LEGAL ASPECTS OF IMPLEMENTING A TOTAL NATIONAL POPULATION PROGRAM

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In our interdependent world, it is not possible nor practicable to attempt to solve problems in isolation. Thus, matters of population must be seen in conjunction with many other factors — including health, education, employment, food supplies, housing, and environment.

Kurt Waldheim
Secretary-General of the United Nations, 1974

LAW AS AN ASPECT OF POPULATION POLICY

The inclusion of legal considerations in the analysis of the population question has been relatively recent. As late as 1965, for example, only one lawyer was to be found among the thousand participants and observers at the United Nations World Population Conference in Belgrade, and not one of the hundreds of papers presented there dealt with the legal aspects of population. In the past decade the complete lack of consideration of the role that the law can play in the population field has been overcome, and there is a general recognition that any attempt to formulate a total approach to fertility regulation must necessarily include an input from the legal community.

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

Since the population problem is multidimensional and the co-
ordination of many fields of expertise is involved -- a process
which has heretofor been hampered by strict compartmentalization --
the population problem can no longer be viewed solely as one of
numbers or of census taking, nor can the provision of contraceptives
and family planning services be regarded as the sole solution to the
population problem. Merely decreasing the rate of population growth
is but one aspect of the problems associated with problems flowing
from population. So long as "law is an instrument of social policy,"2
its potential as catalyst for social reform should be fully realized.3

With respect to population, it seems unnecessary to emphasize
that many laws exist which affect matters related to the broader ques-
tion of population. This being so, "Population Law" may be defined
as that body of the law which relates directly or indirectly to the
population growth, distribution, and those aspects of well-being af-
fecting, as well as affected by, population size and distribution.
By "law" is meant the constitutional, statutory, administrative, and
decisional, as well as the customary.

"Law," as used in this paper, embraces more than the governmental
decisions or programs that are "put into official form and translated
into action."4 The types of laws which can typically be used to im-
plement a totally coordinated population policy aimed at solving popu-
lation problems may be divided into three basic categories: laws
which affect fertility by intervening at some point in the procreation
process (regulation of abortion, contraception, and sterilization);
laws which indirectly affect fertility through regulation of social
relationships related to fertility (e.g., marriage, descent, inheritance,
status of women); and, laws which indirectly affect fertility
through economic effects (tax, child allowance, maternity benefits,
social security).


3. L. T. Lee, "Law and Family Planning," in Studies in Family Plan-
ning (New York: Population Council, 1971), p. 82. This was
originally a background paper prepared for the Expert Committee
on Family Planning in Health Services of WHO, November 24-30,
1970.

lation and Law (Leiden: W.W. Sijthoff; and Durham, North
Since 1966 five major events have lent particular urgency to the consideration of Population Law as an ingredient of a total population policy: (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; 5 (2) the unanimous adoption in 1968 by the United Nations Conference on Human Rights of the Teheran Proclamation which declares that family planning is a basic human right, and of a resolution which states that couples also have the right to be sufficiently instructed and informed on family planning; 6 (3) the U.N. General Assembly Declaration on Social Progress and Development in 1969, which contains a provision that the right to family planning includes not only the right to "knowledge," but also to the "means necessary" for the exercise of this right; 7 (4) the unanimous agreement at the United Nations Symposium on Population and Human Rights held January 21-29, 1974 in Amsterdam that among the essential elements of population assistance programs offered to governments by international organizations would be the compilation, review, and reform of their laws in the light of both population policy and human rights; 8 and (5) the adoption by the UNFPA/UN Symposium on Law and Population in Tunis on June 21, 1974 of concrete recommendations for implementing an integrated program on legal reform in such areas as status of women, family relations, education, labor, migration, social security, incentives and disincentives, contraception, voluntary sterilization, abortion, the role of para-medicals in family planning services, and ways of coordinating local, national, and international programs related to population.


The effect of the recognition of family planning as a human right has been aptly described by Vicente Abad Santos, Secretary of Justice for the Philippines:

Having been endowed with the character of a "human right," family planning therefore imposes not merely a moral but also a legal responsibility upon the state. Our own government has a legal duty to see to it that laws and policies contradictory to this right should be amended or abolished, and new ones adopted in conformity with and in promotion of this right. To bring our present laws in consonance with official recognition of family planning as a right, it is necessary to institute systematic legal reforms, and thereafter to coordinate them into the legal mainstream.9

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

As noted by Professor Elizabeth Odio in her paper prepared for the Symposium on Law and Population in Tunis, nations should not confine their action in the area of population to the narrow subject of family planning.10 The issues of population are much broader than that. They touch upon a number of other subjects which may well be conditions precedent to the effective implementation of a total

9. Letter from Vicente Abad Santos, Secretary of Justice of the Philippines, to Irene R. Cortés, Dean of the University of the Philippines College of Law, dated March 16, 1972.

population program, or for that matter, to a total national develop-
ment scheme.

The various instruments of the United Nations have set out the
following rights without which, it would seem, a total population
policy cannot be achieved:

1. The right to adequate education and information on family
planning; 11

2. The right of access to the means of practicing family plan-
ning; 12

3. The right to the equality of men and women; 13

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; 14

5. The right to work; 15

6. The right to an adequate social security system, including
health and old age insurance; 16

7. The right to freedom from hunger; 17

8. The right to an adequate standard of living; 18

13. 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.
14. Declaration of the Rights of the Child, principles 1, 4, 6, 9,
and 10.
15. International Covenant on Economic, Social and Cultural Rights,
Art. 6.
16. Ibid., Art. 9.
17. Ibid., Art. 11 (2).
18. Ibid., Art. 11 (1).
9. The right to freedom from environmental pollution;¹⁹
10. The right to liberty of movement;²⁰
11. The right of privacy;²¹
12. The right of conscience;²²
13. The right to separation of church from state, law from dogma;²³
14. The right to social, economic, and legal reforms to conform with the above rights.²⁴

The interrelationship of the rights is readily apparent. The first right, for example, presupposes a universal literacy and compulsory education, thus the necessity may exist for a revision of education law toward that end as well as permitting or requiring sex or family planning instruction in schools. Existing laws on obscenity may need to be changed if they forbid the publication, broadcasting, televising, or mailing of family planning material. Regulations of publicly owned mass communication media may need to be reexamined with a view to determining their obligation to disseminate family planning information.

Other questions posed include: 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?²⁵

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19. Ibid., Art. 12 (2) (b).
21. Ibid., Art. 17.
22. Ibid., Arts. 18 (1).
23. Ibid., Arts. 18 and 26.
24. 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.
25. This balancing process is one of the more difficult tasks which confront the developing nations in particular, though the issue of allocation of resources is one that is common to all.
How may the conferment of certain benefits, like education and family allowances, while meeting the actual needs, not constitute a "bonus" for increased fertility? Conversely, how may the withdrawal of certain benefits or the limitation of them to a certain number of children, 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 implementation by inadequate or inconsistent administrative decrees? What should be the relationship between municipal and international law through the medium of human rights, which includes the family planning right?

It is obvious that a systematic approach to the above problems calls for a joint and coordinated effort on the part of all government agencies concerned. The hitherto adoption of piecemeal legislation or measures focusing generally on the availability of contraceptives to the end user must be seriously reconsidered and placed in proper perspective.

26. The effects of the French legalization of the sale and distribution of contraceptives in 1967, for example, must be weighed against yearly increases in family allowance payments, on the one hand, and the nonenactment until 1972 of administrative decrees to implement the 1967 law, on the other. See Décret No. 72-318 of April 24, 1972 implementing Article 4 of Law No. 67-1176 of December 28, 1967, regarding birth control and repealing Articles L648 and L649 of the Public Health Act. For an unofficial translation, see Jacques Doublet and Hubert de Villedarly, Law and Population Growth in France (Law and Population Monograph Series No. 17, 1973), Appendix II.

27. Note the simultaneous promulgation of the following laws to implement the Chinese family planning program: (a) Guides for Increasing the Supply and Reducing the Prices of Contraceptives, as adopted by the Ministry of Commerce, the Ministry of Health, and the Chinese National Association of Marketing Cooperatives, Chung-Hua Jen-Min Kung-Ho-Kuo Kuo-Wu-Yuan Kung Pao (People's Republic of China, State Council Bulletin), March 23, 1957, pp. 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, Ibid., April 2, 1957, p. 303; and (c) Notice Issued by the Ministry of Health Stressing the Protection of Women and Youth Engaged in Rural Labor, the Intensification of the Campaign for Women's and Infants' Hygiene, and the Improvement of Health Service in the Nursery System, Ibid., April 2, 1957, pp. 313-15.
THE ROLE OF LAW IN A NATIONAL POPULATION PROGRAM:
SOME PROPOSALS

Bearing in mind the intricate interrelationship among different areas of the law as well as the lack of any systematic research on the impact of particular laws on fertility, consideration may nevertheless be given to legal and policy reforms in the following areas in furtherance of a total population program:

1. Education
   a. Top priority should be given to the provision of free primary education and, once realized, to the institution of compulsory education.  
   b. Suitable text materials in population education shall be prepared for instruction in schools and through the mass media, and instructors in this subject should be given adequate training.
   c. Population education should be integrated into the curricula at all school levels.
   d. All students, boys and girls, should devote one year during their secondary education to the service of their country in such tasks as the eradication of illiteracy, propagation of family planning, performance of social work.

2. Labor
   a. Where employers are required by law to provide occupational health services for employees, family plan-


29. Ibid., Item III (A).

30. Such service would take the place of military service as well as put males and females on an equal footing.
ning should be integrated into such services.31

b. Maternity32 and paternity33 leaves with pay should be
provided up to the third child.

c. Child-care centers should be established to assist
working mothers.

d. Appropriate incentive programs (e.g., "savings bonds," "educational trust fund")34 should be devised to dis­
courage excessive or unwanted pregnancies among working
women.

e. A minimum working age of not less than thirteen should
be established.35

3. Social Welfare

a. The minimum marriage ages should be increased to
eighteen.36

31. See ILO/ECAFE, Report on Asian Symposium in Labor and Population
Policies (Kuala Lumpur, July 24 - August 3, 1972), p. 11. See

32. In 1968 for example the Government of Singapore, through the Em­
ployment Act, Sec. 95 (1), cap. 122, restricted paid maternity
leave up to the third child. See Hall, "Law and Population Growth

33. In the Philippines for example a paternity leave of about one week
with pay is the custom. Regularization of this institution up to
the third child may motivate men towards family planning.

34. See, generally, O. D. Finnigan, Incentives (and Disincentives) in
Family Planning (Manila, 1972; limited distribution).


36. Ibid., Item IV(A).
b. No marriage license should be issued to couples who have not been certified as having attended family planning lectures or counseling.37

c. The coverage of the Social Security System should be broadened to include even self-employed individuals, and the benefits shall be substantially increased so as to assure a minimum decent standard of living without the need to rely on children for old age support.38

d. A Legal Aid Office should be created to investigate and prosecute cases concerning nonsupport of children, born in or out of wedlock, by either of the natural parents, as well as cases concerning discrimination based on sex, religion, race, and political belief.

4. Health

a. Contraceptive supplies and services should be made available as free public services to all who need them.

b. Instruction and training should be provided to doctors, nurses, and midwives in the rendering of family planning services.40

c. All government hospitals and maternity clinics should

37. See for example Ordinance No. 5 (An Ordinance Requiring Applicants for Marriage Licenses to Secure Certificates of Family Planning Orientation), enacted by the Municipality of Tiwi, Albay, Philippines, March 13, 1974.


39. Enforcement of natural fathers' obligation to pay for support and education of children, whether born in or out of wedlock, perhaps through garnishment at the source of income, may well discourage men from fathering children as a sign of machismo.

provide free delivery services up to the third child, combined with post-partum programs.

d. An adequate incentive system should be devised for motivators, taking into account the number of new acceptors recruited and pregnancies averted.

e. Abortion

First version: An abortional act is justifiable when committed upon a female with her consent by a duly licensed physician.

41. The following scale of delivery fees was established by the Singapore Government for deliveries in Government hospitals and clinics [see Singapore Family Planning and Population Board, Fourth Annual Report 1969, 1971].

<table>
<thead>
<tr>
<th>Number of living children prior to this birth</th>
<th>Delivery Fee S</th>
<th>US $</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>10</td>
<td>4</td>
</tr>
<tr>
<td>1</td>
<td>20</td>
<td>8</td>
</tr>
<tr>
<td>2</td>
<td>50</td>
<td>20</td>
</tr>
<tr>
<td>3+</td>
<td>100</td>
<td>40</td>
</tr>
</tbody>
</table>

42. See Canoy and Lee, Model City Project (1972), Sec. III-C-1.

43. This principle underlies the abortion statutes adopted by New York, Alaska, and Hawaii (with New York restricting the applicability of the law to within twenty-four weeks of pregnancy, and Alaska and Hawaii adopting thirty- and ninety-day residency requirements, respectively). An evaluation of the operation of the abortion law in New York City in the first two years indicates "an enormous success," demonstrating "conclusively" the safety of abortion on a mass scale. The overall maternal death rate was cut to 37.7 per 100,000 live births from the preceding two-year period rate of 52.2; the infant mortality rate was reduced to 20.8 per 1,000 live births in 1971 and 20.3 in the first half of 1972; and out-of-wedlock births declined from 31,903 in 1970 to 28,126 in 1971, or a decline of 11.8 percent. See New York Times, October 8, 1972, p. 1, col. 3.
Second version: No abortion operation may be performed except by qualified physicians and on the following grounds: (1) if a mother's health is endangered by the continuance of pregnancy; (2) if pregnancy results from rape or incestuous relations; (3) if there is a high probability of the baby being born defective; or (4) if pregnancy results from contraceptive failures.

f. No sterilization operation should be performed except by qualified physicians and with the consent of the person involved.

g. Standards should be established for paramedical personnel to perform IUD insertions and prescribe pills through the use of approved checklists.

44. In open-ended interviews conducted with 105 people of different professions and occupations in the Philippines in 1972, a great majority of respondents recommended the liberalization of Philippine laws to allow abortion on the first three grounds indicated above, notwithstanding the fact that 95 percent of the Filipinos are Roman Catholics. The fourth ground is deduced strictly from logic: If a woman, having determined to avoid pregnancy, resorted conscientiously to a particular contraceptive method prescribed by her physician or priest, but nevertheless became pregnant, should she and the unwanted baby as well as the society bear the consequences of such contraceptive failures?

Although the new Indian Abortion Law (The Medical Termination of Pregnancy Bill No. XXI-B of 1969), which was passed in August 1971, and came into effect in January 1972, does not stipulate contraceptive failures explicitly as a ground for abortion, Explanation II to Art. 3(2) provides: Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

45. In many countries, there is no law against sterilization per se, but usually there is a law against assault or heavy bodily injury, to which sterilization may be analogized. The lack of clarity on this point has discouraged resort to sterilization in many instances. See Stepan and Kellogg, The World's Laws on Voluntary Sterilization for Family Planning Purposes (Law and Population Monograph No. 8, 1973).

5. **Finance**

   a. All contraceptive drugs and devices should be imported free of duty, or such costs should be kept to a minimum.

   b. Tax incentives should be given to manufacturers of contraceptive drugs and devices.

   c. Tax exemptions for dependent children should be limited up to the third child.

   d. A lower property tax rate should be given to owner-occupants who are single or have fewer than three children in view of lesser burdens imposed on the society in terms of educational, medical, and other public services and facilities.

6. **Public Information and Post Office**

   a. Advertisement of contraceptives and dissemination of family planning information through mail and mass media should be permitted.47

   b. Government owned or supported media should include family planning in their regular programs.

7. **Public Works**

   a. Rural electrification and highway construction should be given high priority.

   b. Low cost, small unit public housing projects should be constructed, with priority in the allocation of space given to small families with three or less children in the interest of safety and health, as well as family planning.48

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48. Housing laws usually require the provision of a minimum amount of space per person, e.g., thirty-five square feet per person planned in Hong Kong (*Far Eastern Economic Review*, October 21, 1972, p. 16, col. 2). Such a requirement, together with the high visibility value of housing projects, argues for the construction of public housing projects described above.
8. **Status of Women**

Laws, regulations, and customs which affect the status of women should be examined with a view to bringing them into conformity with the principles of equality of the sexes.\(^{49}\)

9. **Law Compilation and Revision**

With a view to facilitating legal reform, existing laws bearing directly or indirectly upon population and family planning should be compiled, their possible impact upon fertility assessed and revisions proposed.\(^{50}\)

10. **National Governments**

National governments should establish, if they have not already done so, an official body to formulate national population policies and coordinate the activities of the various ministries involved in the field of population. National governments should also consider the adoption of a general population law which clearly sets forth these policies.\(^{51}\)

11. **Local Governments**

Local governments should be actively involved in the population field by mobilizing local personnel and resources both in implementing national population policies and in instituting programs uniquely suited to local conditions.\(^{52}\)

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\(^{50}\) *Ibid.*, Items IX, XI (A).

\(^{51}\) *Ibid.*, Item IX.

\(^{52}\) *Ibid.*, Item X. Examples of local governments' initiatives in the population field which may be cited are: (a) the establishment of a Population Planning Commission in the City of Cagayan de Oro of the Philippines in September 1973 to coordinate family planning activities and develop population policies and programs for the city; and (b) the adoption of Resolution No. 37, Ordinance No. 5, by the Municipality of Tiwi, Albay, in the Philippines in March 1973 requiring applicants for marriage licenses to secure certificates of family planning orientation.
12. **International Organizations**

National governments should, if the need arises, consider avail­ing themselves of assistance offered by international organiza­tions, both public and private, in the field of population and family planning, and coordinating their programs with inter­national development/population plans and strategies.53

The foregoing proposals are not meant to be exhaustive. It is con­ceivable that changes in the existing laws such as those regulating land tenure, inheritance, and adoption may also have an impact on fertility. Nevertheless, the above proposals may serve as a point of departure as well as a basis for discussion in the search for a total approach to the population problem.

In the ultimate, family planning is but a means to an end — the en­hancement of individual as well as the community well-being — measurable by such indices as taxable income, property assessment, investment and savings, unemployment rate, literacy rate, total school enrollment, welfare cases, peace and order, mortality rate, and so forth, of which fertility change constitutes but one, albeit important, yardstick. The success or failure of legal reforms must thus be measured by the changes in all of the above indices.