya issued instructions to all medical officers and senior nursing sisters on simple methods of birth prevention "to tend to the poor people's needs".

In 1957, the family planning association of Kenya was formed and a few years later, in 1962, it became affiliated with the International Planned Parenthood Federation by which it is still largely financed. This voluntary organization very much paved the way to official recognition and acceptance of the Government's responsibility to provide the means for family planning to anyone who so desires.

In 1965, the Government of Kenya published the sessional paper "African Socialism and its application to planning in Kenya". In this paper, official concern regarding population growth and its implication was expressed. In the paper, the Government declared that "a programme of family planning education will be given high priority". In this same year (1965) the Government made a request to the population council in U.S.A. to send a team of experts to study the population problem in Kenya and make recommendations for a programme of family planning "through voluntary means and within religious prescriptions".

Based on their findings and supported by knowledge regarding demographic and economic trends experienced in other countries, the Advisory Group of experts submitted a report to the Ministry of Economic Planning and Development. After careful consideration, the Government decided early in 1966 that it would "pursue vigorously policies designed to reduce the rate of population growth through voluntary means".

The conjunction of national and family interests has been the basis of the Government view that a population programme is to be considered as an integral part of the total social and economic development of the nation and should have especially close links with the Government health

services, in particular, maternal and child health care. In line with this concept is the principle that the programme must be voluntary and take cognizance of the wishes and religious beliefs of individual parents. In keeping with the Government's general policy objectives of providing medical services available free of charge to those wanting them, information on modern methods of family planning as well as supplies and clinical services are offered free to those families who want to avail themselves of the opportunity.

In 1967, the Government created an administrative organization able to cope with the complex problem of implementing the new programme. A National Family Planning Council of Interministerial composition was formed in February, 1967. In October of the same year, however, owing to differences of opinion on essential matters of policy, such as that on the relative roles of Government and voluntary organizations, the council was dissolved and the executive authority was conveyed from the cabinet to the Ministry of Health.

In the Ministry of Health, executive responsibility for the programme rests with the Director of Medical Services, who is the chairman of the Family Planning Working Committee, an advisory body in which members of the Planning Section of the Ministry of Health as well as representatives of the Ministry of Finance and Planning and the Family Planning Association of Kenya are serving. The family planning activities are considered to be part and parcel of the National Health Services.

Two types of contraceptives are currently in use in the family planning clinics. These are the oral contraceptives, generally referred to as the pill, and the intrauterine contraceptive devices (I.U.D.) and are distributed free. Like other drugs, the pill is required to be prescribed by a doctor or be dispensed at the direction or supervision of a doctor. The administration of the intrauterine device also requires direction and supervision of a doctor. It is however the practice that persons other than the doctors do administer and dispense the various contraceptives. I am not however aware of any specific legal coverage regarding this matter apart from the one generally assumed that such a person (other than the doctor) must be theoretically covered by an identifiable qualified doctor.

In this field, I feel more attention should be directed, especially where the nursing cadre are required to carry some procedures that, by law, strictly fall under the purview of the registered doctor's responsibilities.

A limited number of family planning clientele make use of the injectable type of contraception. The administration of these fall under the same consideration as the above.

ABORTION AND TERMINATION OF PREGNANCY

To many people's minds the word abortion carries with it overtones of illegality and hence many people prefer to use the term miscarriage when the meaning desired is expected to be innocent or spontaneous type of termination of pregnancy. To many people, abortion means criminal interference with the normal state of pregnancy with a view to destroying products of conception.

Generally in medical parlance abortion implies the expulsion of the

products of conception before the 28th week of pregnancy, while expulsion of the products after that period is often referred to as pre-mature labour. This usually refers to the spontaneous type of expulsion of the said products.

In some cases, however, it is found necessary to expel the products of conception on medical grounds. This deliberate move to end the fecund state is commonly referred to as termination of pregnancy on medical grounds.

Under these circumstances, consideration is given to the woman's life and health before considering interruption of pregnancy and the abortion is carried out on medical principles to avert the grave danger. However, from a purely medical point of view, the number of health conditions necessitating artificial abortion is small. These are mainly conditions of the heart and some serious kidney diseases. Also in some cases of severe psychiatric disorders, termination of pregnancy may be indicated.

Turning to the very sensitive question of illegal abortion, implying here termination of pregnancy through illegal procedures and not under medical supervision, it is quite clear that this is a problem whose overt manifestations are merely the tip of the iceberg. I am unable to obtain any accurate information regarding the magnitude of this problem and the reasons are, I think, obvious. It is an area which is shared by the quack in the backyards and back streets of our cities and towns and also by some registered doctors who have, unfortunately or fortunately (depending on who is looking at it) made a lucrative private practice component of their overall general private medical practice. Those of us who have worked in our hospitals are aware of the vast numbers of women and girls who end up in our casualty wards with what might appear a spontaneous abortion, and what one does is merely to complete the process and the abortion is successfully completed.

What is the grim side of this story is that many of these victims of criminal abortions suffer irreparable damage to their productive systems as a result of infection; some have died as a result of the clandestine procedures or an overdose of the supposedly abortifacient agent while some suffer chronic ill-health as a result of this intervention.

Although there are no reliable accurate statistics that would indicate the magnitude of the problem of illegal abortions, impressions gained through the experiences in hospitals tend to show that the problem is real and should be given serious consideration now. On occasions, mention has been made of legalizing abortion as a means of family planning. However, moral and religious arguments have been presented opposing such a move. It is my view that due to the fact that existing contraceptive methods have significant failure rates, the question of legalizing abortion should be given appropriate consideration if only for averting known miseries, and sometimes death, of many girls and young women in their best years of life.

Socio-Legal Considerations and Family Planning Programmes in Africa*

F. OLU OKEDIJI

A meaningful analysis of the socio-legal aspects of family planning programmes in Africa should address itself to the following issues: (1) How effective are deliberate governmental population policies and social legislation in changing pro-natalist behaviour or reproductive habits within particular countries in Africa? (2) If the effectiveness of these population policies and social legislation are in doubt, to what extent can we say that general improvements in nutrition, economic well-being, educational standards, health, social justice and status of women will create conditions for the regulation of individual and national fertility levels? (3) To the extent that the inter-connections between law, population matters and social change are so complex, can we say that particular legislation or particular components of population policies cause a decline in fertility levels?

Before we attempt answers to these questions, we ought to discuss initially the demographic situation in African countries in order to highlight those conditions which encourage pro-natalism and probably anti-natalism as well.

DEMOGRAPHIC CONDITIONS ENCOURAGING PRO-NATALISM IN AFRICA

Recent demographic publications on African countries have given us fairly reliable estimates of birth rate for all African countries. The birth rate for all of the populations of Africa combined is 49 per 1,000.¹ From the point of view of interregional comparison, Africa has the highest birth rate in the world. In European and North American countries, the birth rate is 18 per thousand; in Asia, it is 38 per thousand; and in Central America, it is about 39 per thousand (see Table 1).

A critical study of Table 1 shows very clearly that the highest birth rates in all regions of the World are concentrated in the African region, i.e. 50 per 1,000. Of the 38 countries listed in Africa, 16 have birth rates of 50 and over; in Asia, only 5 out of 27 countries listed have comparable level of fertility as reported for most African countries, while there is none in Central America. The question which ought to be raised at this point is as follows: "What factors account for pro-natalism in most African countries?" These

*Waldock, Humphrey, "Human Rights in Contemporary International Law and the Significance of the European Convention", in the European Convention on Human Rights, *International and Comparative Law Quarterly*, Supplementary Publication, No. 1 (1965), p. 3.

1. Brass, W. and A. J. Coale, et al., *The Demography of Tropical Africa* (Princeton, New Jersey, Princeton University Press, 1968); and J. C. Caldwell and C. Okonjo, eds., *The Population of Tropical Africa* (London; Longmans, 1968).

Table 1 1969 World Population Data Sheet Population Information for 137 countries

Region or Country	Population Estimates Mid-1969 (Millions)	Birth Rate per 1,000 population	Death Rate per 1,000 population	Current Rate of Population Growth	Number of Years to double Population	Infant Mortality Rate (Deaths under one year per 1,000 live births)	Population Under 15 years (per cent)	Population Projections to 1980 (millions)	Per Capita Gross National Product (US\$)
WORLD¹	3551	34	15	1.9	37		37	4368	589
AFRICA¹	344	46	22	2.4	28		43	456	140
NORTHERN AFRICA									
Algeria	13.3	44	11-14	2.9	24	86	47	19.5	220
Libya	1.9			3.6	19		44		640
Morocco	15.0	46	15-19	3.0	23	149	46	22.4	170
Sudan	15.2	52	18-22	3.0	23		23	21.0	1000
Tunisia	4.8	45	17	2.8	25		41	6.4	200
UAR	32.5	43	15	2.9	24	110	43	6.4	200
WESTERN AFRICA									
Dahomey	2.7	54	26-31	2.9	24	110	46	3.4	80
Gambia	0.4	39	19	2.1	33		38	0.5	90
Ghana	8.6	47	20	2.5	28	156	45	12.2	230
Guinea	3.9	55	35	2.0	35	216	44	6.1	80
Ivory Coast	4.2	56	33	2.3	31		43	5.5	220
Liberia	1.2	40		1.8	39		37	1.5	210
Mali	4.9	52	30-32	2.0	35	123	49	6.5	60
Mauritania	1.1	45	25-28	2.0	35	187			130
Niger	3.7	52	25-27	2.7	26	200	46	4.8	80
Nigeria	53.7 ^a	50	25	2.5	28		43		80
Senegal	3.9	43	17	2.5	28	93	42	4.9	210
Sierra Leone	2.5	44	22	2.2	32	146	37	3.3	150
Togo	1.8	55	29	2.6	27	127	48	2.3	100
Upper Volta	5.3	53	35	2.0	35	182	42	6.3	50
EASTERN AFRICA									
Burundi	3.5	46	26	2.0	35	150	47	4.7	50
Ethiopia	24.4			2.0	35			30.1	60
Kenya	10.6	50	20	3.0	23	132	46	14.6	90
Madagascar	6.7	46	22-25	2.4	29	302	46	8.5	90

Region or Country	Population Estimates Mid-1969 (Millions)	Birth Rate per 1,000 population	Death Rate per 1,000 population	Current Rate of Population Growth	Number of Years to double Population	Infant Mortality Rate (Deaths under one year per 1,000 live births)	Population Under 15 years (per cent)	Population Projections to 1980 (millions)	Per Capita Gross National Product (US\$)
Malawi	4.3			2.5	28		45	6.1	50
Mauritius	0.8	30	9	2.0	35	65	44	1.1	210
Mozambique*	7.3	42	31	1.2	58			9.0	100
Rwanda	3.5	52		2.7	26	137		5.0	40
Somalia	2.8			3.1	23			4.1	50
Southern Rhodesia*	4.8	48	14-18	3.0	23	122	47	7.1	210
Tanzania	12.9	45	23	2.9	24	189	42		80
Uganda	8.3	42	20	2.5	28	160	41		100
Zambia	4.2	51	20	3.1	23	259	45		180
MIDDLE AFRICA									
Angola*	5.4			1.4	50		42		170
Cameroon (Western)	5.7	50	26-28	2.2	32	137	39		110
Central African Republic	1.5	48	30	1.7	41	190	42		110
Chad	3.5	45	31	1.5	47	160	46		70
Congo (Brazzaville)	0.9	41	24	1.7	41			1.1	120
Congo (Demoractic (Rep.))	17.1	43	20	2.3	31	104	39		60
Gabon	0.5	35	30	0.9	78	229	36		400
SOUTHERN AFRICA									
Botswana	0.6			2.0	35		43		60
Lesotho	0.9	40	23	1.8	39	181	43		60
South Africa	9.6	46		2.4	29		40	26.8	550
Southwest Africa (Namibia)	0.6			1.7	41		40	0.9	
Swaziland	0.4	36		2.9	24			0.6	290
ASIA¹	1990	38	18	2.0	35		40	2472	184
SOUTH WEST ASIA									
Cyprus	0.6	25	7	1.8	39	28	35	0.7	690
Iraq	8.9	48		2.5	28		45	13.8	270
Israel	2.8	25	6.6	2.9	24	25	33		160
Jordan	2.3	47	16	4.1	17		46	3.3	1220
Kuwait	0.6	52	6	7.6	5	37	38		3410

Table 1 (cont.)

Region or Country	Population Estimates Mid-1969 (Millions)	Birth Rate per 1,000 population	Death Rate per 1,000 population	Current Rate of Population Growth	Number of Years to double Population	Infant Mortality Rate (Deaths under one year per 1,000 live births)	Population Under 15 years (per cent)	Population Projections to 1980 (millions)	Per Capita Gross National Product (US\$)
Lebanon	2.6			2.5	28			3.6	480
Saudi Arabia	7.2			1.8	39			9.4	240
Southern Yemen	1.3	37	8	2.2	32	80		1.6	
Syria	6.0			2.9	24			9.2	180
Turkey	34.4	46	18	2.5	28	161	46	48.5	280
Yemen	5.0						44	6.9	90
MIDDLE SOUTH ASIA									
Afghanistan	16.5			2.3	31			22.1	70
Bhutan	0.8			2.7	26			1.0	
Ceylon	12.3	32	8	2.4	29	56	41	16.3	150
India	536.9	43	18	2.5	28	139	41		90
Iran	27.9	50	20	3.1	23		46	38.0	250
Nepal	10.9	41	21	2.0	35		40	14.1	70
Pakistan	131.6	52	19	3.3	21	142	45	183.0	90
SOUTH EAST ASIA									
Burma	27.0	50	25-31	2.2	32		40	35.0	60
Cambodia	6.7	41	20	2.2	32	127	44	9.8	120
Indonesia	115.4	43	21	2.4	29	125	42	152.8	100
Laos	2.9	47	23	2.6	27				70
Malaysia (East and West)	10.7	36	7	3.1	23	49	44	14.9	280
Philippines	37.1	50	10-15	3.5	20	73	47	55.8	160
Singapore	2.1	27	5	2.5	28	26	43	3.2	570
Thailand	34.7	46	13	3.1	23	31	43	47.5	130
North Vietnam	21.4			3.1	23		38		
South Vietnam	17.9			2.6	27				120
EAST ASIA									
China (Mainland)	740.3 ^a	34	11	1.4	50			843.0	
China (Taiwan)	13.8	29	6	2.6	24	20	44	17.6	230
Hong Kong*	4.0	23	5	2.3	31	26	40	5.5	560
Japan	102.1	19	6.8	1.1	63	15	25	112.9	860

Region or Country	Population Estimates Mid-1969 (Millions)	Birth Rate per 1,000 population	Death Rate per 1,000 population	Current Rate of Population Growth	Number of Years to double Population	Infant Mortality Rate (Deaths under one year per 1,000 live births)	Population Under 15 years (per cent)	Population Projections to 1980 (millions)	Per Capita Gross National Product (US\$)
North Korea	13.3	38	10-14	2.4	29			17.5	
South Korea	31.2	41	10-14	2.8	25		42	43.4	150
Mongolia	1.2	40	10	3.0	23		30	1.7	
AMERICA¹									
NORTHERN AMERICA	225	18	9	1.1	63	22	30	264	3399
Canada	21.3	18.0	7.3	2.0	35	23.1	33	22.3	2240
United States	233.1	17.4	9.6	1.0	70	22.1	30	240.1	3520
LATIN AMERICA¹	276 ⁴	39	10	2.9	24		43	376	385
MIDDLE AMERICA									
Costa Rica	1.7	45	7	3.8	18	70.0	48	2.7	400
El Salvador	3.3	47	13	3.3	21	62.0	45	4.9	270
Guatemala	5.0	43	15	2.8	25	92.0	46	6.9	320
Honduras	2.5	49	17	3.4	21		51	3.7	220
Mexico	49.0	43	9	3.4	21	63.0	46	71.4	470
Nicaragua	2.0	46	16	3.0	23		48	2.8	330
Panama	1.4	41	8	3.2	22	45.0	43	1.9	500
CARIBBEAN									
Barbados	0.3	30	9	0.9	78	48.0	38	0.3	400
Cuba	8.2	27	8	2.0	35	40.0	37	10.1	320
Dominican Republic	4.2	49	15	3.4	21	80.0	47	6.2	250
Haiti	5.1	44	20	2.4	29		38	6.8	70
Jamaica	1.8	40	8-9	2.5	28	35.0	41	2.1	460
Puerto Rico*	2.7	26	6	1.1	63	33.0	39	3.1	1090
Trinidad and Tobago	1.1	38	8	2.4	29	42.0	43	1.6	630
TROPICAL SOUTH AMERICA									
Bolivia	4.5	44	19	2.4	29	99.0	44	6.0	160
Brazil	90.6	38	10	2.8	25	79.0	43	124.0	240

Information Service, Population Reference Bureau, 1755 Massachusetts Avenue, N.W., Washington, D.C.

Table 1 (cont.)

Region or Country	Population Estimates Mid-1969 (Millions)	Birth Rate per 1,000 population	Death Rate per 1,000 population	Current Rate of Population Growth	Number of Years to double Population	Infant Mortality Rate (Deaths under one year per 1,000 live births)	Population Under 15 years (per cent)	Population Projection to 1980 (millions)	Per Capita Gross National Product (US\$)
Colombia	21.4	45	11	3.4	21	80.0	47	31.4	280
Ecuador	5.8	45	11	3.4	21	90.0	48	8.4	190
Guayana	0.7	40	9-10	2.7	26	40.0	46	1.0	300
Peru	13.2	42	11	3.1	23	63.0	45	18.5	320
Venezuela	10.4	41	8	3.3	21	46.0	46	15.0	850
TEMPERATE SOUTH AMERICA									
Argentina	24.0	23	9	1.5	47	58.0	29	28.2	780
Chile	9.6	33	10	2.3	31	108.0	40	12.2	510
Paraguay	2.3	45	11	3.4	31	80.0	45	3.5	200
Uruguay	2.9	21	9	1.2	58	43.0	28	3.3	570
EUROPE¹									
NORTHERN EUROPE									
Denmark	4.9	18.4	10.3	0.9	78	16.9	24	5.3	1830
Finland	4.7	16.5	9.4	0.6	117	14.2	27	5.2	1600
Iceland	0.2	22.4	7.0	2.0	35	13.7	34	0.3	1740
Ireland	2.9	21.1	10.7	0.5	140	24.4	31	3.5	850
Norway	3.8	18.0	9.2	0.8	88	16.8	25	4.3	1710
Sweden	8.0	15.4	10.1	0.8	88	12.6	21	8.6	2270
United Kingdom	55.7	17.5	11.2	0.6	117	18.8	23	60.2	1620
WESTERN EUROPE									
Austria	7.4	17.4	13.0	0.5	140	26.4	24	7.7	1150
Belgium	9.7	15.2	12.2	0.1	700	23.7	24	10.2	1630
France	50.0	16.9	10.9	1.0	70	20.6	25	53.8	1730
West Germany	58.1	17.3	11.2	0.4	175	23.5	23	61.0	1700
Luxembourg	0.3	14.8	12.3	0.1	700	20.4	22	0.4	1920
Netherlands	12.9	18.9	7.9	1.1	63	13.4	28	15.3	1420
Switzerland	6.2	17.7	9.0	0.9	78	17.5	23	5.9 ^a	2250
EASTERN EUROPE									
Bulgaria	8.4	15.0	9.0	0.6	117	33.1	24	9.2	620
Czechoslovakia	14.4	15.1	10.1	0.5	140	23.7	25	15.8	1010
East Germany	16.0	14.8	13.2	0.1	700	21.2	22	17.7	1220
Hungary	10.3	14.6	10.7	0.3	233	38.4	23	10.7	800

	Population Estimates Mid-1969 (Millions)	Birth Rate per 1,000 population	Death Rate per 1,000 population	Current Rate of Population Growth	Number of Years to double Population	Infant Mortality Rate (Deaths under one year per 1,000 live births)	Population Under 15 years (per cent)	Population Projections to 1980 (millions)	Per Capita Gross National Product (US\$)
Poland	32.5	16.3	7.7	0.8	88	38.1	30	36.6	730
Rumania	20.0	27.1	9.3	1.8	39	46.8	26	22.4	650
SOUTHERN EUROPE									
Albania	2.1	34.0	8.6	2.7	26	86.8		3.0	300
Greece	8.9	18.5	8.3	1.2	58	34.3	25	9.3	660
Italy	53.1	18.1	9.7	0.7	100	34.3	24	58.8	1030
Malta	0.3	16.6	9.4	0.6	117	27.5	32	0.4	510
Portugal	9.6	21.1	10.0	1.1	63	59.3	29	10.9	380
Spain	32.7	21.1	8.7	0.8	88	33.2	27	34.8	640
Yugoslavia	20.4	19.5	8.7	1.1	63	61.3	30	22.8	510
USSR	241	18	8	1.0	70	26	32	277.8	890
OCEANIA¹	19	24	11	1.0	41	18	30	23	1857
Australia	12.2	19.4	8.7	1.8	39	18.2	29	15.2	1840
New Zealand	2.8	22.4	8.4	1.9	37	17.7	33	3.6	1930

WORLD AND REGIONAL POPULATION (Millions)

	World	Africa	Asia	North America	Latin America	Europe	Oceania	USSR
MID-1969	3,551	344	1,990	225	276	456	19	241
2000 Projections, UN Constant Fertility	1,522	860	4,513	388	756	751	33	402
Per cent Increase	112%	150%	127%	72%	174%	25%	74%	67%
2000 Projections UN Med. Est.	6,130	768	3,458	354	638	527	32	353
Per cent Increase	73%	123%	74%	57%	131%	16%	68%	46%

1969 Data Sheet Footnotes

*Non-sovereign country.

Latest available year.

Assuming continued growth at current annual rate.

1966 data supplied by the International Bank for Reconstruction and Development.

- Population totals take into account small areas not listed on Data Sheet.
- Official government estimate of 64.8, based on 1963 census, is now considered high.
- UN estimate. Other estimates range from 800-950 million.
- Mid-1969 population estimates for the Latin American countries are taken from the latest figures of the Latin American Demographic Centre of the United Nations. These figures are more recent than those of the 1967 UN Demographic Yearbook on which most of this Data Sheet is based.
- Foreigners with resident permits not taken into account.

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factors can be classified into four categories: (1) the nature of the socio-economic organization of most African countries; (2) the prevalence of high mortality rate, especially high infant mortality rate; (3) the existence of sizeable areas of subfertility/infertility; and (4) the character of Moslem cultures. Each of these classes of factors requires further elaboration.

SOCIO-ECONOMIC ORGANIZATION OF MOST AFRICAN COUNTRIES²

Traditionally, from the perspective of the land tenure system and the rural collective way of farming under conditions of rudimentary technology, a large family system is required to provide rural manpower in clearing the land, planting and harvesting food and commercial crops.

The colonization of Africa is marked by the exploitation of Africa's human and natural resources to satisfy external needs; and this has brought about not only a dislocation of Africa's social and economic organization but the dichotomization of African societies into the so-called "traditional" and "modern" sectors. And, in this circumstance, development would correspond either to the disappearance of the traditional sector or its absorption into the modern sector. What has clearly manifested itself is that African societies for centuries have been progressively incorporated into the exploitative onslaught of world capitalism, which leads to specific dysfunctional consequences for these societies; namely, income inequalities, general climate of insecurity created by unemployment which encourages people to raise large families, inadequacy of basic social and health services as well as malnutrition leading to high mortality rate (especially infant mortality rate), and so forth.

PREVALENCE OF HIGH MORTALITY RATE

The prevalence of high mortality rate, especially high infant mortality, in Africa is strongly rooted in the character of Africa's social and economic organization. The epiphenomena of this defective social and economic organization (with particular reference to health pathologies) are: poor environmental sanitation, inadequate health facilities, poverty, malnutrition, hazardous ecological conditions, and so forth.

Without much doubt, conditions which favour high levels of mortality will generate a reactive and probably a balancing trend in high levels of fertility. This process explains the pro-natalist tendencies in most African countries.

EXISTENCE OF SIZEABLE AREAS OF SUBFERTILITY/INFERTILITY

Before demonstrating the extent to which subfertility/infertility can encourage pro-natalism, these two concepts must be defined. Subfertility "is a measure of the relative inability of a group, community or an area to produce enough live births (that is, so few) as to have lower levels of fertility relative to some known and applicable measure for the group, community or the

2. United Nations, *International Conference on Human Rights* held in Teheran in 1968.

2a Okediji, F. Olu, "Sociological and Psychological Aspects of Population Policies in Africa", *International Review of Modern Sociology*, 2, 2 (1972), pp. 129-142.

area. Subfertility therefore reflects the sum total of individual fertilities in an area, a group or community reproducing below expected standards.”³ On the other hand, “infertility is the incapacity to impregnate or to conceive and carry a pregnancy to live birth. This assumes that infertile persons could be fecund and have the biological capacity to reproduce. However, the measure of infertility will derive from the total absence of a live birth. Primarily, infertility refers to persons who have never demonstrated the capacity to impregnate or to conceive and carry a pregnancy to live birth. This differs from secondary infertility of persons with known history of previous live births but not able subsequently to impregnate or to conceive and carry a pregnancy to the live birth at the time of being investigated.”⁴

Although the available data on the geographic distribution of infertility and subfertility are rather thin and thus concentrate in Francophone areas, yet recent data also point to the fact that some Anglophone areas show remarkable concentration of subfertility and infertility. Table 2 depicts these areas very vividly.

Table 2 Areas of Subfertility/Infertility in Africa⁵

CAMEROON	CENTRAL AFRICAN REPUBLIC	CHAD
(north of Bonoué)	Nzakara	North Arabs
Foulbe	Zande	(Baguirmi)
Gounde	GABON	(B.E.T. Kenem)
(South of Benoué)	Ba-Kota (Ogoone-Lolo)	(Lake Iro)
Foulbe	(Moyen-Ogoone)	IVORY COAST
Dourou	NIGER	Wobe
Centre (Sanaga River)	Kanuri	Godie
Many little tribes	Nomads (Toureg Bouzou)	NIGERIA
(South)	Farfarou	Biroms
Dzimou	Bororo	Nomads
Bakweri	SUDAN	Yoruba (Oyo)
ZAIRE	Zande (Southwest)	Mboum
Bas and Haute Uele	Nomads-Baggars	Kanuri (Borno)
Mongo	(Blue-Nile)	UPPER VOLTA
Azande	UGANDA	Peul, Senonfo
Mangbetu	Baganda	Bobo-Oule
(Zande)	Itesot	TANZANIA
KENYA	CONGO BRAZZAVILLE	Haya (Western)
(Eastern)	Sangha, Ba-Kota	(angani (Eastern)
SENEGAL	Mbochi, Makaa	Swahili
Puel, Maures	Djem	
Nomads		

Source: Adadevoh, B. K., *Subfertility in Africa* (Ibadan: Caxton Press, 1974) pp. 5-6

What factors account for these pathological conditions of infertility and subfertility in some areas of Africa? To the extent that this is not the core

3. Adadevoh, Kwaku, A., *Subfertility and Infertility in Africa* (Ibadan: Caxton Press, 1974), p. 2.

4. *Ibid.*

5. *Ibid.*, pp. 5-6.

of this essay, we can do no more than classify these factors which include the following: (1) demographic factors such as age at marriage, patterns of marriage including types of marriage, incidence of divorce and marital instability; (2) socio-cultural factors which include traditional practices in regard to dowry, pregnancy and delivery which have been identified or suspected as plausible channels through which the phenomenon of infertility or subfertility manifests itself; and medical and pathological factors.⁶

It is somewhat obvious that in those areas where infertility and subfertility are prevalent, pro-natalist attitudes will also be prevalent.

THE CHARACTER OF MOSLEM CULTURES

The character of Moslem cultures has been described as conducive to the highest fertility rates in the world.⁷ This assertion, of course, can be challenged to the extent that in tropical Africa a set of unique conditions may yet constitute a barrier to the acceptance of anti-natalist programmes. It is most likely that the character of Islamic cultures may reinforce these unique conditions generating pro-natalism. This assertion ought to be exemplified.

- (a) In Islamic countries (as well as in most rural areas of pre-industrial and traditionally-oriented countries) there is a strong, marked preference for male progeny. This means that as soon as a woman has had her quota of males, she will tend to stop conceiving as opposed to a woman who has no marked preference. However, it seems that in many, if not in most African tribes, girls are as welcome as men.⁸
- (b) Islamic cultures have a quasi abhorrence for illegitimate children. The illegitimate child has no legal standing in Islam. In numerous African groups on the other hand, the very notion of an "illegitimate" child is ambiguous, and the fruit of such an "illegitimate" union will be joyfully adopted by the father of the girl.⁹
- (c) Infanticide for economic reasons is virtually non-existent in tropical Africa. This does not seem to be the case in Moslem countries.¹⁰
- (d) Sterility is a tragedy for a Moslem woman; in certain African tribes it makes the woman a kind of outcast.¹¹
- (e) The traditional African woman is seen first as a potential mother, before being considered an object of sexual attraction. This does

6. *Ibid.*, pp. 9-19.

7. Kirk, J., "Factors Affecting Moslem Natality", in B. Berelsson, et al., *Family Planning and Population Programmes* (Chicago: University of Chicago Press, 1967), pp. 501-579.

8. Williamson, N. W., *Son Preference around the World* (Unpublished paper, Harvard Centre for Population Studies, Harvard University, Boston, Massachusetts).

9. This is the situation among the Ewonde of Yaounde region in Cameroon.

10. According to the Algerian Ministry of Health, there were about 1,000 recorded infanticides in 1968, of which a considerable number are estimated to have been economically motivated. The significance of this can be argued. However, this fairly demonstrates that Islam does not constitute a serious obstacle to such events.

11. Among, at least, one ethnic group in Upper Volta, a sterile woman at her death is buried without any ceremony in a special graveyard which is surrounded with thorns, after her thighs have been pierced. (Source of Information; Madame Izard, Centre Voltaïque de la Recherche Scientifique, Ouagadougou).

not mean that physical beauty is unimportant, but beauty seems to come after the capacity to reproduce. Among the Ewande and other tribes, women do all they can to make their breasts hang down (this supposedly enables the milk to flow better and is called "casser la boule") going as far as to beat their breasts with a stick. In Islam, such behaviour is unheard of and the abundance of erotic poetry in Moslem Arab culture, for instance, underlines the sexual aspect of woman's nature rather than the purely reproductive aspect. As a matter of fact, the preservation of beauty was one of the first reasons advanced to justify contraception in Islamic culture.¹²

- (f) Contraception for "malthusian" purposes is legalized in Islam,¹³ whereas it does not seem that this was even a culturally approved behaviour in any known African tribe.

The central thesis of this essay therefore is that a meaningful socio-legal analysis of family planning programmes in Africa must address itself to those laws which are promulgated to bring about fundamental and structural transformation of those conditions which encourage pro-natalism. These conditions have already been delineated and discussed. It will be a misplacement of goals to promulgate laws which are just oriented to changing attitudes alone or reinforcing human rights concerning population matters. These are mere epiphenomena of the structural conditions which are conducive to pro-natalism.

POPULATION POLICIES TRANSFORMING STRUCTURAL CONDITIONS ENCOURAGING PRO-NATALISM: A SOCIO-LEGAL ANALYSIS

What is a population policy? As a point of departure, we ought to examine critically the United Nation's definition of population policy:

. . . measures and programmes designed to contribute to the achievement of economic, social, demographic, political and other collective goals through affecting critical demographic variables, namely the size and growth of the population, its geographic distribution (national and international) and its demographic characteristics.¹⁴

This definition has obvious limitations in two respects. First, it must be expanded to include those measures and programmes which *are likely* to affect critical demographic variables and those which are *designed* to do so. Second, we should make a distinction between policies which *influence* population variables and those which are *responsive* to population changes. An example of a population-influencing policy is the decision to provide public health facilities to the totality of the citizens of a country. Such a policy will definitely reduce mortality, especially infant mortality. An example

12. Khan, H. A., *Islamic Opinions on Contraception*, (Dacca, 1963).

13. Khan, *Ibid.*

14. United Nations Economic and Social Council, Population Commission, *Report of the ad hoc Consultative Group of Experts on Population Policy* (E/CN. 9/267), May 23, 1972, p. 6.

of a population-responsive policy is the provision of free primary, secondary, technical and university education for all children in a given country. This can be viewed as the response of a government to a population variable.

From the point of view of policies influencing population variables directly, family planning services and legal abortions can directly affect population size through reduction in the number of births. On the other hand, policies influencing population variables indirectly may include provision of children allowance for the first three children only. This may have an indirect effect on the reduction of number of births because of parents' decisions to do so.

Our amplification of the concept of population policy shows clearly that it is grossly erroneous (as it is usually conceptualized by the highly industrialized nations) to equate population policy with family planning programmes. It is, within the above context, widely accepted that the heightening of impetus to the reduction of fertility in the less developed countries of the world originated from the highly industrialized nations; and, unfortunately, this has not been accompanied by an articulated concern for reduction of mortality or optimum distribution of people through comprehensive planning or fairly equitable consumption of world's resources by the citizens of the world.

Therefore, a comprehensive policy influencing population variables must encompass the following spectrum: mortality and morbidity, fertility levels directly and indirectly, population composition, population distribution (including urbanization), and international migration. This policy must be subsumed under a national development plan.

To the extent that the implementation of some of the contents of these policies will require administrative and legal backing for them to be effective, then several socio-legal implications of these policies could be explored. For classificatory purposes, laws can be conceptualized in three mutually related but analytically distinct categories; prescriptive, proscriptive and obligatory. Prescriptive laws spell out the range of permissible behaviour. Proscriptive laws prevent particular type of action or behaviour, while obligatory laws carry some compulsion or imperativeness with them. In an attempt to apply this classificatory scheme to analyzing the interconnections between law, population matters and social change, we will examine the components of population policies as they relate to the amelioration or eradication of those demographic conditions conducive to pro-natalism in Africa.

PRESCRIPTIVE LAWS

For purposes of recapitulation, prescriptive laws spell out the range of permissible behaviour or action. Such laws can make provision for the following: increasing or decreasing family allowances for dependants; provision of inoculation against measles; the subsidization of educational facilities for particular number of dependents at all levels from primary to university education; provision of jobs for able-bodied women who desire to work outside

the home; provision of functional literacy classes for women who desire such classes; and so forth.

INCREASING OR DECREASING FAMILY ALLOWANCES FOR DEPENDENTS

These legal measures may tend to have indirect effect on either increasing or decreasing the number of births by influencing parental decision on family size. For example, nations like Gabon, People's Republic of the Congo, and Zaire, which explicitly desire to increase their population size may hypothetically increase family allowances to parents who desire to increase the number of their children from 4 to 6. This policy, while encouraging a range of permissible action on the part of parents, has an indirect influence on parental decision as well as on increasing family size.

From the point of view of discouraging pro-natalist attitudes, the law may operate in the opposite direction. That is, the government may limit family allowances to the first 3 or 4 children only. This policy may in turn discourage many parents from raising more than 3 or 4 children as the case may be.

The policy of subsidy of educational facilities for particular number of dependents at all levels from primary to university education may operate in similar directions as the family allowance policy already discussed.

PROVISION OF INNOCULATION AGAINST MEASLES

From the point of view of prescriptive law parents of children can take advantage of this provision of inoculation against measles, which is a potentially lethal disease. The effect of this policy will be a substantial decline in infant mortality, which will in the long run bring about a decline in the level of fertility.

It must be emphasized that a policy which provides inoculation against measles is an integral part of a larger health package which ought to be made available to the masses of African population. And, from the point of view of high mortality levels in Africa, it is unfortunate to note that generally low priority is assigned to health care in national budgets. Not only that, several African countries appear to have concentrated on curative rather than preventive medicine in their health care delivery systems. Political manoeuvrings have generally influenced the location of out-patient and in-patient care institutions.

Both legal and administrative supportive structures should be given to greater efforts in the provision and even distribution of material and child care institutions, preventive medicine, sanitation facilities, simple personal hygiene and nutritional education. The long term consequences of these will be a substantial reduction in mortality.

SUBSIDIZATION OF EDUCATIONAL FACILITIES

A policy to subsidize educational facilities for a particular number of dependents at all levels of education from primary to university may operate both ways as either a pro-natalist or an anti-natalist policy.

It may operate as a pro-natalist policy if the government subsidy covers a large number of dependents, say 5 or 6. On the other hand, it may operate as an anti-natalist policy if the government subsidy covers a smaller number of children, say 2. Of course, we are not suggesting by any stretch of the imagination that the relationship between this kind of government subsidy and family size is one to one.

PROSCRIPTIVE LAWS

Proscriptive laws, as already defined, prevent particular types of action or behaviour. In the population context, proscriptive laws, like the other laws which we have differentiated, can encourage pro-natalist and anti-natalist attitudes.

It is relevant at this point to examine rather briefly the actual policies of the governments of Sub-Saharan Francophone client states with respect to proscriptive laws against birth control. To the extent that most of these governments believe that their countries are underpopulated (due in part to the factors discussed earlier in this paper), they do not officially support organized family planning programmes. For example, the governments of Chad, Congo-Brazzaville, Cameroun, Gabon, Guinea, Upper Volta, Niger, Ivory Coast and Central African Republic proscribed any kind of family planning programmes, although from the point of view of prescriptive law they have allowed some private doctors to give counsel to patients on the availability and use of contraception.

The historical antecedent of such proscriptive population laws operating in Francophone Sub-Saharan Africa can be traced back to the French "Law of 1920". Each of the Francophone states has enacted "reception" statutes either as a part of its constitution or as a law of ordinance.¹⁵ Moreover, these statutes provide that all French colonial law in effect prior to a nation's independence and not contrary to its constitution remains in effect until amended or repealed by the government.¹⁶ It is interesting to note that the French "Law of 1920" which was enacted long before any of these Francophone client-states became politically independent has been repealed by the French government itself.¹⁷

The intensity of the enforcement of the proscriptive law will determine the extent to which the law itself will bring about substantial changes in the reproductive behaviour of couples towards higher level of fertility. This observation is reinforced by the situation in Gabon. According to Pradervand, the government of Gabon passed a new anti-contraception law which proscribes the importation of contraceptives and prescribes heavy fines and prison sentences for violators of the law. Special inspection teams have also been set up by the government to enforce this law.

15. Salacuse, Jaswald, W., *An Introduction to Law in French-Speaking Africa*, Vol. 1 (Virginia: The Michie Company, 1969).

16. *Ibid.*

17. Wolf, B., *Anti-Contraception Laws in Sub-Saharan Francophone Africa: Sources and Ramifications*, (Medford, Massachusetts: Fletcher School of Law, 1973), p. 22.

The third and final type of law which we will focus attention upon is obligatory laws.

OBLIGATORY LAWS

Obligatory laws make particular action or programme compulsory. From the point of view of the central thesis of this essay, we will attempt to demonstrate with a few examples the extent to which some components of a population policy backed by obligatory laws can transform at least in part those conditions which are conducive to pro-natalism in African countries.

Examples of some of these obligatory laws pertaining to population issues in relationship to social and economic development are as follows: enhancement of the status of women, migration and urbanization, primary concentration on rapid increase of gross national product, and equitable distribution of income and social welfare among the entire population.

ENHANCEMENT OF THE STATUS OF WOMEN

In general terms, African cultures place emphasis on the role of women both as wives and as mothers. However, among the educated there is growing concern that alternative roles should be provided for women through education as well as increased employment in the urban-industrial sector of the economy.

Therefore, obligatory laws could be promulgated by governments to increase the status of women, increase their participation in public affairs, and provide alternatives to early marriage and motherhood. For example, the government policy in Ghana is to improve and provide equal opportunities for the female population in education and employment. The 1969 Official Population Policy has enunciated this very clearly. Also in Ghana, the Law Reform Committee is studying closely the problems and prospects of the liberalization of abortion law. In Tanzania, there is the policy which enunciates that women have equal access to education and jobs at all levels. The school system also emphasizes improved nutrition, health and sanitation; and especially girls are exposed to these very early in their educational experience.

How do all these policies influence fertility? We cannot affirm this with all certainty. Notwithstanding, it could be hypothesized that some of these fundamental changes which will enhance the status of African women are necessary conditions for the acceptance of limitation of family size through the utilization of contraception.

MIGRATION AND URBANIZATION

Most African governments show concern about policies dealing with internal and international migration. There are many instances of exodus of large ethnic groups from both Eastern and Western Africa and such exodus is explained by economic and political factors.

Let us for a moment examine internal migration which is a critical factor in the growth of urban centres in most African countries. Many factors

account for this process of rural to urban migration: increasing population pressure on the land coupled with the prevailing agricultural systems which wear out the land, the underdeveloped nature of most rural communities, the opportunities available in the urban areas, and so forth. This process leads to rapid urbanization with its attendant problems and sub-standard, make-shift housing; increased alienation; high rate of criminal activities, etc.

Some African countries have evolved policies, albeit obligatory, to stem the heavy wave of rural to urban migration. For example, the Tanzanian government, a few years ago, nationalized all landholdings and introduced a socialistic form of agriculture. It is obligatory for all able-bodied persons to work, and the educational system has been reorganized to meet the needs of a largely rural population. Highly placed government officials and political leaders were obliged to work in villages hand-in-hand with the rural population in order to show the importance of agriculture to the totality of the rural population. It is believed that the Tanzanian experiment has virtually stabilized rural-urban population and has also constrained the flow of rural-urban migration.

In apartheid South Africa and in the remaining Portuguese colonies obligatory laws requiring Africans to carry passcards and obtain residence permits are obnoxious and also contravene personal freedom and individual human rights.

RAPID INCREASE OF GROSS NATIONAL PRODUCT AND MORE EQUITABLE DISTRIBUTION OF INCOME AND WELFARE SERVICES

From the theoretical point of view, it is more meaningful to conceptualize the interconnections between population policies and development planning as a continuum ranging from policies which emphasize the growth of gross national product to those which emphasize the amelioration of income inequalities.

Policies which encourage increase in gross national product will include, among other things, the following:¹⁸ high level of investment in manufacturing industry; manipulation of agricultural and industrial prices resulting in a drain of capital from rural areas for use in industrial development; utilization of "modern" capital-intensive, labour-saving industrial technology to increase productivity and to encourage the multiplier effects of modern industry; development of industrialization through import-substitution and export-promoting policies, expansion of state functions and capabilities; development of heavy industry and manufacture of consumer durables, such as automobiles, in order to reduce external dependence; a rapid rise in incomes of the small segment of the population involved in the "modern" sector, including the middle and upper classes as well as unionized labour; and channelling most

18. National Academy of Sciences, *In Search of Population Policy: Views from the Developing World* (Washington D.C.: National Academy of Sciences Press, 1974), p. 44.

benefits to large urban populations with relative stagnation in rural areas and smaller cities and towns.¹⁹

Policies which place emphasis on a more equitable distribution of income and social services among the entire population ought to include the following:²⁰ improved health services for both urban and rural populations; widely dispersed educational facilities; increased number of jobs; rural development; increased opportunities for education and industrial/urban employment for women; wider popular participation in decision making; tax and other income-distribution policies; and family planning programmes in rural areas and among the urban poor.

From the point of view of implementation, the emphasis in this section is that administrative and legislative structures should be invoked to back up the amalgamation of these two mutually related perspectives to development policies which will generate the conditions for the modernization of demographic structures and processes in African countries.

CONCLUSION

The central focus of this essay is that a discussion of the socio-legal aspects of family planning programmes in Africa ought to be predicated on the differentiation and analysis of these conditions which encourage pro-natalism, such as the structure of economic dependence of African countries on Euro-American technology, high mortality rate (especially high infant mortality rate), subfertility and infertility, and the character of Islamic culture. Some conclusions flow from the above central premise.

First, family planning programmes cannot be equated with population policies. In fact, the former constitute a component of the latter. And, population policies are an integral component of national development plans.

Second, after reviewing those demographic conditions in African countries which foster pro-natalist attitudes, we demonstrated the extent to which legal and administrative structures could be provided to strengthen the implementation of those policies which will radically alter such pro-natalist attitudes.

Finally, policies which combine high industrial growth rate and a more equitable distribution of income as well as social services will be more effective in changing conditions which encourage pro-natalism. Of course, such policies must be supported by legal structures.

19. *Ibid.*

20. *Ibid.*, pp. 44-45.

Family Planning in Kenya and Problem of Drop-outs

J. MUGO-GACHUHI

INTRODUCTION

In Africa where family planning is only now beginning to receive considerable hearing, most of the talk has been on whether family planning is desirable or not. In those countries where a decision has been arrived at that there exists a need for family planning, and a programme has been established, the major activities have been one of trying to get the people to approve and accept the use of family planning contraceptives. Studies of Knowledge, Attitudes and Practices (KAP) have over and over shown that the general public by and large approve of family planning. However, clinical returns tend to show that very few of the approving public do indeed avail themselves of the services offered.

People who initially come to the programmes are normally highly motivated and are likely to stay on contraceptives for at least 12 months. They are few in number. The others who are recruited into the programme almost always drop out of the programme almost as soon as they are enrolled. Because family planning workers are too busy preaching the goodness of family planning, and because family planning programme administrators are also too busy coping with the organizational problems of their organizations, rarely is there an effort to follow-up those who have dropped out of a programme in an effort to bring them back to the fold of the movement.

Reports of family planning programmes only talk of first visitors and revisitors (potential acceptors and those who have already accepted) without ever mentioning previous acceptors who have become non-acceptors. It is believed that unless those who default, especially if they do so in large numbers, are brought back to the programme, or unless the reasons for their dropping out are known and where possible corrected, these programme drop-outs could be more harmful to the programme's success than those who have never entered the programme in the first place.

In Kenya, there is a fairly well-developed programme both at the official government level as well as an active Association. It is believed that over 50,000 women¹ are visiting family planning clinics each year. Of this 47,342

1. This figure is for 1973. See Ministry of Health, Family Planning section. 1973 *Annual Report*. Report No. 14. The actual figure for the first visitors in 1973 was 50,054 and for revisitors 211,301. For the purpose of this paper, the following definitions are used.

A first visitor is defined as client who visits a reporting clinic for the first time.

A revisitor is a client who attends the same clinic in which she is registered as a first visitor, for the second or consecutive times.

Acceptor is a client who visits a family planning clinic and accepts a contraceptive method.

A drop out is a person who, upon her decision or upon the influence of another person, stops using contraceptives which she was previously using and without an explanation or change into another method.

are said to have accepted a method while the remainder were either infertile or did not accept a method for unknown reasons. While this figure is indeed high and speaks well of the efforts of the family planning to recruit more programme participants, it is also known or implied that as many women drop out of the programme on each given month as are those newly registered.²

On the assumption that this is so, this presents a major problem for the family planning programmes in Kenya and the underlying causes should be checked so that they can be corrected before the programme comes to a standstill. The purpose of this paper is to present data on family planning drop-outs in one Kenya District of Kisii. The field work for this study was done between March and June, 1973.

METHODOLOGY

The instrument used in this study was one of an interview schedule. The questionnaire which was administered face to face consisted of 124 items. The questions were divided into various sections as follows: (a) Knowledge, Attitudes and Practices of the former family planning clients. (b) Since our sample consisted of only those who had ever been registered in a family planning clinic and had discontinued with the programme, the next section was designed to solicit information other than the reaction to the particular contraceptives (side effects) which might be a factor for discontinuation. Questions such as the type of reception, explanations concerning the methods, distances from their home to the nearest clinics, availability of transportation to and from the clinics, were thought to be important factors which might cause a client to discontinue with the programme. To some extent these questions were also designed to evaluate performance of the field workers and family planning clinical staff from a client's point of view. For the purposes of this paper, however, the clinic evaluation is not reported.

SAMPLING AND SAMPLE SIZE

The total population from where the samples were drawn comprised all those women who had ever been registered and had previously adopted a contraceptive method within Kisii District.

From the clinic records, up to the time of investigation, over 3,000 women had been registered. From this population 610 women were found to have discontinued.³ A sample size of at least 20% was considered adequate

2. In a study which followed 1465 contracepting women, it was found that by the time a woman was supposed to return—1st revisit, 39% of the women in non-IUD methods never returned. By the time of 4th revisit which is within one year for non-IUD methods, only 18% of the original acceptors were returning. The others had dropped out of the programme so that by the 9th visit—two years after the initial acceptance of the method—only 2% of the original acceptors were returning. See J. Mugo Gachuhi "Who Needs Family Planning?" in Henry P. David (ed.) *Proceeding of the Conference on Psychology and Family Planning*. Transnational Family Research Institute, 1972. Washington DC. P. s. 20. For the above reference see Table 2, p. 18.

3. For the purposes of deciding who was a drop-out, a client was considered to have dropped out of the programme if she had not reported to the clinic for a period of six months or more from when she was expected to report. This was for all methods except IUD. The IUD users were considered drop-outs if they had not reported to a clinic for a period of one year from the date of insertion.

for the purposes of follow-up and interview. To determine who was to be interviewed, very crude sampling method was decided upon as follows: All the card numbers of those clients who had not returned within the time required, were listed down. Each of them was written on a separate piece of paper. These slips were folded and mixed together and the required number drawn. The determination of the number required was based on the principle of representation for each year and each of the six clinics which offered family planning services. Table 1 gives an example of year sample representation for one clinic.

Table 1 KISII DISTRICT HOSPITAL

Name of Clinic	Year Dropped	No. of Drop-outs	Selected Size for Year and Clinic
Kisii District Hospital	1968	14	3
	1969	45	10
	1970	197	44
	1971	161	36
	1972	N+L	N+L
Total		417	9%

After selecting the representative cases, each number was written on the questionnaire and included the relevant information obtained from the clinic records, e.g. name, address, location. A total of 160 cases were selected for interview which was 26.2% of the drop-out population. From this sample size, total of 110 women (nearly 69%) were followed up and interviewed. The remaining 50 women were not traceable.⁴

PROBLEMS OF THE FOLLOW-UP

Unlike the developed countries where street addresses are known, there exists a big problem in Africa when one wants to follow up clients. In Kisii society, women, who were the subject of our investigation, are virtually unknown. Thus, the information we got from the clinic records, while it was useful as an indication of the general area we were likely to find our respondents, was on the whole unreliable. The clinic cards only contained the name of the woman and her husband. This is useless information in a society where you not only require the name of the wife, her husband and the name of the

4. Those who could not be interviewed for reasons as follows:
- (a) 19 respondents had permanently moved to other parts of the country.
 - (b) 5 respondents refused to be interviewed (they actually ran away from the interviewers).
 - (c) 4 respondents could not be interviewed even after repeated visits to their homes because they were never there.
 - (d) 22 respondents were untraceable. Apparently these had given false names and addresses to the clinic staff.

husband's father but also the clan. In addition to this you need the name of the nearest market.

The other problem of follow-up in a big district such as Kisii is that one is likely to find that the person you wanted for interview was away. Thus arrangements had to be made for revisit to the home—something that can take up to a whole day for just one interview.

THE DATA

CHARACTERISTICS OF THE RESPONDENTS

Nearly all of the respondents were married women—100. 5 were unmarried, 4 were widowed at the time of interview and one was divorced. The age range was from 15 to over 40 years.⁵ Thus two women were between the age of 15-19; seventeen between 20-24; twenty-five between 25-29; twenty-eight between 30-34; twenty between 35-39 and eighteen were 40 years and over. This is to say that 83.7% of the sampled women were within the most fertile period and would therefore be said to be most in need of contraceptives.

Educationally, 28% of the respondents had never been to school. 24% had completed between one and four years of primary education. 41% had completed between five and eight years of primary education, while the remaining 7% had nine years of education and more.

74% of the respondents gave housewife or self-employed as their occupations. 20% were employed and 6% did not give their occupations. On the question of religion, 11% said they had none, e.g. they were traditionalists; 26% were Roman Catholics, 61% belong to the various Protestant denominations and 2% were Muslims. Nearly all the respondents (107) had children, while the remaining 3 respondents had none. Asked if they had had all the children they wanted to have, 41.8% said they had had enough; 55.5% said No and 2.7% refused to answer the item. For those who wanted additional children, they were asked how many more they wanted. 48.4% thought they wanted between one and two children; 40.3% wanted at least between three and four children, while 11.2% did not know.

CONTRACEPTIVE KNOWLEDGE AND DESIRE TO SHARE WITH OTHERS

All along it should be kept in mind that we are dealing with women who have already been exposed to family planning contraceptives and are registered as having used a form of contraceptive. Thus it is expected that all our respondents should be able to name and even describe various types of contraceptives. Knowledge of particular contraceptive and also ability to describe the method, by and large, depends on which methods the family planning groups advocate more often and which methods are available. In Kenya nearly all contraceptive methods are available. However, one finds

5. While the internationally accepted age of menopause is around 49 years, we have used 40 years as the age at which, even though many women will continue to have menstruation, only a few continue to have children after this age. In any case since most African women start having children while still young, by the age of 40, many have already had a large-size family. Those who go to clinics to seek contraceptives after this age, do so not so much for spacing as for stopping.

that in the rural areas only three are talked about by both the field motivators and the clinical groups. These methods are the oral pill, the intra-uterine device (IUD) and the condom. Whether emphasis on these methods reflects personal prejudices of the people providing the services against all other methods or that it reflects their judgment concerning the people who use these methods and therefore choose and recommend to them what they think are the best contraceptives, is not clear. It is possible that any of these possibilities or a combination of all of them might be in operation.

In our present study therefore, we were not surprised to find that respondents could only recall these three methods. The question was not meant to determine if a respondent could recall a method of family planning. Rather the question was meant to find out if respondents could recall the name of the method or methods of family planning which they had adopted when they first decided to use contraceptives. 89.1% recalled they had adopted the oral pill the first time; 4.6% had adopted the IUD and 2.7% had adopted the condom. Another 2.7% had not adopted any method and the remainder could not remember. This was verified from the clinic records.

Many arguments have been put forward that many people in Africa, while they do not mind being talked to about family planning, would not want to talk to somebody about it and particularly about contraceptives, especially if they are using some. This is said to be so because widespread use of contraceptives is still very limited. One would not therefore want to be known as an acceptor for fear she be accused of other things. Thus, while the concept of using satisfied adopters as agents of family planning is thought by some to be a good one, it is not quite known that there are enough satisfied contraceptors in Kenya at the present time to be useful.

Respondents were asked whether they would recommend family planning to anyone. Only 23.6% said yes and the majority, 71.8%, said they would not. 4.6% were not sure. Those who said they would recommend family planning to others were asked why. Twenty women said they would recommend use of contraceptives because "others should know the value of small families"; four said while they would be willing to talk about family planning, they would do so only to other women "because it is easier to talk to women". Two women mentioned benefits of spacing children as the main reason they would talk to other women.

Those who said they would not talk to anyone about family planning had a variety of reasons for not doing so. Some of the main reasons were the following: "People might think I want to bewitch their children and in turn might bewitch mine". "Because I do not like family planning". "No one in my area wants family planning". "Family planning is considered secret". "It is no good to do so in our clan". "It is not my business". "I do not want it to be known I am practising family planning", etc.

FAMILY PLANNING AND THE SIGNIFICANT OTHERS

We believe that with the exception of those women who are highly motivated to use family planning contraceptives on a continuous basis, the

majority of women, particularly in the rural areas, will not accept to use contraceptives for long periods of time if those they consider should know better do not support the idea of family planning or for that matter any innovative idea and especially if it goes beyond the accepted norms. To the extent this is true, it is not known if continuous reassurance from family planning workers to the women who have adopted family planning would be of any lasting value. This is more true if those workers are from outside the immediate cycle of "significant others".

Respondents in this study were asked if their "clan/lineage approve of family planning." To our surprise, 81% of those who had adopted family planning before dropping out said that their clan/lineage disapproved of family planning. Only one 45-year-old woman said that her clan/lineage approved of family planning. 15% said they did not know. The fact that the respondents were relatively young (see above), and had initially accepted family planning and also withdrawn from the programme, may mean that a strong social pressure exists for them to get on with the business of child bearing. Subsequently, the high percentage of those who claim that their clan/lineage disapproves of family planning.

To ascertain how strong the clan/lineage feeling against family planning was, respondents were asked to indicate how strongly they thought this feeling to be. The question for those who indicated their clan/lineage disapproved of family planning was "does your clan/lineage disapprove of family planning "very strongly or moderately strong". 54.6% of the respondents thought the disapproval was very strong and 26.4% thought their clan/lineage disapproved of family planning only moderately.

When clan/lineage disapproval was co-related with respondents' age, 70% of those between 20 and 34 years indicated that the disapproval was very strong, an indication perhaps of the strong desire and therefore pressure for the women in this age group to have children. It would seem that at least in the rural areas, as the woman gets to the peak of her child bearing age, she is more likely to be affected by disapproval of family planning and the more pressure she gets to have more children, the better the chances that she is likely to drop out of a family planning programme.

Religion, which many people think might be a factor in non-adoption of family planning, was thought by 64.6% of the respondents to be opposed to family planning. Of this 44% thought religion was very strongly opposed to family planning. We are not sure how to assign the influence of religion in an area which, while many profess to belong to an organized religion, still has a strong influence of the traditional society. Thus, Western religious teaching of "Go ye and multiply" combined with a pro-fertility traditional society might be basis for people to feel that their religion strongly opposes family planning. This we doubt, if it is indeed the case, and as it has been argued elsewhere, there is no evidence in the history of Kenya's family planning

activities that there has been an organized opposition to family planning on religious grounds.⁶

RURAL COMMUNICATION: A REASON FOR DROPPING OUT?

Communication in rural Africa is extremely difficult. Because of these difficulties, availability of various services are also thinly spread-out and in some places almost non-existent. Lack of reliable transport, high transport costs, varying weather condition and the policy of family planning programmes which with the exception of the women on IUD, gives only enough contraceptives to last for not more than three months, it is suspected that these conditions influence many women to drop out of family planning programmes. It is almost next to impossible during planting, weeding and harvesting seasons to get many of the rural women to leave their farms and go to a family planning clinic to collect contraceptives, unless it is within a few minutes' walk from their homes. These are some of the reasons, on the basis of which, some people have advocated non-clinical methods which can be easily available to rural mothers without requiring them to spend too much time travelling long distances to get contraceptive services.

To see if some of these factors had anything to do with dropping out of programmes, respondents were asked how they used to travel to the places where contraceptives were available. 32.7% of the respondents used to travel on foot and the rest, 67.3%, always travelled by bus. The length of time taken to travel to and from the clinics varies anywhere from just under one hour to more than three hours. Unless a woman is highly motivated or she has another business near the place where she is to pick up contraceptives, it is doubtful if many will travel long distances in search of contraceptives.

Though it is not clear whether availability of transport or ease of obtaining contraceptives would be an important factor in keeping the people in the family planning programmes, it would nevertheless seem to be at least a partial factor. As a partial solution to the problem of having the people going long distances to find contraceptives, it might be advisable for the family planning programmes to go to the people instead. This is particularly so in a situation such as obtains in Kenya where people are not yet sufficiently motivated to want to make the sacrifice the family planning programme would seem to be asking them to make.

Though transportation may be a factor in some people's stopping the attendance of family planning sessions, it would still seem that other factors must be present before those already initiated to the programme can decide to drop out. All along in our data presentation we have tried to point out some of the factors which might be at work.

Availability of transport is connected with easy access to contraceptives. Respondents were asked if they found it easy or hard to get the

6. See J. Mugo Gachuhi "Sources of Family Planning Information in Kenya. Institute for Development Studies, University of Nairobi. Working Paper No. 76, January 1972. Perhaps the important point here is not whether or not organized religions are opposed to family planning but whether the individual concerned believes that his religion is opposed to the programme.

contraceptives they wanted. 54.5% found it easy in comparison to 33.6% who found it difficult. 11.8% were not sure or could not remember. There are several reasons given as to why it is hard to get contraceptives. Besides transportation problem which has already been given, the other important reasons are "inability to send someone to collect the contraceptives particularly in times of illness"; or "there is no one to leave at home". Only five respondents thought that "too much time was wasted at the clinic".

DECISION TO CONTINUE IN OR TO DROP OUT OF THE PROGRAMME

There are several reasons why a woman would want to stop using family planning contraceptives, just as there are reasons for her wanting to continue. Some of these reasons for discontinuation are that she may want to become pregnant after a period of rest; she may be under social pressure from others to withdraw from the programme; she may be experiencing side effects with no suitable alternative method(s); she may have reached menopause and therefore have no more need for contraceptives; or she may find supplies difficult to obtain, and so on. Any of these reasons or a combination of them are sufficient to promote a drop-out situation.

The reasons for continuation with the programme could be the opposite of those above. One of the reasons, especially in the rural areas, which make many of the women not return to the clinics is the poor information (education) they get during their first visit to the clinics. While the explanations given by the clinical staff to their clients sometimes leave a lot to be desired, it seems that many of the major factors to discontinue with the programme are not due to the reception and handling that clients get at the clinics.

Many women claim that they often forget to return to the clinics on the day they are supposed to or they forget to take the pill when they should. Accidental pregnancy during this period is too often blamed on either the "ineffectiveness" of the method or the failure of the clinic staff to explain what is to be done properly. On the question of whether our respondents returned to the clinics every time they were expected to, 59.1% claimed that they did not. 33.6% said they never returned when supposed to. The others had no answer.

For those who did not go back to the clinics when expected to, a variety of non-clinical reasons for their non-return were given. The major ones which were: "I had decided to stop". "I conceived while on method". "My husband forced me to stop". "I finished the pills and had no time to visit the clinic". "My child died". Only three respondents claimed that they had become dissatisfied with the clinic services.

When prodded further, many important reasons began to emerge. We believe it is these reasons which might be more important in influencing a decision to stop or to drop out of the programme (see Appendix 1). From the appendix we note that failure to follow instructions, medical and socio-cultural factors are the major reasons which caused many of the former contraceptors to drop out of the programme. Many of these reasons are truly

beyond the ability of the family planning workers who would need a general societal education before they can be corrected.

THE PILL AND THE IUD: THEIR GOOD AND BAD SIDES

In Kenya's family planning campaigns, many hours are spent by the field workers explaining the physiology of human reproduction as well as explaining each method. Whether heavy investment on this type of "education", particularly to rural illiterate women, is good or bad remains to be seen. Studies in Latin America⁷ show that many of the women do not remember much anyway on what they have been taught about physiology.

The decision to continue with a particular type of contraceptive as opposed to choosing another will depend on side effects that type of method is reputed to have either by experience or hear-say—or it will depend on the benefits it is supposed to have. As has already been said elsewhere in this paper, the pill, the IUD and to a lesser extent the condom, are the methods mostly recommended to the rural women. To find out what the respondents thought were the good and the bad about the two principal methods, they were first asked to state what they thought were some of the good things "you experience while using the pill". 20% said there was "nothing good; 27.3% said it was good because it regulates the monthly period; 61.8% said prevention of pregnancy and spacing of children are the good aspects of the pill and those who did not know were 18.1%.⁸

There were as many bad things said about the pill as there were good ones, perhaps indicating the ambivalence of the respondents: Pill-taking is costly (15.5%),⁹ causes backaches, bleeding, headache, stomachache, etc. (11.8%); the pill delays pregnancy when desired (8.2%); it closes the uterus, affects the mammary glands, makes one weak, and one can get pregnant unexpectedly (27.2%). The others either did not know or did not see anything wrong with the pill.

When asked specifically if they had ever experienced any of the problems they were referring to, slightly more than half (58 women) answered in the affirmative as follows: Became fat and often weak (8);¹⁰ unable to become pregnant as soon as they wanted (19); dizziness and hungry most of the time (18); and backaches, stomachache and irregular monthly flows (13). If in fact these respondents did experience what they claim and perhaps as a result of which they decided to discontinue with the programme, then it is important that the possibilities of these side effects be not only explained to them at the initial period of contact with the family planning workers, but also thorough follow-up should be initiated soon after the women have adopted

7. Lily B. de Bucheli and Donald W. MacCorquodale "Education for Family Planning: The Need to Review the Current Approach" in *International Journal of Health Education* 17 (2).

8. Because of multiple responses, percentage may add up to more than 100%.

9. We are unable to interpret the term "costly" unless it is in terms of the time spent going to the clinics and remembering when to take it, the pill, as other methods are available free of charge in all government clinics as well as from the mobile units.

10. These are raw figures.

a particular method. Unless this is done, there is a danger of not only these women becoming permanent drop-outs, but they are likely to negatively influence many other potential family planning adopters to the detriment of the programme.

With respect to the IUD there were as many people giving positive reasons for it as there were those pointing bad things about the coil. On the positive side the following reasons were given: IUD is less costly (34); it is a surer method of stopping pregnancies (14); using the IUD lessens suspicion (10). On the negative side, and based on the experience of the respondents as well as on what they heard from their friends, the IUD is said to: cause too much irregular bleeding, backache, headache, pus, etc. (27); sometimes it could disappear into the stomach and lead to a possible operation (18);¹¹ examination (before insertion) is painful (4); feeling of sickness when nearing the time for the period (7), and there is a possibility of the IUD falling out if one is bleeding heavily (4). As in the case of the pill the same comment on the IUD would hold.

The condom, which is the other method available in the rural areas also received some comments. On the good side, "woman is never involved" (7);¹² less costly (9); no ailments caused by it (6); nothing good (14). On the bad side: not comfortable to the women (6); men not free to use it (7); might break and thus get pregnant (8), and nothing bad about it (6). On both the good and the bad side, the ones not giving an opinion are largely those who do not know anything about the condom or have not had experience with it.

CONCLUSION

We have presented several variables which would seem at first to be contributing, at least in part, to programme discontinuation. However, it is not clear whether the high rate of discontinuation of contraceptive usage can be attributed to these factors alone. For one, we have the difficulty of measurement and therefore unable to make a general statement concerning continuation or discontinuation. It is known that when recruiting new family planning clients, particularly from group meetings and maternal and child health centres, many women are given samples and especially the condom. Yet these people are often listed down as having accepted a method. Inclusion of these women in the clinic returns as acceptors would be extremely misleading since in the first place they never accepted to use contraceptives. It is doubtful whether they even give the condoms to their husbands.¹³

This type of data creates a serious problem when one is trying to do a follow-up in effort of either bringing back to the programme or to find out

11. When probed further, none of the respondents knew of anyone who had undergone surgery because the "IUD had gone into their stomach".
12. While we are not in a position to argue one way or another for lack of data, there is a widespread belief that the African male is not interested in the sexual climax (orgasm) of his sexual partner. Whether our respondents' answer "woman is never involved" is considered good by the African woman is a question of speculation.
13. G. Cernada, "Family Planning Drop-outs and How to Communicate with Them" The Population Council—Cyclostyled and undated.

whatever became of them. Do we call a woman who came to the clinic, was given a method (other than the IUD or the injectable Depo-Provera), took it home but never returned, an acceptor or do we call her a drop-out? What of the woman who came for services, was highly motivated but when she got home she was faced with a stiff resistance from the members of her family? How long must a woman be using the various contraceptive methods (but on a continuous basis) before we can call her an acceptor? Likewise, do we call a woman who adopted a method, continued with it for a while and had a child but never came back to the programme, a drop-out?

These and similar questions make a study of this kind extremely difficult to interpret. To facilitate better interpretation of this type of data, a better definition of an "acceptor" as well as a "drop-out" is clearly needed. This of course does not mean that there are no difficulties with persuading clients to continue with a programme for an appreciable length of time. To this end, perhaps a better educational strategy needs to be introduced. Education, however, no matter how well thought out, will not succeed unless it first takes into consideration the social setting of the people. This is especially so because it would seem that ignorance, conservative religions, as well as a community's mores, all stand in the way and too often they are ignored by programme personnel. In any successful programme, problems of health, nutrition, sex education, etc. would have to be included in lectures about family planning. In other words, family planning must be presented as a package.

A programme of family planning campaign which ignores the men is doomed to failure in Africa. Women in Africa, by and large, do not make decisions of having so many or so few children. Decision on the part of the woman alone to adopt contraceptives without the knowledge and agreement of her husband is bound to create a lot of difficulties if later found out. The male must be persuaded to participate in the decision-making concerning the use or non-use of contraceptives. Likewise, many other factors which may seem to be insignificant at first should carefully be assessed by the family planning programme as if later they are not to be the source of programme discontinuation.

APPENDIX I
REASONS FOR CONTRACEPTIVE DISCONTINUATION

Rumours	Failure of Expectations	Medical Reasons	Social Culture	Economic	No Reasons	Failure to Follow Instructions
Pills made me sterile (3)	Was not helped to get a girl (2)	General discomfort(2)	Wanted to have needed children first (14)	Lack of transportation money (4)	No reason (7)	Forgot pills and got pregnant (15)
Methods would kill me (4)	Was not given method I wanted (6)	Sickness (12) Switched to withdrawal method (6)	Husband stopped me (13) Feared witchcraft (7) Family was against contraceptives (3) Divorce/separation/widowed (6)		Don't know (4)	Got pregnant while practicing (19)(a) Failed to get re-supply (13)
7	8	24	43	4	11	47

The numbers in brackets are the numbers of respondents (raw figures). The total number of respondents is greater than the actual base because some respondent gave more than one reason.

(a) This is a common problem which is normally blamed on the method one is using. What in actual fact happens is that some women fail to follow instruction properly and skip a few days during which they are not protected. During those days they might continue to have sexual intercourse which result in pregnancies. This is particularly true if they forget the contraceptives during their most fertile period during the cycle.

A Sociological Look at Law and Population

J. C. K. KABAGAMBE

According to Webster's Third International Dictionary, Law is a binding-custom or practice of a Community: a rule or mode of conduct or action that is prescribed or formally recognized as binding by a supreme controlling authority or is made obligatory by a sanction (as an edict, decree, etc.) made, recognized or enforced by the controlling authority. To a Sociologist Laws are a type of rules specifying appropriate and inappropriate behaviour. In other words a Sociologist sees Laws as a type of norms. The norms that are referred to as Laws are institutionalized. Laws unlike other norms are designed, maintained and enforced by the political authority of the Society or the State. To a Sociologist therefore Laws are seen in the main to specify appropriate and inappropriate behaviour and pursuance of appropriate behaviour is enforced by the political authority of the Society. This element of the political authority enforcing conformity to the institutionalized norm (Law) is another differentiating factor between Law and other types of norms. The other norms are designed, maintained and enforced by the public sentiment or feeling instead of by the political authority of the Society. Another point to note is that since norms refer to appropriate and inappropriate behaviour this will change with time.

The purpose of this paper is not in fact to enter into a discourse on the relationship between Law and Population in general but rather to look at some Laws in Uganda and their effects or implications on the population in Uganda. An attempt will also be made to see what kind of population policy might be deduced for Uganda by looking at these Laws. The Laws that will be looked at are those on Abortion, Marriage, Inheritance and the Land Tenure. These four Laws have been selected for treatment in this paper because of their close connection to population. The Law on marriage governs behaviour connected with entry into marital unions; needless to say, entry into marital unions will to some extent determine the fertility performance of given individuals. I use the phrase to some extent advisedly since in several African Societies fertility performance is conceivable outside marital unions; in fact this phenomenon is on the increase. The Law on abortion, like that on marriage, attempts to influence fertility performance either negatively or positively. This will depend on the objectives of the particular Law on abortion in a specific Country. In a Country where the law on abortion is restrictive then this will tend to increase the fertility performance of individuals provided the illegal abortions do not defeat the objectives of the law. The Law on inheritance could have an effect on the timing of entry into marital unions. Some laws on inheritance have an

inclination to primogeniture. This inclination could lead to late or early marriages for the first born children. If the first born is supposed to take all responsibility over the other children till they become of age, this might deplete the resources from which he could otherwise have obtained bride-wealth and thus eventually delay his marriage. Finally the Law on Land Tenure can influence a Society's attitude and even policy favouring a large and expanding population or in some cases a small population. A Law on Land Tenure that vests all powers over land on the government will give a free hand to a government having an expansionist population policy to settle people from congested areas into those less congested. Whereas a law on Land Tenure that encourages private ownership of land will tend to have effects somehow contrary to the foregoing situation. It is within such a context that I intend to carry out an examination of some of the laws of Uganda and their effects on population and their implication in connection with Uganda's population policy.

In Uganda like in several other formerly Colonized Countries the ultimate source or basis of the Laws in operation are the Laws that operated in the metropolis during the colonial period. In other words Laws operating in the former colonies will tend to draw heavily on the Laws that have operated in the Metropolis. In this respect a number of Laws operating in countries like Uganda cannot reasonably be referred to as norms (in the Sociological sense of the word) which have been institutionalized. It is within such background that I intend to look at the Law on abortion with regard to Population in Uganda. Laws on abortion can be looked at in the main from the rationale of their institution. Though Laws on abortion vary a great deal in several parts of the world they can be divided into three basic categories which could be referred to as restrictive, moderate and permissive. The first category of abortion, laws either prohibit abortion totally or limit it to cases in which it is judged necessary to preserve the woman's life or occasionally her health. The second category, that of moderate laws, extend the grounds for abortion, but generally require that a strict procedure be followed in obtaining permission for the operation. The last category, that of permissive laws, generally places no restriction on the availability of clinical abortion, except perhaps for time limitation on late-stage abortions. Uganda's Law on abortion could be categorized as restrictive. In Uganda both the woman who attempts to procure a miscarriage and the person who helps or attempts to help procure a miscarriage are guilty of a felony and either or both are liable to imprisonment for a term ranging between three and fourteen years.

The only occasion where abortion is allowed is that where it is necessary to preserve the woman's life or her health. This exception is not, however, easily obtained. It is allowed on the basis of the opinion of three doctors, one of whom must be a Psychiatrist. The point here is not to look at the legal aspect of abortion in Uganda but rather to see the effects of these legal aspects with regard to population growth.

In accordance with the stated objective of this paper, I will now turn to the implications of the abortion Law in Uganda. Uganda, like several

other developing countries, is experiencing a high rate of population growth in comparison to its rate of economic growth. Looking at the available data and excluding the heavy net migration that occurred in the intercensal period between 1959 and 1969 the rate of natural increase in 1969 was about 3.2%. This was a result of a crude birth rate of 50 per thousand and a crude death rate of 18 per thousand and giving rise to a young population (46 per cent of total population under 15 years of age). The rate of natural increase has been accelerating since the period directly preceding the Census year such that by 1972 it was estimated to be about 3.3 per cent. With regard to the economic situation total gross Domestic Product by sector according to 1966 prices was growing at an annual average rate of 4.4 per cent for the period 1966 to 1970. Given this picture and the fact that the Third Five-Year Development Plan Target of GDP, annual growth for the same period was 6.3 per cent, it is reasonable to assume that the high rate of population growth has a part to play in the rather poor performance of the economy. But if one is to fully understand the effects of the abortion law in Uganda one has also to look at the socio-cultural factors connected with reproduction. A look at some of the results from a study we have carried out in two rural districts of Uganda, especially with regard to the advantages of having many children, shows that an overwhelming majority of the women interviewed (N=1050) state that the more children you have the better for you as these will provide security in the parents' old age. They are also still having a psychological hangover from the time of high death rates and this is reflected in the reason for many children being a guarantee that at least some will survive. On the cultural level the available evidence suggests that in many traditions there is a great desire for several children. I will give two cases in point to illustrate this desire. M. K. Kisekka in her contribution to *Cultural Source Materials for Population Planning in East Africa* by A. Molnos has the following to say with regard to the Baganda of Uganda. That it is a great shame for one to die without leaving any offspring to take over one's property and to represent one on earth. In Buganda when a childless man dies he is buried with a banana stem saying: 'There are your children, do not curse our children'. This is to prevent his spirit from troubling the children of his siblings, demanding propitiation from them. Traditionally, in Buganda, a person's social status in the family, community and clan, was measured in accordance with the number of his children, and for a man, with the number of his wives as well. M. T. Mushanga, also contributing to the same work mentioned above, had the following to say on this point with regard to the Banyankole of Uganda. That among the Banyankole, a proper woman is a married woman with many children, especially male children. She should be hard-working, clean, and able to treat visitors hospitably. But more important is the fact that she must have live children. A woman who bears children, half of whom die and only half survive, falls short of this expectation. An ideal woman is one who enjoys a high social status in her community, which wealth or education cannot confer. The most important criterion is the number of

children a woman has had with one man, especially male children. A proper woman, among the Banyankole, is a mother.

Given the foregoing facts one could reasonably state that in Uganda many societies place a high value on high fertility and that this support is displayed in the high fertility performance underlined both by the fear of a high infant mortality rate (which is being reduced faster than the general population perceives) and a strong cultural liking for several offspring. In such a situation a law on abortion like the Uganda one already referred to above will enhance the pronatalist attitude already existing. A restrictive law on abortion like that of Uganda will be very much in line with encouraging a high fertility since it will minimize abortions intended to terminate socially unsanctioned pregnancies which would include those of unmarried girls and those that result from adulterous relations. The law as it stands is one that has a pronatalist inclination and more intended to discipline deviants from this inclination and to actually bring them back into the fold. Looked at from the point of view of restraining deviants, the Law on abortion in Uganda could be said to reinforce public sentiment on abortion. We shall be looking at the implications of this law with regard to Uganda's population Policy at a later stage. We will now turn to the law on marriage.

The basic law governing marriage in Uganda dates back to the earliest parts of this century. According to that law the offence that could be committed or deviance from the institutionalized norm with regard to marriage is that of bigamy. And whoever is guilty of bigamy shall be liable to imprisonment, with or without hard labour, for a period not exceeding five years. The second offence or deviance is one where an unmarried person goes through the ceremony of marriage with a person whom he or she knows to be married to another person. This is punishable by imprisonment, with or without hard labour, for a period not exceeding five years. Of concern to us in connection with this law are two facts: one that marriage was conceived of in terms of monogamy and had to be performed in court or in an approved place of worship, and second is the fact that in cases of minors (that is those aged below 21) the consent of the parent or guardian before a marriage is effected is essential. This type of law by not at least setting the legal minimum age at marriage could allow for a situation of low ages at marriage in Uganda and this in turn would lead to a longer exposure to the risks of conception for Ugandan women. And a longer exposure to conception with no child-spacing and non-use of contraceptive methods should be able to provide ideal conditions for a high fertility.

A very widely documented conclusion in works of socio-demographic studies in Africa is that age at marriage (especially for females) is low in Africa. This would be a natural consequence of a marriage law that sets no minimum age at marriage. The evidence based on the calculation for singulate mean age at marriage using data on population single in 1969 in Uganda shows the mean age at marriage as 17.7 years for the whole country with a total fertility of 5.4 and a completed fertility of 5.0. Looking at the evidence more closely by looking at the Provinces there is no clear indication

that a low age at marriage would be a major determinant of fertility levels. The evidence on the other hand lends credence to the fact that a low age at marriage along with other factors like non-use of family planning methods will bring about high fertility levels in Uganda. The latest in the form of a decree passed recently has left the situation with regard to the marriage law and population unchanged. In fact the decree on marriages has come in to give greater status to Customary marriage than they had enjoyed hitherto. The decree did not only raise the status of Customary marriages but indeed in a way played down the value attached to monogamy. For it made it possible for a man to marry as many wives as ten in case he was married under the customary system and as many as one's religion allowed if originally married in church or mosque. This decree, like earlier laws on marriage, by not stating the minimum age at marriage leaves scope for a low age at marriage with its obvious consequences on population growth. The decree also introduced another aspect namely, legalizing polygamy, which can have some effect on population growth in Uganda. The effect just referred to will very much depend on whether polygamous marriages produce more children than monogamous marriages. Debate on this issue has been going on for quite some time. The conclusions reached so far, namely, that there would tend to be more children in monogamous families than in polygamous ones appears to lack sufficient evidence. I will give an example encountered during a Research Project on Fertility Differentials in two rural districts of Uganda in connection with the role of polygamy in population growth in Uganda.

In one of the Districts, namely, Teso, in which we worked, there is a custom such that a man does not have sexual intercourse with his wife after delivering a baby till this baby can be asked to bring water in a cup and it understands the message and executes it. This in practice is about two years from the birth of a child. With such a system is provided some in-built technique of child spacing. And given a monogamous situation population growth would be reduced somewhat. But the actual situation is that people in this society are polygamous, which in effect means that while this custom-enforced abstention lasts the man can switch to the other wife or wives. And given a recognition of the customary marriage as is provided for in the Decree, this would have a pronatalist effect and would bring about a higher rate of population growth in a Society like I have referred to above. In fact more information on the fertility performance of polygamous marriages is needed before any definite conclusion can be arrived at. In another encounter during the same study referred to above we tried to find out the coital frequency of a polygamous husband on the assumption that the higher the coital frequency the more the chances of conceiving. He informed us that he had four wives and that he had sex with each one of them at least seven times a week. According to his arrangement each wife was allocated a week during which the husband would stay in the same house for the night but that this meant that he could have sexual intercourse with any of the other three during the day. These two cases then show that the decree allowing for

polygamy in Uganda will tend to have the effect of encouraging a higher rate of population growth through higher birth rates.

A look at the Inheritance Law in Uganda does not immediately show any effects on the population in Uganda. This is as a result of two factors. In the first place it is more concerned with those who die intestate; secondly the property involved in the majority of cases is small such that it cannot possibly alter the material being of the people involved. The additional fact is that even in cases where primogeniture is involved in inheritance this does not necessarily delay or hamper the chances of marriage of the first born who may have inherited the father's property. This is explained by the fact that as marriages are still largely a family affair at least in the field of payment of bride price the relatives would provide both for the first born's bride price and for the maintenance of the other children. Thus the law on inheritance would not have much impact on population in Uganda in comparison to those other countries where primogeniture applies to inheritance and involves caring for the other siblings till they are of age and can earn their own income.

With regard to the law pertaining to land tenure in Uganda there are certain interesting aspects to note. Just before the 1900 Buganda Agreement with the British Government and according to the then existing Land Regulations the Commissioner could, if he thought fit, grant to any person a certificate authorizing him to hold and occupy the portion of land described in the Certificate for a term not exceeding twenty-one years. To safeguard the "natives", interests a certificate was not to be granted in respect of any land which at the commencement of the land regulations was cultivated or regularly used by any native or native tribe. The power to determine the cultivation or regular use was, however, left to the Commissioner. The turning point in the field of Land Tenure was the 1900 Buganda Agreement referred to earlier. This Agreement introduced some form of private Land ownership in Buganda. The latest in the field of Land Tenure in Uganda is the Public Lands Act, 1969. This Act, though it did not greatly upset the system of private ownership of land in Buganda, did introduce some important changes in Land Tenure in Uganda. It did set down the purposes for which public land in rural areas may be alienated. The Act also did set conditions for the sale of land for the grant of public land in freehold and for the grant of leases in public land.

Turning to the effects of a law on land tenure with regard to Population in Uganda, a point was made at the beginning of this paper to the effect that a law on land tenure that vests all powers over land in the Government will give a free hand to a government pursuing an expansionist population policy to settle people from congested areas into those areas less congested, while a law on land tenure that encourages private ownership of land will tend to have effects somehow contrary to the foregoing situation. Certain districts of Uganda are currently experiencing land shortages because of high rates of population growth and as a result Government has tried to alleviate the problem by resettling people in districts that appear to have unoccupied land.

This resettlement has affected the peoples of Kigezi District in the South West of Uganda, the people of Bugisu in the East and those of West Nile District in the North West. People from these congested Districts have been moved to adjacent sparsely populated Districts. This resettlement has been done rather easily because the land in Uganda, with the exception of that which falls in the system of private ownership, is largely owned and controlled by the state. With regard to population growth the Government has made it possible for the districts affected not to feel the pressures consequent on a high rate of growth in the face of very little cultivatable land for a population that is engaged in a basically subsistence production.

Looking at the Laws we have been discussing as a whole, the following picture emerges. With regard to abortion, land tenure and marriage it would appear that Uganda possesses institutionalized norms that tend to favour a pronatalist population policy. And this as we noted earlier in our discussion of the abortion law appears to be an implicitly accepted policy by the people of Uganda. This implicit acceptance can be seen from the underlying cultural values attached to the whole subject of reproduction. Given a situation then of a pronatalist attitude to population as assessed from the laws we have looked at in the paper, it is worthwhile comparing this with the officially declared views of Government on the question of Population. Uganda's Third Five Year Development Plan devotes an entire chapter to the discussion of population giving the basic characteristics of the population and stating some of the policies involved.

In stating the Policy Proposals for the Plan with regard to Population the following is said:

"Uganda is not yet in a critical position of population growth outreaching available resources. However, the Government is convinced that in view of the economic, social and health problems arising from the present high birth rates, some of which have been mentioned in the preceding section, it is necessary to institute a programme of advice to women on family planning and child spacing matters."

Uganda's attitude to population as judged from the laws treated in this paper is pronatalist. The declared policy in the plan first of all expresses sentiments towards a pronatalist policy but ends on a note of antinatalist. The ambiguity can be seen in first expressing public feeling towards population, which feeling is pronatalist, and then when faced with reality as represented by the available information, seeming antinatalist action is envisaged.

If an antinatalist population policy was deemed ideal, then some of the laws we have referred to need to be amended. The law on abortion would at least be amended to approximate to other moderate laws on abortion. This would enable those who might be interested to use it in regulating the size of their families. A relatively high minimum age at marriage would have to be incorporated into the marriage law; if anything, such an amendment if properly enforced would delay for some time an individual's chance of participating in the reproductive process. This along with other factors might have some effect on the rate of population growth. On the

other hand Uganda could pursue a pronatalist policy and at the same time carry out a vigorous economic policy that would enable the rate of economic development to keep at a faster pace than the rate of population growth. Whichever of these two policies Uganda chooses, it is necessary that the laws concerning population and operating at a given time do reflect what the country's population policy is at the time.

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Islamic Law and the Regulation of Fertility Levels in Kenya

F. MUSLIM

INTRODUCTION

While the world population continues to grow, opinions differ as to its effects on society. There are those who regard this growth as a stumbling block to economic development and social stability in particular countries and even in the world in general. Others view the total effect of population growth as posing the greatest threat to world peace.

On the other hand, countries who consider their population to be small look upon population growth as a prerequisite to economic development.

Since a number of papers presented at the Workshop examine this question, this particular paper sets out only to deal with Islamic Law and the way it relates to the regulation of birth rates. Though Islamic law as a factor in any consideration of this question has been examined in regions of the world where large Muslim communities are found, little has been done in this direction in Kenya. Islam being the other major religion in Kenya, knowledge of its stand is worth the while of those persons engaged in the efforts to regulate the country's birth rate as well as to those who are adherents of this religion. This paper, therefore, should be seen as a small contribution to the efforts which should be made to provoke a public discussion on this subject which intimately touches upon the lives of Muslims in this country.

THE MUSLIM COMMUNITIES

The chief areas of Muslim settlement in the world occupy an area roughly the size of the North American continent and have about twice the population. A fundamental uniformity is found among this world Muslim community despite factors of territorial separation, linguistic diversity, political fragmentation and the absence of a central religious hierarchy. In this community natality has been found to be higher than that of neighbouring peoples of other major religions.

The table on p. 141 includes only countries having large Muslim majorities and with a total population of half a million or more. Other countries with Muslim majorities or strong Muslim pluralities include Guinea, Nigeria, Lebanon and Malaysia. The first two apparently have very high birth rates as determined from survey and census data.

The South Asia Seminar on population policy held in Colombo, Sri Lanka in February 1973 was attended by participants from Bangla Desh, India, Nepal and Sri Lanka, all of which countries have large Muslim communities. Participants at this Seminar agreed that current population growth

Table 1

Country	Estimated Population (1969) Millions	Birth Rate per 1,000	Growth Rate
Algeria	13.3	44	2.9
Libya	1.9	Not available	3.6
Morocco	15.0	46	3.0
Tunisia	4.8	45	2.8
U.A.R.	32.5	43	2.9
Afghanistan	16.5	Not available	2.3
Iran	27.9	50	3.1
Iraq	8.9	48	2.5
Jordan	2.3	47	4.1
Saudi Arabia	7.2	Not available	1.8
Syria	6.0	Not available	2.9
Turkey	34.4	46	2.5
Yemen	5.0	Not available	Not available
Indonesia	115.4	43	2.4
Pakistan	131.6	52	3.3
Albania	2.1	34.0	2.7
Mali	4.9	52	2.0
Mauritania	1.1	45	2.0
Niger	3.7	52	2.7
Senegal	3.9	43	2.5
Somalia	2.8	Not available	2.7
Sudan	15.2	52	3.0
Kuwait	0.6	52	7.6

Source: Adapted from 1966 Data supplied by the International Bank for Reconstruction and Development.

The table below gives the latest data on natality in Muslim countries: rate in their countries are too high and expressed the need to reduce these rates of growth. Concern centred on the effects of population growth on efforts to increase the amount of food available to each person as well as the rise in unemployment as the generations born in the 1950's enter the labour market.¹

Similar concern on the effects of rapid population growth rates were expressed by participants in the Middle East Seminar on Population Policy held in Yugoslavia in April and May, 1973. With declining mortality rates even higher rates of population will result. Seminar participants saw the present high population growth rates as a problem in all their countries. Egypt and Turkey have had to revise their planned economic growth targets because in each plan period rapid population growth contributed to short-falls. Other countries such as Iran and Tunisia explicitly take population growth and distribution into account in their development planning.²

Faced with this problem, leaders in these Muslim countries have come out in support of measures likely to reduce their countries' population growth

1. "In search of Population Policy: Views from the Developing World", National Academy of Sciences, Washington, D.C. pp. 7-23.

2. Ibid., pp. 24-39.

rate. One of these leaders was Gamel Abdel Nasser, the late President of the United Arab Republic who, in 1962, said that "The objective set by the Egyptian people, through the revolution, to double their national income, at least once every ten years, was not a mere slogan. It was a result of calculating the amount of the force required to face underdevelopment and rush for progress, keeping in mind the increasing rise of the population.

"This increase constitutes the most dangerous obstacle that faces the Egyptian people in their drive towards raising the standard of their production in their country in an effective and efficient way."³ In addition, leaders of the Muslim countries have given their support to the International effort to reduce the population growth rate, an indication of this support being the fact that of the nineteen world leaders who signed the "Statement on Population by Heads of State,"⁴ issued by U Thant, the then Secretary-General of the United Nations, six were leaders of governments whose populations are predominantly Muslim. This statement recognized the population problem as a principal element in long range national planning if governments are to achieve their economic goals and fulfil the aspirations of their people.

The support given to the international effort to regulate birth rates have been incorporated into some of their countries' Development Plans. An example is Malaysia's Development Plan, which details the steps the Government contemplated taking with a view to reducing the population growth rate. On the more general plan, the Development Plan states that Plan is to lay the ground work for less rapid population growth by instituting an effective programme of family planning. Reduction of the birth rate is an additional goal which is closely related to the primary objective of raising income levels. Family Planning offers an opportunity to influence the birth rate and sharply accelerate the pace at which levels of welfare rise."⁵

Before moving on to discuss Islamic Law and the provisions it makes for measures to control or regulate the rapid population growth, attention will now be turned to an examination of the characteristics of the Muslim Community in Kenya.

The 1969 Kenya Population census does not set out the size of any community on the basis of its religion.

The data is analyzed on the basis of sex, age, area, tribe or nationality and no attempt has been made to analyze the data on the basis of religion. The latest figures available on the distribution of the Kenya Population by religion (excluding the then Northern Province) are contained in the 1962 Kenya Population census, as shown in the table below.

Not included in the Table 2 are Muslims of Asian origin who numbered 40,057 and Muslims of Arab origin who numbered 33,741.⁶ As noted above the figures so far given do not include the population of the

3. Gamal Abdel Nasser, "Draft of the National Charter", 1962.

4. The Population Council, "Studies in Family Planning", No. 16, January 1967.

5. Government of Malaysia, First Malaysia Plan 1966-1970. See also, Morocco, King Hassan II, Royal Decree, No. 18-66, August 26, 1966.

6. Kenya Population Census, 1962, Vol. 4, p. 65.

Table 2 Percentage of Distribution of African Population by Region and District (Excluding Northern Province)

District	Total	Roman Catholic	Protestant	Muslim	Others
Nairobi City	100	30.9	48.7	4.3	16.1
Nairobi Pen-Urban	100	26.4	34.6	2.1	36.9
Total	100	30.0	45.8	3.8	20.4
<i>Central:</i>					
Embu	100	27.5	32.2	—	40.3
Fort Hall	100	21.6	50.2	—	28.2
Kiambu	100	17.5	40.4	0.5	41.6
Meru	100	14.3	23.1	1.0	61.6
Nanyuki	100	20.0	20.9	2.7	56.4
Nyeri	100	22.7	40.6	0.3	36.4
Thika	100	32.1	38.1	2.4	27.3
Total	100	20.5	36.0	0.6	42.9
<i>Coast:</i>					
Kilifi/Malindi	100	4.3	9.8	4.7	82.2
Kwale	100	6.3	17.3	48.6	27.8
Lamu	100	1.2	1.8	92.3	4.7
Mombasa	100	23.3	29.0	35.8	11.9
Taita	100	13.1	46.0	4.7	36.2
Tana River	100	0.3	12.7	84.5	2.6
Total	100	9.0	19.9	26.6	44.5
<i>Nyanza:</i>					
Central Nyanza	100	34.7	47.7	0.8	16.9
Elgon Nyanza	100	34.7	37.4	0.6	16.9
Kericho	100	39.4	28.8	0.4	43.3
Kisii	100	26.5	38.3	0.2	30.2
North Nyanza	100	31.3	56.4	3.8	9.8
South Nyanza	100	30.0	42.7	0.4	27.5
Total	100	29.4	47.7	0.8	16.9
<i>Southern:</i>					
Kajiado	100	0.4	27.7	1.5	70.4
Kitui	100	7.1	25.2	0.1	67.6
Machakos	100	10.8	50.4	0.2	38.6
Narok	100	0.7	13.0	0.5	85.8
Total	100	8.0	37.7	0.3	54.0
<i>Rift Valley:</i>					
Baringo	100	5.5	28.5	0.3	65.7
Elgeyo Marakwet	100	14.3	23.2	0.7	61.7
Laikipia	100	20.6	17.7	0.5	61.2
Naivasha	100	11.4	39.2	0.8	48.6
Nakuru	100	20.7	27.8	1.1	50.4
Nandi	100	22.9	27.3	0.3	49.4
Trans-Nzoia	100	40.9	25.7	1.4	32.0
Uasin Gishu	100	23.4	26.5	1.0	49.1
West Pokot	100	1.6	56.6	0.2	92.6
Total	100	22.2	36.7	3.0	38.1

Source: Kenya Population Census, 1962 volume III, African Population Statistics Division, Ministry of Planning and Economic Development.

Northern Province and if the Somali-speaking tribes of Garissa, Wajir, Mandera and Moyale Districts, who are predominantly Muslim, were to be included the total population of Muslims in Kenya would be about 6 per cent.⁷

The population census carried out in 1969 showed the population of Kenya to be about 10,942,705 with a national growth rate of 3.3 per cent. This figure (i.e. birth rate) being a national average, it is conceivable that some particular communities in the nation do have a growth rate higher than the national average and this fact prompts us to inquire into the Muslim birth rate characteristics to establish whether it is higher or lower than the national one.

BIRTH RATE CHARACTERISTICS IN MUSLIM COMMUNITIES

To our knowledge, no effort has been made to date to establish the birth rate characteristics of the Muslim Community in Kenya. In view of this it would be hazardous to make any observation on it one way or the other. However, there is evidence that the birth rate in some Muslim communities in the East African countries is lower than the national average. In his article, "Population Growth and Differential Fertility in Zanzibar Protectorate",⁸ Blacker notes that there is a great variability in the natality of Muslims South of the Sahara where the Muslim religion and way of life fuse with tropical African cultures and religions. In Zanzibar, natality of Afro-Arab women is estimated by Blacker to be barely at the level of replacement, a condition which he finds only partly explained by the lush incidence of sterility and venereal disease.

The other Muslim communities in which natality has been found to be low are in East Africa, in Camerouns and elsewhere, again partly explained by the incidence of sterility.

In view of the fact that no figures are available on the birth rate characteristics of Muslims in Kenya and because of the fact that the Muslim religion and way of life fuse so much with tropical African way of life it is reasonable to assume that the birth among Kenya Muslims does not differ to any appreciable degree from the national birth rate figure of 3.3 per cent. In addition, it may be noted that in areas of underdevelopment, religious differences in respect of fertility may be slight. Busia, for example, found in the then Gold Coast no significant difference between Christian and Muslim illiterates in regard to the average number of children.⁹

Among the conditions which have been said to make for high fertility in Muslim communities is the fact that Islamic doctrine holds that pleasures of the flesh and specifically sexual intercourse, are a God-given virtue to be enjoyed and conjugal obligations to be fulfilled. In this connection, the Quran has laid down the objectives which matrimonial relations between men and

7. Kenya Population Census, 1962, Vol. 3, African Population, Ministry of Planning and Economic Development, October 1966, p. 48.

8. *Population Studies*, 15 (3): 285-66 (March 1962).

9. K. A. Busia in Frank Lorimer, et. al., "Culture and Human Fertility" Paris (1954), p. 346.

women must serve. These are (1) Procreation, and (2) Fostering love and action and promoting culture and civilization. The Qur'an says:

"Your wives are a tilth for you, so go into your tilth as you like and do good before hand for yourselves."¹⁰

Commenting on this verse Abul A'la Maududi has emphasized the procreation aspect as the main objective of matrimonial relations in these words: "By describing women as a tilth an important biological fact has been pointed out. Biologically, a man is a tiller and woman is tilth and the foremost purpose of the inter-relationship between the two is the procreation of the human race. This is an objective which is common to all—human beings, animals and the world of vegetation. The tiller of the soil cultivates the land, not in vain, but for produce. Take away this purpose and the entire pursuit becomes meaningless."¹¹

However, there is no evidence that there is a higher frequency of sexual intercourse among Kenya Muslims or elsewhere than among non-Muslims, and Dudley Kirk emphasizes this fact when he writes: "In a society which emphasizes the value, even the religious merit, of sexual exuberance within marriage, it might be hypothesized that the frequency of intercourse might be higher than in societies more restricted on this subject. This might be expected to contribute to a higher birth rate. There is almost no direct evidence. Very fragmentary and inconclusive data show higher frequency of intercourse for Muslims in special studies in Lebanon and Bengal, but the populations included were small and the data are verbal responses that might reflect cultural biases as well as real differences."¹²

Polygamy, which is permitted under Islamic Law has often been seen as one of the factors promoting high birth rates in Muslim communities. Taking this view, some Muslim countries have sought to restrict polygamy and in Tunisia, a Muslim country that has acted to limit the extent to which traditional norms can be revised, polygamy has been made illegal.

In Kenya, polygamy is not restricted to the Muslim community alone. Traditionally, all the tribes of Kenya were polygamous, without any limit on the number of wives a man might take, other than what he could afford.

Those Africans who have adopted Islam have been limited to four wives and those who have adopted Christianity are required to be monogamous though it is not uncommon for Africans who have contracted as Christians to subsequently contract customary law unions while that marriage lasts. This is not only contrary to the rule of the Church but also constitutes a criminal offence. Polygamy is usual among Muslims, Arabs and Somalis but Muslims from India and Pakistan are usually monogamous in practice. The Ismaili Community, however, are monogamous by virtue of their constitution.

Dudley Kirk, examining polygamy to establish whether it contributes to

10. Sura 2: 223 (Sura stands for chapter in the Qur'an).

11. Maududi, "Birth Control," Islamic Publications Ltd., Lahore, Dacca 1968, p. 86.

12. Muslim Attitudes toward Family Planning", The Population Council, New York, 1972, p. 82.

the high birth rates in Muslim communities has come to the conclusion that such evidence as is available cannot support such hypothesis. "There is an extensive inconclusive literature about the effects of polygamy on the total birth rates of Muslim Communities. One thing is clear—in Muslim societies it does promote opportunities for marriages of all females—single, widowed and divorced."¹³

Even if there is conclusive evidence that polygamy does promote high birth rates, its effect would not be of long-term importance in Kenya where this form of marriage is on the decline not only among the Muslim community but also among the non-Muslim community. Among others, it was this fact which persuaded the Kenya Commission on the Law of Marriage and Divorce to advise against taking any steps to prohibit polygamy by law. "We think polygamy will die out and it is in the national interest that it should. Rising standards of living and the cost of bringing up and educating children will, almost certainly, contribute to this end. Diminishing land reserves and increased mechanization in farming will tend to remove the traditional rural justification for it. Furthermore, the education and emancipation of women, a process already under way, will, we think, mean that women will, in the future be less willing to form part of a polygamous household".¹⁴

It has often been claimed that Islamic divorce law contributes towards large families by creating an atmosphere in which women fear divorce if they do not produce children. Typical of such claims is the one contained in the summary report of the Middle East Seminar on Population policy held in Yugoslavia in 1973. "Islamic divorce law, which discriminates against women is a prime target for those seeking to improve the conditions of women in Muslim countries. That many women fear divorce if they do not produce several children, especially boys, contributes to the pressures to bear children and reinforces tendencies towards large families."¹⁵

To our knowledge, to support the above view in as far as Kenya is concerned one can say that under Islamic Law, as it is under customary law, the fact that a woman cannot bear children justifies her husband taking another wife".¹⁶

The Qur'anic teaching of determinism has also been said to be a factor contributing to large families in Muslim communities. In the belief that all things were created by degrees and all things in the lives of men and other creatures are set down beforehand, man is precluded from doing anything to hasten or otherwise influence what is going to happen to him. "In a society where people live on a subsistence level, where they are handicapped by ill-health and ignorance and where a person's station in life is mostly defined by birth, the individual does not have much belief in his ability to shape his

13. *Ibid.*, p. 82.

14. Report of the Commission on the Law of Marriage and Divorce. Paragraph 78. Government Printer, Nairobi, 1968.

15. "In Search of Population Policy: Views from the Developing World", National Academy of Sciences, Washington D.C. 1972, p. 31.

16. Report of the Commission on the Law of Marriage and Divorce. Government Printer Nairobi, 1968. Paragraph 280.

destiny and control his environment in order to get what he desires. It is easier for him to yield to the belief that the control and the satisfaction of his wants and the fulfilment of his wishes lie in the hands of God."¹⁷

More than most factors discussed above, the belief in determinism among the Muslim community in Kenya as much as elsewhere plays a great part in creating attitudes and bolstering conditions which are conducive to large families.

Having now briefly discussed some aspects of Islamic Law which have been regarded as creating tendencies towards large families, we shall now look at the attitude of Islamic Law to control of population growth. We shall first examine the sources of Islamic Law.

ISLAMIC LAW AND THE REGULATION OF BIRTH RATES

Among the churches which have taken a stand to regulate or reduce the birth rate is the Roman Catholic Church whose view was summarized by Pius XI in the encyclical "Casti Connubii" (1930)—"Any use whatsoever of matrimony exercised in such a way that the act is deliberately frustrated in its natural power to generate life is an offence against the law of God and of nature and those who indulge in such are branded with the guilt of a grave sin". At the same time he upheld the legitimacy of periodic abstinence under certain circumstances as a means of child spacing and family limitation—"Nor are those considered as acting against nature who in the married state use their right in the proper manner although on account of natural reasons either of time or of certain defects new life cannot be brought forth."¹⁸

This teaching, reaffirmed by Pius XII in 1951, was reiterated as a norm in 1964 in the wake of continued controversy when Pope Paul VI remarked, "Let us say in all frankness that so far we do not have sufficient to regard the norms laid down by Pius XII on this matter as superseded and therefore no longer binding. So these norms must be considered valid until we may feel obliged in conscience to alter them. In a matter of such importance it seems right that the Catholic should desire to follow one single law propounded authoritatively by the church. So, it seems advisable to recommend for the present that no one should arrogate to himself the right to take a view differing from the norm now in force."²⁰ And on 25th July, 1968 was published the encyclical on Regulation of Births (Human vitae) of Pope Paul VI prohibiting artificial means of birth control.

Now to Islamic Law. Islamic Law is derived from the Qur'an 'Sunna' (i.e. the words and deeds of Prophet Muhammad (May Peace Be Upon Him), Ijma (i.e. Catholic Consent of the Community) and Qiyas (i.e. analogy).

In certain matters the Qur'an and the 'Sunna' have laid down clear and categorical injunctions and prescribed specific rules of conduct. In such

17. Sania Hamady, "Temperament and Character of the Arabs," New York. Twayne Publishers, 1959, p. 222.

18. Act Aps 22 (1930) 560.

19. Ibid., p. 561.

20. *L'Intenzione Checqui*, Act Aps 56 (1964), pp. 588-589.

matters no jurist, judge, legislative body not even the 'Ummah' (i.e. the Muslim Community) as a whole can alter the specific injunctions of the law or the rules of behaviour expounded by them. Says the Qur'an:

"It is not for the faithful man or woman, to decide by themselves a matter that has been decided by Allah and His Messenger, and whosoever commits an affront to Allah and His Messenger is certainly on the wrong path."²¹

Except for the express prohibition of abortion in the Qur'an, a question which will be discussed later, and the apostolic tradition usually cited in support of coitus interruptus, Islamic Law is silent on the wider question of birth control by family planning or the use of contraceptives. In discussing measures to regulate birth rates, therefore, one examines the other two sources of Islamic Law, viz. the Catholic consent of the Community and analogy to see whether they throw any light on the licitness or otherwise of these measures.

Ija (i.e. the doctrine of Catholic consent) came into force before the end of the first two hundred years of Islam. In effect it was the agreement of the Ulama' or doctors of Islamic Law in certain regions and itself became the subject of a tradition from the Prophet (May Peace Be Upon Him) to the effect that his Community would not agree on an error.

Ijma is arrived at through 'Ijtihad' which word literally means "to put in the maximum of effort in performing a job but technically it signifies maximum effort to ascertain, in a given problem at issue, the injunction of Islam and its real intent."²²

The purpose and object of 'Ijtihad', Maududi points out, is to understand the Divine Law and to impart dynamism to the legal system of Islam by keeping it abreast of the changing conditions in the world. But before one can exercise Ijtihad he must have;

- (a) Faith in the Shariah and conviction of its truthfulness and to have no desire to act independently of it.
- (b) A proper knowledge of the Arabic language, its grammar and literature because the Qur'an has been revealed in this language and the means of ascertaining the 'Sunnah' also depends upon this medium.
- (c) Acquaintance with the contributions of the earlier jurists and thinkers of Islam. This is necessary not merely for training in the exercise of Ijtihad but also for the sake of ensuring continuity in the evolution of the law.²³

Ijtihad can acquire the force of law through consensus of opinion by the learned men of the Community, the Ijtihad of an individual or group may be adopted by people as in the case of the acceptance by large numbers of Muslims of the Hanafi, Shafei, Maliki and the Harbal Schools of Law. In

21. Sura 32:36.

22. Maududi, "The Islamic Law and Constitution," Islamic Publications Ltd. Lahore, Dacca, 1969, p. 73.

23. See Maududi, *ibid.*, on the question of Ijtihad.

addition, an institution may be empowered in an Islamic state to legislate and it may enact a particular piece of Ijtihad in the form of law.

The doctrine of the Catholic consent remains of enormous importance, it being one of the hopes of the Islamic system today in many of its attempts to keep up with a changing world.

'Qiyas', (i.e. analogy) the last of the sources of Islamic Law, consists of application to a matter with respect to which there is no clear guidance, a rule or injunction available for some similar matter.

In considering this question of Ijtihad as far as Kenya is concerned one sadly notes that the quality of Islamic teaching imparted to its adherents is not conclusive to the creation of searching minds. In this country, Islamic education is mainly offered in 'Madrasas'²⁴ and students who attend them are normally in their early ages.

One of the main shortcomings of these schools is that they are not centrally administered, one result being that they have no common syllabus so that the content of the teaching depends very much on the training received by teachers in them. Of course, the quality of teaching in some of them especially in Mombasa, Lamu and Mambui is remarkable. In most other parts of the country it is not uncommon to find students just reciting the Qur'an without understanding the meaning of what they recite. In these 'Madrasas' the Arabic language, so vital for a full understanding of the Qur'an and most works on Islam, is not taught.

However, measures are being undertaken to persuade these 'Madrasas' to use a common syllabus which will offer the Arabic language as well as other Islamic subjects

Islam is also taught in secular schools to Muslim students but even here the product depends on the training received by whoever is teaching the subject since the Ministry of Education does not require the teacher of Islam to have some particular proficiency in the subject.

Islamic religious knowledge is also offered as a subject by the East African Examinations Council for those candidates taking the East African Certificate of Education. But the subject is also optional so that no special steps are taken to ensure that it is well taught in the schools whose students take the subject in their examinations.²⁵ The examination syllabus includes a study of the development of Islamic Law, its sources and major principles. The contribution of Islamic thinkers such as al-Ghazali is also examined, and the problems of modern Islamic legislation and attempts to reform the Islamic society in various countries are dealt with. The syllabus includes a section on the 'Hadith' (Saying of the Prophet, May Peace Be Upon Him): its importance for both religious and legal purposes in Islam. 'Hadith' and 'Sunna' as a major source of Islamic law and doctrine and how they were collected are the other questions dealt with in the syllabus.

On the face of it this syllabus covers what aspects of Islam are necessary

24. Schools built by local Muslim communities for the sole purpose of teaching Islam.

25. E.A. Examinations Council, E.A.C.E. Regulations and Syllabuses, 1974, E.S.A Bookshop, Kampala, p. 57.

to equip Muslims with analytical ability basic to the exercise of Ijtihad but, as in 'Madrasas', the quality of the teaching depends on who teaches the subject.

As early as 1936 the movement for birth control succeeded in getting a 'Fatwa' (the opinion of the 'Ulama' on a point of Islamic Law) from the Mufti of Egypt, permitting the use of preventive measures, and in 1952 the former rector of the Cairo Al-Azhar University announced that he was in favour of birth control. More recently, Sheikh Abdulla, Al-Qalqili, the Grand Mufti of Jordan has given an opinion in favour of family planning.²⁶ Though the Grand Mufti starts by stating that the purpose of marriage is procreation, he goes on to state that this is conditional upon the availability of means and ability to bear the costs of marriage and meet the expenses of child education and training, so that children may not go to the bad and develop anti-social ways. And according to Islamic law, marriage should be disallowed if the would-be husband is incapable of meeting the expenses of married life. To this, reference is clear in the Qur'an:

"And let those who do not find a match live in continence until God make them free from want out of his bounty."

One drawback to the influence of these 'Fatwas' in creating attitudes favourable to the measures designed to influence the population growth rates in Kenya stems from lack of their publicity. Not only have the majority of Kenya Muslims never heard of them, but more surprisingly, even the Sheikhs with whom we discussed this question. Despite this, most of them arrived at conclusions a lot similar to the 'Fatwas' given above and in doing so they proceeded on various principles of Islamic law such as the avoidance of hardship, the need for balance and the claims of equity.

The only factor which, they conceded, justifies the taking of measures to control the birth rate is the health of the mother. In their view, birth control practised from no health reasons or merely for the sake of preserving the beauty of the figure or as a means of escape from the responsibility of bringing up children is 'Haram' or forbidden. Indeed, birth control practised because of poverty and because of no health reasons is not accepted by the laws of Islam because both government and society are required to look after the propagation of their members in order that the society should become strong, powerful and great in the eyes of other nations.

The other drawback to the efficacy of these 'Fatwas' is the fact that they are binding only on the Muslims of the region in which they have been enacted.²⁷ However, as pointed out above these Fatwas can be adopted by Muslims of other regions and this is the case in East Africa.

To date, many Fatwas can be cited in support of measures being initiated by Muslim nations to regulate birth rates. However, it is important to note that because Islam does not have the hierarchical structure of the Roman

26. "Muslim Attitudes. Towards Family Planning", The Population Council, New York, 1972, p. 3.

27. Tayimmua, Fatawa, Vol. 1, p. 406, Matb'a Kurdistan-al-Ilmiah, Cairo, 1326 A.H.

Catholic Church the above Fatwas have been the subject of widespread controversy. One of the many Muslim scholars to oppose birth control is the Rector of the Cairo Al-Azhar University, Rahman Tag, who said that "Islam forbids artificial insemination and birth control. The Constitution stipulates that the family is the basis of society. The foundations of the family, the Constitution continues, are religion, morality and patriotism. Now, artificial insemination and birth control are the ruin of the family and thus of society."²⁸

To date the most articulate opposition to birth control from a Muslim scholar comes from Abdul A'la Maududi who takes the social and economic organization urged by the Islamic doctrine as the context within which the necessity of birth control should be considered. "The Islamic culture strikes at the roots of the materialistic and sensate view of life and eliminates the motivating forces that make man abstain from fulfilling one of the most fundamental wages of human nature, that is, of procreation. As already seen, birth control is not an unavoidable demand of human nature. It is a product of certain cultural forces, of a peculiar social circumstance, of a value-pattern that makes man obsessed with his personal comforts and pleasures to the neglect of the needs of the society and the race. From this it can be legitimately inferred that if a people have a different social-cultural set-up and if the forces and conditions that led to the social movements of birth control in the Western society do not obtain amongst them the occasion for such a movement will not arise."²⁹

By forbidding usury and interest, disallowing monopoly, forbidding speculation and gambling, discouraging hoarding and introducing such institutions as 'Zakat',³⁰ Islam, Maududi argues, has remedied the ills that have been responsible for economic dislocation and disparity in the Western society and for raising a system of economic exploitation of the many at the hands of the few.

The ethical teachings of Islam require man to lead a simple and morally chaste and unblemished life. Islam declares unlawful all forms of social misbehaviour including drinking, fornication, adultery and other sexual vices. It discourages idleness and waste of time in useless pursuits and places. Islam wants man to live a balanced life—balance between work and rest; effort and enjoyment, material and moral, individual and social aspects of life. "Eat and drink but be not prodigal, LO! Allah loveth not those who exceed the limits"³¹ is the Qur'anic injunction.

Islam's approach to spending is that wealth is a trust and should be spent only where necessary and up to an extent that is desirable. In the matter of dress, housing and procuring comforts of life, one should exercise restraint and spend within reasonable limits. From the teachings above, Maududi argues that "That is how not only through moral training and spiritual

28. The "Al-Ahram," April 23, 1956.

29. Maududi, "British Control", Islamic Publications, Ltd. Lahore, Dacca, 1968, p. 80.

30. State acquisition of a part of the wealth above a certain limit in cash or kind at a fixed percentage per annum, and its distribution in the society for social welfare and public good.

31. Sura 7:31.

education but also through a set of social, moral and economic regulations and directive principles Islam strikes at the roots of immorality, extravagance and insatiable hunger for luxury and lust—the hall-marks of a society that takes birth control, as was done in the West".³²

The main thrust of Maududi's contention is founded on a just Islamic economic system and it is within such a system that birth control is, in his view, irrelevant. However, one wonders whether such an economic system obtains in any Muslim nation or a non-Muslim nation for that matter. As for the Muslim nations of the Arab world, it is only recently that governments in these nations have begun to spend the large incomes derived from oil and other national resources for public benefit. And in the Pakistan of a few years ago, it is now a matter of public knowledge that a handful of families dominated the entire economic system.

Elsewhere in the world, Muslim communities exist in the midst of economic systems that incorporate all the elements which are either disallowed or alien to the Islamic economic system. Maududi's argument is that birth control does not have a place under the Islamic economic system which, by striking out the causes of economic exploitation of the many at the hands of the few, leads to the diffusion of wealth and the well-being of the whole community. But this economic system does not obtain in its true form in any Muslim or even non-Muslim country today. For this reason, therefore, it is no longer proper to discourage birth control on this ground alone.³³

Another objection to family planning is that when its methods become widely known there will be a spurt in illicit relations because the fear of illegitimate births would have been eliminated. "The practice of birth control on a vast scale has provided a great impetus to illicit relations. Besides fear of God and the sense of accountability on the Day of Judgement two other factors have helped mankind—particularly the women folk in maintaining a high standard of morality: first their innate modesty and secondly the fear that an illegitimate child will bring them disgrace in society. The new outlook generated by 'modern civilization' has deprived a large number of women of their sense of modesty and moral uprightness. The social climate in which she breathes is permeated with illicit sex. Night-clubs, hotels, theatres, cinema houses, dance and music halls are the 'cathedrals' of this culture."³⁴

Another Muslim scholar who has expressed fear of the effects of birth control devices may have on the morality of the people is Mr. Muhammad Sha-hidullah of Pakistan. In this connection he says, "In the interest of Pakistan, I should say that contraceptives should not be supplied to each and everyone, nor any contraception operation be performed without the advice of a responsible officer of the family planning centre. Neglect of this precaution may encourage sexual immorality in society. Sexual anarchy in

32. Maududi: "Birth Control", Islamic Publications, Ltd. Lahore, Dacca, 1968, p. 83.

33. *Ibid.*, p. 37.

34. *Ibid.*, p. 37.

Europe and America owing to the unrestrained use of contraceptives should be an eye-opener for Pakistanis.”³⁵

Although the Sheikhs with whom we discussed this question expressed views similar to the ones above, the solution lies in preventing the evil deed rather than opposing birth control. Today adultery is committed in Muslim communities in Kenya as much as elsewhere and the adulterers always find a way of doing it. Therefore, measures should be adopted to eradicate the evil. Pointing out the futility of the fears expressed in regard to the effect of birth control devices on the morality of Muslim communities, Khalifa Abdul Hakim, in his article “Islam and Birth Control”³⁶ argues that “. . . necessary reforms in the life of man cannot be shelved simply because of the danger that some people will take undue advantage of them. The government, keeping in view the good of the people, levies control upon the export, import or purchase of certain articles. But it provides occasions for black-marketing. The government, however, does not lift control out of fright from profiteers. Every type of control will be subjected to the same type of conditions, whether it is price control or birth control.”

There is no text in the Qur’an or the apostolic tradition which makes mention of contraceptives used as a means of birth control. This is because the pill did not exist when the Text was revealed. But what is important is the setting forth of the attitude about contraception and, by analogy everything that has the effect of stopping pregnancy, as a preventive measure, is permitted. In answering the question whether a man or his wife have a right to take some scientific measures to lengthen the intervals between pregnancies so that the mother can have rest and regain her health and the father would not be under health, economic or social stress, Mr. Muhammad Abdul Fattah el Enari, Chairman of the Fatwa Committee, Azhar University, replied “The use of medicine to prevent pregnancy temporarily is not forbidden by religion especially if repeated pregnancies weaken the woman due to insufficient intervals for her to rest and regain her health. The Qur’an says “—Allah desireth not hardship for you” (2/12/185). But the use of medicine to prevent pregnancy absolutely and permanently is forbidden by religion.” In a written response to a question by the author of this paper, the chief missionary of the Bilal Muslim Mission of Tanzania said more or less what El Enari had said. “Birth control is allowed on the condition that husband and wife are agreed to it and there is no danger to the health of either party or to the health of the child who may be born afterwards.”³⁷ On the strength of this and the views of other Muslim scholars it can be stated that the use of contraceptives to prevent pregnancy for reasons of health is permissible under Islamic Law.

There is also little controversy about the licitness of coitus interruptus as a means of birth control under Islamic Law. The companions of the Holy

35. Sha-hidullah, M., “Family Planning and Islam”, paper presented at the First Indian Ocean Regional Conference. I.P.P.F. Dacca, East Pakistan, January 1962.

36. Muhammad Pulvarvi, “Birth Control” Lahore, Pakistan. June 1959.

37. In a letter to the author dated October 3rd, 1974.

Prophet (May Peace Be Upon Him) according to Jabir (R) practised it and the Prophet did not prohibit it. "We used to practise 'azl' (Coitus interruptus) while the Qur'an was being revealed (Buk-hari and Muslim)." Muslim adds after it, "When the information reached the Prophet (May Allah grant him blessings and peace) he did not forbid it." It is clear that they practised it to prevent conception. But it should only be practised with the consent of the wife.

Castration has been prohibited in Islam, so permanent destruction of the power of procreation in a man or a woman should not be allowed. Permanent sterilization should only be allowed in case of persons suffering from incurable mental, hereditary or contagious diseases or when a woman is not fit for pregnancy.

If husbands and wives manage to take preventive measures of contraception bearing in mind their conjugal obligations and their duty as parents the problem is solved. But if through any kind of negligence they find themselves faced with a *fait accompli* (i.e. pregnancy) the question arises whether Islamic Law should allow them to resort to abortion.

Al-Ghazali, the most original thinker Islam has produced and its greatest theologian analysed this problem and stressed the great difference between 'Azl' and abortion. 'Azl' has nothing to do with abortion. Abortion is a crime carried out against a being that is already an actual life. This being passes through successive stages that begins with a drop of sperm reaching the wife's womb and receiving the first breath of life. It is a crime to put an end to this existence that is scarcely beginning. But when the first cell is transformed into a bit of flesh, then foetus, then crime is still more serious. If the soul penetrates this body which is taking on its true form the crime is even more grave."

This does not alter the fact that certain 'Ulama' have authorized abortion but before the foetus has reached the age of 4 months. Still it is necessary for such an abortion to be motivated by worthwhile reasons. On the other hand, the 'Ulama' are unanimous in forbidding abortion after the fourth month. If an abortion takes place after that age, it is considered a veritable assassination and is judged by Muslim jurists as such. But Muhammad Naciri, Professor of the History of Islamic Legislation at the University of Mohamed V. Rabat, takes the permissibility of abortion under Islamic Law a step further when he says that "—if it is established that the continuance of pregnancy, even when the foetus has reached an advanced age, may lead to the death of the mother and that abortion constitutes the sole means of saving her from danger, then in that case, abortion is called for. The mother cannot be sacrificed for the child."³⁸ Naciri's view constitutes a departure from the views generally held by 'Ulama' and other Islamic scholars and whether it is gaining popular acceptance is a question which only time and further inquiry can answer.

38. In a speech at the National Seminar on Family Planning, Rabat, Morocco. October 11-14, 1966.

Having looked at Islamic Law and its stand on the question of regulation of birth rates, attention will now be directed towards the Muslim countries and communities to examine whether their programmes are in accord with the Islamic position as stated above.

REGULATION OF BIRTH RATES IN MUSLIM COMMUNITIES

In Muslim countries today efforts are being made to relate the injunctions of Islam to the demands of modern society. This has necessitated a re-interpretation of, or a change in the Sharia. Thus, the Ottoman Law of Family Rights promulgated in 1917 forbade the marriage of boys and girls who had not reached the age of puberty. The legislation was based on the humanitarian ground that it is pathetic that a child who should be playing happily should be made to perform the heaviest of duties: the bearing of children and the management of a home.

In other countries such as Egypt, the Sharia has been left unaltered but the courts have been forbidden to entertain certain actions.

In Muslim countries today family planning and birth control programmes are supported by governments. In Tunisia, family planning programmes have been extended in an effort to contain the population and to enable as many people as possible to avail themselves of contraceptives; the government has eliminated the prescription requirements of oral contraceptives.

Tunisia is among the first Muslim states to deal with the question by legislation. The Amended Abortion Law³⁹ decreed by President Bourguiba in 1973 declares that induced abortion is authorized during the first three months of pregnancy provided it takes place in a hospital or other authorized clinic by a qualified physician.

After three months, the decree goes on, interruption of pregnancy is possible when the physical or mental health of the mother is endangered by the continuation of the pregnancy and also whenever the unborn child may be harmed or deformed. In such a case, the mother must enter a medical institute before the operation. This abortion can only take place on production of a signed certificate from her doctor to the doctor called upon to perform the operation.

This decree is contrary to what is taken as the Islamic position on abortion in the following ways:

1. It does not specify for what reasons an abortion may be performed. Under Islamic Law, the only reason justifying an abortion within the first three months of pregnancy is the health of the mother, but the decree would allow abortion for social reasons (whatever these are!).
2. Except for the view of Professor Naciri, no Muslim jurist or scholar has supported abortion after the fourth month.

Iran, following on the footsteps of Tunisia, has permitted abortion for social as well as medical reasons.

39. I.P.P.F. Medical Bulletin 8 (2): April 14, 1974.

This apparent liberalization of Islamic position has been possible where Governments have taken a dynamic interest on the question of relating the Sharia to the present-day conditions. In non-Muslim countries Muslim communities have not had the benefit of such dynamic leadership so that most individuals have been left to cope with problems arising out of Islamic Law as best as their conscience dictate. Such is the fate of the Muslim community in Kenya.

In Kenya, however, one fails to understand why this state of affairs should exist, since Islamic Law forms part of the law of the land though restricted to "the determination of questions of Muslim law relating to personal status, marriage, divorce—".⁴⁰ The Chief Kadhi or his representative, should avail himself of the opportunities he has over the radio, through meetings, etc., to educate Muslims, for whom he is the appointed leader, on the questions of family planning, birth control, abortion, etc. As it is now, Muslims faced by such problems act on the strength of what they think is in their best interest.

CONCLUSION

At this point, it can be said that while Muslim opinion is not unanimous on the morality of efforts to regulate birth rates, the weight of Islamic scholarship supports the licitness of temporary measures to prevent contraception within the limits discussed in this paper. In view of this and despite the fact that Muslims in Kenya have not taken a clear stand on this question, it can be said that Islamic Law will not pose any major hindrance to the efforts to regulate population growth rates. This view is lent support by the Egyptian experience with family planning which shows that obstacles to action on high fertility are to be found on the side of motives and not means. The economic and social organization of the family, the general illiteracy and lack of education of the women, the poverty of the masses are, in the last analysis, the real obstacles to the diffusion of birth control.⁴¹

However, since illiteracy, lack of education of women, and poverty of the masses are factors not peculiar to the Muslim community in Kenya, it is to be hoped that the degree of acceptance of measures to regulate the birth rates among the Muslims will develop at a pace similar to the acceptance of these measures by the rest of the Kenyan Society.

40. S. 5 The Kadhi Courts Act, 1967.

41. Mohmoud Seklani, "La Fécondité Les Rays Arabes: Données Numériques, Attitudes et Comportements," *Population*, Vol. 15, No. 5 October-December, 1960, pp. 831-856 at p. 855.

The Right of the Unborn Child and Minors

O. K. MUTUNGI*

INTRODUCTION

One need not be a specialist in demography, nor indeed a moralist, to understand that a discussion on population control (family planning) is another phrase for "tailoring population members in an attempt to achieve the best of life both at the family and national levels".

"... measures and programmes designed to contribute to the achievement of economic, social, demographic, political and other collective goals through affecting critical demographic variables, namely the size and growth of the population, its geographic distribution (national and international) and its demographic characteristics".¹

A not very sophisticated member of the Roman Catholic denomination put it to me thus:

"All this unchristian talk about population control and family planning is nothing more than an expression of the worst type of selfishness: sacrificing life for 'good life'."

Whether or not that is what the whole complexity of population control is about may be of little moment. But the clergyman's reactions hint at one of the critical points of disagreement with respect to family planning and population control, which have been used to justify abortion and infanticide:

"We were not ready for a baby yet; the baby would have been born unwanted because of rape, incest; the pregnancy had to be terminated for the health of the mother etc. etc."²

This paper is not concerned with the morals or otherwise of all or any of these activities or justifications. However, from the above quotation, it seems clear that in the actors' (whether an individual or a given community) conscience, there looms a feeling that something either legally or morally unsound has been, or is about to be committed. Hence the attempt for a justification.

The truth seems to be that in the broad mechanics of population control, whether through family planning in its varied devices or through abortions, someone's rights are either violated or threatened with violation. And one can trace these rights as far back as pre-conception. For instance, with the

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1. U.N. Economic and Social Council, Population Commission in *IN SEARCH FOR POPULATION POLICY*, by National Academy of Sciences: Washington D.C. (1974), p. 86.

2. *Roe v. Wade*, (1973) 410 U.S. 113 (2d) 147; *Bourne*, (1939) 1 K.B. 687.

scientific development of artificial insemination and test-tube techniques, it would seem that the world is in for a major re-examination, and the necessary anticipatory precautions have to be embarked upon at the earliest stages possible. With the above developments, if they are perfected, it is clear that a woman might have an egg removed from her ovaries, fertilized in a laboratory and implanted in a paid "foster mother".³

If an infertile husband agrees to his wife's being made pregnant with sperm donated by another man, the child is technically, and legally, illegitimate.⁴ And unless the nations come up with measures to control the possible abuses of commercial sperm banks and test-tube baby techniques, long-term sperm banks in which sperms can be stored in liquid nitrogen virtually indefinitely, could complicate the issue. Children could be born by artificial insemination years after their fathers are dead; and a woman could remarry after the death of her first husband but still have a child by him to create, for example, a legitimate heir.⁵

All these would raise the question as to whether a child should not have a right to a legitimate birth (if at all he has to be born)⁶ or whether the parents, or one of them, or even the society as such, should have a right to bring about the existence of the child under such legal conditions and implications.

I doubt whether any participant in this conference can hotly dispute the proposition that every person is zealous in the protection of his/her legal rights—property rights; liberties; and most important of all the right to preserve one's health and therefore, life. However, the paradox seems to be that while we treasure our legal rights so much at the adolescent stages, there is very little articulation, indeed, attention to, our rights at the stages when we most need protection and legal nurture. I speak of the unborn child and infant stages of human life.

This paper attempts to examine, howbeit inadequately, some aspects of the legal rights of minors from the early stages of the defenceless foetus through the physically and economically dependent stages of growth to the age of majority. For in the author's opinion, it seems naive for a community to grant legal protection in some stages of one's life-span and not to the entire continuum.

Take for instance, what does it benefit a person to know that he is protected against unjustifiable personal injuries as soon as he is born when the absence of such protection during his pre-natal stages may result in his never appreciating those rights because of deformity or mental underdevelopment associated with conduct of others during the pre-natal period; or that he might not have been born altogether (because abortion is not effectively controlled in law).

It seems that the rights of infants are not only ignored at the pre-natal

3. "Have a Pop Star For a Father?" in Sunday Express report, 1st September 1974, p. 17.

4. Ibid.

5. Ibid.

6. It has been argued in *Gleitman v. Cosgrove*, that every person has the right not to be born.

stages but are ill defined and overlooked even at very late stages. Three instances of this deliberate side-stepping of infant's rights at late stages are in matrimonial proceedings; under the law of evidence; and the parental/teacher powers over the child (*infra*).

PART A

WHEN LIFE BEGINS

Virtually all legal systems (Kenya's included) recognize and grant rights to all "persons"; and the term person is used to include non-natural persons like incorporated companies.⁷ So, as soon as we say one is a "person" in law, then all the legal rights attach to him. The problem then turns on when, in the life span of a human being, the foetus acquires the status of "a person in law?"

Thus, the question "when life begins" seems to be the springboard of most of the issues in this field. And as naturally expected, opinions are far from being in agreement on the point. Ethicists hold that human life begins at conception, or no later than that point a few days later (blastocyst) when the question of whether one or more persons will be produced has been irreversibly settled.⁸

A protestant theologian, Paul Ramsey, has argued that medical research supports the position of those who would impute full human dignity even to the non-viable foetus:

"Genetics teaches us that we were from the beginning what we essentially still are in every cell and in every—attribute. Thus, genetics seems to have provided an approximation, from the underside, to the religious belief that there is a soul animating and forming man's bodily being from the very beginning".⁹

However, not all ethicists will buy this. And the following middle way approach seems to carry the consensus:

"The foetus, therefore, at least from blastocyst, deserves respect as human foetal life".¹⁰

This view seems to be backed by scientific research and finding that human development is a single, continuous process from the fertilization of the ovum to the achievement of adulthood. On this basis, it would be arbitrary and irrational to choose a given point in the continuum (whether the detection of a foetal heartbeat, or quickening or viability or birth) and regard it as the beginning of human life.¹¹

The Roman Catholic Church, a strong opponent of the destruction of any human life is not, as might otherwise be expected, all that agreed on the

7. See The Constitution of Kenya Act, 1969, (No. 3 of 1969), s. 123 (1) and Interpretation and General Provisions Act Cap. 2 (Laws of Kenya s. 2 (24)).

8. See THE ABORTION DILEMMA (ed.), by R. E. Cooke; A. E. Hellegers; R. G. Hoyt; H. W. Richardson: Bantam Books Inc. New York (1968) p. 84.

9. Ibid., p. 85.

10. Ibid.

11. Ibid.

issue. For example, Father Richard A. McCormick S. J. has propounded a theory which is preferred by a notable number of catholic philosophers and theologians. This view holds that the soul is not infused at conception but rather at some later point, perhaps when the body develops recognizable human characteristics. The Catholic Church, he says, has never settled the theoretical question definitively.¹² In practice, however, official Catholic policy forbids abortion at any point, both because in the absence of certainty the presumption must be that the foetus is a human person, and because, even if the presumption is false, the embryo constitutes the necessary material for the infusion of a soul.¹³

It is unfortunate that no generally accepted proposition can be reached with regard to this most important issue of "when life begins". And depending on the view taken on this question different stands are understandable and divergent practical conclusions are naturally expected. For example, from the ethicists' standpoint (*supra*), it is difficult to accept that every abortion is homicide, much less, murder.¹⁴ Pursuant to the stand that life does not begin until "the foetus is born" the American Civil Liberties Union holds that the decision to have an abortion is a private decision in which the state should not interfere. On this view, it is a civil right of a woman to seek to terminate a pregnancy; a doctor likewise has the right to perform or to refuse to perform an abortion, without the threat of criminal sanctions.¹⁵

LEGAL PERSON: IN CIVIL LIABILITY

Important as the issue of "when life begins" may be, it seems evident that agreement on the matter is not easy to come by. However, this opinion-torn issue need not unduly delay our coming to grips with the major problems. For in the author's view, and for the purposes of this paper, the core of the problem is not so much when life begins, but when a given legal system will clothe that life with the status of a person worthy of protection. And this seems to be the practical approach adopted by some states in the United States of America.

Thus, in the State of Louisiana, it has been held,¹⁶ that a viable child *en ventre sa mere* was a person in contemplation of the law and so entitled to the benefits of Article 954 of Louisiana Civil Code which provided:

The child in its mother's womb is considered as born for all purposes of its own interests; it takes all successions opened in its favour since its conception, provided it is capable of succeeding at the moment of its birth.

Consequently, the court held that either or both parents of a child whose death, three days before birth, is caused by the negligence of another, by reason of injuries inflicted before birth, and at an advanced stage of

12. *Ibid.*, at p. 86.

13. *Ibid.*

14. *Ibid.*

15. *Ibid.*, p. 96.

16. *Cooper v. Blanck*, 39 so (2nd) 352 (La. App. 1923).

pregnancy of the mother shortly before parturition, have a right of action for damages as having survived to him and for the loss of their said child, as conferred upon them directly under the terms of the article.

In another American case,¹⁷ it was alleged that the Plaintiff received pre-natal injuries caused by the alleged negligent operation of a motor car by the Defendant which caused it to collide with the car in which the Plaintiff's mother was riding while pregnant, which resulted in plaintiff being born with a deformed right foot, right ankle and right leg.

Giving judgement for the Plaintiff, the Judge said:

"At what particular moment after conception, or at what particular period of the pre-natal existence of the child the injury was inflicted is not controlling because in general, a child may be considered as in being from the time of its conception where it will be for the benefit of such child to be so considered. While we realize that cases such as this may present extreme difficulties of proof, we are not concerned with that question here. If a child, born after an injury sustained at any period of its pre-natal life, can prove the effect on it of a tort, it would have a right to recover."¹⁸

In England, and Kenya, there exists no such clear statements on the issue. But from the common law and cases, it is evident that the unborn child may recover for pre-natal injuries. However, difficulties exist in formulating the rights/duties of the unborn child and the third party, respectively. Take for instance, the tort of trespass under Kenya Occupiers' Liability Act.¹⁹ Under occupiers' liability an occupier of premises²⁰ owes no duty of care to trespassers, except for intentional harm to the trespasser after the occupier becomes aware of the former's presence.²¹

If the occupier must be aware of the trespasser on the premises before any duty of care can attach for intentional harm, then problems arise with respect to unborn children. Suppose a pregnant mother is a trespasser, is the child in her womb a trespasser too? The problem here arises from the physical identification of the mother and the foetus.

It therefore appears that liability for pre-natal injuries to the child should depend on liability to the mother. That is to say that whenever there is liability at common law to a mother for an act or omission which causes pre-natal injury, the child should be entitled to recover damages.

TORTFEASOR TAKES HIS VICTIM AS HE FINDS HIM²²

The other approach enabling the unborn child to recover under Common Law is by the application of the "thin skull doctrine":

17. *Hornbuckle v. Plantation Pipe Line Co.*, 93 S.E. (2nd) 727 (Ga. 1956).

18. Citing, *Marrow v. Scott*, 7 Ga. 535, 537.

19. Cap. 34 (Laws of Kenya).

20. Premises are defined to include: vessels; vehicles, and aircrafts; *ibid.*, s. 2(3)(a).

21. *Bakaboneki v. Bunyoro Districts Administration* (1970) E.A. 310.

22. For detailed analysis of this, see: LAW COMMISSION REPORT ON INJURIES TO UNBORN CHILDREN (LAW COMMISSION No. 60) Comnd. 5709, herein-after referred to in footnotes as "LAW COM. No. 60".

"The test is not whether these employers could reasonably have foreseen that a burn would cause cancer and that he would die. The question is whether these employers could reasonably foresee the type of injury he suffered; namely, the burn. What in the particular case is the amount of damage which he suffers as a result of that burn depends upon the characteristics and constitution of the victim".²³

There are two ways in which this rule that a tortfeasor takes his victim as he finds him could affect a claim for damages for pre-natal injury. The first one is in cases where the birth of a child with some slight disability was a foreseeable result of a defendant's negligence; the child might be born with a serious disability because of an unknown and unforeseeable weakness in the foetus.²⁴ The second case is in those instances where the mother might herself be injured in circumstances in which it was foreseeable that she might suffer some injury; as a direct but unforeseeable result of her injury she might bear a child with disability.²⁵

In both instances, the child should be entitled to recover full compensation for the disability. In the words of Lord Parker (*supra*), "the characteristics and constitution" of a female tort victim should include the fact that she is pregnant and that if injury is caused to the foetus she is bearing, that injury is properly equated with unforeseeable personal injury caused to the woman herself.²⁶

WHO IS LIABLE FOR PRE-NATAL INJURY TO UNBORN CHILD²⁷

In most legal rules, exceptions to the general rule are not uncommon for whatever reasons. The general rule here should be that everyone who causes pre-natal injuries to the unborn child is liable. Thus framed, the rule would include the mother of the child. However, when all has been said and done, there is a case for examining whether the rule should embrace the child's mother. And the Law Commission Report of 1974, on Injuries to Unborn Children, recommended that the mother be excluded from the general rule of liability.

The reason for recommending this exception for the child's mother is that love and other sociological factors are not always congenial bedfellows. The relationship between a mother and her disabled child is one that is very distressful and to add a legal liability to pay compensation may increase the tension already existing between the child and the mother to the probable further detriment to the former.²⁸

Legal Person: Under Criminal Law

"It is not murder to kill a child in the womb or while in the process of being born. To be the victim of murder the child must be wholly expelled from the mother's body and it must be alive".²⁹

23. Lord Parker, in *Smith v. Leech Brain*, (1962) 2 Q.B. 405 at p. 415.

24. LAW COM. No. 60, p. 8.

25. *Ibid.*

26. *Ibid.*, at pp. 28-29.

27. For full analysis of this, see LAW COM. No. 60, pp. 21-26.

28. *Ibid.*, p. 22.

29. See J. C. Smith and B. Hogan: CRIMINAL LAW, London: Butterworths (2nd-ed) (1969) p. 182.

This proposition is based on the definition of murder under the common law:

“Murder is when a man of sound memory and of the age of discretion, unlawfully killeth . . . any reasonable creature *in rerum natura*—with malice aforethought. . . .”³⁰

These two Common Law principles have been incorporated in Kenya’s Penal Code³¹ under sections 214 and 203 respectively. Thus, section 214 provides:

A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother.

Under s. 203, murder is committed when any person, who with malice aforethought, causes the death of another person by an unlawful act or omission.

From all this, one concludes that until it is wholly expelled from the mother’s womb, a child is not a reasonable creature *in rerum natura* and therefore it cannot enjoy the legal protection against homicide. And coupled with this criterion of reasonable creature *in rerum natura* is the commonly applied rule that the child must have an existence independent of the mother.³² The tests of independent existence which the courts have accepted are that the child should have an independent circulation and that it should have breathed after birth. However, great difficulties exist with respect to the two tests:

“ . . . it is not essential that it should have breathed at the time it was killed; as many children are born alive and yet do not breathe for some time after their birth”.³³

And according to Atkinson,³⁴ there is no known means of determining at what instant the foetal and parental circulations are so dissociated as to allow the child to live without the help of the parental circulation; and this dissociation may precede birth.

Acknowledging the problems in arriving at a clear-cut answer as to when a child starts independent existence, the relevant portion of the Penal Code of Kenya provides:

. . . whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel-string is severed or not.³⁵

What must be emphasized is that all these uncertainties surround the precise moment at which the child comes under the protection of the law of murder. And this has led to decisions which are incapable of logical analysis. For instance, it has been held that if a child is poisoned or injured in the womb, is born alive and then dies of the poison or injury, this may be murder or manslaughter.³⁶ And in *West*,³⁷ Maule J., directed the jury as follows:

30. *Ibid.*, p. 181.

31. Cap. 63 (Laws of Kenya).

32. See 20 L.Q.R., p. 143.

33. Park, J. in *Brain*, (1834) 6 C. and P. 350.

34. 20 L.Q.R. 143 at p. 145.

35. Cap. 63 (Laws of Kenya) s. 214.

36. 3 Co. Inst. 50.

37. (1848) 2 Cox C.C. 500.

. . . if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living and afterwards dies as a consequence of its exposure to the external world, the person who by her misconduct so brings a child into the world and put it into a situation in which it cannot live, is guilty of murder”.

The contradiction is apparent. To argue that the child is not “a person” capable of being killed until it is expelled from the body of its mother; but that an act committed to it before it is so expelled from the mother which act so incapacitates the child after its birth that it cannot live, constitutes murder, is a logically untenable proposition. One cannot commit an act against a non-existent person.

LESSER THAN THE MOTHER’S LIFE

Involved in the totality of the rights of the unborn child (whether under civil or criminal law) is the problem of balancing the claims of the mother vis-a-vis those of the child, of individuals vis-a-vis the community, and the right to life against equality of life.

Neither the author of this paper, nor this workshop can possibly settle these fundamental issues which hinge on questions of abortion on which beliefs, opinions, biases, points of view on the value of life at varying stages, are the basis of differences.³⁸ And whether these varying viewpoints have or have no basis may not be very important. What should be noted here is that the views are often reflected in most countries’ laws. We are all aware that law frequently discriminates among classes of persons, and often in a somewhat arbitrary manner. For example, in Kenya and the United States of America, everyone who is under 18 years of age has no voting right irrespective of his/her understanding and the development of his/her mental faculties; a husband is dutybound to support his wife regardless of the wife’s sources of income vis-a-vis those of the husband.

All these arbitrary distinctions may be, and seem to have been accepted so far. But law seems to reach the limit of its powers of discrimination when the right to life is in question.³⁹ A legal system which exalts the superiority of a mother’s health over the child’s right to be born creates a hierarchy of rights in which the rights of the living to happiness transcend the rights of the unborn to existence.⁴⁰ And in the author’s view, such system seems to be in a dire need of self re-examination.

Even when the “existence” of the unborn child is legally recognized, the rights (if any) of such child are subject to the rights of the mother and the other children in the family. Thus although section 1 of the Infant Life (Preservation) Act, 1929, (England), prohibits the killing of any child which is capable of being born alive the provision is watered down to virtual meaninglessness as far as the child’s interests go by the proviso therein. This reads:

38. THE ABORTION DILEMMA, *op. cit.*, p. 3.

39. *Ibid.*, p. 94.

40. *Ibid.*, p. 102.

Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.⁴¹

The phrase "for the purpose only of preserving the life of the mother" was given a very wide meaning by Macnaghten, J., in the celebrated case of *Bourne*⁴² when the learned judge said:

"As I have said, I think those words (for the purpose of preserving the life of the mother) ought to be construed in a reasonable sense, and if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother".⁴³

Under the Abortion Act, 1967, (England), the unborn child's interests are not only subordinated to those of its mother, but also to those of the rest of the family. Thus, s. 1 (1) of the Act provides:

Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—

- (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of the family, greater than if the pregnancy were terminated.

Looking at the section as a whole, one feels that there are too many eventualities upon which the pregnancy (which obviously affects the child's interests) may be terminated. Except under s. 1 (1) (b) where termination of the pregnancy would be justified if there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped, very little consideration seems to be given to the unborn child's interests.

In brief, when all has been said and done, the rationale of holding one life (or lives) higher than another (or others), let alone the health (physical or mental) of the existing family members is highly questionable.

PART B

OTHER RIGHTS

Thus far, the discussion has focussed on the controversial topic of the rights (if any) of the unborn child. The author is not unaware that there probably exists enough problems with the already born children, thus leaving insufficient thought about the unborn ones. If this were a sufficient reason

41. Cap. 63 (Laws of Kenya) s. 240 is to the same effect.

42. (1939) 1 K.B. 687.

43. *Ibid.*, at pp. 693-694.

for the hitherto neglected rights of the unborn child, then the immediate question is whether the interests of the already born children (minors) are sufficiently taken care of by the legal system and process.

This question may very briefly be examined under many heads, including such heads as the rights and powers of parents/school teachers to punish (corporally) children without incurring legal liability. In a paper of this nature, only two or so of these heads can be examined. The author has arbitrarily chosen to discuss these other civil rights of minors under two headings; namely: under matrimonial law; and under the law of evidence, with the hope that these two aspects would serve to highlight the deficiencies.

UNDER MATRIMONIAL LAW

In matrimonial proceedings (divorce and separation) most cases seem to be concerned with the husband and the wife, with the children coming in as a consequence—that is who should have the custody after the divorce proceedings have been closed. But even then, in the custody proceedings, the child seems to be treated as though it were an inanimate object; with no right or say on whether to stay with the father or mother or neither. In the author's view, the court cannot do complete justice unless the child is recognized as a necessary, indeed, indispensable party to the proceedings.⁴⁴

“Any one who has a direct personal interest in the decision and whose rights might be adversely affected by the decision is such party.”⁴⁵

And who would be more likely to be adversely affected by divorce proceedings than the child. The divorced father or mother may remarry and be as well off as before, if not better. But the child does not seem to have such juicy option. Whether the parents divorce and remarry or not, the child remains the son/daughter of those very parents:

“Yet, despite the obvious stake that the child has in such matters, the courts and the legislatures have failed to establish his right to representation by counsel, except in juvenile delinquency proceedings”.⁴⁶

This position seems unsatisfactory for it appears that in any court proceedings, there are three types of parties, namely:

- (a) formal parties—persons before the court;
- (b) persons having an interest in the controversy,

and who ought to be made parties in order that the court may act on the rule which requires it to decide on, and finally determine the entire controversy and do complete justice by adjusting all the rights involved in it. These are commonly termed “necessary parties”. But if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice without affecting other persons not before the court, then such parties are not indispensable parties. The

44. See *BEYOND THE BEST INTERESTS OF THE CHILD*, by J. Goldstein; A. Freud A. J. Solnit: Free Press, Macmillan Publishing Co. Inc. New York (1973) p. 65.

45. *Ibid.*

46. *Ibid.*, at p. 65.

third type of parties to court proceedings embraces persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.⁴⁷

It is submitted that children should occupy the third category of parties above, and ought to be represented by counsel/advocate in such proceedings. The presumption that a child's parents are generally best suited to represent and safeguard his interests seems fallacious, at any rate once the child's custody becomes the subject of a dispute between the parents, and a court action becomes necessary as is often the case in divorce or separation proceedings. Nor does it seem correct to assume that if the parents are not the best representatives of the child's interests, the state will be. Often there may be major conflicts of interests between the child's rights; the parents; and the state. Take for instance a case where a divorce is necessitated by the political motive that one of the parties to a marriage contract is a security risk and has to be deported. Or a situation in which one of the parents, in a position of political influence and power, tries to use that political weapon to obtain what he could not legally obtain, namely, a divorce.

In both instances, it seems unrealistic to assume that the child's interests can be looked after by the parents or the state or both.

The stress is on the need for legal representation of children in both divorce and separation proceedings. Only in this way can material evidence be adduced in court to show the needs of the child and how best they may be served. And by shifting the focus of the decision to the problem of meeting the needs of the child, the law would move, as it should, away from making moral judgements or assigning blame on either of the parents; which are, from the child's stand point, irrelevant.⁴⁸

UNDER THE LAW OF EVIDENCE

This is a delicate area and no detailed analysis can be entered into in a paper of this nature and size. Suffice it to point out (as in the preceding sub-headings) some overtly "discriminatory" provisions with respect to children's evidence. The two relevant sections are sections 124 and 125 (1) of Kenya's Evidence Act.⁴⁹

Section 125 (1) deals with competence of witnesses generally and provides:

All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years,⁵⁰ extreme old age, disease (whether of body or mind) or any similar case.

47. *Ibid.*, at p. 155 n.l.

48. *Ibid.*, p. 79.

49. Cap. 80 (Laws of Kenya).

50. In both the Evidence Act, and The Oaths and Statutory Declarations Act (Caps. 80 and 15 Laws of Kenya, respectively) "child of tender years" is not defined. But from *Kibangeny Arap Kolil v. R.* (1959) E.A.C.A. 92 it means under 14 years.

Looking at the subsection the common-sense conclusion would seem to be that once the child has passed the "understanding the questions put to him", test, his evidence would be treated, and given the same weight by the courts, as that of any other witness, including witnesses falling under the two other categories mentioned in the sub-section. But unfortunately, that is not the case. The evidence of a child has been singled out and made to undergo a second test; namely, corroboration.

Section 124 of The Evidence Act of Kenya provides:

Notwithstanding the provision of s.19 of The Oaths and Statutory Declaration Act, where the evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated⁵¹ by other material evidence in support thereof implicating him.

This is a major deviation from the general rule that as a matter of law, the uncorroborated evidence of one witness will normally suffice.⁵²

While appreciating the dangers in accepting just anything that a child of tender years may say, there is need to avoid the danger at the other end of the scale. Take for instance the not far-fetched hypothetical case in which the child is himself/herself the victim of a criminal conduct by a third party. In the first place if the child neither understands the oath, nor knows the truth from falsehood, he/she cannot give any evidence since no amount of corroboration can assist it.⁵³ Where the child understands the nature of oath, he can give sworn evidence,⁵⁴ while if he does not understand the nature of oath but knows truth from falsehood he should give unsworn evidence.⁵⁵

The overall implication of this is the placing of children at the mercy of third party conduct. A child may be molested and receive all manner of cruel treatment without much remedy unless corroborative evidence can be adduced. And such corroborative evidence does not of course include testimony of hundreds of his regular children friends who may have witnessed the commission of the alleged offence.⁵⁶ In other words, under these circumstances, the child's rights would go unvindicated where similar facts, but involving an adult would most probably come out differentially.

CONCLUSIONS

The survey highlights the extent to which the right of the unborn children and minors are articulated and the importance that ought to be given to such

51. Corroborative evidence is evidence particularly implicating accused with the offence charged: See: *Lenton Mkirila v. Republic* (T) (1963) E.A. 96; *Allia; Muyambwa Mande v. Republic*, (1965) C.A. 193.

52. Cross and Wilkings: AN OUTLINE OF THE LAW OF EVIDENCE London: Butterworths (1964) p. 84. The other area where corroboration is required *is* a matter of law is in rape cases.

53. See the recent East African cases of: *Agata d/o Senziku v. Republic*, E.A.C.A. Criminal Appeal No. 134 of 1973 (Tanzania); *Zubairi Buye and Another v. Uganda*, E.A.C.A. Criminal Appeal No. 163 of 1973.

54. Cap. 15 (Laws of Kenya) s. 19.

55. *Ibid.*

56. *Agata d/o Senziku v. Republic*, E.A.C.A. Criminal Appeal No. 134 of 1974 (T).

rights by our legal system. Indeed, the reader will have discovered, through reading the paper, that the unborn children and minors have either no legal rights whatsoever or very few if any; and that throughout the paper reference to "rights" are really what, in the author's opinion, ought to be, rather than what are, such rights.

That opinions as to when life begins are divided owing to either religious, moral, or other differences does not seem to be a sufficient ground for the continued negative attitude in this field. For we seem to have failed to furnish sufficient care and legal protection of the interests of minors even where "when life begins" is not an issue. Giving the custody of a child to an irresponsible parent because the system does not cater for the proper evidence and interest of the minor to be brought out may have as grave consequences upon the minor's development as permitting (whether intentionally or otherwise) third parties wantonly to inflict pre-natal injuries upon the unborn child without any threat of legal liability. The same may be said with respect to illegitimacy, given the current scientific developments in the field of artificial insemination and test-tube baby techniques.

In brief, there seems to be a case for reviewing and reforming not only the laws relating to the interests and rights of the unborn children and minors, but also our attitudes in that respect.

The Political Economy of Population Policies in Africa

E. B. E. NDEM*

PREVIEW

The luxuriant sprouting of population theories in the last two decades, significantly after the Second World War, makes it imperative for the world to take perhaps a more than usual cognisance of it. Demographers, economists, sociologists and others whose disciplines are involved, directly or indirectly in population problems, have been insistent on inviting our attention to the dangers and the inevitable predicament of an uncontrolled population growth. Concern is often expressed over the rate of population growth outstripping, in geometrical dimension (the Malthusian phraseology), economic growth. It has been contended that as population grows without a corresponding rise in the level of investment and therefore, of consumption, the inevitable outcome is a rather bleak socio-economic outlook. Industrial stagnation and the vicious cycle of unemployment and general depression will, ipso facto, follow.†

Following this line of reasoning, Horace Belsham contends:

“. . . But since in any case prospective rates of population growth are likely to be a deterrent to economic development in many, if not most, underdeveloped countries, we also conclude that family planning programmes should be included in development plans, and not simply included but integrated with them. This applies especially in rural areas where the multi-purpose community project type of agency will normally offer the best prospect of success.¹

Developing countries are warned that astronomical population growth rate which is not symmetrically compensated for by economic expansion leads to disaster. As a corollary, investment in “social overheads” will tend to be greater in underdeveloped countries where the economy of scale runs into difficulty because of lack of technological innovations. Moreover, it is argued, as population grows geometrically there is always the tendency for large concentration of population to gravitate to urban centres where, as Colin Clark contended many years ago, the social overheads are profusely available at cheaper costs than in the rural areas.² This phenomenon, therefore, holds attraction for the rapid mobility of unskilled labour force from the rural to the urban centres with the resulting snow-ball effect of overloading the social

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†This type of analysis is historically attributable to the Malthusian prognosis and some contemporary neo-Malthusian followers. We shall be dealing with some aspects of this approach in this paper.

1. Horace Belsham: *Population Growth and Levels of Consumption* George Allen and Unwin Lond, 1956, p. 45.

2. Colin Clark “The Economic Functions of a City in Relation to its Size” *Econometrica*, Vol. XIII, No. 2, April 1945.

overhead. It is relevant at this juncture to take especial note of what Horace Belsham said:

The rapid growth of the large urban areas may involve heavy expenditure in necessary amenities and services and have prejudicial effects on welfare through overcrowding and the lack of amenities. There may be diminishing returns in terms of both economic cost and levels of living from concentrated urban growth. This would suggest a case for planned development of decentralized towns of moderate size.³

This analysis has a general application to societies both developed and developing. But the dismal note is more logically relevant to African nations. Developed societies with technological innovations can reasonably absorb and accommodate population increase, because they have built into the system self-regulating mechanisms qua industrialization techniques. And so N. Kaldor argues with the support of Belsham that:

In a developed society, which is susceptible to unemployment arising from a shortage of effective demand, a growing population may have an expansive effect on aggregate demand or output even if output per head would not be increased by population growth at full employment. It may therefore provide an incentive to investment, making it easier to approach a position of full employment or recovery from depression. Expanding population becomes an important element in a rising trend of aggregate demand and output. A change in the rate of population growth may then affect the volume of employment, so that if it increases there is both more capital and a higher ratio of working labour to population. The decline in the rate of population growth in the 'twenties' may have had a bearing on the intensity of the depression in the 'thirties', and on the difficulty of getting out of it.⁴

This rosy picture in relation to population increase in developed countries soon becomes drab and depressing when the same phenomenon—a rise in population in the underdeveloped areas—is observed. The capitalist economic analysts see the trend as dangerous since it is lacking in the system the self-adjusting mechanism operative in the developed capitalists' social structures. Belsham observes, "In underdeveloped societies, however, the relatively small importance of unemployment due to a shortage of effective demand gives little support to a case of population increase based on these grounds".⁵ The grounds are, *inter alia*, a lack of corresponding rise in investment and hence a relatively low level of consumption, and an absence of the necessary stimuli for economic expansion. And in the same tone, no less pessimistic, is the view of Bert F. Hoselitz. Writing on *Population and Industrial Growth* with particular reference to the Middle East and South Eastern Asia he says this in regard to agriculture:

"... Thus, unless technological changes occur in agriculture, we may expect that the countries from the Middle East to South Eastern Asia will have small-scale agricultural activity using great numbers of workers."⁶

3. Horace Belsham, *ibid.*, p. 69.

4. N. Kaldor, 'The Relation of Economic Growth and Cyclical Fluctuations' *The Economic Journal*, March 1954, p. 68.

5. Belsham, *ibid.*, p. 71.

6. Bert F. Hoselitz: *Sociological Aspects of Economic Growth (An Adaptation)* Feffer and Simmons Inc. New York, 1960, p. 49.

However much technological advancement may contribute in reducing the hazards of a growing and changing civilization, it would seem that as far as population issue is concerned, the ghost of Malthus shall continue to rule us from its grave. This is not a question of trying to exercise Malthus in tackling a social phenomenon whose theories have ceased to have any relevance. He may be found guilty of conducting an analysis in a static social equilibrium: but that he never anticipated the bewildering revolution in technology or indeed in nuclear sciences which has immensely helped to reduce the scourge of disease, poverty and misery to which man became a helpless victim in the non-scientific age. But scientific discoveries and the application of science and technology have not succeeded to eliminate the threat inherent in the acceleration of population growth which Malthus warned against. This warning has been sardonically referred to by the late Paul A. Baran as the "Malthusian menace";⁷ this is perjorative and implies raising the proverbial cry 'wolf', 'wolf', when the prowling animals is no where to be seen.

THE SOCIALIST OPTIMISM

The Marxian dialectics as represented by Baran and others in analyzing population problems have argued *ad nauseam* that capitalist economists, servile to the Malthusian methodology are consistently raising unjustly an alarm over the increasing birth rates in underdeveloped countries. And Baran argues with ruthless logic using Marx's frame of reference that:

Although it is of course far more convenient, and much more in conformity with the interest of the ruling class—to explain "overpopulation" by the external laws of nature, rather than by the historical laws of the capitalist "production", this "explanation" has no more to do with science today than it had in the case of Malthus, for the scientific facts in the matter are altogether different from what the neo-Malthusians would wish us to believe. To mention them in "desperate brevity": it is, first of all, not true that miserable living-standards, famine, and epidemics necessarily go together with absence of populations or with their rapid increases.⁸

And in support of his thesis Baran finds support from the work of Grundfest with an almost puritanical obsession. According to Grundfest, as quoted by Baran, population density is not closely related to, or the direct cause of poverty, misery, disease and other social abnormalities found in underdeveloped countries. His enumerated facts are these "(a) poor countries are so, independently of their population densities and despite possession of rich agricultural and/or mineral resources; (b) colonies may have much lower population densities than their 'mother' countries, and much richer resources (for example, Surinam and the Belgian Congo), and yet be very much poorer; (c) there is no correlation between the population density and the living

7. Paul A. Baran. *The Political Economy of Growth*. Monthly Review Inc. U.S.A. 1956, p. 388.

8. Paul A. Baran, *ibid.*, pp. 389-930.

standards of the rich countries, which rank in the latter respect about as follows: England, Scotland, France, the Low countries, Italy and (far behind) the least populated, Spain; (d) there is, however, a direct correlation between living standards as just ranked and industrialization . . . ; (e) all the 'poor' countries also have one common factor: they are industrially underdeveloped, and their resources are exploited extractively for the (capitalist) world market".⁹

Baran's contention (with the tinge of socialism) is completely opposed to the views of 'conventional' demographers and economists who, in spite of their awareness of technological innovations and industrialization, from which underdeveloped countries may benefit, can still envision the human catastrophe that will result from unchecked acceleration of population growth. To Baran the often predicted baneful consequences emanating from population pressure on an unequal means of subsistence is all the fatuous imagination of the votaries of capitalism. He says:

But it is sheer fabrication that the poverty of a country is caused by population pressure, it is nothing short of fantastic to attribute it to the 'physical' impossibility of providing food for a growing population. The absurdity of this view is equally obvious whether we consider the problem in its relevant time-dimension or follow the prophets of doom into their science-fiction calculations concerning the year 2100 or 2000.¹⁰

Baran dismisses with impatient and provocative scholarship other contrary views, for instance: (a) the findings of Public Health and Demography in the Far East, 1950 (of the Rockefeller Foundation), which argues that "sooner or later the increasing pressure of people on subsistence will lead to the re-establishment of the forces of death, whether by general debility of the people or by famine and pestilence;" and (b) R. C. Cook who in his *Human Fertility: The Modern Dilemma*¹¹ also avers that, "even if science could find a way to synthesize bread and beefsteaks from sea water, could such a multitude be fed?" Other writers on population problems who share Baran's optimism have painted an extraordinary rosy picture of what man can do with his land potentials to offset the 'Malthusian pessimism', Colin Clark's attractive phrase. Colin Clark, with a less critical stance, makes the following observation:

World population may be expected to increase at the rate of 1% per annum, while improvements in the technique of agriculture, may be expected to raise output per man-year at the rate of 1½% per annum or (2% per annum in some countries). Any profound Malthusian pessimist is thereby completely discredited—scientific improvements alone are capable of taking care of the increase of world population.¹²

One more example of the optimistic advocates for unlimited population increase for whom the science of technology provides the panacea for all

9. "Malthusianism", *Monthly Review* (December 1951), p. 251.

10. Paul A. Baran, *ibid.*, pp. 391-392.

11. R. C. Cook, *Human Fertility: The Modern Dilemma*, New York, 1951.

12. Colin Clark 'The World's Capacity to Feed and Clothe Itself', *Way Ahead* (The Hague, 1949), Vol. II, No. 2.

human malaise. Because of the importance of these contentions and their implications on population and underdevelopment M. K. Bennet's views are quoted in extenso:

No one ought to be impressed by calculations of land-man ratios, such as will show in arithmetical perfection that if world population should increase at its current rate of about one per cent annually, a specific year in the future could be named when only one square inch of the earth's surface would be available per person. This is purely an arithmetical exercise. It is also a sterile one.

. . . Society may be counted upon to act in such a way that the impeccable arithmetical calculation fails to work out; society has the power to act. The arithmetic carries in itself no element of prediction, no element of compulsion. Equally sterile and uninteresting are all efforts to calculate how many people could ultimately be fed by the produce of the earth's surface. . . . Serious students, however, tend nowadays to turn their analytical powers and tools on parts of the world rather than upon all of it; on history and observed tendencies more than on prophecy, on prospects for few decades rather than for centuries or eons to come.¹³

The literature which condemns neo-Malthusianism as representing the bourgeoisie capitalist system is prolific. Ploughing through their various documentation one cannot fail to be impressed by their consistent laissez-faire attitude over the population issue. Over-population to them is not a function of the inverse proportional increase in natural resources, but rather the deliberate stagnation of economic development brought about by capitalist entrepreneurs. Because, by inference, natural resources are always there. That they fail to meet the needs of increased population is an artificial constraint imposed on the system. And so Baran expounds:

“. . . In order for the notion of 'over-population' to have any significance, it has to be unequivocally stipulated *in relation to what the population is supposed to be excessive*. However, once this is made clear, it will be realized that there are few places, if any, of which it could be fairly said that they suffer from overpopulation in relation to natural resources. . . . Such overpopulation as exists at the present stage of historical development is not overpopulation in relation to natural resources but *in relation to productive plant and equipment*".

And Baran rounds off his expose by invoking the pontifical assertion of Engels, that 'the pressure of population is not upon the means of production but upon the means of employment'.¹⁴ There is implicit in the above argument the questionable assumption that natural resources are inexhaustible. And if one allows for the felicitious contention of the unfathomable bountiness of the earth's economic potentials there is the obvious fallacy that no matter the magnitude of population increase, that income per capita, investment and other social overheads and the standard of living will continue to keep pace with population growth.* But interestingly enough the apostles of unlimited

13. M. K. Bennett: *Population, Food and Economic Progress*. Rice Institute Pamphlet 1952, p. 58.

14. Paul A. Baran, *ibid.*, p. 394.

* We shall be discussing this point in detail later on.

population growth are perhaps convinced against their will that a rise in the standard of living, some measure of elitism and sophistication, will force the birth rate to fall. With more Public Health facilities, observation of simple domestic hygiene, death rate will correspondingly fall. And Baran quotes D. Ghosh approvingly, that:

What is more, economic growth, by improving medical facilities and by spreading prophylactic care, tends greatly to reduce the death rate—the most salutary and the most urgently needed development everywhere, and in particular the backward countries. For a reduction of the death rate implies not only a rise in the health, vitality, and productive efficiency of the population; but also—and this is especially important—a decline in child mortality.¹⁵

The relevance of this analysis does not seem to support the contention for an astronomical birth rate. On the contrary, it follows, as a logical sequence, that as technological innovations increase productivity and therefore (provided the rhythm is not disturbed) the desire for a better standard of living, the over-all effect will be to reduce correspondingly the birth rate. Elitism and sophistication take a higher standard of living as its symbol. An insatiable propensity to procreate and 'fill the earth' will be checked by the above-mentioned factors. If we are to go by the experience of Japan, a non-Western society whereby technological innovations and advancement combine to reduce the fertility rate, then African nations which insist that what they need is the application of science and technology—mechanization of agriculture—cannot escape the obvious and related consequences. In effect, whether Africans like it or not, the growth rate will diminish paripassu with improved conditions of living and a high rate of consumption.

In the pre-industrial societies of Africa a contingent of wives and numerous children was an economic investment and a sign of affluence; this provided a reservoir for labour supply. Investment in capital outlay, such as physical assets, did not come into the entrepreneur's calculations. Indeed it was irrelevant, bearing in mind the social ecology. All he needed was men and women who would till the soil, sow the seeds during seed-time, and available manpower during harvest time. There were also ready hands to transport the big man's commodities to markets that were within distances that did not entail the risk of loss of property. The cultural values, and the ethic of the society supported and encouraged the procreation of many children. An infertile wife (the blame was, and is very often fixed on the woman) was regarded as an embarrassment and indeed a curse to the family of the bride! But time changes.

My investigations into what I called *The Changing Pattern of Family Structure Among The Elite of Eastern Nigeria** in 1962 showed that over 85 per cent of those interviewed and the analysis of the Questionnaire returned,

15. Paul A. Baran, *ibid.*, p. 395.

*This Research was financed by the University of Nigeria Nsukka (1962) and I would like to express my gratitude to the University Authorities.

opted for monogamy (the fact that they had concubines or mistresses in addition to their wives did not seriously challenge the validity of the evidence) and with three to five children (at most). Because they argued that education and the acquisition of other elitist paraphanelia were becoming more and more expensive; and that the more dependents one has the greater the demand on one's limited resources; thus prudence and economic realities applied the check to the individual's desire to have more children.

SOCIO-ECONOMIC REALITIES

Africa, it seems, is caught in a dilemma. Pious optimism in regard to a somewhat imagined possession of unlimited natural resources and agricultural potential is a potent factor in this day-dreaming. Africa, (most of the nations in the continent anyhow) contends that the available land mass can accommodate more than a billion population; that what is abnormally lagging behind in the continent's development projections is the intensification of agricultural production. Make or transform every piece of arid and apparently uncultivable land into an orchard; fight soil erosion, and prevent wanton destruction of the forest, preserve wild life and other related sources of food supply, then the 'menace' of population theories can be conveniently thrown into the compost-heap of demographic history. This is how most African countries tend to articulate the population problem. The Zambia Daily Mail, for instance, argues with some bizarre conviction "that there is nothing to fear in Zambia about population explosion. If we work hard we shall have enough food to feed the population".¹⁶ This seems to be the unabating current of views expressed by most African delegates at the Population Conference held in Bucharest in August this year. Although the official report of the Conference is not yet available it was generally carried in the various world news media that members of the developing countries at the Conference were consistent in opposing the view that there was, or there would be, in the foreseeable future, population problems in their territories, because, as they argued, the latent economic potentials of these respective countries have hardly been tapped. The contention does not pretend the existence of an idealized paradise always round the corner! But let us match these fanciful dreams against the socio-economic realities. Unlimited population growth is bound, sooner or later, to have a depressing and debilitating effect on economic growth and on the nation's general social policies. Population growth which is *not* equally (not arithmetically) compensated with rapid economic expansion, increase in per capita income is surely an arsenal for social eruption. In this connection Harold F. Dorn has this to say:

As population continues to increase more rapidly than ability to satisfy needs and desires, political unrest, perhaps leading to the violent overthrow of existing governments, becomes almost inevitable. The temptation to adopt a dictatorial form of government in order to achieve more quickly the desired rise in level of living may become irresistible for many countries. Many of the nations of Africa, Asia, and Latin America

16. Zambia Daily Mail, Vol. I, No. 1, 332 October 15, 1974.

do not have the capital and technological skills required to feed and clothe a rapidly growing population and simultaneously to raise per capita income in accordance with the expectation of their population. An immediate supply of capital in the amount required is available only from the wealthier nations. The principle of public support for social welfare plans for their populations is now accepted by many nations. The desirability of extending this principle to the international level in order to support the economic development of the less developed nations has not yet been generally accepted by the wealthier nations.¹⁷

Even if we accept, with all the human emotions involved in the arguments of most of the nations of Africa, that arable land does not constitute a problem (which is hardly true), yet as populations increase in inverse ratio to the fixed factor, land, the marginal productivity of land per man-yield enters the inevitable phase of diminishing returns. Land becomes over-cultivated. There is a limit to what fertilizers and other biological devices can restore: the so-called 'primitive' system of shifting cultivation, which was to allow the land to lie fallow for some time (so as to ensure the re-activation of the natural chemical content of the soil) cannot be practised now because such a system was feasible where the territory was sparsely populated. With population density of 300 to 400 per square mile in some parts of Eastern Nigeria† and with the ravages of soil erosion, it is apparent that supporters of population increase are disturbingly light hearted and somewhat naive. Agreed, some parts of the continent may be underpopulated in relation to the size of the territory, natural resources and the availability of skilled-manpower. And there are very few, if any, of the developing countries of Africa that can claim to have the skilled expertise which will help to accelerate industrial output. This is a rare and scarce commodity for the supply of which, the streak of nationalism notwithstanding, African nations will have to depend, for decades to come, on the developed nations.

Significantly the issue of population pressure and the attendant repercussion had been the central theme of demographers over the past ten years. The critical observation of Irene B. Teaeuber in this connection deserves the attention of African countries. She observes:

“ . . . The ordinary man feels the pressure of increasing numbers in his own family and village. Children become burdens when education and training are responsibilities of parents. Two or more surviving sons mean division of the land. Perhaps, too, the increasing numbers of children mean that some of them cannot attend school. Jobs may be poor and few in the villages, the towns and cities. . . . It is obvious that increasing populations produce pressures that are felt throughout a society in many aspects of life. . . . The trends are ironic indeed for a world dedicated to the advance of welfare. Populations increase least, food production most in the developed countries. Presently, calories available per capita per

17. Harold F. Dorn 'World Population Growth' in *The Population Dilemma* Ed. Philip M. Hauser. Printice-Hall Inc. Englewood Cliffs. N.J. (1963) p. 26. It is difficult to disguise the fact that the fall of the governments of Niger and Ethiopia respectively was not unconnected with famine and the alleged poverty of the masses. (My observation.)

†This was the estimated figure before the recent population census. Absence of a reliable statistical evidence would not discredit empirical observation in the circumstance.

day amount to some 3,000 in most of the developed countries. Total calories per capita per day, including domestic production and imported food, amount to about 2,000 in India, the Philippines, little more than 2,000 in Pakistan and Ceylon.

And furthermore she emphasizes that:

Population growth intensifies the difficulties of the low income countries. Disproportionate numbers of the earth's children are born in those areas where physical conditions of living are minimal. These are also where opportunities for education and individual development are limited.¹⁸

What Africa faces today, and will continue to face for years to come, is the development of the human capital; the supply of healthy and efficient human resources, the expertise necessary in any technological race so that she will be able to reduce to a considerable extent her dependence on foreign expertise. This is a crucial issue. Dependence on foreign expertise or on the technological know-how of the developed countries is by and large, a form of neo-colonialism. This drains the foreign exchange which any developing country needs so desperately in order to effectively carry on its industrialization projects: reduction in the importation of foreign foodstuff which means the stimulation of agricultural production—a phenomenon difficult not to take cognizance of. Draughts that hit Ethiopia, (with thousands of victims) in Niger Republic with the same disastrous consequences—all have been pointers to what fate lies in store for a nation with inadequate food supply and where the social overheads have been depressed by population growth. The same distressing and pathetic story is the case in India and Bangla Desh. Ansley J. Coale has quite succinctly raised the issue of population growth and the feasibility of industrial expansion. Can the same tempo or rhythm be kept between increased population and economic growth? Coale does not think so. There are the related questions of social overheads to which reference has been made. About underdeveloped countries Coale says:

Their populations at present suffer from inadequate diet, enjoy at best primitive and overcrowded housing, have a modest education or no formal education at all (if any) and rarely attend school (if children), and are often productively employed for a fraction of the year. These populations suffer all of the misery and degradation associated with poverty. They naturally wish to enjoy the universal education, adequate diet, housing equipped with modern amenities, the long and generally healthy life, the opportunity for productive work and extensive voluntary leisure that the highly industrialized countries have shown to be possible. To do so the underdeveloped countries must modernize their economies.¹⁹

The industrial syndrome must be related to investment potential in the society, that is to say, the volume of savings from which the investment and consumption are the necessary end-product must not be too diametrically

18. Irene B. Teacuber: 'Population Growth In Underdeveloped Areas' in *Population Dilemma*, pp. 30-31.

19. Ansley J. Coale: 'Population and Economic Development' in *The Population Dilemma*, p. 48. And contributors to 'the Economic Consequences of The Size of Nations' Ed. by Austin Robinson MacMillan and Co. Ltd. Lond. 1963 hold similar views.

uneven. One's ability to save has a close correlation with one's income bracket and family responsibilities. The greater the magnitude of the mouths that one bread-winner has to care for (this is where the social values of the extended family system in Africa are being systematically eroded because of the socio-economic realities) the lesser the amount available for private savings. Thus the social phenomenon of rapid individualism for which the developed countries are noted is rapidly gathering momentum in Africa. Private entrepreneurship depends on harnessing the financial and material resources available. But where increase in fertility rate eats into potential capital accumulation then the economy faces a terrible vampire. The economic system remains anaemic as the new blood is syphoned off, as it were, by population pressure. But here Paul Baran and those of his school will argue that in a socialist economic system the function of the private entrepreneur is irrelevant; that the state, having taken over the commanding heights, would be the sole and absolute entrepreneur.

But does it logically follow that since the state is that entrepreneur therefore population growth cannot affect its industrial and economic expansion? Is one of the sources of the state's revenue not related to the taxable capacities of its citizens? Even the Eldorado socialist stage will sooner or later find itself enmeshed in its own fantasies. And rightly, Ansley J. Coale has observed:

In a capitalist economy, where investment is financed out of private savings, the fact that families with a large number of children find it more difficult to save reduces the volume of savings and hence the level of investment. When low incomes are not an important source of savings, higher fertility creates social pressure to increase the share of national income received by the poorest earners (the non-savers) in order to maintain minimum standards of consumption. . . . When it is the government rather than individual entrepreneurs that provides a large proportion of national investment fertility affects the level of investment through its effects on the capacity of the government to raise money through taxation.²⁰

It is obvious that if we are not transfixed by the over-optimism of some socialist ideologies we cannot fail to recognize the inherent danger in a population growth which makes impossible social and economic development.²¹ Any indifference by the African nations as regards the menace of uncontrolled population increase is a postponement of the evil day which is bound to come. It smacks of irresponsibility, to say the least. Some African countries look at the higher per capita income as an index of affluence and therefore population growth to them does not constitute any serious threat. Take Zambia, for example, with a per capita income of K244 (for the year 1973). Statistical information for other countries within the same geographical belt in 1973 are not available to the author. But for 1970 figures for the following countries in close proximity to Zambia were as follows: Malawi

20. Ansley J. Coale, *ibid.*, pp. 54-55.

21. See Harold J. Barnett "Population and Resources: Malthusianism Conservation" in *Demographic and Economic Change in Developed Countries. A Conference of the Universities—National Bureau Committee For Economic Research. Princeton University Press 1960.*

(in U.S. dollars 144); Tanzania 91; Uganda 140, Kenya 140; and Zambia 340.²² These comparative figures would immediately convey the unavoidable impression that Zambia is the richest country in Africa, south of the Sahara. Statistical evidence often has its own magic, sometimes unrelated to the empirical situation. The grim socio-economic realities are covered up (unintentionally though) and the unwary observer is swept off his balance. And in this connection the Times of Zambia had this to say:

We are obviously riding high and should be congratulating ourselves. The estimate is unrealistic because it includes the salaries of expatriate miners on the Copperbelt, who are probably the highest paid group of workers in the country.

Zambia chalked up a 75 per cent increase in their annual income during the same period—from K320 in 1964 to K960 in 1972, etc. Again, the figures K320 and K960 respectively for the years 1964 and 1972 for Zambians contain the same defect which we observe in the per capita income for 1973 above. This income bracket is conspicuously silent about those who earn K150 to K190 per annum and who happen to constitute the majority of wage-earners. Backed by this unsatisfactory computation of her per capita income Zambia logically adopts a nonchalant attitude towards the population issue. Moreover, it is argued that the physical size of Zambia, over 752 square kilometres and about four times the size of the United Kingdom can conveniently accommodate more than five times her present population of 4.5 million.* Zambia's population growth rate is variously estimated at 2.9 and 3 per cent: whichever of the estimates is correct it cannot fail to engender concern.

The central issue as is implied in this paper is not so much the size of the area (though this is not irrelevant) but economic growth and the quality of the population. The argument of Zambia has been echoed by Nigeria and other African countries at the Bucharest Conference, to which reference has already been made. The persistently gnawing question which most African countries evade is *quantity* versus *quality*: more people in order to increase population density in a sparsely populated territory (and ultimately she will be thrown into a vicious circle); or should quantity—healthy, but small population (and who, or what should determine the size of nation's population) be the more rational choice? This rhetorical question in parenthesis will be answered in section four of this paper. However, it is relevant to observe that this phenomenon of indifference to population growth, or indeed, the positive drive towards population increase is not confined to African countries. Eastern Germany is in a dilemma: a decline in her birth rate. This has compelled the government of Eastern Germany 'to encourage young couples

22. Times of Zambia 18th September, 1974.

*Because Great Britain with $\frac{1}{4}$ the physical size of Zambia can support a population of 55 million is no reason to recommend the same population density for Zambia. In logical terms this is an argument of the "excluded middle". The economic potentials of Britain, her large markets and technological advancement and social overheads fall under the category of the best in the world. Moreover, opportunities for migration which the British have are not available to Zambians nor to other Africans because of the incidence of race.

to have children. They rise to the top of waiting lists of scarce new flats and are eligible for an interest-free loan of 5,000 marks (about K1,600). With each child born an increasing part of the loan does not have to be repaid at all."²³

Latin American countries are another case in point. Argentina, more than half of Europe, has a population of 25 million. This is considered abnormal; and with a growth rate of 1.3 per cent per annum which is regarded as the second lowest in Latin America, Argentina claims justification to take measures to increase her population. It does seem, therefore, that the element of relativity is impelling. The needs of the country concerned and the relative availability of economic resources to support an expanding population must be taken into account. There is, therefore, no one population equation or formula to be taken as definitive.

POLITICAL AND MILITARY IMPLICATIONS

The technologically advanced countries are constantly making wide strides in scientific discoveries and inventions. Political sophistication and the ambition to expand their territories through one form of alliance or another, through the more venal and questionable form, neo-colonialism, are closely tied up with their inventive genius. Political power becomes a mere cant if it is not functional: functional, and perhaps pragmatic, in the sense that political power subsumes or implies military power. In this connection a large population is a significant factor both in terms of availability of man power for the industrial and economic sectors of the country and also for the defence or otherwise of the nation.

While a large population is not the sole determinant in the planning of military logistics it is none the less one of considerable importance. It is, however, appreciated that numbers alone do not give a nation involved in an act of belligerency the necessary striking power. But a large population with a growing economy, an economy which is not depressed by population pressure, is certainly not undesirable. Especially when the taxable capacities of the citizens give the government sources of revenue from which to acquire sophisticated weapons of war. In this respect a small nation (in terms of population) will be at a disadvantage even if it can operate the military hardwares (and thereby tries to cancel out its numerical inferiority), for example Israel. And this may be one of the reasons why the state of Israel is not insensitive to measures adopted by any nation to prevent Jews in its territory who want to migrate to Israel. On this issue of population and military power the Organskis argue quite persuasively in favour of a large population. And they contend that:

The argument that modern weapons will soon cancel the advantages of a large population is invalid for yet another reason. Atomic bombs require more than knowledge for their manufacture. America's war machine is manufactured by a long list of her greatest industries. Only a great and populous nation has the kind of industrial installations required

23. Leslie Collett (Berlin) Correspondent for Sunday Times of Zambia, March 31, 1974.

to turn out modern weapons of mass destruction. Their cost is staggering: one intercontinental ballistics missile alone costs 35 million dollars; an atomic submarine costs from 50 million to 150 million dollars. No private source can possibly afford the capital investment required to make such weapons; furthermore, once made, they are almost immediately out of date. Only a national governmental can afford such outlays, and only a national government with millions of taxpayers and billions of dollars at its disposal. Even Britain has given up her missile programme as too expensive and has decided to rely on American missiles to protect her.²⁴

The argument of the Organskis is not one-sided; for they also recognize the fact that a large poverty-stricken nation (whose nationals survive on subsistence level) faced with perennial epidemics is more of a liability than an asset. Certainly a large population, other things being equal, is an incentive to economy of scale: critical skilled manpower shortage, a constant phenomenon in a region afflicted with a small population but with enormous economic potentials will not be the immediate problem.

In recent years the minority regimes of Southern Africa have mounted campaigns to encourage White emigrants from Europe. The motivations are two-fold: (a) to increase the size of White population and thus stimulate the economic and industrial expansion of the regions and (b) to increase their military might; their oppressive policies inevitably compel them to expect military confrontation with the oppressed Africans who, population-wise, outnumber the Whites by the ratio of 5-1. Africans have equally articulated the problem. A conscious awareness of their denial of basic human rights by the minority White regimes is certainly fundamental to the whole population controversy in Africa. Whites in these areas do not impose their superiority by sheer number. On the contrary, their numerical inferiority is fully compensated for by the superior economic power which they wield and by the sophisticated military weapons supplied them by other White governments outside Africa. With this the dominance of Whites over Blacks will be perpetuated. And to change the structural relationship between White and Black in this part of the world a new indoctrination of the equality of the human races seems attractive and impelling! But is this not baying at the moon? Will the shaft of logical analysis ever penetrate the aberration of Whites, callous and insensitive to the voice of reason? When therefore, the Africans consider their plight under the White regimes as fixed and unalterable, they are bound to treat, with the utmost suspicion, appeals from the White world for population control or a check in the annual population growth rate. The provisional population census of Nigeria gives that country over 70 million in contrast to 59 million (United Nations figure for 1970), and the annual growth rate being estimated at 2.66. The released provisional figure would seem to suggest that the annual growth rate is about 4%. This is phenomenal just as that of Zambia is. Nigeria has vast mineral oil resources which have added impetus and bouyancy to her economy since the end of the civil war. Her agricultural potentials are immense and give

24. Katherine Organski and A. F. K. Organski, *Population and World Power* Alfred A. Knoff, New York, 1961, p. 17.

bright hopes for the future. On balance, one may say that Nigeria is rapidly joining the charmed circle of the developed nations. But the possession of vast economic potential is not necessarily the criterion that warrants a nation to be classified as developed; nor should this give licence to an astronomical increase in fertility without giving due thoughts to other relevant qualifications such as, for instance, the development of the nation's human capital and the provision of the social overheads.*

At present the population of the continent of Africa is estimated at 345 million.

Death rates are falling and demographers have pointed out that by the year 2,000 Africa will have about 8,000 million people. China has a population of 814,279,000 and India, running neck and neck with China, her population is estimated at 563,494,000.²⁵ How do African nations react to these facts? As already pointed out political and military considerations seem to undermine other important relevant issues. To them increase in their population is a challenge in spite of the awesome incidence of starvation, disease and untimely death—the perennial affliction to which India is subjected. When African leaders are reminded about the fate of India, as an example, they often come back with the retort: “But for the large population of India she would not have acquitted herself so well during the military confrontation with Pakistan. Let us come down from our Olympian heights and face practical realities. We are surrounded by hostile White neighbours and you are asking us not to be in a position to provide at least 120 Divisions in the field when the contingency arises”.†

This argument of the African nations deserves serious and sympathetic attention. The world is not becoming any saner and pacific than it was since the Second World War. War as an instrument of creating international comity, respect for each nation's territorial sovereignty may be decried as the paranoid element in the 19th century imperialism. But are nations of the world, particularly the White dominant groups any less addicted to the use of force, military or otherwise, to gain their political objectives especially where the underdeveloped nations are concerned? On what basis of international morality (if there is any such thing) can South Africa justify its continued occupation of Namibia or Ian Smith's minority regime of Rhodesia? By shared military might and with abnormally small populations these two White regimes can afford to defy world opinion. Africa is left with no other alternative than to draw the unpleasant conclusion that the world adores force, not reason, not logic. It follows, therefore, that Africa's frame of reference (which she is compelled to adopt) is the possession of a large population. Military logistics to Africa must be considered in time dimension; the operation of sophisticated

*Examples of some Middle East countries flowing in affluence yet, paradoxically, misery and squalor constantly stirring the populace in the face are not conclusive or encouraging evidence that the possession of these rich natural resources will automatically alleviate the dilemma of underdevelopment.

25. United Nations Population Year 1974. (Molleveide Projection).

†Nigeria in her current (1974) budget allots more than 200 million Naira to defence and her army is estimated at not less than 250,000.

military weapons and the acquisition of nuclear power, which seems to be one of the accepted criteria of being developed, are all intrinsically bound up with a large population and economic growth.

The disastrous consequences of unlimited population growth, Africa is not unaware of; but since the world has lost its conscience, and the deprivation of elementary human rights are all visible signs of *Power*, Africa refuses to continue to be numbed by the opium of the "the meek shall inherit the earth". The suspicion is deep and fundamental. But is this suspicion justified, or even if its embers are fed by historical experience, and sociological realities with frayed tempers becloud rationality, are we also justified in wishing a universal catastrophe?

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The Political Economy of Population Policies: The Uganda Experience

FRANK BAFFOE

INTRODUCTION

The theory of economic change in relation to the behaviour of the population variable has occupied the minds of greater analysts and continue to command the attention of some of the best brains of our time. Thus, by way of apology, my efforts are not directed to produce anything startling and new. The paper pursues a rather moderate goal. It attempts to shift the focus of analysis of the income-population relation from the so called "population problem" to a "production problem". The aim of the analysis is, bluntly put, to hunt down the *exorcised* ghost of Malthusianism, which he continued to haunt all and sundry.

Conventional wisdom will have us believe that the relationship between fertility trends in the less developed countries is so crucial that all efforts to generate a sustained economic growth are doomed to failure. As Joseph J. Spengler from a Malthusian vantage will put it: "... even a moderate rate of population growth will seriously counterbalance the effect of income increasing forces."¹ Indeed, thoughts on population matters of our day have not managed to escape a Malthusian tinge.

My basic contention in this brief paper is that the genuine problem inherent in the demographic-economic relation can be reduced to a question of evolving socio-economic institutional framework which will both enhance technological improvements as well as make it possible to utilize the available factors fully and more efficiently to satisfy the set goals of the underdeveloped economy. The simple basis of my position is that any economy is a reflection of the utilization of its available resources, and the capacity of an economy to solve the problems involved in the utilization of its resources is a better indicator for its economic advancement. In other words: "The purpose of an economic system . . . is, to provide the goods and render the services that people want. . . . The best economic system is the one that supplies the most of what people most want."²

Against this background measurable demographic factors in accounting for economic change are only of secondary importance compared to socio-economic forces to generate greater output.

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1. J. J. Spengler: "The Population Obstacle to Economic Betterment" The American Economic Review. Papers and Proceedings May 1951.
 2. J. K. Galbraith: Economics and the Public Purpose, London: Andre Deutsch 1937, p. 3. It must be noted that "under-development" is ex definitione a state of an economy where labour, capital, entrepreneur, etc., are potentially available and can be mobilized but because of lack of effective socio-economic inductive mechanism are either idle or under utilized.

As a point of departure the paper begins with a reappraisal of the so-called "population problem" from the neo-Malthusian vantage point. The next stage of the analysis is to examine the quantitative and qualitative aspects of the Uganda population in order to relate them to economic forces. Against the quantitative and qualitative background the policies of the government with regard to the Uganda population will be evaluated. The paper will conclude with policy recommendations which stem from our "production problem" thesis.

ON DEFINITION

The ultimate objective of economic development is to improve the well-being of individual men, women and children in a community. This economic well-being implies both material and non-material benefits such as more and better food, better housing, access to education and medical facilities, and opportunity for gainful employment for all of the working age group determined by society.

Despite its limitations, conventionally the growth of per capita income is identified as one of the best available measures of economic progress. This measure is the growth of a nation's income adjusted for its population growth (Y/P). This simple relationship between the growth of a nation's income and that of its population has a profound significance for the improvement of human welfare. Concern over this simple relationship has been markedly tremendous throughout the world in recent years.

THE MALTHUSIAN THESIS

About 175 years ago Thomas Robert Malthus, a clergyman, declared in a path-breaking essay on the "Principles of Population"³ that population growth was the main cause of mass poverty: the higher the population growth rate, the more difficult it was to raise per capita income and hence the material and non-material well-being of members of a community. Malthus postulated that production of the means of subsistence could be increased only in arithmetic progression, while population had a tendency to grow in geometric progression. Malthus was explaining poverty in terms of a simple race between population and the means of subsistence.

According to Malthus the degree of population growth was held within the limits of subsistence by what he termed 'positive' checks of famine, war, pestilence and early mortality. He contended, from his premises, that the misery of the masses could not be relieved by reforms; because any assistance or benefits offered through such reforms would shortly be consumed by new additions to the population. Thus the only hope for improving the economic

3. T. R. Malthus: *An essay on the Principle of Population as it affects the Future Improvement of Society*, London: J. Johnson 1798. Malthus was the first to make a serious quantitative analysis of population problems. He was against the optimism of such philosophers as Condorcet and Godwin during the early days of the Industrial Revolution when the population of England was increasing very rapidly and when the working and living conditions of the masses were extremely bad.

well-being of the masses in the long run lay in the practice of "moral restraint" in the sense of prudential delay in marriage.

As is now well known the Malthusian hypothesis was a gross oversimplification of the laws of population and economic change and the complex relationship between them. Production is not necessarily limited to arithmetic ratio of increase, nor does population necessarily grow in geometric progression. As Colin Clark contends:

"It is doubtful whether there has ever been historical fact, an actual instance of the supposed Malthusian universal, of population overtaking agricultural productivity, multiplying right up to the limits of subsistence, and then being held in check by some new form of 'vice and misery'."⁴

And yet the Malthusian mire has never ceased to rear its head since the prophet first made his pronouncements. Ever working in the shadow of the so called "population problem" many economic development theorists and policy-makers have always made the "Malthusian trap" as their point of departure. Thus the Pearson Commission in 1969 wrote:

"No other phenomenon casts a darker shadow over the prospects for international development than the staggering growth of population."⁵

Obviously history has not been kind to the dire predictions of Malthus; and this is because of his restrictive assumption of little or no progress in the techniques of production. Malthus grossly underestimated the human ingenuity! And yet, the Malthusian monster loiters around and continues to haunt men. What gives life to this 'ghost' of bad omen? Indeed, the proliferation of institutions, conferences, seminars, workshops, etc., dealing with the so-called 'population problem' testify to the inexorable spirit of Malthusianism.

POLITICAL ECONOMY OF POPULATION GROWTH: A RESTATEMENT

Two broad views about the interactive relationship between population growth and economic change have evolved from the long-standing controversy. One view is the Malthusian one which has pessimistic understones and emphasizes the inhibiting effects of population growth on human welfare. The other view which emanates from the optimistic Smithian school stresses the hope of economic progress resulting from technological innovations to contain the growing population.

Essentially both outlooks recognize the crucial fact that the population of any country has a unique relation to its economic growth. The population is both the object for which goods and services are produced and it is also the major agent in the process of production of the goods and services—in

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4. Colin Clark: "Population Growth and Living Standards". *International Labour Review*, August 1953.
 5. Lester B. Pearson (Chairman): *Partners in Development*. Report of the Commission on International Development. London: Pall Mall Press, 1970, p. 55. Compare this pronouncement with Prof. Spengler's statement already quoted: "even a moderate rate of population growth will seriously counterbalance the effect of income increasing forces."

the latter situation, the population becomes the prime initiator of socio-economic development. Richard Jolly puts it this way:

“The human population appears in a dual capacity. Development is of course for its benefit; at the same time the human stock is the fundamental economic resource. Capital, technology, natural resources are of course important. But without the human agent they are passive. It is the initiatives and actions of people which create and develop the other factors and bring them into use. It is thus the human resources, the people of a country, on which development ultimately depends.”⁶

Basically, the characteristic features of what has come to be termed “population problem” resolve themselves into one fundamental ‘economic law’, namely the “Law of Diminishing Returns.”⁷ The law states that so long as the production methods remain the same [sic], any additional application of capital and labour to, for example, a given area of land will after a time period cause a less than proportionate increase in the output. Thus the case is established the growing population inhibits improvement of the economic well-being of the members of community!

Although this ‘law’ was first formulated with respect to predominantly agricultural economics of Western Europe, some apologists contend that the ‘law’ has its validity in even an industrial economy. It is argued that industry can at best delay the inception period and the point of the “law of diminishing returns” as compared to agriculture. The only reason for the delay being that industrial processes are more susceptible of technological improvements and greater division of labour than agriculture. The inevitable result will be a point of maximum return beyond which the average per capita output will begin to decline. The population associated with such an out-per-capita-maximizing population level is conventionally termed, ‘optimum population size.’⁸ It is assumed that there is a theoretical ‘population optimum’ for each country which may be defined as follows: given existing technological knowledge, capital equipment and exchange possibilities with outside world the optimum population for any given area is that which will yield the maximum per capita output.

It follows from the definition of optimum population that any increase in population beyond the optimum will result in a decrease in per capita output and lower the well-being of the population. On the other hand, a population below the optimum would mean that some resources of the area are underutilized.

It must be noted that even at this level of theoretical discussion the size of an area’s population can only be meaningfully discussed when viewed against the background of the available resources: natural resources, techno-

6. Richard Jolly: “Manpower and Education” in *Development in a Divided World*. D. Seers and L. Joy (eds.), Penguin Books, Harmondsworth 1970, p. 203.

7. The “law of diminishing returns” was first given precise formulation and called the “most important proposition in political economy” by John Stuart Mill in 1845; cf. *Principles Book one, Chapters 10-13*.

8. Edmund S. Phelps: “Population Increase” *Canadian Journal of Economics* 1, No. 3, 1968, p. 498.

logy, acquired skills and organizational arrangements. Absolute numbers have little explanatory power.

The 'optimum population size' itself varies with changes in the technique of production which in turn influences the total output. It depends on factors such as the age structure, sex and geographical distribution of the population, distribution of income and wealth, quality of the labour force (education, training and health) and public policies. Thus no close approximation to an optimum population is obtainable. The concept remains an ideal and static construct devoid of any empirical content⁹—a child of the Malthusian dire predictions which was stillborn!

QUANTITATIVE AND QUALITATIVE ASPECTS OF THE UGANDA POPULATION

According to the census of the years 1948, 1959 and 1969 the population of Uganda was as follows:

1948	:	4,959,000
1959	:	6,537,000
1969	:	9,549,000

From these figures we can calculate the average annual growth rate of population for the period 1948 to 1959 to be 2.5 per cent and for the period 1959 to 1969 to be 3.8 per cent. The latter growth rate of 3.8 per cent has been contended to have overstated the rate of natural increase for two basic reasons:

- during the inter-censal periods Uganda is known to have had a heavy net immigration
- during the 1959 census some areas of the country were undercounted.

In view of these points the rate of natural increase for 1969 has been put at 3.2 per cent. For the country as whole this rate falls into the following components:

- a crude birth rate of 50 and
- a crude death rate of 18 per thousand.

At an accelerating rate of natural increase (the crude death rate is expected to continue to decline) the Third Five-Year Development Plan (1971/2-1975/6) indicates that the Uganda population would be just over 12 million in mid-1976.¹⁰

The population densities vary considerably between regions and districts. Some districts such as Kigezi, West Buganda, and large parts of Western region have comparatively high population densities (over 100 persons per sq. km.), and others have relatively low densities of less than 50 persons per sq. km.—Bunyoro, Karamoja, Mubende, Sebei and most areas of Northern region.

There have been striking population movements between the different

9. The concept of 'optimum population' is highly theoretical because it is a simplistic treatment of a complex interactive relationship between population size and available resources of a country. It is a static concept which grossly ignores the dynamic aspects of population growth in the form of age and sex structure, quality (in health, in education and in training), adaptability, inventiveness, etc., etc.

10. Uganda's PLAN III. Third Five-Year Development Plan 1971/2-1975/6, pp. 69-78.

districts. According to the 1969 census Ankole, Busoga, Bunyoro, East and West Buganda and Masaka had high rates of net immigration. It was noted that the people who moved to these districts came mainly from East and West Acholi, Bukedi, Kigezi, Lango and Teso.

Another aspect of the Uganda population worth noting is the age structure. As can be seen from the table, the most striking feature of Uganda's population is the very high proportion of young children in the total population. In 1959 it was recorded that 41 per cent of total population were children aged 14 years or less; this figure increased to 46 per cent in 1969.

Table 1. Population By Age Groups: 1969 Census

Age Group	Population	Cumulative per cent
—4 years	1,837,269	19.24
5-9 years	1,470,540	34.64
10-14 years	1,096,482	46.12
15-19 years	831,213	54.83
20-34 years	2,059,998	76.40
35-49 years	1,210,521	89.04
50-64 years	664,824	96.04
65 plus	365,465	99.87
Not stated	12,535	0.13
Total	9,548,847	100.

Source: Uganda's Plan III, p. 71.

It is obvious that a rapidly growing population will imply a corresponding rapidly expanding labour force seeking productive employment. The situation will become even aggravated since only 20 per cent of the new entrants into the labour force are likely to be absorbed, under the existing socio-economic set up, in wage employment.

From the following table it can be seen that only an insignificant proportion of Uganda's population is being utilized in wage employment.

Table 2.

	1960	1965	1968	1969	1970
Population (million)	6.4	7.6	9.2	9.6	9.6
Working Force ('000)	229	228	267	281	299
As % of Population	3.6	3.0	2.9	2.9	3.1
Working Force in Agriculture ('000)	53	51	55	55	55
As % of Total Population	0.8	0.7	0.6	0.6	0.6
Working Force in Industry ('000)	37	42	45	48	59
As % of Total Population	0.6	0.6	0.5	0.5	0.6
Working Force in Service & Administration ('000)	139	136	137	178	185
As Total Population	2.2	1.8	1.8	1.9	1.9

Source: Calculated from various issues of Uganda Statistical Abstracts.

The seriousness of this under-utilization of one of the prime movers of the development process has been succinctly described by Richard Jolly as follows:

"In most poor countries, however, the human resources are by no means fully used. Committed to large development programmes, pressed on every hand by a multitude of urgent tasks, all of which require people to carry them out, one might expect to find a hard-pressed labour force, working long hours and strained to limit. The situation in reality is one of almost total contrast. Major sections of the adult population are underemployed, working short hours or at half-pace for much of the year. Large numbers, especially in the urban areas, are openly unemployed, living off relatives or petty theft while seeking a wage-earning job which never materializes. Thousands leave school every year—in some countries literally millions—only to spend the following months or years looking for jobs."¹¹

This long quotation has been necessary because it highlights the crucial aspect of underdevelopment—a lack of co-ordinated socio-economic system which can develop human resources and employ them productively and fully. The burden is to create social organizations which can contain and foster the 'lawlike' movement toward better things. A system capable of change and is constantly changing to enhance innovations which rather unfortunately are generally treated as an exogenous factor¹² by Malthusian protagonists.

Against these facts the pertinent question posing itself is: What policy implications does the Uganda government envisage? Does it see the low standard of living as stemming from the 'high' population? Apparently it does; and this brings us to the relevance of the policies.

POLICY IMPLICATIONS OF THE PATTERN OF POPULATION GROWTH

The Third Five-Year Plan devotes an entire chapter to demographic analysis. With regard to the growth pattern of the population it is said that:

"Uganda is not yet in a critical population growth outreaching available resources. However, the Government is convinced that in view of the economic, social and health problems arising from the present high birth rates . . . it is necessary to institute a programme of advice to women on family planning and child spacing matters."¹³

The problems implied are the low per capita income, high dependency ratios, increased unemployment, and low per capita investment per worker and per farmer. Not the educational system, which is incapable of solving the important task of preparing the population for economic and social development, but rather aspiration to standards which are inappropriate, irrelevant or sometimes positively harmful to the development of the country¹⁴ is to blame; it is the population. Malthus still lives on! This is a platitude in its over-riding importance.

11. *Op. cit.*, p. 203.

12. J. Steindl: *Maturity and Stagnation in American Capitalism*, 1952, p. 152.

13. Uganda's PLAN III, p. 76.

14. R. Jolly: *op. cit.*, p. 207.

An effective policy must be based on both knowledge and political decision by the government that committedly takes concrete measures to implement the set goals. Policy has been defined as "governmental actions that are designed to alter population events or that actually alter them."¹⁵ What is the knowledge upon which the government's statements of position and administrative programmes designed to alter the "population events" of Uganda are based?

Writing in the January issue of the *Edinburgh Review* of 1830 Thomas B. Macanlay made an interesting and relevant statement to our day and age. Macanlay wrote:

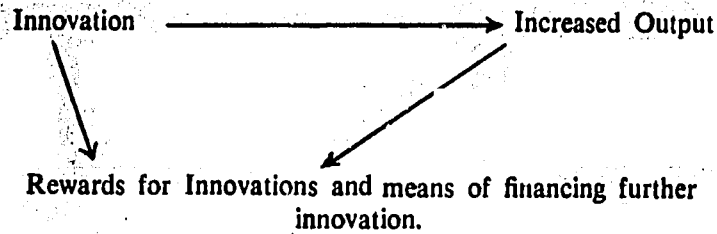
"We cannot absolutely prove that those are in error who tell us that society has reached a turning-point, that we have seen our best days. But so said all who came before us, and with just as much apparent reason. . . . On what principle is it that, when we see nothing but improvement behind us, we are expected to see nothing but deterioration before us? . . . If we were to prophesy that in the year 1930 a population of fifty million, better fed, clad and lodged than the English of our time, will cover these islands . . . that machinery constructed on principles yet undiscovered will be in every house, that there will be no highways but railroads . . . , that our debt, vast as it seems to us, will appear to our grandchildren a trifling encumbrance, which might easily be paid off in a year or two, many people would think us insane. . .".¹⁶

The policies and programmes genuinely reflect serious and pessimistic doubt about what sort of future the prevailing socio-economic system would provide for the masses. But even then the policy effectiveness with regard to changing population events still remains speculative. As D. V. Glass, an authority on population issues concludes, "not much can be said about effects of population policy. . . . Evidence that desired effects are being produced is inconclusive. . .".¹⁷

CONCLUDING REFLECTIONS

My contention in this paper has been that the so called 'population problem' is as a matter of fact a 'production problem'. The crucial point we have failed to appreciate is that any changes in societal performance reflect the set of rules governing intra-societal relation among individuals and organizations, what people learn, the incentive system they confront, and the pay-off matrix of the game they play with the outside world. What we require is a change in economic efficiency which is generally reflected in changes in the behaviour of individuals and institutions, which could be characterized in terms of three functional sets of factors:

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15. B. Berelson: "Population Policy: Personal Notes" *Population Studies* 25, Part 2 (January 1971) p. 173.
 16. Quoted in L. J. Zimmerman: *Poor Lands Rich Lands, The Widening Gap* (New York: Random House 1965) pp. 11-12.
 17. D. V. Glass: "Population Growth and Population Policy" *Journal of Chronic Diseases*, 18, pp. 1079-1080.



This is what Culbertson has termed "feed-back loop governing cumulative efficiency change."¹⁸ The policy-implication is to create the kinds of institutions, policies, and laws that will encourage self-feeding process; and in a negative sense remove conditions that impede efficiency change—the issue becomes a political one. The performance of a society can be revolutionalized through a recasting of the roles, a revision of the rules within which power is gained and exercised.

18. John M. Culbertson: *Economic Development: An Ecological Approach*, Knopf 1971.

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Labour and Welfare Laws and Their Bearing on Population in Ghana

R. B. TURKSON

INTRODUCTION

Over the past decade or so, governments, particularly those of the Third World have been seriously concerned about what is usually characterized as the "population problem", primarily because of the rather disturbing demographic and economic forecasts which have emerged during this period. What has generated this concern has not been so much the size of the population as the *rate* at which it is growing as compared with the rate of economic development.

The desire to find solutions to the "population problem" has led in many instances to programmes geared almost exclusively towards reducing birth rates. It is generally assumed that a slower rate of population growth will automatically lead to a rapid increase in per capita income and make more goods and other basic necessities of life available to the people. In other words, reduction of birth rates will lead to an improvement in the welfare of the population in general. It is the considered view of the writer, however, that a population programme aimed exclusively or even mainly at reducing birth rates cannot lead automatically to the kind of results indicated above unless it is combined with efforts to institute a more just and egalitarian social and economic framework (i.e., efforts at economic development in the real sense of the term and not just economic growth). It is believed that an improvement in the living standard of the man in the street is essential for a meaningful and effective population policy.

Ghana's annual population growth rate is 2.8% and this makes her one of the fastest growing nations in the world. Indeed, demographers estimate that if the present trend continues, it is likely that by 1982 Ghana's population will have doubled. A situation like this will certainly create a severe strain on the economic and social machinery of the country. Even now the rapid rate of population growth can be said to account for the strain on social amenities and jobs, especially in the urban areas. It is becoming increasingly clear that the few employed adults in the country cannot adequately support both the increasing number of young people, the aged and the large number of unemployed. If progress is to be made, the government will have to find means of curbing the rapid rate of population growth, while at the same time stepping up the rate of economic development.

One of the instruments which has an impact on population growth and which can therefore be combined with other methods to check population growth is the law.

In this paper, the various laws relating to labour and welfare in Ghana

will be examined to find out to what extent they are likely to promote or detract from the objective of reducing the rate of population growth. In particular, attention will be focused on the following matters:

- (a) Legislation governing labour relations, particularly provisions which deal with the health and welfare of employees and their dependants and also with the employment of children;
- (b) Collective bargaining agreements, particularly provisions regarding maternity leave and entitlements of pregnant female employees and medical assistance to employees generally;
- (c) Legislation governing the welfare of children both before and at birth and during their lifetime. Provisions relating to the registration of births, abortion, the prevention of harm to the new-born child, the concealment of birth, the abandonment of children and the education, maintenance and adoption of children will be examined.

Some of the relevant statutes in this connection are the following:

- (i) The Industrial Relations Act, 1965, Act 299;
- (ii) The Labour Decree, 1967, N.L.C.D. 157;
- (iii) The Workmen's Compensation Act, 1963, Act 174;
- (iv) The Social Security Decree, 1972, N.R.C.D. 127;
- (v) The Education Act, 1961;
- (vi) The Registration of Births Act, 1965;
- (vii) The Criminal Code, 1960, Act 29;
- (viii) The Maintenance of Children Act, 1965.

LABOUR LEGISLATION

The Labour Decree, N.L.C.D. 157, 1967, contains provisions designed to protect the pregnant female employee. Paragraph 42 (1) of the Decree imposes the following obligations on the employer of any industrial, commercial or agricultural undertaking:

- (a) The employer shall give leave to any pregnant female worker if she produces a certificate given by a Medical Officer or a midwife registered under the law for the time being in force relating to the registration of midwives to the effect that her confinement is in the opinion of such officer or midwife likely to take place within six weeks after the date of the certificate;
- (b) The employer shall give at least six weeks leave to a female worker in such undertaking immediately after her confinement. Where the confinement is abnormal or where in the course of the same confinement two or more babies are born, the above-mentioned period shall be extended to at least eight weeks;
- (c) The employer shall permit the female worker to take her annual leave in addition to her maternity leave if she becomes entitled to annual leave before the expiry of her maternity leave;
- (d) The employer shall not assign or temporarily allocate a pregnant female worker to a post outside her place of residence after the completion of the fourth month of pregnancy if such assignment or

allocation in the opinion of a Medical Officer or a midwife will be detrimental to her health;

- (e) The employer shall not employ overtime in such undertaking a pregnant female worker or the mother of a child less than eight months old;
- (f) The employer shall pay the pregnant female worker at least 50% of her basic salary during the period of her maternity leave;
- (g) The employer shall allow a female worker, if she is nursing a child, half an hour twice each day during working hours for the purpose of nursing the child.

Finally paragraph 43 states that the employer shall not dismiss a pregnant female employee merely because of her absence on maternity leave.

Undoubtedly, the foregoing provisions of the Labour Decree are heavily pro-natalist inasmuch as there is no indication of the number of times a female employee can avail herself of the advantages accorded her by these provisions. It would appear that the provisions ought to be seriously re-examined in view of the government's avowed commitment to family planning as a method of population control. There is no doubt that a pregnant female employee needs the kind of protection embodied in these provisions. What is disturbing is the fact that there is no limit to the number of times she can go on maternity leave and claim all the attendant benefits.

Any comprehensive population programme must of necessity take account of the welfare of the child once it is born. So far as labour legislation is concerned, provisions on the employment of juveniles have a definite role to play. For example, without a minimum age for the employment of juveniles, parents, in view of the economic situation, will be tempted to force their children prematurely into employment in order to benefit from their earning power. Besides, if the minimum age for the employment of juveniles corresponds with the maximum age for compulsory education, the likelihood is that there will be a reduction in fertility because the compulsory attendance of children at school will deny their parents a source of income and at the same time saddle them with the kind of financial burden which education of children entails. This situation is bound to direct their attention to the advantages of reduced fertility. It is in this light that the provisions on child labour ought to be viewed.

The Labour Decree has important provisions on the employment of children. Paragraph 44(1) of the Decree prohibits the employment of a child except where the employment is with the child's own family and involves light work of an agricultural and domestic character. Paragraph 45 prohibits the employment of children on night and underground work except that children between the apparent ages of 16 and 18 may be employed with the written consent of the Chief Labour Officer under the following circumstances:

- (i) in a case of emergency which could not have been controlled or foreseen, is not of a periodical character and interferes with the normal operation of the undertaking, and
- (ii) in a case of serious emergency, when the public interest demands it.

Besides, paragraph 46 of the Decree imposes an obligation on any employer to keep a register of young persons employed by him showing dates of their birth, if known, and, if unknown, their apparent ages. A child is defined by the Decree as any person of the apparent age of 15.

Recently, following reports of Ghanaian children employed in the Lebanon under conditions which amount virtually to slave labour, the Government passed a decree (The Labour Amendment Decree, 1973, N.R.C.D. 150) making it an offence for anyone to make an agreement to employ any Ghanaian under 18 years of age as a clerical worker, artisan, labourer, apprentice or domestic servant outside Ghana. Anyone who procures or promotes the making of any such agreement is also guilty of an offence.

It is significant to note that under Ghanaian law (i.e., the Education Act, 1961) primary and middle school education is free and compulsory for all children of school-going age. Any parent who contravenes this provision of the Act is guilty of an offence and is liable on summary conviction to a fine not exceeding C20.00 (about £10) and, in the case of a continuing offence, to a fine not exceeding C4.00 (about £2) for each day of default.

It must be observed that the nature of financial assistance to education would tend to alleviate the burden of bringing up children and reduce in a significant measure the negative effect on fertility which the prohibition on employment of juveniles together with a compulsory education scheme would otherwise have. In any case, it is not clear to what extent the provisions of the Labour Decree and Education Act in this regard are complied with.

The next question relating to labour legislation which requires discussion is the nature of the benefits payable to a retired or injured employee or, in the event of death, to his dependants and to what extent, if at all, these benefits are likely to influence his attitude to procreation.

The Social Security Decree, 1972, N.R.C.D. 127 which repealed an earlier statute (The Social Security Act, 1965, Act 279) contains a comprehensive scheme designed to promote the welfare of the worker. The Decree establishes a Social Security Fund administered by a Trust out of which are paid superannuation, invalidity, survivors, sickness, unemployment and emigration benefits. The scheme is essentially contributory and the rate of contribution is specified in paragraph 27 of the Decree as follows:

- (a) Five per centum (5%) of the worker's monthly salary to be paid each month by the worker, and
- (b) Twelve and a half per centum (12½%) of the worker's monthly salary to be paid each month by the employer.

By virtue of paragraph 23, the Decree applies to every employer of an establishment employing not less than 5 workers and to every worker employed therein. Lecturers and other academic staff of the three universities and their employers are exempted from the provisions of the Decree. It must be pointed out, however, that in relation to this class of persons there is already in existence a Superannuation Scheme which is not materially different from the scheme established by the Decree. Foreign missions in Ghana are also exempted except that they may volunteer to register their Ghanaian staff under

the Decree. Besides, the Decree makes provision for other voluntary members of the scheme. Paragraph 25, for example, states that an employer to whom the Decree does not apply may with the written consent of the majority of his workers, volunteer by written application to the Board of the Trust that the Decree may be applied to that establishment.

What then are the details of the benefits available under the scheme established by the Decree? Paragraph 40 specifies the classes of benefits as follows:

- (a) A superannuation benefit when a member of the Fund retires or is retired after attaining the age of superannuation which is, with regard to men, 50 years, when they retire voluntarily and 55 years in any other case. With regard to women the age of superannuation in the event of voluntary retirement is 45 years and 50 years in any other case;
- (b) An invalidity benefit, when a member of the fund is rendered by a permanent physical or mental disability incapable of any normal gainful employment;
- (c) A survivor's benefit payable:
 - (i) on the member's death, to the person or persons in whose favour a valid nomination exists in the Trust's office in such amount or proportion as may be specified in the instrument of nomination and
 - (ii) in the absence of a valid nomination, to such members of the family, and in such proportions, as may be prescribed;
- (d) An emigration benefit payable to a member of the fund who satisfies the Chief Administrator that he is emigrating, or has emigrated, permanently from Ghana;
- (e) A sickness benefit of such amount as may be prescribed by regulations shall be paid to a member out of his own contribution on his application during sickness.
- (f) An unemployment benefit subject to such conditions as may be prescribed; and
- (g) Such other benefits as may be prescribed.

With respect to survivors' benefits, the member's nomination is restricted to his family. "Member of the family" is however defined so as to include wives and children and even some members of the extended family.

It is important to note that in relation to workers to whom the Decree applies, these benefits are in addition to whatever benefits there may be under any person, provident fund or gratuity scheme. These matters are regulated under such statutes as the Pensions Ordinance 1950, the Pensions (Amendment) Act, 1971 and the Civil Service Act, 1960. Perhaps, the most curious of the provisions of these statutes is the one which states that a woman who retires from the public service on grounds of marital obligations or for the purpose of marriage is entitled to pension or gratuity even though she may not have attained the minimum pensionable age.

Although the statutes stipulate that public officers have no absolute

right to the benefits, in practice, they are invariably awarded these benefits provided they satisfy the conditions laid down.

In addition to the foregoing statutes on the welfare of the employee, there is the Workmen's Compensation Act, 1963, Act 174 which applies to all employees except those in the Armed Forces. The Act requires every employer to pay compensation to his employees who sustain injury or die as a result of injury sustained in the course of their employment. Not every injury entitles an employee to compensation. The Act is in essence a reproduction of English legislation on the subject. One finds in the Ghanaian Act the same qualifications applicable to its English counterpart, viz.:

- (i) the injury must have arisen out of and in the course of the workman's employment,
- (ii) an employee loses his entitlement to compensation when the injury is attributable to his own negligent or wilful conduct,
- (iii) Drunkenness at the time of the accident disentitles the injured workman.

The compensation payable under the Act is not uniform. For example, the amount paid when the injury results in permanent total incapacity is dependent on the workman's monthly earnings at the time of the accident and the compensation is 54 times this amount but should not, in any case, be less than C800.00 (about £400). Where death results from the injury sustained, the quantum of compensation depends on such factors as whether the workman left any dependants wholly or partly dependent on his earnings.

In practice, workmen rarely resort to this Act primarily because of the prospect of recovering large sums of money by way of damages (especially where the injury can be attributed to the negligence of the employer or a person for whose acts the employer is, in law, responsible) in a civil action based on negligence.

It is submitted that the existence of the various welfare schemes described above is likely to engender in the worker a feeling of financial security which may in turn reduce the need for a large number of children as a potential source of financial support in times of unemployment, invalidity or old age. Besides, there is evidence in Ghana of a feeling, particularly amongst the elite, that in these hard times it is better by far to have a few children fairly early in one's working life so that these old age and retirement benefits may be used in improving the quality of one's life during retirement rather than in maintaining and educating one's children.

The provisions of the Social Security Decree on emigration benefits need special mention. Benefits of this nature constitute one method of population control, provided of course they are attractive enough and those who emigrate do not come back into the country. Indeed the Ghanaian Decree requires evidence of permanent emigration. The practice in Ghana, however, has been adverse to the aims of these benefits. Workers, particularly those from neighbouring countries, have in the past collected their emigration benefits and then have found their way back into jobs in the country. So disturbing is this practice that there is a growing consensus in official circles that the emigration

benefits under the Social Security Decree should be abolished. It seems, however, that abolition is not the solution to the problem. Rather, some means will have to be found to strengthen our immigration machinery (particularly the issue of work permits) so as to ensure that those who collect emigration benefits do not come back into the country to work.

COLLECTIVE BARGAINING AGREEMENTS

Pursuant to the provisions of the Industrial Relations Act, 1965, (Act 299) collective agreements have been entered into between the various branches of the Trades Union Congress and employers in various establishments—industrial, commercial and agricultural. By virtue of Section 10 of the Act, these agreements form an integral part of the contracts of employment between employers, and employees. In other words, their provisions are legally enforceable against employers as if they form part of individual employment contracts. Indeed, the rights conferred on employees by these agreements cannot be waived by the employee and in the event of any conflict between the provisions of a collective agreement and those of an employment contract, the former prevail. Irrespective of the provisions of the Act on enforceability of collective agreements, it would appear that the agreement is enforceable on the basis of common law principles of agency or, in the alternative, on the basis of Section 5 of the Ghana Contracts Act, 1960, Act 25 which deals with the enforcement by third parties of contracts expressly purporting to confer benefits on them.

The provisions of these agreements which are relevant to the subject matter of this paper are those relating to maternity leave and benefits and medical assistance generally.

On maternity leave and benefits, the provisions of the existing collective agreements basically follow the pattern laid down in the Labour Decree (discussed *supra*). They all comply with the basic minimum requirements of the Decree. Some even have provisions which go beyond these basic minimum requirements. Typical examples are the agreement between the Industrial and Commercial Workers Union and the Graphic Corporation and that between the same Union and Shell (Ghana) Ltd.

The observations made in relation to maternity leave and benefits under the Labour Decree apply with equal force to the provisions of these agreements on the subject.

With regard to medical assistance to employees, the collective agreements examined generally provide for free medical attention to all employees (but presumably not to their dependants). This includes medical examination, surgical treatment, and cost of drugs prescribed by the doctor. Besides, there is periodic and free medical check-up for employees.

These provisions are significant since in Ghana there is neither a system of health insurance such as exists in Britain nor a scheme for free medical aid. Rather, there is a statutory scheme under the Hospital Fees Act, 1971, which ensures that only specified persons (e.g., students, lunatics or indigent persons) obtain free medical assistance.

The provisions of the agreements relating to free medical aid, it is submitted, are wide enough to include medical assistance in respect of birth control.

THE WELFARE OF THE CHILD

Before and at Birth

When one thinks of the welfare of the child before birth the question of abortion comes immediately to mind. The law relating to abortion in Ghana today is governed by sections 58, 59 and 67 (2) of the Criminal Code, 1960, Act 29. These sections provide as follows:

“58. Whoever intentionally and unlawfully causes abortion or miscarriage shall be guilty of second degree felony.

“59 (1). The offence of causing abortion or miscarriage of a woman can be committed either by that woman or by any other person; and that woman or any other person can be guilty of using means with intent to commit that offence, although the woman is not in fact pregnant.

(2). The offence of causing abortion can be committed by causing a woman to be prematurely delivered of a child with intent unlawfully to cause or hasten the death of the child.

“67 (2). Any act which is done, in good faith and without negligence for the purposes of medical and surgical treatment of a pregnant woman is justifiable, although it causes or is intended to cause abortion or miscarriage, or premature delivery, or the death of the child.”

It is, perhaps, of some significance that sections 58 and 59 which create the offence of abortion appear in Part II of the Criminal Code which deals with offences against the person, i.e., criminal homicide and cognate offences. It would appear then, from the context in which abortion law is set in the Criminal Code, that the law in this regard is aimed at protecting life—presumably, the life of the foetus. Such a conception of life has religious and philosophical under-pinnings. For example, Christian (particularly Roman Catholic) theology teaches that a foetus is endowed with a soul right from the time of its conception. It is this view of when life begins which shaped the original English rules on abortion after which the present Ghanaian law on the matter was fashioned.

Turning to the rules themselves, it would appear from section 67 (2) of the Criminal Code that an abortion is lawful if the following conditions are satisfied:

- (i) the purpose must be medical or surgical treatment of a pregnant woman,
- (ii) the abortion must be done in good faith, and
- (iii) the abortion should be done without negligence.

By far the most important defect in the present law is that it fails to answer the question of who is qualified to perform a lawful abortion and what medical or surgical indications will justify the performance of an abortion. The failure of the draftsman to answer these questions has left both lawyers and doctors in doubt as to the scope of legal abortions. It is possible to take the view that by referring to “purposes of medical or surgical treatment”, the

Criminal Code limits the application of the provision only to persons qualified to administer medical or surgical treatment under the law of Ghana, i.e., persons registered under the Medical and Dental Decree 1972. It would seem, therefore, that native herbalists, midwives and other para-medical staff are precluded from performing legal abortions.

The other related question is the nature of medical or surgical indications which will justify the performance of a legal abortion. In other words, is abortion permitted under the Criminal Code only where it is necessary to preserve the life and health of the mother? Or is it also permitted in cases where the pregnancy could have serious medico-social effects on the mother or the child where, for example, the child was conceived by rape or the child is likely to have serious congenital defects? Here, again, the view may be taken that since the Code insists on "good faith" on the part of the person performing the abortion, the legislature probably intended to leave the determination of the permissible scope of legal abortion entirely to the discretion of those competent to determine what is required "for purposes of medical or surgical treatment of a pregnant woman."

Other matters such as consent requirements, requirement as to length of pregnancy, the place of performance are presumably also to be left to the discretion of the person performing the abortion.

There is no direct provision on fees for abortion but it appears that the Hospital Fees Act, 1971, Act 387 exempts certain classes of persons (e.g., students, indigent persons, lunatics) from payment of hospital fees, including fees for abortions.

The Law Reform Commission of Ghana, after carefully weighing the advantages and disadvantages of having a restrictive abortion law, has recently expressed support for the liberalization of abortion laws. This is in line with informed opinion not only in legal circles but medical circles as well. Most doctors, for example, feel that there is a correlation between the present restrictive abortion laws and recourse to the high-risk (and sometimes, high-cost) operations of the backstreet abortionists.

Pursuant to its recommendation, the Law Reform Commission has circulated three alternative draft proposals for liberalizing abortion laws. The first draft, which follows the British Act on the matter, lays down a general rule making the termination of pregnancy illegal. Exceptions to this general rule authorize the termination of pregnancy by a registered medical practitioner, if two registered medical practitioners or one gynaecologist are/is of the *bona fide* opinion that the continuance of pregnancy will involve risk to the life of the pregnant woman, or risk of injury to the physical or mental health of the pregnant woman or any existing children of her family. Such termination is also authorized if there is a *bona fide* opinion that there is substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. Such authorized termination of pregnancy should be carried out in hospitals or clinics approved by the Government.

The second draft also makes abortion a crime unless it is carried out by

a registered medical practitioner in a general public hospital or clinic or a private hospital regulated under the Private Hospitals and Maternity Homes Act 1955 or in a place approved by the Commissioner for Health. Apart from this requirement, no further limitations are imposed. The decision to perform the abortion is left entirely to the doctor.

The third draft also prohibits abortions unless they are carried out in a hospital or a clinic. However, it enumerates the situations in which abortions, even in hospitals will be lawful. Such abortions will only be lawful where a registered medical practitioner forms the opinion in good faith that:

- (a) the continuance of the pregnancy will involve serious risk to the life of the pregnant woman or injury to her physical or mental health; or
- (b) that there is substantial risk that the child may suffer from or later develop a serious physical or mental abnormality; or
- (c) that the pregnancy is the result of rape, defilement of a female, carnal knowledge of a female idiot or incest; or
- (d) that the pregnant woman has recently given birth to a child such that her capacity to care for another child is seriously limited; or
- (e) by reason of her circumstances the pregnant woman will be unable or unlikely to care adequately for the child if born.

Which of these alternative drafts will eventually be adopted remains to be seen but it would appear that the third draft is the best since it sets out in sufficient detail the grounds upon which legal abortions may be carried out.

The move towards liberalization of abortion laws in Ghana is a desirable one in view of the Government's declared commitment to family planning.

For the state to plan its population programme effectively, it is necessary to know the rate at which its children are being born. The Registration of Births Act, 1965, requires that every child must be registered within 21 days of the date of birth. The duty to register is cast upon the parents of the child or the occupier of premises where the child was born or the person present at the birth of the child. The law as it stands is adequate and, if carried out, ought to serve its purpose. But it is doubtful whether registration is being carried out as envisaged by the Act. This is primarily due to the fact that there are not enough registration centres and the few that exist are not conveniently located. These, however, are administrative difficulties which ought to be possible to solve. Besides, a more effective enforcement machinery is required.

The Criminal Code, 1960, Act 29 has provisions designed to protect the new baby. These relate to the concealment and abandonment of the new-born child and causing harm to the child at birth.

MAINTENANCE

The Criminal Code, 1960, Act 29, Section 79 (1) provides that a man is under a duty to supply the necessaries of health and life to his wife and children (legitimate or otherwise). A guardian is under a similar duty with respect to his ward.

Besides under the Maintenance of Children Act, 1965, the mother of a

child may, on application, be awarded a maximum amount of C10 a month towards the maintenance of a child. This amount has to be paid by the father of the child. The amount of C10 is unrealistic and the cumbersome procedure involved in applying for it has tended to discourage most women from applying for it. The Law Reform Commission is, therefore, working on a new decree designed to give better protection to the neglected child.

Finally, under the Matrimonial Causes Act, 1971, Act 367, either party to a marriage may petition the court for an order for maintenance on the ground that the other party to the marriage has wilfully neglected to provide reasonable maintenance (or make a reasonable contribution towards same) for the petitioner or any child of the marriage. Presumably this petition can be brought even if there is no substantive petition for divorce pending.

EDUCATION

Sex education, which is gradually arousing the interest of educationists, primarily because of the publicity given to the family planning programme in Ghana, is not specifically provided for by the Education Act, 1961. But the provisions of that Act, particularly Section 1 (2), are wide enough to give the relevant authorities statutory backing for the introduction of sex education into the curricula of schools. That section provides as follows:

"It shall be the duty of the local education authority for each area as far as its functions extend to contribute towards the spiritual, moral, and physical development of the community, by securing that efficient education throughout the primary and middle stages shall be available to meet the needs of the population."

If it is accepted that sex education has something to contribute to the spiritual, moral, mental and physical development of the children in the community and that sex education is inherent in the concept of efficient education, then this section would appear to provide an adequate statutory basis for the introduction of sex education into the curricula of schools.

The conclusion that emerges is that it is possible to mount a programme of sex education in schools without contravening any of the laws governing education. The question which arises, though, is whether such a programme is necessary.

Traditional society had a system of sex education. At the time when there was no formal education, the young girl, for example, stayed with her mother and other female members of the family group and in this way she learnt "proper" female behaviour including how to comport herself as mother, wife and housekeeper. At puberty, i.e., at menstruation and prior to marriage, she was initiated into womanhood. Most ethnic groups in Ghana still observe these puberty rites. In the performance of these rites, emphasis was placed on the importance of the family in socialization and its role as an agent of social and moral control. The idea of pre-marital chastity was complemented by a range of social safeguards and sanctions which made violation difficult, if not impossible. Any incidence of sex misbehaviour met with severe punish-

ment. There was also an elaborate system of sex prohibitions and taboos to control teenage and even adult sex behaviour.

With the gradual relaxation of traditional and parental control the dangers of disregarding traditional values have lost much of their threat. The modern child spends most of his or her formative years in school. The school system itself provides a greater opportunity for children of both sexes to mix freely together. With social change, relatively earlier physical maturity and various situations in which sexual experimentation can take place, there is a marked decrease in pre-marital chastity.

That the youth of today indulge in sexual activity on a grander scale than their predecessors cannot be doubted. But the amount and content of information and knowledge about sex leave much to be desired. It is in this light that better sex education is seen as an essential component of the family planning programme. Without it, the adolescent is left on his or her own either to commit blunders or learn through unorthodox methods.

If sex education is necessary, then the following questions deserve serious attention:

- (a) Who will be the most effective group to carry out the sex education programme—educational institutions, the churches, a government organization or who?
- (b) At what stage in the life of the adolescent should he or she be introduced to formal education on sex?
- (c) What should be the permissible content of such a programme?

With regard to the availability of financial assistance to education, primary and middle education is, under the Education Act, 1961, free and compulsory for all children, male or female, of school going age. The Act prescribes penalties for non-compliance with its provisions in this regard, i.e., C20.00 fine and, in the case of a continuing offence, a fine not exceeding C4.00 for each day of default.

Secondary education is not compulsory but it is partly free up to the Ordinary Level (West African School Certificate) in the sense that tuition is partly subsidized and textbooks do not have to be paid for. Tuition at the Sixth Form level, however, is completely free. Higher education (i.e., university education) is now partly free in the sense that the allowance for books and incidental expenses has been withdrawn.

It would appear that by and large the provisions on financial assistance to education are pro-natalist and, perhaps, ought to be re-examined in the light of the government's commitment to family planning.

CONCLUSION

The foregoing has been an attempt to examine Ghana's labour and welfare laws in order to ascertain to what extent they promote or detract from the objective of population control. What emerges from the discussion is the fact that some of these laws are likely to have a negative effect on attempts at population control while others are adequate but need a more effective enforcement machinery. This state of affairs is perhaps excusable

in view of the fact that the laws were not originally made with population control as an objective. This accentuates the need to harmonize those parts of the law which have a bearing on population control and to bring them together in a comprehensive Population Code. This exercise is bound to bridge the gap between the declared objective of population control and the law as it stands today.

The Population Implications of Rural Development in Kenya

METTE MONSTED

INTRODUCTION

The population question has exploded into the African discussion of development with a force which may lead to fear that it is going to be a top score, distorting the carefully prepared development priorities established during the 10 years after independence.

The population issue is brought up in innumerable seminars, conferences and workshops, and is given a top priority in Africa, even if so little is known about the process of development and the essence of the initial rural development.

This paper is trying to outline some perspectives and interpretations of the relation between population and rural development, and to raise some questions on the relevance of this high priority on the population problem and on the way it has been presented in isolation from other factors of development. Many other aspects of rural development may have just as much or even more impact on the family size than family planning programmes.

RURAL POPULATION GROUPS IN KENYA AND MIGRATION PATTERNS

In Kenya a large majority of the population lives in rural areas. In 1969 the rural population was 92% of the total population and even with a very high increase in the urban population at about 7%, the increase in rural population is continuing at about 3% (3.1% in 1969). This high level of growth is related to the high fertility level of 50 per 1,000, which is higher than the estimated fertility in the census 1962. This implies an estimated total fertility of 7.6 births per woman who has survived until 50 years of age. In 1962 the total fertility was estimated at 6.8.

But mortality is also still high, and an estimate on the basis of the census (1969) provides a crude death rate of 17%, and an estimated infant mortality of 125-135%.¹ These figures are calculated on a national basis, but still provide basic information for the rural population.

What is more important in relation to the different rural groups, however, is the distribution of population and the structure of the population. Demographic indicators of the structure are: (1) adult sex ratio, (2) dependency burden and (3) percentage of households with female head of household.

The adult sex ratio is defined as adult males per 100 females (age over 15), and it is lower, the higher the outmigration of males. The dependency

1. Calculations on the basis of Census (1969).

burden indicates the number of children to be supported per 100 adults. This is higher, the higher the adult outmigration, and the higher level of fertility. The percentage of households with female head of household also reflects the number of women living alone due to other factors, i.e. widows and the outmigration of men at the time of the census. However, it also reflects the number of polygamous households. All of these measures therefore provide an indication of the effect of especially men's migration on the structure of population. Table 1 last column is provided to show the extent of these phenomena, that is, the geographical distribution of the population involved.

Table 1. Indicators of the structure of population in the Provinces: (1) Adult sex-ratio, (2) Dependency burden (3) Percentage of households with female head of household, (4) Percentage of distribution of the population in the provinces in 1969.

	Adult sex ratio	Dependency burden	Percentage female head of household	Percentage of population in provinces 1969
Kenya	98	102	29	100,0
Nairobi	229	57	16	4,7
Central Province	82	113	37	15,3
Coast Province	128	81	22	8,6
Eastern Province	89	105	37	17,4
North Eastern Province	122	92	29	2,3
Nyanza Province	89	109	30	19,4
Rift Valley Province	107	99	24	20,2
Western Province	76	121	31	12,1

Source: Calculations on the basis of 1969 Census.

These figures are of course very crude for a description of the population structure, but they identify some of the indicators that may provide some idea of the demographic conditions and the regional variations in these. There are also great variations within the regions, for example, in Machakos and Kitui districts in Eastern Province and in Murang'a in Central Province the households with female head of households. In surveys made later some of these districts revealed up to approximately 65% of the adult men were away for employment in other districts.² Also in the Coast Province the migration to Mombasa distorts the provincial rural data.

The figures from the Census do in themselves represent the limitations of that kind of data. The registration of migrants in a census is very difficult except when only the place of birth and place of enumeration are used, and these only give a minimum indication. Also the figures are actually too old to illustrate the effect of rural development and migrations on the structure of the population, as most of the migration and development in rural areas has taken place within the last few years.

2. P. M. Mbithi and B. Wisner: Drought and Famine in Kenya: Magnitude and Attempted Solutions. *Journal of Eastern African Research and Development*. Vol. 3, No. 2, 1973, Nairobi.

However, the table provides an indication of the results of rural-urban migration of men. The migrations between rural areas are usually family migrations and do not have the same impact on the population structure as regards sex ratio, dependency burden, proportion of households with female head of household. But it affects the distribution of population on the regions.

The indicators of the migration also provide some fundamental population characteristics which are assumed to be closely related to the rural development process in the areas. The total pattern of migration whether rural-rural or rural-urban should not be studied in isolation, but together with the groups of populations involved and the possible causes for this respond to other factors.

The population groups relevant for this are the agricultural population in the different farm sizes and different production pattern. The service, trade and industrial groups are very closely related to farming; 70% are also farmers, and the specialized groups therefore constitute only a very small fraction of rural population.

The major agricultural groups are:

1. Progressive, though not large-scale farmers with a cash income of over £110 per year and increasing profits from agriculture. This group is 13% of the total rural population.
2. Small-scale farmers (medium group). This group has a cash income of between K.£50 and K.£110 per year, and make up 19% of the rural population.
3. Very small farmers, mainly subsistence agriculture. This group which is 38% of the rural population has a cash income of less than K.£50 per year.
4. Pastoral and nomadic households account for 13% of the rural population.
5. The landless rural population consisting of landless labourers and a rural squatter population. This group is 12% of the rural population. Most of these are "traditional squatters", who, due to land and labour policies in the colonial period, were rendered landless.

These categories of the rural population are not equally distributed in the country, and they do not respond equally to rural development or to local pressure on land or to better education facilities.

The progressive farmers mainly improve their income within agriculture, through increased productivity, i.e. use of better crops, fertilizer, improved ploughing, irrigation, graded cattle, and through buying more land. This group does not constitute the group of potential migrants either for rural-rural or for rural-urban migrations. At least they are not pressed out of agriculture to supplement with incomes in other areas or supplement land. However, a few within this group are already urban citizens using efficient agricultural production to supplement the urban income. They have moved earlier and are now expanding agriculture with investments from urban incomes, but do not migrate back.

The farms are mainly characterized by a division of labour where the

man is managing the farm, though not always working on the farm himself. A majority of these farms, and also of the medium group of farms, can be found within Central, Rift Valley and parts of Eastern Province.

The very small-scale farmers are mainly based on subsistence agriculture. This group has severe difficulties in improving agricultural productivity due to shortage of money. The only possibilities lie in more intensive production with more labour input, or through money generation outside agriculture. The conditions for increasing labour input, and also to be able to market the products are varying according to regions. In Central and parts of Eastern Province all members of the family including the men seem to work in agriculture, whereas in other parts of Eastern Province and especially in Western Province the men seem to migrate to urban areas for occupation, or are engaged in local business or industrial production. The marketing of products seems to be also easier in Central and Eastern Province, both due to more local purchasing power and to better access to a large market for agricultural products in Nairobi. Agricultural development therefore cannot be expected to be similar for the different regions, and the effect of extension service, introduction of new crops, and education may not have the same impact on the population in different areas and types of farms.

Among pastoral and nomadic people, mainly in the North of Kenya and in parts of Rift Valley, very few groups have improved their productivity and living conditions, and extremely few have access to education and medical services. Furthermore the previous reserve grazing land is to an increasing extent included in the agricultural cultivation for the permanent settled farmers, and thus excepted from the available grazing land for the livestock. This is an example of changes which improve conditions for some groups of population, while depriving other groups and other areas of their development possibilities. Some of the pastoral peoples therefore have to rely much more on the women's cultivation of land than before.

The landless squatter population is a result not only of the special settlement laws from the colonial period, i.e. land-labourers having a small piece of land for cultivation as a part of the payment while they were working on the plantations, but also the spontaneous settlement directed toward areas of non-claimed land. A smaller landless population may now also be found as labourers at the large-scale farms, especially in Central and Rift Valley Provinces.

The groups of squatters seem to consist of people who have migrated from areas where their land could not support their family. This group of people, however, on the average is much poorer, older and has much less education than other migrants,³ thus leaving them with very few possibilities for improving conditions for their families.

3. P. M. Mbithi and C. Barnes: *The Spontaneous Settlement Problem in the Context of Rural Development in Kenya*. IDS June 1974, Nairobi.

MIGRATION TRENDS

The main trends of rural-rural migration is directed toward the previous white highland with very low population density and good soils, and toward areas in the Coast region and some areas, previously belonging to pastoral groups, where there is a good agricultural potential, but very low population density.

Even if the previous pastoral areas are good grazing land, it is marginal in relation to agriculture, i.e. there is higher rain-uncertainty and poorer soil than in the already cultivated land. The migration is mainly coming from districts like Kakamega, Kisii and Murang'a, which are former Trust lands with high population densities and small plots of land per family. The rural-rural migration seems to relieve the land pressure because the families of the migrants may take over land in the outmigration area, and do not have to subdivide land to such small plots. Thus it provides basis for a fundamental increase in productivity for both in- and outmigration areas. However, the rural-urban migration is very different in nature, mainly because it is seldom a permanent migration, being often a temporary migration in very long periods. This migration seldom seems to relieve the pressure on land, and tends to preserve the existing landholdings, resulting in a sub-division of holdings to very small pieces. These small pieces of land makes it even more important to seek employment and income generation outside agriculture and thus, for sure, leaves the agricultural production for subsistence to women and children.

To illustrate some of the aggregate migration patterns, the inflow and outflow of the provinces are shown in Table 2. However the statistics are based on the place of enumeration in 1969 census and the place of birth. This means that the trends are going far back in time, and especially in Central areas of Kenya it is also showing some results of the forced migrations. Also many of the temporary migrations are not possible to identify in this kind of registration.

Table 2. Population Flows up to 1969: Persons Enumerated in Provinces Outside Their Birth Places

<i>Province</i>	<i>Outflows 1969</i>	<i>Inflows 1969</i>
Central	332,555	151,421
Coast	27,666	155,210
Eastern	161,871	33,454
North Eastern	10,280	8,919
Nyanza	186,069	169,329
Rift Valley	88,823	428,355
Western	200,946	58,699

Source: P. M. Mbithi and C. Barnes; *The Spontaneous Settlement Problem in the Context of Rural Development in Kenya*, IDS, June 1973, Nairobi, p. 39.

The main trends, however, identify, the major outmigration areas: Western, Eastern and Central Province. While Rift Valley and Coast Province,

on the other hand, have received a very heavy inflow of migrants to the new lands. The inflow to the Coast Province is mainly from the heavily populated areas of Eastern Province and some from Western, while the migrants to Rift Valley are mainly from Western and Central Province, i.e. Kakamega and Murang'a districts.

RURAL DEVELOPMENT AND IMPACT ON MIGRATIONAL PATTERNS

Rural development may cover all economic and social changes within the rural areas. Here, however, the focus is upon:

1. Increased agricultural productivity.
2. Access to facilities like schools, clinics, water, roads.

Especially the evaluation of the development is related to its effect on the size and structure of rural families. An outline of the groups involved in rural development is provided in the above section. The explanation of the different patterns of reactions in the social groups to different aspects of development is assumed to be closely related to the division of labour within the family and the impact of development on family life. The results of the families' response to the different aspects of development, may be measured in the aggregate variables: fertility, mortality, migration and population structure and distribution. Tables 1 and 2 illustrate not only the men's migration, but also the response to differential rural development in the regions.

The family or rather the division of labour within the family is here assumed to be a decisive factor for how the rural development and development programmes are influencing the family's living conditions and the migrational pattern.

It is here assumed that there are great variations in organization of labour in agricultural production, not only on different types of farms, but also in different areas of Kenya.

In the majority of the farms and majority of rural families, namely, in the small farms, the women are the main labour force within agriculture due to the traditional division of labour. They are responsible for the production of foodcrops for the family supply. The men constitute a kind of "labour reserve", mainly ploughing new land, a function however which is diminishing because of a change away from shifting cultivation. Also in some cases they may be managing, assisting in agriculture, taking care of cash-crops or assisting in peak seasons. The men's contribution in medium and larger farms is much more important due to an emphasis on cash crops, while on the small farms they do not seem to play a significant economic role in agriculture.

If this is the typical pattern, there are problems in many of these areas in introducing new crops and improving productivity, as the men still maintain the economic decision power and the women may not engage in major economic decisions on investments for agricultural production and are usually not contacted by the agricultural extension officers who advise the men on the development of agriculture. Also it is still a man's land, even if he is very little or not at all engaged in the farming. Case studies from

Kakamega district show that even if the woman buys land out of her money earned in agriculture and trade while the man is away, this land belongs to the man in case of divorce.⁴

The main hypothesis is: Where the traditional division of labour is still strong, there is a tendency for the men to seek employment in other sectors than agriculture, and thus a very high tendency toward urban migration. These men may be able to take up even very poorly paid employment, as the main costs for supporting the family are carried by the women and the children in agriculture. An improvement of education in such an area is likely to increase the men's rural-urban migration further, as the chances of getting a job in the city improves while the inclination to work in agriculture declines considerably.

The complementary hypothesis is: If the division of labour in the family is less traditional and thus the men are more inclined to work on the land, then the tendency to migrate is less, except when the average land plots are very small. If migration is taking place after all in these areas, it is mainly a family migration to other rural areas for the purpose of improving the agricultural production. This development may be found in Central Province, the people in the northern part moving more towards the north, new lands, and to the settlement schemes in Rift Valley.

To illustrate the economic role of men and women, especially in periods of drought or slack agricultural seasons, a table of non-agricultural activities in Machakos District is provided. The activities of women are not limited to agricultural production alone, but are constantly related to the provision of food for the family. This implies that if agriculture does not supply enough, other income-earning activities must supplement for buying food. The men's work in this area seems mostly to be in employment outside the area, and in local small business. The table is collected in an area where 65% of adult males and 6% of adult females were away for employment in other areas.⁵

There is one problem as regards the interpretation of the table, namely, that the role of the women as important contributors may well be even more pronounced than is suggested here, because many of the income-generating activities performed by the women are considered illegal, and thus difficult to collect information about. Some of these economic activities may however still play a major role in the family economy, for example, brewing of beer and liquor (*chang'aa*) and prostitution. In a recent survey in Kisumu district approximately 40% of women supplemented income by occasionally brewing beer and *chang'aa*.⁶

The table should also supplement the above description of the complex economic structure of the small-scale farms.

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4. Unpublished case studies from pilot research, collected by J. J. Akong'a Dept. of Sociology, Univ. of Nairobi, December 1974.
 5. M.A. Thesis by S. Nyaake-Owuor: Primacy of Determinants of Rural-Urban and Reverse Urban-Rural Migration in Kenya. Dept. of Sociology, Nairobi 1974.
 6. Unpublished data collected in Kisumu district by Institute for Development Research (Copenhagen) in a household survey Sept.-Dec. 1974.

Table 3. Non-Farm Activities for Men and Women in Parts of Machakos District

	Percentage Household Members	
	Female	Male
1. Shopkeeping (general store, butchery, eating house, bar, etc.)	0	30
2. Beer brewing (often illegal)	29	5
3. Casual labour	25	14
4. Petty trade: sale of snuff tobacco, grain, food items, drugs, vegetables, etc.	23	6
5. Bicycle repairs, shoe-repairs, tailoring, masonry and carpentry	0	30
6. Lorry and bus transport	0	10
7. Weaving, rope-making (e.g. bead stringing), mat-making, etc.	10	2
8. Carving, beehive making, arrows/bows making, dance-drums making, arrow poison, brewing	0	0
9. Livestock trade	0	4
10. Water carting	0	3
11. Medicine men, anti-witchcraft healing	6	3
12. Pottery	2	0
13. Part-time teaching, preaching, etc.	2	3
14. Other	10	9
	107	127*
Number with some kind of non-farm job	= 48	38
Total householders accounted for % without a non-farm job	163	51†
	70	34
Total sample of households	= 100	
Total households in 4 sublocations‡	1,462	

Source: Philip M. Mbithi and B. Wisner: Drought and Famine in Kenya: Magnitude and Attempted Solutions. *Journal of Eastern African Research and Development*, Vol. 3, No. 2, 1973, Nairobi.

Note:

*In some cases household members held more than one non-farm job.

†Note that 65% of the adult males and 6% of the adult women were away on employment outside the study areas and were not included in the sample.

‡These data include only 4 sites—Lower Machakos (Kimutwa), Kahaba, Shiakago and Isiara

FAMILY SIZE AND HEALTH

The pattern of migration has been analyzed in relation to the production and the organization of the production. The analysis of family size should be based on the same, as the conditions for large vs. small families are closely related to the workload and the division of labour within the family.

The variations in the division of labour in the family imply a very different emphasis on and need for children labour contributions.

We have very limited information of the economic role of children in agriculture. Diana Hunt in her agricultural survey in Mbere⁷ indicated the importance of the children in herding. They both contributed as hired labourers and as family labourers. Studies from Uganda also indicate the

7. Dianna Hunt: Resource Use in a Medium Potential Area: The Mbere Rural Economy. Working Paper 180 IDS Nairobi 1974.

importance of children's labour on the farm, and the perception of the necessity of many children for this work among the parents;⁸ also in the settlement schemes, where a new production is very important, and the children's contribution seems to be essential in the agricultural production. In farms relying on family labour the children apparently play a major role in the production and in relieving the mother of tasks as water fetching, collecting firewood, taking care of younger children, etc. The "utility" of children above 6 years seems to be high. Considerations on the level of fertility, and the relevance of limiting family size should therefore be analyzed within the context of the total costs and benefits of the children in the family.

The precise relation between production, division of labour and large vs. small families is not quite clear. For example in rural-urban outmigration area, if the dependency of family labour is decisive for the family economy, critical seasonal shortage of labour may result when the family is not very large. This may especially be the case where the men are away from the homestead for very long periods. The necessity of family labour in an area like this, therefore, may lead to an emphasis on a large family due to economic considerations. Of course it may also be argued that the man may not migrate if he does not have a large family on a small plot of land, or that the woman wants to limit family size if she is alone for long periods with the children, but the analysis related to the economic structure seems to indicate that the contributions of the children are important and influence the basis for changes in family size.

The children are also clearly perceived as the old age security for the parents. A few children must survive to provide for the parents in old age, and when mortality is still pretty high among infants, a high number of births are considered necessary.

As the utility of children must be analyzed within the specific economic and social conditions of the families, therefore variations of considerable size may be expected in fertility according to the local patterns of:

1. The economic role of the children in the household.
2. The duration of men's migration.
3. The level of sub-fertility and sterility.
4. The women's load of work and the impact of child-bearing and number of children on the women's income.
5. The work load on the women to care for subsistence, i.e. the time spent on fetching water, firewood, and for cultivation.
6. The level of child mortality.
7. Cost of children's school fees, clothes, etc.

An evaluation of the fertility level should also be related to health. One factor which seems to have rather severe impact on fertility is venereal diseases. Very little is known about this, and only vague indications from some

8. E. and E. R. Laughlin: Economics, Sexual Behaviour, Attitudes, Attitude Change and Family Planning among the So of Mount Moroto, Karamoja District, Uganda, in Angela Molnos: Cultural Source Materials for Population Planning in East Africa. Vol. 1, 1974, Nairobi 1974, p. 160.

areas of Eastern Province and among some of the pastoral people reveal sub-fertility.⁹ However, in some areas of Tanzania and Uganda with a high level of temporary migrations there is a very low level of fertility, even if there are motivations for large families.¹⁰

Also the health of children is important for evaluation of the fertility level. In some areas the child mortality remains high, and the symptoms of malnutrition are often registered at health clinics, e.g., in a cash crops area within Machakos district, up to 50% of the population have symptoms of malnutrition. The former cultivated protein rich food were now too expensive to buy.¹¹

When many children die from a combination of a bad resistance to sickness (measles, influenza, different respiratory diseases or malaria) then it is not very likely that the fertility level is going to decline.

With these evaluations in mind, predictions of fertility trends become very difficult until we have more research on the basic dynamics of population. However, if the interpretation of the factors influencing fertility is relevant, the family planning programmes are having extremely little impact on the fertility. The basic conditions for motivating limitations in family size cannot be created by family planning programmes. These programmes have to be based on already existing motivation. This means that if there is no motivation in the families for limiting family size, the family planning programmes in such areas are a pure waste of money.

Indications from the analysis of attendance at family planning clinics show that from 1969 to 1971 the "number of first visitors (acceptors) per clinic and year has continuously decreased", also the number of new acceptors in 1971 was less than half of the increase in the female population 15-49 years from 1970-71".¹² One more indication reveals somewhat the same trend: "the programme cost about K.£13 per acceptor" or "the cost per birth prevented was K.£49 in Kenya in 1969/70".¹³ This is extremely high in relation to other countries. A description of the acceptors shows they are younger, more educated and economically better off than the average female population in these ages.

As a conclusion of this it should be underlined that money for family planning programmes is a waste of resources, if there is no social and economic basis for this.

The data on the family planning programme illustrates how expensive this is. The programme, which has a very high priority in foreign assistance, is planned in 1974-78 to cost \$38.8 million, of which \$9.6 million are foreign donations.

Maternity health and education of medical personnel is however also to

9. B. Kwaku Adadevoh: *Subfertility and Infertility in Africa*. Ibadan 1974.

10. A. Richards and P. Reining: *Report on Fertility Surveys in Buganda and Buhaya, 1952* in F. Lorimer: *Culture and Human Fertility 1954*, UNESCO, Paris, p. 352-403.

11. Van Luijk: *Social and Cultural Aspects of Health and Disease, in Health and Disease in Kenya*, ed. Vogel, Muller, Odingo a.o.

12. Lars Bondestam: *Population Growth in Kenya*. Uppsala 1972, p. 31. Calculated from Statistical Abstract 1971.

13. *Ibid.*, p. 34-35.

some extent included in the programmes. One implication of a very large expansion of the programme is the increased need for medical staff for this purpose, but an increase in medical staff is also very much needed to deal with rural health, as personnel for already existing Harambee rural clinics are not available.

Emphasis on other aspects of rural development may have much more impact on the development, the living conditions and family size than the family planning programmes. As the analysis suggests, an increased productivity in agriculture, relief of women's work in subsistence agriculture, e.g., easy access to clean water and better facilities for marketing agricultural products, may really not only have impact on the development of agriculture, but also on the family size. Also a much higher emphasis on rural health and nutrition seems to be a necessary condition for reducing family size.

CONCLUSION

The purpose of this paper mainly has been to raise the issue that so much money is poured into family planning without sufficient knowledge of the basic dynamics of population and, moreover, that population policy is much more than just family planning. Other aspects of rural development influencing health, economic structure, migration, etc. are much more important elements of the population policy and have many more implications for the rural family.

The implication of the analysis for law and lawyers is clearly related to the land-ownership. The emphasis in rural development on new land and expropriation of land for large development schemes reveals a need for a research and development of appropriate land tenure systems; especially for development of new cultivated area, there is a need for some kind of registration of land-ownership to secure the buyers of land against newcomers' claim to the land. Also in relation to the expropriation of large areas for development schemes like Ahero rice scheme or Mumias sugar estate, the access to land, the prices, and the ownership patterns are changed very much in large areas around, and, also, there are problems of security to maintain newly bought land.

One of the aspects stressed in this paper is that there are many cultivators who are not owners and have no right to land, either through inheritance or in case of divorce. How can the women be secured more rights to land, at least to their own land in cases of divorce?

The many migrations, both rural-urban and rural-rural, and the importance of rural-rural migrations as a development factor make it important to take up research on land tenure systems and their impact on the development of new land and on migrations—maybe also the possibilities for restrictions on the urban migrants' automatic inheritance of land, or restrictions on the subdivisions of the plots.

Population and Social Pollution in the Sudan

OMER OSMAN EL MARDI*

INTRODUCTION

The subject of this paper is the relationship between rural-urban migration and the growth of criminality in the Sudanese Capital—Khartoum. Often a lawyer is caught between the worlds of social subjects like sociology and anthropology when he tries to study the interaction between law and the society in which it is formed and in which it operates, what may be called sociological jurisprudence and legal anthropological studies.¹ At the time of independence the Sudan possessed few large towns though the country was dotted with numerous small ones. Recently tens of thousands of Sudanese have been moving from rural areas into towns and this resulted in the expansion of many urban areas large or small. The phenomenon of rural-urban migration, the mechanism that brings about urbanization has been the subject of an increasing enquiry, and a variety of "push" and "pull" factors have been suggested as contributing to the growth of towns in the Sudan. Likewise the many social problems which accompany the drift to towns have been subjected to² examination and analysis and various recommendations have been made. What is much less documented is the sort of social life which the Sudanese lead when leaving their rural homes to make their residences in towns.

The visitor to Sudanese towns finds that their population is drawn from diverse ethnic and cultural backgrounds. Those populations are not only representative of such varied ethnic groups as Arabs, Beja, Darfurians, Funj, Nilo-Hamites, Nilotes, Nuba, Nubian and Sudanic elements, but also representative of several regional³ or national cultures, notably West Africans, Egyptians and Ethiopians. There are also groups of Greeks, Syrians, Lebanese and Indians that can be referred to as minority groups. Thus the urban setting in the Sudan is a multi-cultural society and the factors which mark off the different groups within it are diverse. Chief among these factors are national origin, language and religion.

With a per capita income of Ls 40 per annum, the Sudan is one of the least developed countries in the world. Depressed incomes and unemployment in the rural areas are among the main causes of rural-urban migration. The fact that agriculture is by far the most important sector of the Sudanese economy (in 1971 agriculture accounted for 35% of G.D.P.), a vast area of the

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1. Sudan Urban Society, Tagel Anbia Ali (Phil. Soc. of Sudan Conference, 1972).
2. The Philosophical Society of the Sudan 17th Annual Conference 1972 frasclosen to investigate this highly complex problem.
3. Population and Housing Survey 1964-66 (the Department of Statistic).

country and the scattered population lacking modern or efficient means of transportation, indicates that the country will continue to be more rural than urban at least for the foreseeable future.

The urban growth rates of our cities are much faster than those of rural villages. While the country's population grows at the rate of 2.8% annually the population of most of our principal cities is increasing at a rate which normally exceeds 5% per year. The most spectacular growth of cities has taken place during the last two decades as a natural consequence of the increasing employment opportunities in both secondary and tertiary activities. This rapid growth has been particularly noticeable in the cases of the Three Towns' conurbation (Khartoum, Omdurman and Khartoum North). The rate of growth can be realized by reading these figures from the Report of the Department of Statistics on size of population and annual rates of growth in selected Sudanese towns:

Town	1955-56	1964-65	1969-70
Omdurman	113,551	185,380	244,588
Khartoum	93,103	173,500	244,482
Khartoum North	39,087	80,010	118,105
Port Sudan	47,562	78,940	104,278
Nyala	12,278	26,160	38,780
Gadarif	17,537	45,090	70,335

Department of Statistics Survey (Population Housing Survey 64-66 pp. 49/5, Khartoum—October 1968.

The phenomenal growth of Gadarif town in Eastern Sudan is attributed to the enormous expansion in mechanized farming, and that of Nyala in Western Sudan to the extension of the railway, which made the city the Western rail terminal and gave it the key to the commercial leadership of Dufur Province. Most of our fastest growing cities, besides being the main foci of administration, commerce and trade, as well as other services, are now beginning to emerge as industrial centres. Though industry contributes little in absorbing manpower, the concentration of industries in or near the capital for example, has induced many workers to migrate to the capital with the hope of getting employment. Thus the two complementary factors, on the one hand the rural "push" and, on the other hand, the urban "pull" are jointly responsible for the drift of population from the countryside to towns. It is worth mentioning here that the majority of rural migrants to towns, particularly to the capital are composed of unskilled or semi-skilled workers, who offer to take humble jobs, such as home servants, shoe polishers, sub-retailers of insignificant goods, and so forth.

4. Department of Statistics Survey (Population Housing Survey 64/66, pp. 49/5, Khartoum, October 1968.

It would be misleading to draw the conclusion that the growth of towns is a curse. It is true that this is associated with many evils, nevertheless the question to be asked is not of the order whether urbanization is a curse or a blessing. Urbanization is an off-spring of development. The more the country develops the more towns grow. More particularly the question will be how to lessen the evils of urbanization. To take one of these evils, for instance, crime, and study the cause-and-effect relationship between the growth of criminality and migration and how to lessen the danger of this evil, is the subject of this study.

FACTORS LEADING TO CRIME AND DELINQUENCY AS A RESULT OF URBANIZATION

Crime is the outcome of many factors.⁵ The seriousness of the social problem of crime hardly needs to be emphasized. The explanations for crime have been derived from the method of studying it. Scholars have studied the statistics of crimes, the statistics of trials and conditions of criminals, individual cases, limited cases, criminals "in the open" in order to explain criminal behaviour. But no one theory of criminal behaviour will explain all criminal behaviour. Probably, if all of them were taken together, they might explain it.

The people from tribal communities moving into urban centres are confronted with many problems. The past uniformity of thought and attitude in their former rural society may no longer be present in the new society. Some of them (and in fact this is the first problem that faces them) are faced with unemployment and accommodation difficulties. They litter the neighbourhoods of the towns with shanty-towns which become very quickly the residence of burglars, pick-pockets, and a warehouse for stolen property. To correct the social difficulties what is needed is best summarized by F. Stewart Chappin:

"Community planning is needed to correct social difficulties in which we have blundered in the growth of our cities; it is also needed to prevent the recurrence of costly social problems. Facts are required for intelligent community guidance. But mere facts are insufficient. Knowledge of the cause and effect of relationships is fundamental to planning that seeks to prevent the recurrence of factors which lead to social and civic deterioration."⁶

Some of the factors are narrated by Abdel M. Abdellahi in an article published in the Sudanese Philosophical Society Report of its 17th Conference on Urbanization in the Sudan—held at Khartoum 2-4 August, 1972:

That mass migration results in the dislocation of the old social system as a consequence of its conflict with a new social order based on purely economic relations in which the immigrant finds himself forced to act independently of patriarchal or tribal authority. Contrary to the rural areas the man's worth in this new order is judged by the extent of his wealth and there is only a little space left for the old indigenous norms or convention customs characterized by mutual assistance and co-operation.

5. Crime in Urban Centres in the Sudan, D. S. El Mahadi.

Migrants often fail to secure employment in view of their unskilled attainments, and settle in unhealthy huts and live in conditions of physical deprivation. Such a state of affairs will make them antagonistic when they compare their position with that of the higher classes who enjoy life better, and develop in themselves a feeling of oppression and absence of social justice which is considered to be one of the major elements of crime and delinquency; thus a fertile soil for the growth of deviant or abnormal behaviour.

The failure to secure employment among the immigrants can be realized by reading the figures from reports of Employment Office of Khartoum Province between 1967 and 1971:

1. *1967-68*
Registered number 13197
Appointed number 1305
% of appointment is 10%
2. *1969-70*
Registered number 15873
Appointed number 2088
% of appointment is 13%
3. *1969-70*
Registered number 22295
Appointed number 1009
% of appointments is 5%
4. *1970-71*
Registered number 25682
Appointed number 2493
% of appointment is 9%

If we take into consideration that the registered number forms only a portion of the total number of the unemployed, and that the greater portion is not registered, then the dimensions of the problem will be clearer.

Low standard of income among the poor families forces the mothers to work and the parents to use their children for menial tasks such as boot-shining paper bag selling, car cleaning, side-walk vending, foodstuff carrying, etc., thus depriving them of formal education and giving them the chance of loitering in the streets in bad company. These factors naturally lead them towards theft, smuggling, sexual offences and other types of delinquency. The large number of juveniles who are seen vagrant in the streets or public gardens or begging in the markets of the Sudanese towns are considered to be a result of these factors.

The annual report of the Central Bureau of Criminal Investigation last year showed that 80% of the juvenile offenders are from amongst the migrants to the capital. It is also stated in that report that the increase in sexual offences is due to a number of reasons but amongst the main reasons are the increase in the number of the unattended juveniles, and lack of parental care among the in-migrating parents plus the crowded small houses in which they live with the adults. These poor housing conditions in which children of the migrating poor families find themselves encourage them to search for

playing places in the streets, uncontrolled and unsupervised. Thus they will be able to pick up patterns of delinquent behaviour.

The employment of young immigrants in public brothels, bars, native liquor dens is also detrimental to their character. The trials before Omdurman Juveniles Court disclosed that some of the old residents, who were given trade licences and authorized to open temporary wooden shops, with a view to steady jobs, were utilizing adolescents for sale of hashish and other indecent acts.

The audio-visual media also has great influence upon migrants as something new to them. The young are more susceptible to the effect of the cinema, episodes which they see on the screen. The children who become regular visitors to the cinema may be led to obtain the cost of the ticket by devious means. On the other hand, women who live in similar conditions to these described above are led to a similar fate: most of them end up as professional prostitutes in some of the towns' brothels. Perhaps the factors that most women are dependents of men in the Sudanese society and that the percentage of them among the migrants is smaller than the males—in fact according to 64-66 survey they make 36% of the total number—would justify not studying them as a separate category among the immigrants.

If we take Khartoum North as an example we find that the rate of increase during the period 1966-71 in criminality was very high due to the population increase that exceeded 801% during the same period.⁶

The official records of the police of that city show the following:

Crime:	1966	1967	1968	1969	1970	1971
Murder	18	16	17	18	11	13
Gievous hurt	211	281	241	305	191	252
Simple hurt	1593	2834	2981	3661	3905	4119
Theft	1593	1546	1645	1516	1779	1966
Total	3413	4677	4884	5490	5932	6350

If we take Khartoum, the official records of the police show the following in the period between 1967 and 1971:

	1967/68	1968/69	1969/70	1970/71
Crimes against persons	13840	17270	15860	15492
Against property	11682	12863	13204	13155
Against the State	4530	5684	5561	7631
Omdurman Police Official Records shows the following during the same period:—				
Crimes against persons	7406	8241	9896	11767
Against property	3717	4160	4579	4014
Against State	4947	5969	6594	5097

6. Khartoum North started as a small annex to Khartoum and gradually developed into an industrial town, mainly because of the ease of obtaining cheap land.

But these are the statistics of crimes under the Penal Code. Account is not taken of traffic offences since these are not relevant to our study. Crimes which are regarded as most serious are relatively few if compared with less serious crimes: In the Sudan homicide constituted .03% of all crimes committed. Serious offences represented over 5% of all offences in the Sudan. This is but one reason why the statistics show that the ratio of increase in population is higher sometimes, as in the case of Khartoum North, than the ratio of increase in criminality. The second factor relates to the accuracy of these statistics. Information on a large proportion of the less serious crimes committed will not be reported to any agency for reasons of distance, negligence, fear or indifference. The location of the police station to the injured party is important. As I have shown earlier most of the migrants live in the shanty towns that grow very quickly. They are called "cardboard huts". The Khartoum North Municipality survey of 1968 gave the figure of 17,000 persons for three of these cardboard settlements in Khartoum North.⁷ One surveyor reported that an estimation of 10-12 thousands would be incorrect for one settlement she worked on. The reason was that a large number of residents refused to register themselves with the survey officers.

In those settlements, if they may properly be so called, I was not able to trace any police station, any health centre, school or any other institution that reflects a government presence. The settlers have been so much used to this state of affairs that the appearance of a policeman in the settlement is viewed as something sinister associated with hunting down of one of the members, as an unwarranted invasion of their 'independence' and the privacy of their "enclave" and is therefore strongly resented. This means that the job of the police, as far as crime detection is concerned, is rendered almost impossible because of the premeditated refusal of members of the settlements to co-operate. For these reasons settlers are generally very reluctant to go to a police station to lodge a complaint even when there is genuine need to do so and even where there is a police station near by. They seem to have become convinced that the mere discovery of their being members of one of the "cardboard settlements" will brand them in the eyes of the authorities with being law-breakers. Also they won't take the trouble of going themselves to a police station, even if one is found near enough to justify the trouble, for fear that as a settler he is a law breaker.⁸ The complainant fears that an

Thousands of workers very quickly settled around the industrial area again because it was easy to obtain land to build their own housing or because housing could be obtained at very cheap rate compared to Khartoum. Because of the enormous increase in the number of industries and because of the rush to get relatively inexpensive housing the town very quickly grew into a big city and the population between 1964-1971 jumped from 39087 to 118105. Figures taken from: Miss Fatima Zahir, Khartoum North, Squatter Settlement, published in the Ph. Society Reports 1972.

7. Miss Fatima Zahir, Khartoum North, Squatter Settlement, published in the Ph. Society Report 1972.
8. This apprehension is not without foundation because by the mere fact of living in one of these settlements a person would be violating a host of local government and municipals orders and regulations as well as various provisions of the Public Health Act, the Protection of the Environment Act, the Passports and Immigration Act, the Penal Code, etc.

indifferent or lazy officer may take him into custody instead of dealing with his complaint. I feel it will be justifiable to suggest that crime is more prevalent in these settlements than the ordinary statistics indicate and an entirely incorrect impression regarding criminality may be formed if our conclusions are based entirely on these statistics. A large proportion also of law violations go undetected; many crimes are detected but not reported, and others are reported but not officially recorded. There is a dark figure, as they call it, of criminality which changes with police policies, police efficiency, court policies and public co-operation everywhere.

Other factors that may be taken into consideration in this respect include the poor ratio between police and population. In Khartoum the expansion of the police force has not been keeping pace with population growth. Lack of efficiency or corruption may be additional factors.

What I mean to emphasize here is that the rate of increase in criminality is very high: much higher than official statistics seem to suggest, and a solution for this social problem should be seriously sought.

ARE MIGRANTS SOCIALLY INTEGRATED

A visitor to a Sudanese town finds not only representatives of as varied ethnic groups as I have narrated earlier, but also representatives of diverse national cultures. There are three types of settlement patterns in Khartoum: the old town, squatter settlements and extensions or new areas. At one extreme within the three major sections of the town there are some quarters and neighbourhoods which are closely knit and form homogenous communities. The solidarity of some such quarters and neighbourhoods is based on ethnic, tribal or village identity. The 'Fellata' for example have their own district residential areas, which is the centre of their social, religious and recreational life. In such homogenous quarters the co-residents are kinsmen or fellow tribesmen who retain some contacts with their towns of origin and recreate their traditional practices within the boundaries of their towns of residence. This could be said about the Nubians and Nuba. People who come from the Northern Provinces get more integrated in the town's society. At the other extreme in some quarters and neighbourhoods a great variety of circumstances of co-residents militate against close ties and intensive interaction. For example, in the main city centres, contacts between co-residents of different nationalities, religion, types of jobs, are reduced to a minimum.

Between these two extremes lies the majority of quarters and neighbourhoods of Khartoum. These quarters have mixed populations. They attract their residents from diverse ethnic origins and economically they are communities of both rich and poor. The occupants of these quarters are quite often less mobile, and consequently strong ties and a sense of collective responsibility akin to that which binds kinsmen are developed in these quarters. Co-residents enter into one another's houses, exchange gifts and help one another whenever needed. In some such neighbourhoods the habit of having food and eating in large groups, which is so important a feature of village life, has not disappeared. These practices are reinforced by the highly

cherished virtues decreasing co-operation among neighbours and co-residents characteristic of Islam, to which the bulk of the inhabitants of these quarters adhere. Relations are strong among the old neighbours while, depending on the manner they were received by the old-timers, the new arrivals may find it easy or difficult to adapt themselves to the pattern of relationships prevailing in the quarter or neighbourhood. The situation is better summarized by a social surveyor.

“In Sudanese towns relationships deriving from co-residents range from intense patterns of inter-action based on ethnic or tribal solidarity to more tenuous patterns which obtain among individuals a household with varied ethnic and socio-economic backgrounds”:

Among the residents from the diverse ethnic groups, the rate of criminality is higher. The rural values, to protect your fellow tribesman's wife or sister, no longer exist and sexual offences increase; to consider your fellow tribesman's property as your and protect it no longer exists as a feeling towards the strangers around you, and the feeling that you may get away with it encourages theft. The economic pressures encourage all that and more. The values here are different and society changes for the worst. The Report of the Central Bureau of Criminal Investigation stated that the grievous hurt offences are increasing rapidly among the migrating peoples in their shanty-towns or the Native Liquor houses where they get together, each armed with a knife or a heavy stick, and feeling insecure among strangers, and defending himself against the least insult or intimidation excessively. The report on the settlements of the seasonal cotton pickers showed that in five minutes a quarrel or “shakla” may attract more than the immediate parties to it and may turn to a tribal affray in which hundreds may be involved and in which some may get killed or injured without knowing why or how the fight started in the first place.

CONCLUSION

In the big towns of the Sudan generally and in Khartoum, the Capital, in particular, the rapid growth of population due to the daily flow of migrants from rural areas creates many problems. Their adverse impact upon the traditional beliefs, health, housing and social structure is too obvious to need any elaboration.

The findings and recommendations of the 17th Conference of the Philosophical Society of the Sudan held in Khartoum between 2nd and 4th August 1972 on Urbanization in the Sudan, were summarized as follows:

1. There is need for more decentralization of services and economic activities on the basis of religious planning with the view of bridging the gap between urban and rural areas.
2. There is need for the co-ordination and integration of physical planning with economic and social planning at the regional and national levels.
3. There is need for the creation of a capable administrative and technical structure for the preparation and implementation of development plans at all national regional and local levels. Such an organization must be competent, having representatives from the

various fields of specialization in urban studies such as physical planners, engineers, urban economists, urban sociologists [among these, lawyers come].

4. To combat the increase in crime in urban areas special consideration must be given for criminological research. This may necessitate the establishment of a special institute or creating a special department in the already established socio-economic research centre in Khartoum University.

That conference clearly indicated that there exists an urgent need to decentralize services so that the tide of migration can be regulated through natural means. "If services go out to the rural people, they will not come to search for them in cities". Therefore, we have to aim at taking decentralization of services as a policy objective. Fortunately, the Sudan Government Five-Year Development Plan was drawn with this objective very much in mind.

In support of Regional Planning, Dr. D. Carry of the African Institute for Economic Development and Planning in Dakar writes:

"From the economic point of view, the pressure of population on the urban centres sooner or later creates problems of unemployment, inadequate housing, crime and delinquency. These problems carry the threat of unrest and instability and have been known in quite a few cases to have led to military coups in several African Countries."

Yet, as in the report of the Symposium on Urbanization in Developing Countries held by IULA in 1967:

"Urbanization can be seen as the growth of urban centres and urban population, but it can also be considered as a process of modernization: a change in the way of life from rural to urban attitudes. In this perspective social unrest can be viewed as a necessary precondition for change in the social structure."

In a seminar dealing with the consequences of urbanization in developing countries it was said:

"Urban centres perform indispensable functions in national growth. Many critical goods and services can only be produced in urban settings. Cities and specially large cities bring about the external economies which increase productivity. The problems of urban growth are not only to a considerable extent inevitable, but further they should be regarded as incidents of a larger development."

This can only be realized if urban growth and development is controlled by the preparation and execution of a long-term policy plan and programme for urban development with a target of ensuring better and fairer distribution of population, resources and economic activities at the regional level.

Population and Land Tenure in Africa: A Case Study of Cameroon

J. M. MONIE

The United Nations has proclaimed 1974 World Population Year. There have been books and articles written by experts on this topic. There have also been films, radio and television shows on the subject. Suddenly people are becoming aware of the fact that in a finite world, growth cannot be infinite. We are told by the experts that the population of the world from the beginning of time to about 1830 A.D. was 1000 million. It then took 100 years to attain the second 1000 million, 30 years to attain the Third 1000 million and the fourth 1000 million which we hope to attain in 1975 will take only 15 years. Following this projection, the population of the world will be something like 6,500 million in the year 2000. Can the world which remains finite keep pace with such phenomenal growth? Will there be enough food, housing, energy, education and medical facilities for everybody? These are the problems about which everybody the world over is worried. The call to keep down the world's population comes from the industrialized countries of Europe and North America. This has been interpreted in some quarters as a white racist plot to keep down the blacks so that the whites will always remain in the ascendance. This, argues Sundaram Sankaran, is not true because the world's non-white population massively outnumbers the whites and is likely to remain so always.¹

There is a further argument that family planning is unnecessary in the developing countries of Africa because there are vast stretches of open and unoccupied land which can take any increases in population.² To arguments of this nature the Ghanaian Minister for Finance had this to say:

"There are those in the grip of the dangerous illusion that the vast expanse of underdeveloped land invalidates the argument for the regulation of population growth in Ghana.

They fail to realize that invariably the land remains underdeveloped because of the lack of capital and technical skills required for its development.

The present rate of growth increases our population by 5,000 people every week. . . . In simple terms, it means that as a nation we are increasing in numbers faster than we can build schools to educate our children, faster than we can construct hospitals to cater for the health needs of our people, and faster than we can develop our economy to provide jobs for more than 140,000 new workers who enter our labour force each year. Our rate of population growth thus poses a serious threat to our

1. Sundaram Sankaran. *Finance and Development*, Vol. 10, No. 4, December 1973, p. 18.
2. Ekwensi, Cyprien: *Drum*, September, 1974.

ability both as individuals and as a government to provide the reasonable needs of our people".³

The argument of the Ghanaian Minister is obviously sound and convincing, but one fears that it may not convince those who argue that were the developed countries less selfish and more willing to share the wealth of the world on more equitable basis, the problem of capital to develop the vast expanses of land would not arise. For them the problem as far as Africa is concerned is one of the equitable distribution of the wealth of the world. With such equitable distribution, there will be enough resources to educate our children, construct hospitals and provide employment for the youth.

Further, it is argued that current research shows that there exist in many African countries sizeable areas of subfertility/inferility.⁴ Thus, the population problem cannot be urgent in those areas.

No less forceful is the argument that most African countries need large populations to ensure rapid socio-economic development. "The human population appears in a dual capacity. Development is of course for its benefit; at the same time the human stock is the fundamental economic resource. Capital, technology, natural resources are of course important. But without the human agent they are passive. It is the initiatives and actions of people which create and develop other factors and bring them into use. It is thus the human resources, the people of a country on which development ultimately depends."⁵ This argument is supported by recent worries about the shortage of labour in the South African gold mines.⁶ Support for this argument also comes from the fact that on the eve of the independence of most African countries, the industrialized countries argued that they were too small to gain statehood or to have viable economies. Barely ten years later, the same industrialized countries are asking these same small countries to keep down their populations—a rather strange paradox.

However, these arguments about population and the vast expanses of land in Africa are very rich areas for research. We do not know whether or not the vast expanses of land can support life at all times. Nor do we know the extent to which there is a fair distribution of such lands amongst the people living in each country. The problems of a fair distribution of land are not unconnected with the land tenure system.

In this essay we shall consider the land tenure systems of Cameroon in order to see how it influences the distribution of population.

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3. McNamara, Robert S., *Population and Development. A race for time. Dialogue*, Vol. 7, No. 2, 1974, p. 8.
 4. Romaniuk A., *Infertility in Tropical Africa*, in *The Population of Tropical Africa* Ed. by John C. Caldwell and Chukuka Okonjo, Longmans 1968, pp. 214-224. Adadevoh B. Kweku, *Subfertility and Infertility in Africa*. Ibadan, Caxton Press, 1974, pp. 1-20.
 5. Jolly, Richard: "Manpower and Education" in *Development in a Divided World*. Ed. by D. Seers and L. Joy, Penguin Books, 1970, p. 203.
 6. *Africa. An International Business, Economic and Political Magazine* No. 41, January 1975, p. 34.

CUSTOMARY LAND LAW

It seems useful, even at the risk of boring the reader, to say a few words on Customary land law in Cameroon. Chief Elesi Odogbolu of Nigeria in his testimony to the West African Lands Commission said that "land belongs to a vast family of which many are dead, few are living and countless numbers are still unborn".⁷ This notion received the blessing of the Privy Council in the celebrated case of *Amodu Tijani v. Secretary of State for Southern Nigeria*⁸ when it concluded that in "native land law . . . the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village or head of the family has charge of the land, and in loose mode of speech is sometimes called the owner."⁹

This section of the decision of the Privy Council adequately summarizes the system of tenure which obtained in Cameroon before the arrival of the colonial masters, namely, the Germans first and then the French and British afterwards.

It should be emphasized that this decision is referred to not because it is accepted by everybody as laying down a generally accepted principle of law but because it gives some form of judicial recognition to the definition of customary land tenure. It need hardly be mentioned that the decision has been criticized in several quarters.

LAND TENURE UNDER THE GERMANS

When the Germans formerly annexed Cameroon in 1884, they proceeded almost immediately to sign treaties with the natives who insisted that "our cultivated ground should not be taken from us for we are not able to buy and sell as other countries."¹⁰ The Germans did not respect provisions of this nature. The result was a mad scramble for land by German nationals. On 15 June, 1896, the Imperial German Government, in an attempt to regularize the situation, passed a decree which provided by section 1 that "save and except in the case of claims to property or other realty which private or legal persons, chiefs or native communities can substantiate, save and except also the rights of occupation of third parties established by agreements with the Imperial Government, all land within the territory being ownerless shall be Crown land".¹¹

This decree raised the question of vacant land (*herrenlos*) quite contrary to the notion which we have already seen, namely, that land belongs to the

7. West African Lands Commission Report 1912, Cmd. 1084, p. 183.

8. [1921] 2 Appeal Cases 39.

9. [1921] 2 Appeal Cases at p. 404.

10. Treaty of Annexation of 12th July, 1884. See Rudin H. R., *Germans in the Cameroons 1884-1914*. New Haven, Yale University Press, 1938. Appendix III, p. 423.

11. Report on the British Sphere of Cameroons Cmd. 1647, Appendix II.

community. This policy, therefore, subordinated native interests to those of the Germans.

Another innovation introduced by the decree of 1896 was the establishment of a Land Commission and a land register (*grundbuch*). With the aid of the decree and the Land Commission the Government as well as private individuals acquired, sometimes forcibly, large areas of what was regarded as vacant land and had these registered in the "*grundbuch*".

When the Germans were forcibly acquiring land, little did they know that they were destined soon to lose, by force of arms, not only those lands which they had acquired, but also the entire territory of Cameroon. The First World War broke out in 1914 and the defeat of Germany resulted in the liquidation of her colonial empire.

The Germans were driven out of Cameroon by combined British and French forces who divided the territory into two unequal parts—the British taking the narrow Western strip and the French the larger Eastern sector.

LAND TENURE IN THE BRITISH CAMEROON

The end of the war ushered in the Mandate System under which Britain and France were asked to draw up Mandates for the approval of the League of Nations. Before the approval of the British Mandate for Cameroon, the British Government had by Proclamation No. 25 of 6th March 1920, declared that the Public Custodian Ordinance of Nigeria and all orders amending the same should apply in the British sector of the Cameroons. Thus the property of German nationals as well as those of the Imperial German Government vested in the Public Custodian appointed under the Public Custodian Ordinance until a decision was later taken to sell the property.¹²

Article 6 of the Mandate Agreement provided that "in framing the laws relating to the holding or transfer of land, the mandatory shall take into consideration native laws and customs, and shall respect the rights and safeguard the interests of the native population. No native land may be transferred except between natives without the previous consent of the public authorities. . . ." It was perhaps this, coupled with the fact that Britain regarded herself as conqueror, that led to the introduction in 1927 of the Land and Native Rights Ordinance No. 1 of 25th February, 1916,¹³ which was already in force in Northern Nigeria. By virtue of this ordinance all lands in the British Cameroons except those owned by individuals and registered in the "*grundbuch*" and large plantations vested in the Governor, and ultimately the Prime Minister who administered them for the benefit of the people.

LAND TENURE IN THE FRENCH CAMEROONS

As we have seen above, the French received the lion's share of the partition which followed the allied occupation of Cameroon. The first act of the French Government after she was granted a Mandate over her sector

12. Meek C. K., *Land Tenure and Land Administration in Nigeria and the Cameroons* Colonial Office Research Studies, No. 22. London HMSO 1957, Part II, *passim*.

13. Cap 105, of the 1948, Laws of Nigeria.

of Cameroon was to pass a number of sequestration laws which enabled her to dispose of the few German properties. Thereupon, she proceeded to pass legislation covering land. The first was an Arrêté of 15th September 1921¹⁴ which divided the land into 4 categories, namely:

1. Lands held under German titles.
2. Lands occupied according to native law and custom but for which no written title existed.
3. Lands situated around villages on which natives cultivate crops, pick produce necessary for their existence and pasture their flocks but on which they have only a right of usage and not of property.
4. "Terrains vacants et sans maître" which corresponds to "herrenlos".

Here again one sees a division from the principle that land belongs to the community. These laws were followed by others which were aimed not only at introducing a registration system for all the categories of land, but also at bringing customary tenure under the rules of civil law¹⁵—a move which was contrary to the provisions in the French Mandate for Cameroons that "in framing the laws relating to the holding and transfer of land the Mandatory shall take into consideration native laws and customs".¹⁶ Land tenure developed along these lines in the two sectors of Cameroon even during the period of Federation although the Federal Constitution of 1961 had provided by Article 6 that the Federal Government was responsible for the law of persons and property.

LAND TENURE IN THE UNITED REPUBLIC OF CAMEROON

Article 20 (2) of the Constitution of the United Republic of Cameroon of 2nd June 1972 provides that only the National Assembly shall be competent to deal with the law of persons and property. Article 21 (1) then provides that with regard to the matters listed in Article 20, the National Assembly may empower the President of the Republic to legislate by way of Ordinance for a limited period and for a given purpose. It was in compliance with this provision that Ordinance No. 71/11 of 6th July, 1974 was promulgated. This law which repeals all legislation dealing with land in the former Federated States of the Cameroon Federation has by Article 1 (2) made the State the "guardian of all lands". It may in this capacity intervene to ensure rational use of land or in the imperative interests, of defence or the economic policies of the nation". The ordinance classifies land into two main categories.¹⁷

Firstly, there is private property which comprises:

- (a) registered land;
- (b) freehold land;
- (c) land acquired under the transcription system;

14. Buell R. L., *The Native Problem in Africa*, Vols. I and II, New York, The Macmillan Press, 1928.

15. Mifsud F. M., *Customary Land Law in Africa with reference to legislation aimed at adjusting customary tenures to the needs of development*. F.A.O. Legislative series No. 7. F.A.O. Rome 1967, pp. 30-32. Codes et Lois du Cameroun Tome IV.

16. Article 5 of the French Mandate for Cameroons.

17. Articles 2 and 14-15 of the Ordinance.

- (d) land covered by a final concession;
- (e) land entered in the "grundbuch".

Then there are national lands which are divided into two classes, namely:

- (i) Lands occupied with houses, farms and plantations, and grazing lands, manifesting human presence and development;
- (ii) Lands free of any effective occupation.

The ordinance firstly provides in Article 16 that "national lands shall be administered by the State in such a way as to ensure rational use and development thereof". It is therefore on this basis of administration that government may in future attempt to control the distribution of population.

THE DISTRIBUTION OF POPULATION IN THE CAMEROONS

The new land laws referred to above regulate land tenure in Cameroon, which has a total area of some 475,000 square kilometres inhabited by an estimated 6,542,000 people. This gives an average density of population of about 14 persons per km.² This average density is obviously small. Thus, it can be argued that it is not yet time to panic about population explosion in the Cameroons. Such an argument presupposes that the population is evenly distributed. A glance at Table I shows that this is not the case. The density of population in the seven provinces of Cameroon varies very widely. The density of population in the Eastern Province is as small as 3.1 persons per km² while in the Western Province it is as high as 68.4. There are various factors which account for the disparity in the distribution of population. These can be classified very briefly under the following headings:¹⁸

1. The impact of physical features upon the distribution of population.
2. Economic factors.
3. Socio-cultural and ethnic factors.
4. The tenure systems.

THE IMPACT OF PHYSICAL FEATURES ON THE DISTRIBUTION OF POPULATION

The United Republic of Cameroon falls into five rough geographical regions. Firstly, there is the western mountain region stretching from Mount Cameroon in the South through the Manengouba, Mbam and Bamboutou massifs, the Bamiléké and Bamenda highlands and ending in the Mandara Hills north of the Benue River.¹⁹ A glance at the population (Map I) shows that this geographical region has some of the most densely populated areas of the country. The reasons for this are many. There is, as we shall see later, a cultural and ethnic factor. Further, this mountainous area, on account of its volcanic origin, has rich fertile soil which supports large-scale agriculture. This tends to attract people who work either in the plantations such as the Cameroons Development Corporation or the privately owned farms of the

18. See generally Zelinsky, Wilbur. *A Prologue to Population Geography*. Prentice-Hall, Inc. Englewood Cliffs, N.J. 1966.

19. *Geography du Cameroun* Edité à l'I.P.A.R. avec le concours de L'UNICEF 1972, pp. 10-64. Ngwa J. A., *An Outline Geography of the Federal Republic of Cameroon*, Longmans. 1967, pp. 13-22.

Bamboutou, Bamileke and Bamenda highlands. Incidentally, it is within this geographical region that lie some of the areas of subfertility/infertility in Cameroon, such as the Ojoundé north of the Benue, the Dourou south of the Benue and the Bakweri around Mount Cameroon.

The second geographical region comprises the coastal plain which is hot and humid and has heavy rainfall. Apart from the plantation areas like the Cameroon Development Corporation, this region is not densely populated. This is because of the swamps and thick mangrove forests.

Thirdly, there are the tropical rain forests which cover the inland forest plateau. Most of this region lies within the drainage systems of the Sanaga, Boumba, Dja and Ngoko rivers. It therefore spreads across most of Southern Cameroon. Apart from the urban area of Yaoundé and its environs, the density of population in the area ranges between less than 2 and 5-10 persons per km.² There are large areas bordering the Congo which have a density of population of less than 2 persons per km.² It is perhaps understandable because most of this area is inhabited by segmented pygmy tribes.

Fourthly, there is the central plateau often referred to as the Adamawa Plateau. Apart from a few areas with a density of population of less than 2 persons per km.² the Adamawa Plateau has an average density of between 5-10 persons per km.² An attempt will be made later to explain this low density of population.

Finally, there is the northern Savannah plain which merges gradually into the Tchad system. This region has a population which is fairly evenly distributed.

ECONOMIC FACTORS AND THE DISTRIBUTION OF POPULATION

It is trite knowledge that the economy influences the number of people living within a locality or a country. This fact is no less true of Cameroon with an economy which is basically agricultural. The agriculture is for the most part rural and subsistent in nature. This therefore means that most farmers practice shifting cultivation while herdsmen roam with their cattle over large expanses of pastoral land. This explains the small density of population in most rural areas.

A good example is the low density of population in the cattle regions of the Adamawa Plateau and most of the northern Savannah.

Quite apart from the plantation areas like the Cameroon Development or the Cash Crop growing areas like the coffee growing areas of the Bamiléké and Bamenda highlands which attract migrant labour, the type of agriculture described above does not attract the younger population and thus accounts partly for the mass rural-urban migration of the population. The Government of Cameroon has introduced measures like the civic participation in national development, the "green revolution" and the creation of a fund for rural development, which are intended to reverse the rural-urban drift. It is perhaps too soon to assess the effectiveness of these measures. In any case, these measures are perhaps based on the assumption that the land is everywhere fertile and capable of supporting this type of rural development.

One of the results of the rural-urban migration is that the bulk of the population is concentrated in the towns and urban areas, most notably Yaoundé, Douala and Nkongsamba, where the average growth rate is about 8%, 13% and 50%, respectively, while the growth rate in other urban areas ranges between 3-4%.

SOCIO-CULTURAL AND ETHNIC FACTORS AND THE DISTRIBUTION OF POPULATION

The agro-economic factors which have been considered above are in turn controlled by socio-cultural and ethnic factors.

Cameroon, like most African countries, has various ethnic groups. Each group occupies a defined geographical area of the country. Each of such groups has its rules as to immigration and emigration, and residence permits which may in certain cases make it difficult for people of other ethnic groups to find residential areas, let alone farm land. This perhaps accounts for the concentration of population in the Bamiléké highlands, which form the bulk of the Western Province; where the density of population is as high as 68.4 persons per km.²

These ethnic groups may also have other identifiable characteristics. In Cameroon the Bamilékés are regarded as the rich, hardworking ethnic group, while the Doualas are regarded as the lazy pleasure loving people. Professor Busia summed up the situation thus:

"It was usually assumed that a tribe from the mountains was tougher than one from the plains, that one from the north was more virile than one from the south, pastoral tribes were finer than tillers of soil. . .".²⁰ This type of attitude does not advance easy movement amongst various ethnic groups and, therefore, militates against an even distribution of population.

The pro-natalist tendencies of most ethnic groups gives another dimension to this subject. It is a commonly held belief in most ethnic groups in Cameroon that one of the aims, if not the chief aim, of marriage is procreation.

This opinion varies from one part of the country to another. One of the reasons for this variation is the influence of religion which seems to have made considerable inroads into the south of Cameroon and, therefore, reduced the incidence of polygamy and its pro-natalist effects. The influence of religion does not seem to have made the same impact in the Moslem north, which remains essentially pro-natalist.

THE LAND TENURE SYSTEM AND THE DISTRIBUTION OF POPULATION

I began this article by dealing briefly with the land tenure system of Cameroon in its historical perspective. This is, therefore, added just to complete the factors which account for the uneven distribution of population.

Socio-cultural and ethnic factors do not only control the agro-economic factors but also the land tenure system. Thus, the land which an ethnic group occupies belongs to it exclusively under customary tenure. Because the ethnic groups vary in population and strength, so does the land which they occupy.

20. Busia K. A., *Africa in Search of Democracy*. Routledge and Kegan Paul, London, 1967, pp. 121-122.

The result of this is that there are some ethnic groups owning large areas of uninhabited land while others have hardly enough for their subsistence. If this condition continues it will not only perpetuate ethnic or tribal animosity but also make the Government rural development programmes difficult to achieve. It was perhaps in recognition of this difficulty that provision was made in the recent land legislation for what are called "national lands". These are tribal or ethnic "lands free of any effective occupation". Such "national lands shall be administered by the state in such a way as to ensure rational use and development thereof". One way of using such land will perhaps be to resettle populations who are "starved" of land or to redistribute same for agricultural purposes. An experiment in such resettlement of land held by Government under a similar tenure was carried out in the North of former East Cameroon, in 1963. Without going into the details, this experiment involved the resettlement of inhabitants from the over-populated mountain area (See densely populated area in North-West Cameroon on Map I) on the plains.²¹

CONCLUSION

The discussion above has dealt mainly with the land tenure and the distribution of population as at present, but not with the wider issues of population control.

As we have already seen, Cameroon has a finite land area of 475,000 sq. km. This area, which is not everywhere habitable, supports an estimated population of 6,542,000 people. This population is increasing at an average rate of 2.5% per year. This means that a total of 162,000 people are born in Cameroon each year. If we take the population of a country as made up of "the sum over time of births and in-migration less deaths and out-migrations"²² then the annual increase of 162,000 people cannot be regarded as correct. The reasons for this are easy to find. Firstly, the number of deaths is decreasing with improved health facilities. Secondly, the influx of immigrants from Europe, Nigeria and neighbouring African countries is not balanced by the same rate of emigration. Thus, the population must be growing faster than it is actually estimated. To the problem of the rapid increase in population must be added the declining employment facilities. What is the Government policy towards this rapidly increasing population which has been estimated to take something like 32 years to double itself?²³ It does seem that "there has never been an explicit population policy in Cameroon. . .".²⁴ The reasons for this are perhaps as much historico-economic as practical.

Historically, the attitude of Cameroon, like that of most French-speaking countries was to discourage contraceptives or family planning of any sort.

21. Mifsud, *op. cit.*, p. 72.

22. Zelinsky, *op. cit.*, p. 27.

23. World Population Data Sheet. Population Reference Bureau 1755. Massachusetts Avenue, W.W. Washington D.

24. See Ondoa. Benedicta, Deputy Director of Population Study Division, Ministry of Planning and Territorial Development, Yaoundé, on a research proposal entitled "Fertility Pattern in the Urban Rural Continuum".

This attitude derives its origin from the French law of 1920 which prohibited abortion and the advertisement or sale of contraceptives.²⁵ Although France has since moved from this position, provisions of this nature are embodied in a recent law establishing a National Association of Pharmacists.²⁶ The economic reason for the pro-natalist tendencies lies in the fact that during the colonial period, the French Government encouraged the payment of family allowances based on the size of the family as well as the payment of pre-natal grants to expectant mothers.

These allowances tended to encourage large families. All these practices militated against any systematic and practical collection of information which could form the basis of any family planning programme or coherent population policy. It is perhaps for these reasons that little or nothing has been said about family planning or the whole question of population control in Cameroon. Quite the contrary; unofficial slogans such as "operation ten million" are known to have been made by some responsible people. These statements ignore the fact that given our growth rate there must come a time when our finite land area cannot absorb an infinitely increasing population. In any case, Cameroon is a country devoted to the principles of the United Nations, so the time must come sooner or later when some note will be taken of the United Nation's attitude towards the population problem. It will be recalled that it was by a resolution of the United Nations that 1974 was designated "World Population Year".²⁷ The sooner note is taken of this situation the better for the Cameroons. This is because the whole problem of population control does not only entail detailed and sometimes protracted multi-disciplinary studies but also because it involves changing attitudes either voluntarily or by means of laws—a task which is by no means easy. In any case we cannot continue to see the population increase at such a phenomenal rate unless this is matched by rapid economic growth.

Table 1

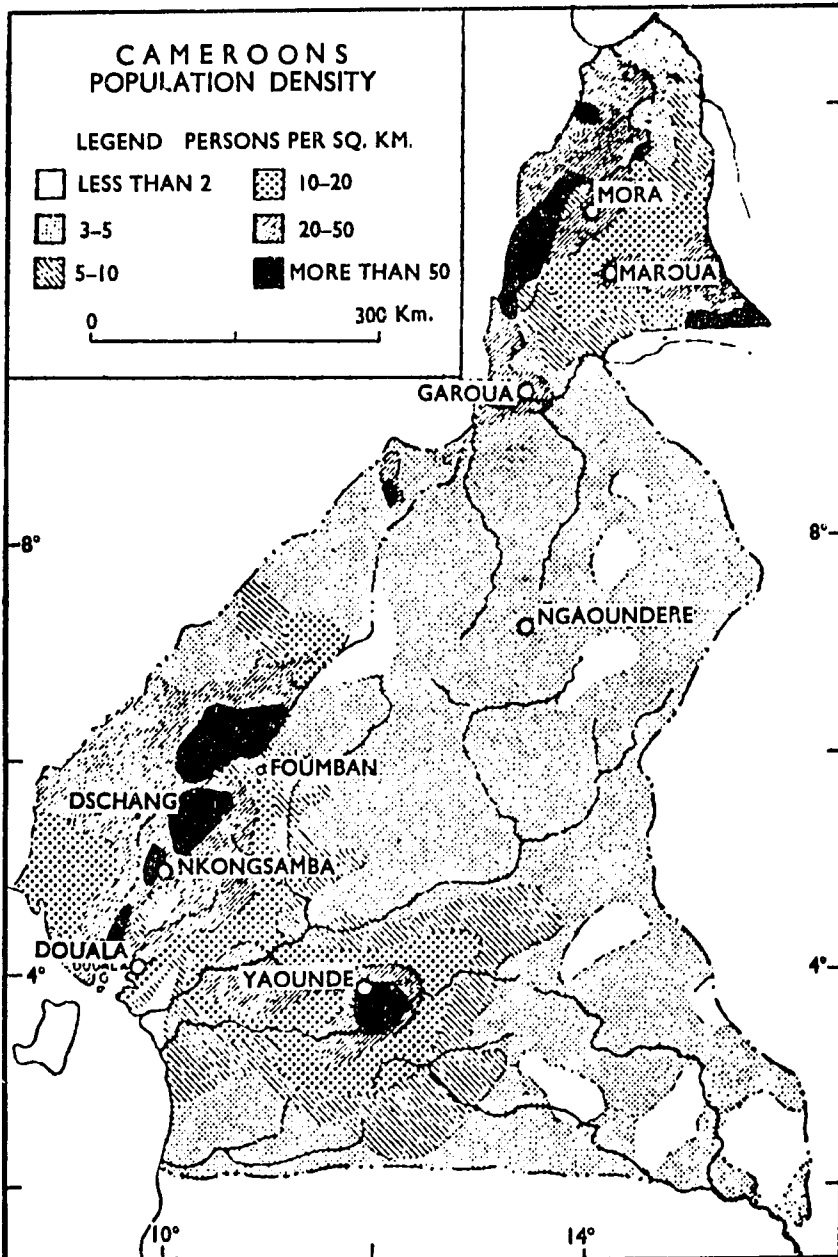
Province	Total Population		Population (000)		Urban	Density
	in 000	%	Urban	Rural	%	in km. 2
			Population	Population		
Centre-South	1,381	21.1	467	914	33.8	11.9
East	340	5.2	42	298	12.4	3.1
Littoral	798	12.2	549	249	68.8	39.4
Nord	1,786	27.3	161	1,625	9.0	10.9
West	949	14.5	253	696	26.7	68.4
North-West	739	11.3	160	1,128	12.4	22.8
South-West	549	8.4				
Total	6,542	100%	1,632	4,910	24.9	14.1

25. Bernard Wolf. *Anti-Contraception Laws in Sub-Saharan Francophone Africa. Sources and Ramifications.* Law and Population Monograph No. 15, 1973, *passim*.

26. Law No. 68-LF-8 of 11th June, 1968.

27. See generally Daniel G. Partan. *Population in the UN System: Developing the Legal Capacity and Programmes of UN Agencies.*

MAP I
CAMEROON-POPULATION DENSITY



This map is extracted from Victor T. Le Vine's Book: *The Cameroons from Mandate to Independence*. University of California Press, 1964.

Demography and the Law in Africa

S. H. OMINDE

INTRODUCTION

One of the most fruitful ways of approaching the subject of population is to consider the nature of the debate that will in future years be regarded as the hall-mark of the 1970's. The debate has centred on the global, regional and national dimensions of the population problem. However, a more relevant aspect of the debate has been the involvement of governments at the international level as well as at the regional levels.

The debate has concentrated in particular on the issue of population growth and its implications to resource situation in the world which sustains man in widely varying circumstances and levels of living. At the Human Environment Conference in Stockholm, a confrontation emerged on the viewpoints of developed and developing countries of the world on the nature of the concerted efforts needed to solve the emergent problems. The conference dwelt very much on the global population growth. A consensus was reached that in developed countries the population problems in relation to environment were essentially problems of high technology and accelerating pace at which the resources were being consumed.

The developing countries insisted that population problems in the less developed parts of the world were essentially those that arose from the lack of development and deepening poverty and that the solution must be seen within the context of development.

At the recent World Population Conference the highlight of which was the World Plan of Action a similar cleavage of approach emerged. There were the neo-Malthusians who viewed the solutions to the population problems of the world in terms of fertility reduction. Most nations of the world attacked this viewpoint as an oversimplification. The specific aim of the World Plan of Action was to help co-ordinate population trends and trends of socio-economic development. It was argued that the basis for an effective solution of the population problem is above all the socio-economic transformation. The Plan of Action was therefore viewed as an important component of the system of international strategies and as an instrument of international community aimed at promoting economic development, quality of human life, human rights and fundamental freedom.

In the case of developing countries it was argued that the present situation originated in the unequal process of socio-economic development. The inequality continues to exist and in the recent decade it has been intensified by the lack of equity in the international economic relations, and associated disparities in levels of living.

The United Nations has just concluded another Conference in Rome

which examined the problems of Population and Food Supply. Dominating the discussion was the plight of the world's hungry nations and prospects of mass starvation in certain parts of the world. Further action on population at the international level is planned. There is the forthcoming conference on Human Settlements in 1976 which will be hosted by the Government of Canada in Vancouver.

However, the intensification of interest in the problems of human numbers is a relatively recent feature. It may also be viewed as an indication of the growing contribution of the Science of Demography to our understanding of problems of human living. Since the Second World War, increasing attention has been directed to the gathering of demographic information and in particular to the assessment of the rate of population growth at the global, regional and nations levels.

The current state of knowledge has underlined the demographic scope of the problem in two main areas. There are first the problems of the demographic phenomena of births, deaths and migration as they affect different regions of the world. Secondly there are problems of the nature of demographic characteristics such as size, distribution and composition. Since the early 1950's these problems which constitute the core areas of demography have been analyzed and solutions proposed.

However, although the root causes of the demographic problems affecting different regions of the world are now fairly well documented, analysis of the legal implications and the impact of the legal processes on the changes are even more recent. Luke T. Lee (1972) summarizes the situation as follows:

"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 the 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

The author observed that although it may seem obvious that attempts to control population impinges on certain aspects of human rights the subject matter remains relatively unexplored. This lack of attention to the legal framework of demographic plan of action is even more startling in the less developed countries of Africa. It is therefore important to examine the nature of the demographic problems of the region with a view to underlining the role of the legal processes in encouraging or impeding the processes of change.

The aim of this paper is to review the basic demographic problems of Africa, the principles on which governmental action can be based and finally to offer some guide lines towards the solution of the problems which could form the framework for supporting legal action.

1. Lee, L. T. *Law, Human Rights and Population. A strategy for Action. Law and Population Monograph Series Number 6, 1972. The Fletcher School of Law and Diplomacy, Massachusetts.*

DIMENSIONS OF THE POPULATION PROBLEMS IN THE AFRICAN REGION

Over the period 1950 to 1970, the more developed regions of the world increased their population from 858 million to 1091 million. The increase in the less developed regions including Africa was from 1628 million to 2545 million. The estimated increase in the continent was from 217 million to 344 million. Forward projections for the region indicate that the total population of the region is expected to rise to about 800 million.²

Between 1950 and 1970 the world population is said to have risen by 46 per cent whilst that of the less developed regions increased by 56 per cent. The percentage population gains for Africa, South Asia and Latin America was 59 per cent, 61 per cent and 74 per cent.³ The less developed regions including Africa increased their population by 917.0 million as against 232.0 million in the more developed parts of the world. Africa's share of the increase amounted to 127.2 million. Thus whereas the less developed regions accounted for 79.8 per cent of the increase, Africa's share accounted for 11.1 per cent of the world's increase.⁴

For the major regions of the continent the increases between 1950 and 1970 were: Western Africa 37.1 million, Eastern Africa 25.4 million, Northern Africa 35.2 million, Middle Africa 11.1 million and Southern Africa 8.4 million.⁵ By the year 2000, Medium Variant estimates of the UN indicate that out of 818 million, Western Africa will account for 240 million, Eastern Africa 233 million, Middle Africa 80 million, Northern Africa 214 million and Southern Africa 50 million.⁶

A survey of the population trends strongly indicated that Africa is experiencing a demographic inflation which will continue well into the 21st century. Table 1 shows the growth trends according to UN medium variant projection.

Table 1. Annual Rates of Population Growth (per cent)

	1976-2000					
	1970 1975	1975 1980	1980 1985	1985 1990	1990 1995	1995 2000
Africa	2.8	2.9	3.0	3.0	2.9	2.8
Western Africa	2.7	2.8	3.0	3.0	3.0	2.8
Eastern Africa	2.7	2.8	2.9	3.0	3.0	2.9
Middle Africa	2.4	2.5	2.7	2.8	2.9	2.8
Northern Africa	3.2	3.3	3.2	3.1	2.9	2.6
Southern Africa	2.5	2.6	2.7	2.7	2.6	2.5

Source: UN World Regional Population Prospects Table 1. *op. cit.*

2. U.N. Urban and Rural Population. Individual countries 1950-1985 and regions and major areas 1950-2000, p. 14-19. ESA/P/WP. 33, Rev. 1, 22nd September, 1970.
3. U.N. Demographic Trends in the World and its Major Regions, 1950-1970 (Preliminary Text), page 5, E. CONF. 60/BP/1 3rd May, 1973.
4. U.N. Demographic Trends in the World and its Major Regions, *op. cit.*, p. 46.
5. U.N. Demographic Trends in the World and its Major Regions, 1950-1970, *op. cit.*, p. 46.
6. U.N. World Regional Population Prospects, Table 1, E./CONF. 60/BP/3, 31st March, 1973.

Examined from a different perspective in the second half of the present century, the doubling time of the total population of the continent is expected to decrease from about 30 years for the period 1950-1970 to about 24 years in the period 1970-2000 as a result of the accelerating growth.⁷ The causes of the demographic inflation in the continent include falling mortality rates, rising life expectancy and sustained high birth rate. Tables 2 and 3 shows the estimated death rate and birth rate for the period 1950-1955 to 1965-1970.⁸

Apart from the falling mortality rates and sustained high fertility, the Gross Reproduction rate estimates on the basis of the UN variant assumption indicate a slight fall from 3.1 during the 1965-1970 period to 2.5 over the 1995-2000 five-year period. For the interval, there is an expected improvement in life expectancy at birth of from 43.3 years to 58.5 years.

Table 2. Death Rates 1950-1970 in Major Areas and Regions

Region	(Rates per 1000 inhabitants)			
	1950	1955	1960	1965
	1955	1960	1965	1970
Africa	26.2	24.5	22.8	21.3
Western Africa	28.3	26.8	25.2	24.3
Eastern Africa	26.8	25.3	23.6	21.8
Northern Africa	23.7	21.2	19.1	16.9
Middle Africa	29.3	27.6	26.1	24.3
Southern Africa	18.4	18.1	17.9	17.4

Table 3. Birth Rates 1950-1970 in Major Areas and Regions

Region	(Rates per 1000 inhabitants)			
	1950	1955	1960	1965
	1955	1960	1965	1970
Africa	47.3	47.0	46.9	46.8
Western Africa	48.8	48.8	49.0	48.8
Eastern Africa	47.2	46.8	46.4	46.6
Northern Africa	48.0	47.5	47.5	46.9
Middle Africa	45.5	45.2	45.0	45.3
Southern Africa	41.6	42.0	40.3	40.7

Source: UN. Demographic Trends in the World and its Major Regions 1950-1970.

However, analysis of the impact of demographic trends must also take into account the expected changes in the functional age groups. The accelerated growth rates will have important influences not only in the age composition but also in the labour force trends. Table 4 shows the composition of the population in Africa by four broad age groups.⁹

7. Ominde, S. H., Population Trends and Demographic Factors in Africa with particular reference to unemployment, p. 9-10. Seminar on Strategies for Increasing Productive Employment in Africa Countries. IDS, Nairobi, 1974.
8. Demographic Trends in the World and its Major Regions, 1950-1970. Table D., op. cit.
9. U.N. World and Regional Population Prospects. Table 4. E/CONF. 60/BP/3. 31st March, 1973.

*Table 4. Africa: Percentage Age Distribution
1965-2000. Medium Variant Projection*

Age Groups	1965	1985	2000
0-4	17.7	18.4	16.1
5-14	26.8	26.9	27.0
15-64	53.7	52.0	53.7
65+	2.8	3.0	3.2

An important feature of Africa's demographic structure is the large base of dependent population. In most regions of the continent the dependent child population constitutes well over 40 per cent of the total population. The demographic upsurge outlined has had the effect of raising the proportion of dependent population. In 1965 persons aged less than 14 years constituted 43.5 per cent of the total population. By 1985 the proportion is expected to increase to 45.3 per cent and in the year 2000 it is expected to be in the region of 43.2 per cent. The economically active age group between 15 and 64 years is expected to decrease from about 53.7 per cent to 52.0 per cent of the total population. On the other hand there are indications that life expectancy is improving. These changing age group ratios have vital effect on social and economic policies of the African countries. The UN medium variant projections suggest that school-age population is expected to rise from 78 million in 1965 to 220 million in the year 2000 A.D. The female reproductive age group (15-44 years) is expected to increase from 65 million in 1965 to 176 million by the year 2000. Projections of the working age population suggests an increase of from 163 million in 1965 to 439 million by the year 2000 A.D.¹⁰

Discussions of the problems of population growth in Africa have brought into prominence the spatial aspects of population change. Spatial redistribution of population and in particular the accelerating rate of urbanization in Africa are responsible for some of the most acute development problems. The problems arise basically from the imbalance between the rapid growth of urban population and the inadequate growth of urban facilities and employment opportunities. The demographic components of the change include the natural increase of the urban population and more important, the extent of the influx of rural migrants into towns.

Causes of the rural to urban drift are complex but they include a desire to escape from the restrictive rural conditions to enjoy urban amenities, lack of suitable employment opportunities in the rural areas; marked rural-urban income differential and the progressive impoverishment of the lowest income groups.¹¹

Analysis of the global situation indicates that between 1950 and the year 2000 the percentage of world population living in the urban areas will have increased from 28.32 per cent to 51.10 per cent. Over the same period the

10. U.N. World and Regional Population Prospects, Table 6, *op. cit.*

11. Ominde, S. H., *Population Trends and Demographic Factors in Africa*, *op. cit.*, p. 15.

proportion of urban population in Africa will have increased from the 1950 modest level at 14.02 per cent to 39.15 per cent in the year 2000 A.D. Table 5 shows the global position and trends in Africa.¹²

At the regional level, considerable variation has been noted on the levels and trends of urbanization. Southern Africa, the most urbanized of the major Africa regions is expected to experience increased urbanization from 37.61 per cent in 1950 to 57.93 per cent in the year 2000. In Northern Africa the expected change in the level of urbanization will be from 26.64 per cent in 1950 to 52.92 per cent in the year 2000. The proportions for Western Africa are 11.42 and 39.85 per cent for 1950 and 2000 A.D. Middle Africa trends suggest a rise from 6.89 per cent in 1950 to 40.66 per cent in the year 2000. In Eastern Africa the level of urbanization is expected to change from about 5 per cent in 1950 to 20 per cent in the year 2000.¹³

Table 5. Urban, Rural and Total Population by Major Areas and Regions as projected for each Ten Years 1950-2000 (in millions)

Region	Urban Population	Rural Population	Total Population	Per cent Urban
<i>World</i>				
1950	704	1982	2486	28.32
1960	985	1997	2982	33.04
1970	1352	2283	3635	37.19
1980	1854	2614	4467	41.50
1990	2517	2939	5456	46.14
2000	3329	3186	6515	51.10
<i>Africa</i>				
1950	30	187	217	14.02
1960	48	221	270	17.93
1970	77	268	344	22.24
1980	125	332	457	27.30
1990	203	413	616	32.97
2000	320	498	818	39.15

Source: UN. Urban and Rural Populations, p. *op. cit.*

At the country level analysis of the rate of increase of urban population indicates that between 1950 and 1985 the urban population of Nigeria is expected to increase fivefold. In Eastern Africa, Tanzania will have a seven fold increase and Kenya and Uganda ninefold. Zambia is expected to experience a twelvefold increase over the period. Expected increases in the already highly urbanized parts of Africa are expected to be similarly high but at a slightly lower level.

Two important features of the shift of population to urban areas need further emphasis. These are the increase in the number of the large cities of

12. Ominde, S. H., Urban Growth in Africa. Commonwealth Association of Planners, Africa Regional Conference, Nairobi, 10-16th February, 1974, p. 5.

13. U.N. Urban and Rural Population, Table 5, p. 17, *op. cit.*

100,000 or more inhabitants and the growth of the million cities in the region. Arriaga (1971)¹⁴ noted that from 1950 to 1970, the cities reaching the 100,000 total population level in the region accounted for 33 per cent of the total increase in population of such cities. In 1950 there were only 45 cities of 100,000 or more in 16 African countries. By 1970, there were 32 countries in Africa with a total of 111 cities each with 100,000 population or more. This increasing concentration in the large cities varies from country to country. In a number of African countries the growth rate has been estimated as high as 12 to 15 per cent.¹⁵

Country positions show that considering the proportion of persons living in cities of 20,000 or more in the early 1960's, for most African countries well over two-thirds of the total population of such cities were to be found in the large cities of 100,000 persons or more.¹⁶

However, another striking problem area of spatial population change is the emergence of the million cities. In most African countries the accelerating tempo of rural-urban migration is increasingly concentrating on one or two large urban centres of the countries. This is essentially the problem of the primate city which has brought in its wake many critical development issues.

In 1950, there were only two cities in North Africa over the million inhabitant threshold. By 1970 the total figure for Africa as a whole had increased to 88. Table 6 shows that by 1985 the number of million cities in Africa will have increased to 19 with 5 in Western Africa, 3 in Eastern Africa, 1 in Middle Africa, 6 in Northern Africa and 4 in Southern Africa. Approximately 47 million people will be living in these cities by 1985. (Table 7).¹⁷

Table 6. Number of Cities having at least 1,000,000 inhabitants at each given date (1950, 1965, 1975, 1985)

Region	1950	1965	1975	1985
Africa	2	5	10	19
Western Africa	—	1	1	5
Eastern Africa	—	—	1	3
Middle Africa	—	—	1	1
Northern Africa	1	3	4	6
Southern Africa	—	1	3	4

Source: UN. The World's Million Cities 1950-1985. Table 1 *op. cit.*

In summarizing the general policy perspectives on population problems in Africa today it is clear that the rate of population change dominates the discussion. Analysis of the dimensions of the demographic problem has underlined the rate of population growth and the impact of spatial changes

14. Arriaga, E. E., *Urbanization and City Growth in Africa*, p. 2. University of California, Berkeley, 1971.

15. Ominde, S. H., *Urban Growth in Africa*, *op. cit.*, p. 11.

16. Ominde, S. H., *Urban Growth in Africa*, *op. cit.*, p. 11.

17. U.N. *The World's Million Cities, 1950-1985*, Table 1, p. 13. ESA/P/WP. 45, 20th March, 1972.

Table 7. Population of Cities having at least 1,000,000 inhabitants at each given date (1950, 1965, 1975) (1985) in millions

Region	1950	1955	1975	1985
Africa	3.4	9.9	21.8	46.8
Western Africa	—	1.1	2.0	9.2
Eastern Africa	—	—	1.1	5.2
Middle Africa	—	—	1.6	3.3
Northern Africa	3.4	7.5	12.9	22.1
Southern Africa	—	1.3	4.1	7.1

Source: UN. The World's Million Cities. Table 2 p. 14 *op. cit.*

as the main priority areas. However a closer examination, of interest at the international and national levels, shows that greater attention has been given to the demographic processes that influence the rate of population change and in particular to prospects for regulation of fertility.

On the other hand, there is no doubt that from the development point of view measures that influence spatial population change have attracted considerable interest. The extent to which these measures have become policy areas has depended on the impetus given at the international level and on the dictates of the internal economic situation.

INTERNATIONAL APPROACH TO POPULATION POLICY

The emergence of the United Nations and in particular the addition of a large number of independent African nations in the late 1950's and in the 1960's has had a very powerful impact on the African continent. In this process of change new ideas, international norms and standards of conduct have become key components of international ideology or guide lines for concerted international action. Economic and social problems of developing African nations have become incorporated in the international debate. In the process of debate principles of reforms have been formulated to guide national policies in such areas as development planning, human rights, health education and employment, land reform, urbanization and other areas of socio-economic development.¹⁸

National activities in the field of population policy go back as early as 1950's when India, Pakistan and China adopted national policies directed at moderating population growth. However, recognition of population problem by the world body only took place in 1966 when the General Assembly adopted the General Assembly Resolution 211 (XXI) on Population Growth and Economic Development. In subsequent years attention has focussed more and more on the problem of human fertility. There has been increasing debate at the international level and marked progress on policy formulation with regard to fertility at the national level.¹⁹

18. Macura, M., Components of an international approach to population policy. *International Social Science Journal*. Vol. XXVI, No. 2, 1974, pp. 195-206.

19. Macura, M., *op. cit.*, p. 197.

Dorothy Nortman reports that in 1972 out of 59 developing nations which possessed an official policy for either a reduction of fertility or in support of family planning activities, twelve adopted such policies before 1966, 24 in the period 1966-1968 and 23 in the period 1969-1972. In addition a number of advanced nations have modified their policies and legislation with respect to reproduction. Other activities include agreements governing international migration and the rights of migrants and bilateral assistance in the field of planned parenthood. But the most important step by the world body was the establishment of United Nations Fund for Population Activities in 1967.²⁰

In the development of policy framework at the international level a number of principles have been established which now influence the attitudes of governments in developing countries of Africa. In the first place, there is the recognition of the sovereignty of nations in the formulation and promotion of their own population policies. The basic aim of this principle has been to ensure that development assistance should not be made conditional on adoption of measures to slow down the rate of population growth. The second aim has been to ensure voluntary participation of nations in international population activities.²¹

The second principle of importance has been referred to earlier in the paper. This is the recognition that population policy is an integral component of the national development policy. The principle recognizes the multi-disciplinary approach to the solution of population problems. A third principle is the recognition of the basic human right, especially the right of parents to decide on the number of children.

A fourth principle accepts the international solidarity as part of the international technical co-operation. The aim of this principle is to ensure that countries with scarce resources are able to take advantage of international resources. It is also based on the recognition of the global context of population problems.

The last principle underlines the scientific foundation of policies relating to development and population. Emphasis on research has been urged in several areas.

In the interpretation of these principles to suit the varied economic and social conditions of human living in the world with differences in cultures and national aspirations, a broader concept of population policy has become necessary. Macaura (1974) has defined population policy:

“... as (a) a set measures by society or government designed to contribute (b) to the achievement of humanitarian, economic, social, demographic and other collective goals (c) by affecting critical demographic variables namely the size and growth of the population, its regional distribution both national and international, and its demographic characteristics such as age, sex structure, family size and the like... The intermediate

20. Macura, M., *op. cit.*, p. 197.

21. Macura, M., *op. cit.*, p. 198.

variables that would be affected would in principle include fertility, mortality, internal migration and international migration.²²

In the more developed parts of the world, there have been three distinct approaches. Most of the policy strategies have been indirect and aimed at influencing the demographic variables through measures relating to socio-economic factors. The examples have included marriage age, family formation, education, employment and the role and status of women. An important strategy in the developed countries has included the need for a comprehensive immigration policy and in particular the need for planned and assisted migration. A third strategy in the more developed countries has been the importation of labour and skilled manpower from developing countries.

In developing countries, emphasis has been on a simultaneous approach including efforts to influence population trend through measures directly affecting mortality, fertility and migration. Further there has been a general attempt to integrate policies aimed at fertility regulation with measures of socio-economic development. Thus policies for moderating fertility and population growth must go hand in hand with intensified development.

Policy implementation shows considerable divergence of approaches. From both the national and international points of view strategies relating to health conditions and in particular to mortality reduction appear to be least controversial. Because of the universal value attached to life there is closer unanimity on the need to reduce mortality. In advanced countries with low infant mortality rates and life expectancy of over 70 years the basic concern is with the modern causes of death and excessive mortality of males in certain critical age groups.

In most developing countries high mortality continues to be a major source of concern. In Africa out of a total of forty-eight countries and territories in 1973 all except two had life expectations at birth of below 55 years. In Latin America there are six out of thirty countries and in Asia there are twenty out of thirty-seven with life expectations at birth of less than 55 years. Crude death rates are low in Latin America but in Africa and Asia the rate varied from 15 to 25 per thousand reaching 28 to 38 per 1000 in special cases. Infant mortality is high and lies somewhere between 120 and 200 or even more per thousand. In such cases priority should be given to legislation to save lives of those already born.

Migration has brought about legislative strategies aimed at controlling the impact of this demographic process on the economy of the various countries concerned. In fact post-independence legislation concerning international migration in Africa has been one of the major sources of controversy. Africa has yet to emerge with policies of international migration more suited to the move towards greater regional, economic and political integration. However, the most important field of population policy at the international,

22. Macura, M., *op. cit.*, p. 200.

regional and national levels is fertility and in particular natality, which is dynamic component of natural increase.²³

Activities to influence fertility are not new. However with the acceleration in the rate of population growth, the need for knowledge of what can be done, and experience in different parts of the world is essential if the pattern of population policies is to meet the needs of development in Africa. Lack of reliable information is one of the major factors contributing to the slow emergence of policy directions in the Africa region.

POLICY FRAMEWORK FOR DEVELOPING COUNTRIES OF AFRICA

The control of demographic processes can only be done through people. This presupposes rational and genuinely humane attitudes. Ideally, formal policy by government to affect the rates of population growth in any country appear to be limited to five main approaches.²⁴

- (i) Communication with the people in order to influence their demographic behaviour in a humane and desired manner.
- (ii) Provision of services to effect the desired behaviour.
- (iii) Manipulation of the balance of incentives to achieve the desired population.
- (iv) Shift in the weight of social institutions and opportunities in the desired direction.
- (v) Achievement of desired behaviour through coercion or the power of the state.

In terms of communication government can provide or encourage others to provide factual information about the population and fertility-related matters. Information may be provided for example on the effect of certain rates of growth. The government can use education or direct persuasion.

In the field of services governments have been active internationally in providing legislation or decrees on what is medically and morally acceptable as a means to demographic control. There have been measures relating to tax and even police powers to achieve a desired demographic goal. Through the public network system it is possible for governments to provide or support services alongside private initiatives. In a number of countries the use of certain contraceptives have been restricted through such avenue. On the other hand it is possible through government support to cover the entire population in the provision of supplies to population at risk. Governments can in this way establish family planning programmes.

The use of incentives has been widespread. It is possible for example to initiate legislation which have the effect of raising or lowering the cost of having children. In a number of African countries there have been efforts to achieve this through such measures as maternity leaves and benefits, family and children allowances, tax benefits, child labour legislation and manipulation of educational fees.

23. Macur., M., *op. cit.*, p. 201.

24. Berelson, B., *An evaluation of the effects of Population Control Programmes.* Oxford University, March 1973.

Among the most important institutional strategies are measures designed to influence the demographic outcome. Measures such as regulation of marital status and in particular the age of marriage, investment in nutrition and sanitation have been crucial in the decline of mortality in general and in particular, infant or child mortality. Other strategies in this field include determination of the extent to which popular education will be available, especially for girls, as well as modernization of agriculture and the economy. It is also possible for government to influence demographic processes in the field of housing.

Lastly, it is possible for governments to achieve the desired rate through the power of the law and its attendant penalties. It is possible for government to attempt to limit the size of families by penalties penalizing birth beyond a certain number.

However, experience shows that the five possibilities open have had varied impacts and there is need to consider policies that are more in line with particular ideology and culture of individual countries.

The use of coercion has been accepted for mortality and migration controls but generally not for fertility. The state for example has the right to vaccination or to demand a certain standard of sanitation. The state uses insecticides in the control of disease. Thus where applied, government controls can be demographically effective. It has already been noted that the decline in mortality was related to a definite action on the part of government. Compulsory introduction of public health measures have in this way been extremely beneficial. In the world the tight control associated with immigration legislation has been supported as being in the interest of sovereignty of the various countries. However direct coercion in the field of fertility remains objectionable in the modern world, and in the African region it is certain to generate a great deal of opposition and may even lead to a general condemnation of fertility regulation.

The use of social institutions has been most successful in affecting the natural growth rates. There is a wide area of agreement on the need to integrate plans for reduction of the rate of growth with those of socio-economic development. However, it is necessary to note that institutional factors are slow to change. The basic issue is what can be done to discourage undue fertility, which may be in the short and long run detrimental to the development of the country.

Incentives used in a number of countries have been based on money. These measures are now gaining ground in a number of developing countries. The child allowances given as tax relief in East Africa were scrapped a few years ago. However it is still too early and the demographic research has not indicated any conclusive results to show that the incentives or disincentives have been successful. Even in the more developed countries it has been shown that generous child allowances are more likely to lead to still lower birth rates. In Asia the incentives have not proved conclusive.

Perhaps the most hopeful area has been the provision of services. Through the provision of services it has been shown that governments can

influence what means of fertility control is available. There have been moves to improve the supplies of contraceptives to legalize sterilization and abortion.

The legalized termination of pregnancy under appropriate medical condition was a key factor in the startling decline of Japanese fertility after the Second World War.²⁵ It has also been shown that the withdrawal of the right to legal abortion in Rumania had a decisive effect on fertility after 1966.²⁶

However, the move by governments to adopt national population policies shows that a vast majority of African countries are still apathetic. Information available show that by 1973 countries in Africa which had an official policy to reduce the rate of population growth only included Egypt, Morocco and Kenya. Nigeria, Tanzania, Uganda and South Africa merely gave official support to Family Planning Activities. Ethiopia, Zaire and Algeria had neither official policy nor support for Family Planning Activities.²⁷

CONCLUSION

Earlier in the paper, attention was drawn to the structure of the population problem in Africa. Emphasis was placed on the nature of the demographic processes and characteristics of the population of the region. It would seem that policy formulation needs to continue to take into consideration such problems as mortality, fertility and migration. However, it is also evident that for most African countries the basic problem of population change is that of high fertility combined with a condition of rapidly declining mortality.

In examining the international policy framework we have outlined a number of principles which continue to guide policy in the field of population. Further, we have examined a number of avenues open to governments in the consideration of population policy. However, the question still remains as to the direction which legal interest in the field of African demographic problems should take. There seems to be four vital areas which need attention in this respect. These are:

- (i) The need for research and an early review of the legal framework for an integrated population policy.
- (ii) The importance of a broader conception of the population policy as part of the national, social and development planning.
- (iii) The importance of an urgent attention to the service infrastructure for regulation of fertility.
- (iv) The urgency of a system of priorities in the legislative strategy for African population problems.

Research and the legal framework

We have already stressed the recent nature of concern with the legal aspect of the demographic problems. The challenge facing law in this field

25. Berelson, B., *op. cit.*

26. Teitelbaum, M. S., *Fertility Effects of the Abolition of Legal Abortion in Romania* Population Studies, Vol. XXVII, No. 3, pp. 405-517, 1972.

27. Berelson, B., *op. cit.*, p. 17.

should not be merely seen in terms of salvaging scraps of legislation affecting demographic trends. There is a very central task here for legal experts working with demographers within a multi-disciplinary framework to bring progressive legislation more in line with integrated development objective.

A broader conception of the population policy

There has been a fundamental difference of approach on population policy issues between the developing countries of Africa and a majority of the more advanced countries. It is significant that international opinion has become more accommodating to our insistence on a social-economic development strategy as opposed to advocates of fertility reduction. Population policy is broader than a mere determination of family size.

The Legal Aspects of Vital Registration Systems in Africa

G. M. K. KPEDEKPO*

SUMMARY

The paper reviews the legal provisions for vital registration systems in Africa. It noted that the legislation governing the functioning of the vital registration services in Africa is, in general, out of date and limited in scope not only because it was enacted some time ago, but mainly because it does not permit the proper fulfilment of the functions described by the system. In most cases, the vital registration laws are defective also and must be brought up-to-date and co-ordinated so that the service can fulfil its functions in accordance with the needs of the various African countries. In this respect the existence of minimum legal texts would greatly assist in simplifying the legislation to the extent that the political and administrative organization of each country would permit.

What is required, the paper maintained, are feasible legislative reforms that can be fully and fairly enforced, perhaps quite simple and flexible legislative provisions, and not just laws languishing in legislative debate and delay or lost in legal complexities, so hedged about with exceptions that they end up by being more rhetoric than reality. The paper noted that given a dynamic situation in both the social and economic developments today, many legal aspects of vital registration can be expected to emerge in the not too distant future and therefore the legislative provisions need flexibility and continuous revision to cope with these situations if and when they arise.

INTRODUCTION

In recent years, there is the growing recognition of civil registration in guaranteeing the status and the rights of individuals in a society as well as the importance of the system as a source of vital statistics. It is indeed clear from the definition¹ of the system itself that the original motivation for establishing civil registration systems was not statistical but to provide a legal record or document of the occurrence of each event. The juridical function is to register the event and the juridical acts that are the basis of a civil status. This makes possible the organization and proper functioning of the juridical system governing the relations of the individuals organized in families and their relations with the State.

*The views expressed are the author's own and not those of any organization.

1. A vital registration system according to the U.N. Handbook of Vital Statistics Methods is defined as "a system which includes the legal registration, statistical recording . . . and the characteristics of vital events primarily for their value as *legal documents* and for their usefulness as a source of statistics". U.N. Handbook of Vital Statistics Methods Series No. 7 (1955).

From the legal perspective, the events of a birth and death constitute two major landmarks in a person's life: a birth gives rise to the personality, the civil status and to other rights and duties; a death extinguishes the personality in question and gives rise to rights of inheritance, and other rights and duties and also the other vital events which create, modify or extinguish a civil status and the various rights and duties.

The evidence of vital events is important to the State as well as to individuals. The law establishes a system of formal proof of a civil status events and acts which represents a recognition that civil registration contributes to the stability of the relations among individuals and between individuals and the State. This stability is the very foundation of law and order and a necessary condition for development. Thus, the registration of vital events can be regarded as an indicator of how far individuals or groups form part of the system of law and order and consequently how far the citizen is a part of the social and cultural life of the community.

However, these obvious legal uses of the records of the system and the growing interest in the statistical uses of registration data are yet to be reflected in the attitudes of many African governments to the establishment of systems of civil and vital registration, since it is common knowledge that African Governments attach low priorities to the establishment of the vital registration systems because of the considerable resources (both human and financial) required without any visible economic returns. Nor is this all. There are also institutional obstacles (legal and administrative) as well as other factors which hinder the development of vital registration systems in Africa. It is the intention of this paper to review in considerable detail the development of the legal aspects of vital registration in the past, the current legal situation and the deficiencies existing in it and to make suggestions for improving the legal provisions for African vital registration systems.

EARLY DEVELOPMENTS OF COMPULSORY AND GENERAL CIVIL REGISTRATION IN AFRICA

In Africa the early institution of a registration system in Egypt² appears to have been an isolated occurrence which did not prove continuous in Egypt itself and which was not, so far as is known, followed in other African countries. In modern times, compulsory and civil registration was introduced by the metropolitan powers in their African colonies; it was by no means general in its application and was first intended to apply only to the nationals of the metropolitan states. At various stages modifications were introduced into the system: registration was extended to non-indigenous groups other than the nationals of the governing state; for example, Indians, Pakistanis or Arabs, who were of importance in that they constituted part of an economic and social class distinct from the local population. There were some instances in which the indigenous population could register a birth or a death, but no compulsion was applied.

2. See for example pages 5-7 of E.C.A. Document No. E/CN/4/CAS/3/8 on "Methods and Problems of Civil and Vital Registration in Africa."

When the idea of compulsory registration was applied to the indigenous populations, a new criterion was established—this time geographic—as urbanization increased, especially in the areas which were the principal administrative centres. Birth and death registration was made compulsory in a number of cases for all population groups, indigenous or otherwise, living in towns or within a certain specified distance of an administrative centre. Occasionally the regulations were so framed that births in all areas were subject to compulsory registration but compulsion in regard to death registration was to apply only in the towns.

Another device adopted under British law was the passing of enabling legislation by which the governor or the local authorities had the power to introduce compulsory registration for all or part of the territory under their jurisdiction. This has not resulted in universal compulsory registration in any British or former British mainland territory of Africa. Somewhat similar developments occurred in the former French territories. In West Africa, for example, registration was extended to the indigenous population in 1916, on an optimal basis. In 1933 it became compulsory for certain groups of people and their descendants—soldiers, public servants, those subject to income or land tax, holders of licences, residents of certain administrative centres and the chiefs and their families. In 1950 registration was made compulsory for those living within 10 kilometres of a civil registration centre, the latter being located in the principal towns and administrative centres. In former French Equatorial Africa, registration was made compulsory for the indigenous population by laws of 1940 and 1944. The development of a modern system of vital registration, however, needs a far more comprehensive system of legal provisions than have been indicated in this section. The next section therefore discusses the essential elements in the legal development for a modern system and examines the deficiencies in the current legal provisions.

MODEL LEGISLATION AND DEFICIENCIES IN THE CURRENT LEGISLATIVE PROVISION IN AFRICA

The foundation of every statistical system is legislation which authorizes a governmental agency to produce statistics and defines the powers and resources which that agency may use to carry out this responsibility. In establishing a vital statistics system a law is usually enacted within the framework of the "Statistics Act" * as well as separate legislation to provide for the registration function itself. In general terms, the legislation specifies the boundaries of the country within which compulsory registration is legal for every group of the population and provision for its enforcement. The legal obligation to register all events specified by legislation is the basic premise for the entire vital registration system.

In discussing the legal basis for the model vital registration described in

*The "Statistics Act" represents a type of "social contract" between the statistical agency and the data—providing public.

this paper, the outline for the law prepared by the Inter-American Association³ presents a good starting point for examining the basis that might usefully be followed in drafting legislation in Africa because the outline provides a broad general framework which can be utilized as a guideline for a comprehensive legislative provision. The framework stipulates the items on which detailed legal provisions are required and what statisticians and demographers would like to see in model legislative provisions for a modern vital registration system. The deficiencies in the current legislation can therefore be examined in the light of what one would expect to see in a model legislative provision as shown in these recommendations.

A critical deficiency in the laws with regards to civil registration is the failure to take sufficiently into account relevant social, cultural and environmental realities which largely determine whether legislation will be merely a status symbol or a functioning instrument guiding individual behaviour or action in a modernizing society. Let us explain further by giving some examples of the deficiencies in the legal provisions.

An examination of the legislative provisions for a number of African countries (using the recommendations* for legislative provision; for a model system as a yardstick) indicates that the Acts and the Regulations are limited in their scope and do not cover many important subjects or uses to which the registration service are put. The Act and Regulations do not, for instance, prescribe for the preparation or amendment of registration records consequent upon adoption or annulment of adoption or determination or revocation of paternity or identification of a foundling.

In terms of flexibility of legislative provisions also, the current legislation leaves much to be desired. A vital registration system is a developing activity and has to cope with the normal problems of growth. In the initial stages of development, the legislative provisions governing the establishment and operation of the system should not have the effect of stifling the growth and the development of the system. This condition is ensured when the registration law contains provisions which authorize or make possible necessary amendments and modifications such as those relating to registration forms, periods of registration, fees and penalties, the creation and extensions to registration areas without recourse to legislative authority. A number of legislative provisions for vital registration system in Africa are defective in this respect.

The prescribed conditions for granting delayed registration include the production by the applicant of documentary evidence relating to the facts at issue. Such documentary evidence is however non-existent in most cases, but in such cases the delayed registration is effected on the strength of affidavits or statutory declarations executed by applicants and attesting to the facts at issue. However, since affidavits and statutory declarations are not incontrovertible forms of evidence, delayed registration effected solely on the strength of such affidavits and statutory declarations are not placed on the

3. Final U.N. Report of the Second Inter-American Seminar on Civil Registration, Lima, Peru (1964).

*See Ref. 3 for more details.

same plane of legal validity as records relating to current and unamended registration records. There should therefore be provisions in the registration law for the former category of records to be endorsed and the admissibility in evidence of registration records so endorsed should be subject to the discretion of the court, the body or individual to whom any such records are offered as evidence. There are no such discriminating provisions in the current birth and death registration Act.

In Kenya, however, an interesting development in the procedure for registering late births and deaths has recently been adopted.* Under the new rules, "late birth" and "late death" have been redefined to mean the birth of a person who is still alive which has occurred in Kenya since 20th April 1904, the particulars whereof have not been registered in the register of births within six months of the date of such birth, and "late death" means the death of a person which occurred in Kenya since 23rd January, 1906, the particulars whereof have not been registered in the register of deaths within six months of the date of such death. The years stated in the procedure for late registration were the years when registration of birth and death were first introduced in Kenya. Thus the law does not only apply to current births and deaths as such but to all sections of the population, particularly the adult population. In a sense, the law is retrospective and the forms require very comprehensive information in order for anyone to undertake late registration. It also makes clear that affidavits are not only insufficient, they would not be accepted as evidence for late registration. The procedure for late registration in Kenya is therefore different from that in Ghana, since in Ghana late registration could be effected on the strength of affidavits. The Kenya procedure for late registration seems to us a more sensible and progressive legislation because it takes account of the social environment and makes it possible for adults to own a birth certificate if they so desire. If the use of birth certificate is encouraged in the social and economic organization of the country by the Government in addition to this law, it would be possible for a great majority of the population to own a birth certificate in Kenya.

In many instances also, neither the Act nor the Regulations and procedural instructions issued under the Act contain any specifications in terms of operational details of the prescribed conditions under which the registration functions are to be performed. J. Y. Owusu,⁴ in his interesting report of some aspects of vital registration in Ghana gives two instances of this type of operational deficiency in the legislative procedures for extracting records of births and deaths from the register of births and deaths and noted that the non-specification in the Regulations of the conditions and requirements for the issue of extracts from the register increases the possibility of unauthorized persons getting access to, or possession of vital records relating to other persons. It was further noted that the seriousness of this deficiency in the registration machinery became apparent recently during a court case which

*Legal Notice No. 154 Republic of Kenya (Cap. 149) (1971).

4. Owusu, J. Y. (1972) Report on Vital Registration in Ghana (mimeographed) Statistical Office, Accra, Ghana.

involved the issue, by the Registry Office, of an extract from a Register of Deaths.

There is also the need for the establishment of reasonable statutory time-limits for the registration of vital events in Africa.⁵ The legislation should probably take into account such factors as topography, means of communication and transport, etc; perhaps different statutory time periods would have to be devised for urban and rural areas because of the different varying conditions in different parts of the country. No doubt; a study of the effects of different time periods allowed for registration (between date of event and date of registration) on completeness and accuracy⁶ of reports would throw some light on this. Comparative studies are important in this connection. A good deal of work along these lines is already in progress;⁷ there has not, however, been much co-ordination of effort in this field, so that the results of different studies cannot always be compared with one another. Greater co-operation between different national research organizations might pay dividends in this area.

Table 1. Statutory Time Allowed for the Registration of a Live Birth, Death and Foetal Death in Selected African Countries

	Time Allowed for the Registration of		
	Live Birth	Death	Foetal Death
Algeria	3 days	24 hours	—
Cameroon	15 days	15 days	—
Ghana	21 days	24 hours	—
Kenya	1 month*	1 month*	—
Libya	15 days	24 hours	—
Rwanda	5 days	5 days	—
Togo	30 days	15 days	—
Uganda	3 months	1 month	—
Zambia	3 months	1 month	—
Mauritius	45 days	24 hours	24 hours
Sierra Leone	14 days	3 days	14 days
Somalia	30 days	30 days	30 days
Sudan	14 days	7 days	14 days
Tunisia	10 days	3 days	3 days
U.S.A.	15 days	24 hours	24 hours

*Amended since 1971 to 1904 and 1906 respectively in order that adults may register and acquire birth certificate.

Table 1 shows the statutory stipulated time for birth, death and foetal deaths to be registered in selected African countries. On the whole, most countries prefer shorter statutory time periods for deaths than for births,

5. Kpedekpo, G. M. K. (1971) Patterns of Delayed Registration of Births and Deaths in Ghana—Ghana Social Science Journal, Vol. No. 1, pages 1-20.
6. Kpedekpo, G. M. K. (1968) Evaluation and Adjustment of Vital Registration from the compulsory Registration Areas of Ghana. Journal of American Demography, Vol. 5, No. 1, pp. 86-92.
7. Kpedekpo, G. M. K. (1974) Vital Registration Systems in Africa mimeographed).

which is understandable (because of public health measures), but one is intrigued by the variations which exist in the length of time given by the law between countries. For births the statutory time limit varies from 3 days to about 90 days and for deaths the time limit varies from twenty-four hours to one month. Even allowing for some variation in the legislation, which takes into consideration the political and administrative organizations of these African countries, and levels of economic development, it seems rather surprising that such wide variations should exist.

Another important source of difference in the procedure for effecting late registration in African countries is the amount of information or detail required on the late registration forms from various countries for this to become a legal document. Would it not be possible to agree on a minimum number of items for all African countries? One effect of this decision would be that the statistics on late registration presented in the statistical year books can be interpreted in a uniform way. At the moment, one needs a thorough knowledge of all the laws from different African countries to make sense out of most vital registration data. It should be emphasized that census data are now being collected on a uniform basis in most African countries and the second most important source of demographic data should also be collected uniformly.

There are, however, genuine difficulties in drafting legislation for vital registration in Africa. For example, the laws on vital registration do not cover stillbirths (late foetal deaths) in most countries, but it may be considered impractical to recommend their registration under present conditions in most of Africa because of difficulties of definition and measurement. Owing to the many legal situations existing in the various countries of Africa, even among various ethnic groups within a single country, definitions and legislation relative to marriages, divorces and separation in Africa runs into difficulties. Existing evidence shows that the laws on vital registration for countries where some form of limited registration has been in practice reveals wide disparities on the enactment and enforcement of laws for some of the items discussed in the legal principles for operating a model civil registration system. While some variation can be expected from country to country, perhaps the existence of minimum legal texts would greatly assist in simplifying the legislation to the extent that the political and administrative organization of each country would permit.

LEGAL ASPECTS OF PRIVACY, STATISTICAL CONFIDENTIALITY⁸ AND SECURITY OF DATA FROM VITAL REGISTRATION

A second use to which vital registration systems are put is that they provide data for statistical purposes. This aspect of vital registration also has

8. Fellegi, I. P. (1972) For a thorough discussion of this topic see for example "The Question of Statistical Confidentiality" in the *Journal of the American Statistical Association*, Vol. 67, No. 337, pp. 1-7.

legal aspects to it and presents legal problems of privacy,* statistical confidentiality and data security. In recent years opposition to census-taking and the collection of vital statistics has been encountered in several countries because of a fear of infringing personal privacy and this had led to difficulties in administering these services. It is perhaps important to understand the reasons which have led to the formation of these attitudes and to take steps to counter their effects. Maybe the legal provisions in the "Statistical Acts" do not give enough protection to the individuals in these countries, but whatever may be the reasons it is worth noting that the real foundation of reliable statistics is public co-operation and not the threat of prosecution under the "Statistics Act".

A brief analysis of the "Statistics Act" establishes the distinction between privacy and statistical confidentiality. The protection of individual returns embodied in statistics acts typically includes at least the following three legal provisions—(1) the individual returns furnished by persons, businesses, etc., will be used only for statistical purposes; (2) the returns will be handled only by *sworn staff of the statistical offices* and (3) the data will be disseminated outside the statistical office only in a form which will not permit the identification of data relating to any individual firm or other respondent.

The essence of the first provision is to establish the purpose of data collection by a statistical office, and a salient feature of statistical information is that it always relates to a well-defined population rather than to a particular individual respondent. The second provision of the Act establishes safeguards for the data that was collected and stored. Even though the Act states that the data can only be handled by sworn staff of the statistical office, who, in turn, are subject to penalties if they divulge information about individual respondents, in most countries this provision is not there and in some cases even if it is inserted it is not strictly implemented. The third provision defines the consent of statistical disclosure and the main provision of the "Statistics Act" stipulates therefore that it is not enough to withhold the publication of the names or other identification of respondents, it is not enough to ensure the security of confidential data, it is not enough to publish data for populations of particular interest (rather than for individuals), it is also incumbent on the statistical offices to maintain a continuous scrutiny of their own publications to ensure that from their publications, no information can be deduced concerning particular individual respondents. Thus the confidentiality provisions of the statistics acts are two-fold: they relate to data security and to statistical disclosure.

Potential sources of violations of data security are—(1) through an employee of the statistical office breaking the secrecy oath through the sale of confidential material or through careless talk to friends, (2) through the means of computer technology, which adds a new dimension to the problem

*Privacy has been defined as the right to determine what information about ourselves we will share with others. The concern about privacy therefore centres around the question of making such information available to others possibly unknown to the respondent without his/her consent thereby increasing the knowledge of the others about him.

in the sense that stored data can be retrieved by unauthorized persons making copies of the confidential data, (3) through the publication of too much detailed statistics, especially in tabulations, so as to make it possible for individual cases to become known by others. It is always possible to argue about how much detail is "too much" in statistical presentations. However, the operationally important point is to stop further cross-tabulations just prior to any individual response becoming identifiable in a tabulation cell.

The concern is real and the danger is also real, particularly in census taking, vital registration and in most forms of data collection procedures, because with the advent of computer technology the identification of respondents has now increased the possibilities of record linkage from different sources as well as the problems of easy identification of individuals from the records of various Government or private administrative agencies.

Perhaps some added legal provisions would be needed in this respect to cover not only the statistical offices but also the computer time hiring companies and bureaus or companies which process data for Government statistical agencies.

DISCUSSION AND SUMMARY

There is need for the revision of the vital registration laws and regulations to adapt them to new conditions and requirements of the various African countries and to take steps to ensure strict fulfilment of the legal requirements, i.e., for the reporting of a birth or death, the requirement of a civil registration certificate as proof of the occurrence of a vital event and the requirement of burial permits, etc., and the simplification of formalities as far as the legislation in force permits would be needed in most African countries. There is also an urgent need for systematic and comparative research or studies covering the legislative provisions among countries of Africa with a view to identifying common legal problems and to recommend possible solutions.

Reform of public law in this sector (vital and civil registration sector) should, in our view, involve a rationalization of allocations of power among governmental institutions so as to respond adequately to the needs of changing circumstances and the building of safeguards to assure at least minimum decency of official action, particularly as it impinges on the ordinary citizen. Perhaps what is required are feasible legislative reforms that can be fully and fairly enforced, perhaps quite simple and flexible legislative provisions and not just laws languishing in legislative debate and delay or lost in legal complexities so hedged about with exceptions that they end up by being more rhetoric than reality. Given a dynamic situation in both the social and economic development today, many legal aspects of civil registration can be expected to emerge in the not too distant future and therefore the legislative provisions need flexibility and continuous revision to cope with these situations if and when they occur.

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