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HUMAN RIGHTS FROM HUMANITARIAN  
PERSPECTIVES: AN INTERNATIONAL  
COMPARATIVE APPRAISAL OF STATE  
LAWS ON AND PRACTICE OF ABORTION  
AND STERILIZATION AS MEANS OF  
FAMILY PLANNING\*

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HUMAN RIGHTS FROM HUMANITARIAN PERSPECTIVES:  
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ABSTRACT

The study describes and analyses the evolution and establishment of family planning as an internationally recognized aspect of human rights both at the level of customary social state practices and as a response to international promotion through the United Nations and agencies. This dialectical relations in legal norm creation and practice at international and municipal levels is then looked at specifically with regard to the use of abortion and sterilization as methods of family planning for humanitarian reasons. The countries whose practice and legal provisions are analysed are chosen on the basis of different religious, political ideology, and levels of technological advance. The result indicates that any one of these variables is not conclusive in determining the official adoption and practice of abortion or sterilization. The study generally puts a case for more liberal and efficient use of abortion and sterilization as methods of family planning on humanitarian, but not on reductionist abstract population policy, grounds. Most of the information analysed was collected by the author while acting as principal investigator for the United Nations Fund for Population Activities' project which was published in 1979 under the title: Survey of Laws on Fertility Control.

### 1. INTRODUCTION

Scholarly analyses of the place of law in population planning have proliferated mainly in the 1970's. This has been in response to and based upon the relatively successful individual, national, bilateral and multilateral efforts made within the United Nations system, beginning in the late 1960's, to uplift the status of family planning to the level of other internationally recognized categories of basic human rights. To the extent that the standards set at the international levels do and are meant to influence intrastate practice, and to the extent that intra-state practice also influence international standards, law making and standard setting become essentially an interactional process where customary practices become a necessary source of positive law. In international legal parlance then we join with Kelsen where he admits that international and national laws share the common heritage of customary practices which become the essence of a living law, excepting the few legal relations created by some peculiar treaties and legislations.<sup>1</sup>

One of the essential conditions for successful internalisation of legal standards is favourable public opinion. In the mobilization of international public opinion favourable to family planning, lawyers acting within their assigned role as expert publicists within the formal international legal order,<sup>2</sup> have played a useful role in highlighting the human rights aspects of family planning. Unfortunately, there still remains an apparent omission to provide persuasive arguments that link family planning with human rights

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1. Kelsen, H., Principles of International Law (New York: Rinehart & Co., Inc., 1952), 407.

2. This is a vital residual source of international law under the Statute of the International Court of Justice, Article 38 (1):

The Court, whose function is to decide in accordance with international law. . . shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

on purely humanitarian bases. The existing focus seems to lie more on the narrow, mechanistic level where the linkage is seen merely as a necessity for reasons of combatting the assumed, but well publicized "population explosion" or, at best, an abstract positivistic claim or disclaim as to international state obligations to provide family planning services for whatever reason. The intention in this paper is to provide a different approach that emphasizes humanitarian aspects of family planning, based on secular natural law and human dignity, as the primary reason that underlies or should underlie the ideals and practice of family planning as a fundamental human right.

The new perspective does not aim at demeaning efforts made in the use of the legal order to facilitate efforts directed at fertility control. Rather the underlying premise here is that the infrastructural arrangements made for the purposes of humanitarian realization of family planning as a basic human right may and should, but where necessary, be used for purposes of fertility regulation depending on each, states bona fide appreciation of the potentialities of its political economy. Demographic considerations are political economy policy questions that should not be made the basis of claiming family planning as a continuous and inherent human right. Human rights aspects of family planning are primarily for the facilitation and protection of human dignity, health and welfare which may or may not be threatened by population size per se. The warring between pro-natalists and anti-natalists or, in a narrow perjorative sense, between pro-life advocates and pro-abortionists, stem mainly from the approach of viewing family planning as a means to population growth control and not as a means for eugenic and therapeutic monitoring of the quality of human health and life.

The foregoing remarks entail the two core themes in this study: 1) the development of a coherent conceptual linkage between family planning and human rights based on humanitarian considerations; and 2) the demonstration of the existence, scope and limitations of customary practices of family planning, through abortion and sterilization, among a wide spread of states within different levels of technological development, differential political philosophies and organized religious cultures.

Part two, following, provides a synoptic description of the origin, nature, and scope of the right of family planning at the international level. Part three provides a critical conceptual linkage between family planning, through abortion and sterilization, and humanitarian considerations based

on natural law as expressed in certain positive laws, especially the Kenyan penal laws. Part four gives a comparative description of state practices of abortion and sterilization--15 countries for abortion and 11 countries for sterilization. The last section, Part five, summarizes some of the fundamental findings in the study and draws conclusions and statements as to the implications of this approach for future action in the continual search for the attainment of a living human right.

## 2. THE RIGHT OF FAMILY PLANNING AND ITS SCOPE

The history of the development of the concept of family planning as a basic human right has been treated broadly by other authors elsewhere, at least until the period up to 1973.<sup>3</sup> The first major international expression of the need to raise family planning to the status of an international human right was made by 12 Heads of State under the Declaration on Population of 10 December 1966, a unilateral declaration later signed by 18 more states. It stated that:

... the great majority of parents' desire to have the knowledge and means to plan their families and that the opportunity to decide the number and spacing of children is a basic human right.

This was reiterated by the International Conference on Human Rights in 1968, and specifically proclaimed in the Final Act of the Conference that:

The protection of the family and of the child remains the concern of the international community. Parents have a basic human right to determine freely and responsibly the number and spacing of their children, . . . couples have the basic human right to decide freely and responsibly on the number and spacing of their children and a right to adequate education and information in this respect.<sup>5</sup>

Finally in 1969 the U.N. General Assembly declared that families should have "the knowledge and means necessary to enable them to exercise their right to determine freely and responsibly the number and spacing of their

3. See, for example, Nanda, V.P., "The Role of International Law and Institutions Towards Developing a Global Plan of Action on Population," The Denver Journal of International Law and Policy, Vol. 3, No. 1, Spring 1973, 1, and Partan, D., Population in the United Nations System: Developing the Legal Capacity and Programs of U.N. Agencies, Law and Population Book Series No. 3 (Durham: N.C. : Rule of Law Press, 1972).

4. See Annual Report of the Secretary General on the Work of the Organization, 16 June 1966-15 June 1967, 22 U.N. GAOR Supp. 1, at 97, U.N. Doc. A/6701 (1967).

5. "Proclamation of Teheran" and "Human Rights Aspects of Family Planning" (Reso. XVIII), International Conference on Human Rights, Teheran, 22 April to 13 May 1968, adopted by 56 votes to none, with 7 abstentions--see in Final Act of the International Conference on Human Rights, Teheran, 1968, The United Nations and Population, Major Resolutions and Instruments (New York: UNFPA, 1974), 48 at 49-51.

children.<sup>6</sup>

Within the framework of rules governing the sources of international law, the above convention and declaratory acts fall within Article 38 (1) (a) of the Statute of the International Court of Justice.<sup>7</sup> Some elements of State cognizance of these general principles and views of expert publicists are clearly included. By formal legal reasoning then, the right of family planning became an international right and only its practice needs to be encouraged and evaluated. We shall see some of this later in the analysis. It is imperative at this juncture to make a few observations on the composite nature and other dimensions of this new international human right.

The right of family planning as set out above seeks to bestow on families some legal privileges and freedoms vis a vis the state authorities they live in. Similarly, the states are called upon to assume some international obligations to try as much as possible to measure up to the requirements. The international community is also charged with supportive obligations to help in the translation of the right of family planning into reality. This, in fact, is the whole purpose of the United Nations Fund for Population Activities.<sup>8</sup> To illustrate: the individual family who wants to decide to have many children may be inhibited by medical complications and thus should have the right to call on the government to intervene and try to correct the impediment. The government may, through scarcity of resources or through inefficient and/or iniquitous allocation of its resources (the latter being the more common), be unable or only partially able to assist the family. The international community then ought to assist the government either through provision of resources or in reorganization of her resources so as to satisfy the individual needs. The individual, in order to earn all this attention is socially obliged not to ask for assistance which is not, with reasonable costs, possible of attainment by the Government with all the help it can muster. The family will also act within the limits reasonably set out by the Government. Such is the nature of this new international human right and, by and large, the nature of most other international human rights.

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6. G.A. Res. 2542, 24 U.N. GAOR Supp. 30, at 49-53, U.N. Doc. A/7630 (1969); note that the General Assembly has an obligation and authority under the Charter, Article 13 to participate in the development and monitoring of human rights and international law in general.

7. See note 2 above.

8. The Fund has been established and its administrative basis designed under juridical authority of the United Nations General Assembly in a series of Resolutions, to wit: 2211 (XXI) Population Growth and Economic Development, 17 December 1966; 2815 (XXVI) United Nations Fund for Population Activities, 14 December 1971; 3019 (XXVI) of 18 December 1972; 1963 (LIV) of 18 May 1973; 2025 (LXV) of 4 August 1976; and 31/170 of 21 December 1976--all the Resolutions between 1972 and 1976, above, bear the title of the Fund.

The development of the right of and to family planning was not imagined by the international community in the abstract. It was and is predicated upon human experience and reason.

Lastly, it is necessary to observe, because of the theoretical framework adopted here, that the right of family planning as stated above has been developed with more emphasis on individual choices than on the very basic reason that some aspects of the right are crucial to other basic rights such as the right to life, which is an independent right of its own. The right to life is being used here not only in its biological sense but also to include the quality of that life. For example, a teenager in high school who becomes pregnant and becomes a mother in a society which scorns such status is not leading a qualitatively viable life. Family planning practice would, in such cases, help in making it imperative for the realization of both qualitative and the biological life. As indicated earlier, the qualitative, humanitarian approaches to family planning have not received adequate emphasis in the development of the universal human right of family planning.

It should be instructive from the illustration given above that when one talks of a single universal human right, like family planning, it is imperative to conceptualize such a right not as a single autonomous whole, but rather as a right to be realized in conjunction with other equally valued rights. In many cases, the attainment of one is impossible without the other or without interfering with the others. Immediately when a positive norm like the right of an individual to privacy is accepted in a society, other legal relations like the protection of family life is questioned, as is quite apparent, particularly in the United States at present,<sup>9</sup> and elsewhere in general.<sup>10</sup> The wisdom in Professor Friedmann's thesis on the new international legal relations as being that of "co-operation" rather than "co-existence"<sup>11</sup> becomes instructive here--the need to develop more legal relations based on equitable rather than absolutist formal legalism. Compromise solutions and relative observance of all the accepted rights should be the goal.

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9. See, for example, Citron, R., "A Spouse's Right to Marital Dissolution Predicated on the Partner's Contraceptive Surgery," New York Law School Law Review, Vol. 23, No. 1 (1977), 99.

10. See Cortes, D.I., "The Right to Privacy and Family Planning," in Human Rights and Population: From the Perspectives of Law, Policy and Organization, Law and Population Book Series No. 5 (Medford, Massachusetts: Law and Population Programme, 1973), 36-40.

11. Friedmann, W., "The Relevance of International Law to the Process of Economic and Social Development," in Falk, R., and Black, C. (eds.), The Future of the International Legal Order, Vol. II (Princeton: Princeton University Press, 1970), 3-35, at 9-10.

On this note it becomes easy to accept the logic developed by expert publicists who have tried to make inventory of the scope of family planning rights and how it is connected, by analogy, to other fundamental human rights. This makes the right of family planning a composite of complementary rights. Professor Lee, among others, has provided a reasonably comprehensive, but by no means inclusive, list of these rights.<sup>12</sup> These he details as the right to or of:<sup>13</sup>

- adequate education and information on family planning;
- access to the means of practicing family planning;
- equality of men and women;
- children, whether born in or out of wedlock, to equal status under the law and to adequate support from natural parents;
- work;
- an adequate social security system, including health and old-age insurance;
- freedom from hunger;
- an adequate standard of living;
- freedom from environmental pollution;
- liberty of movement;
- privacy;
- conscience;
- separation of Church from State, law from dogma; and
- social, economic and legal reforms to conform with the above rights.

Apart from the last category of rights which Professor Lee includes as a logical necessity, all the enumerated rights have been developed by the international system through the same process as the right to family planning. Though axiomatic, the present author would add the right to human dignity and life to the inventory. Human dignity and life are two very fundamental values upon which family planning and its supportives are predicated. Focus on human dignity and human life would allow an easy connection between family planning and humanitarian goals. Of course, the list above, if read carefully, shows a heavy dose of humanitarian considerations.

To illustrate the logic and consistency of Lee's list, let us look at freedom from hunger. Hunger not only interferes with life and human dignity by raising mortality incidents, it also weakens physical performance of the

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12. Lee, I.T., "Population Law: A New Curriculum for Law Schools," in Uche, U.U. (ed.), Law and Population Change in Africa, Law and Population Book Series No. 12 (Nairobi: East African Literature Bureau, 1976), 22-37; note that the list has been published under the authorship of Professor Lee in numerous forums since 1972 which need not be enumerated here.

13. Ibid.

body and leads to disease and further poverty due to the impossibility of active participation in production of needed resources.<sup>14</sup> Scientifically, it is now clear in nutrition studies that hunger not only fuels high infant mortality rates and lowers life expectancy levels, but it also leads to early unnoticed abortions and even lower fecundity.<sup>15</sup> With hunger then, the parental right of deciding the number and spacing of children becomes superfluous. The last illustration, is the right of separation of Church and State since religious dogma may greatly interfere with the realisation of the right to family planning. An important test case on this point was initiated in 1978 in the courts of the United States, in the State of New York.<sup>16</sup> The issues before the court in the class suits brought by doctors and private citizens, mostly women aged between 15 and 25, included the extent to which the Church interfered in the enactment of the 1977 Hyde Amendment by Congress which limits medicaid reimbursement to abortion patients only for abortions performed for medical necessity to save the life of the mother and in officially reported cases of rape or incest.<sup>16a</sup> There is prima facie evidence that the Church lobbied effectively for such restrictions to the detriment of poor women who can not afford hospital costs for abortions other than those falling in the above limited categories. The Hyde Amendment also interferes with privacy in that it requires all rape and incest cases to be reported officially before there can be reasons for reimbursement of costs of abortion. Since religious preferences should be private individual choices, the interference of the Church in fostering its views to be enacted into positive law of general application automatically interferes with those who are not predisposed to religious dogma in realizing their right of family planning through abortion particularly in a country like the United States where the right to abortion has been declared a constitutional right<sup>17</sup>, even to the extent that husbands have been denied any legal rights of deciding for or jointly with their wives.<sup>18</sup> It may be

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14. See Latham, M.C., Nutrition and Infection in National Development, Working Paper No. 258, Institute for Development Studies, University of Nairobi, January, 1976; Scrimshaw, N.S., "Synergism of Malnutrition and Infection: Evidence from Field Studies in Guatemala," JAMA, Vol. 212, 1685, 1970; Gordon, J.E., "Synergism of Malnutrition and Infectious Disease," Chapter 14 in Beaton, G.H., and Bengoa, J.M. (eds.), Nutrition in Preventive Medicine (Geneva: WHO, 1976), 193.

15. See, for example, Frisch, R.E., "Population, Food Intake and Fertility," Science, Vol. 199, 6 January 1978, 22.

16. See a complete brief explanation of the cases in Johnston, L., "Law and Religion Intermingled in Suit on Abortion Ban," New York Times, 14 March 1978, C. 37.

16a. Note: After this study was completed for publication, the Brooklyn Federal District Court (N.Y.) declared the Hyde Amendment unconstitutional while deciding on this McRae Case, see Time, Jan. 28, 1980 p. 24.

17. Roe v. Wade, 410 U.S. 113 (1973).

18. Planned Parenthood Of Central Missouri v. Danforth, 428 U.S. 52 (1976); see generally Citron, supra, footnote 9.

observed that in the opinion of one of the Vatican's leading experts in family planning matters, even the Church's edicts are flexible and must be read in the context of justice and equity.<sup>19</sup> Social justice and equity may dictate against laws such as the Hyde Amendment which is nothing but a codification of religious dogma and class interests of the rich who hardly require state financial support for medical care connected with abortion.

We may conclude this section by emphasising that the concept and the right of family planning is not an abstract construct that is limited to distribution of the pill alone. It is not simply confinable to the reduction of population growth rates alone nor is it merely a tool used for purposes of increasing fertility rates.<sup>20</sup> What it does is to create conditions for rational, premeditated decision-making as regards procreation so that child bearing no longer remains the domain of the mystical gods to decide for human beings. At another fundamental level it helps in providing mothers an opportunity to achieve and maintain health standards that they decide and are sustainable. In short it facilitates the right to life and human dignity.

### 3. ABORTION AND STERILIZATION: THE CONCEPTUAL AFFINITY TO HUMANITARIAN ASPECTS OF FAMILY PLANNING BASED ON NATURAL LAW

#### (a) Natural Law in the Emergence and Content of the Right of Family Planning

The doctrine of natural law has traditionally been associated with principles of justice clothed in sovereign prerogatives, the sovereign being viewed as a conduit for divine orders. In written literature this view predominated in feudal and primitive capitalist political economies before the advent of widespread relative separation of secular leadership from ecclesiastical duties. Subsequent developments have revealed the poverty of the acclaimed linkage existing between secular roles and metaphysical orders. But the doctrine of natural law in its essence is continual.

In a brief but succinct analysis of modern natural law, Professor Leo Gross has argued that the doctrine is a store of fundamental principles of justice contingent and derived from human reason as a product of experience.<sup>21</sup>

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19. The Reverend McCormack, A., "The Catholic Church and Population and Human Rights," in Human Rights and Population from the Perspective of Law. . . op. cit., 45-51 at 50, and The Population Explosion: A Christian Concern (New York: Harper & Row, Publishers, 1973), 49-55.

20. For instance, France in the 1970's.

21. Gross, L., "Family Planning as a Human Right: Some Jurisprudential Reflections on Natural Rights and Positive Law," in Human Rights and Population from the Perspectives of Law, Policy and Organization, Law and Population Book Series No. 5 (Medford, Massachusetts: Law and Population Programme, 1973), 25-35.

Stripped of its metaphysical connotations, the doctrine is no longer static but is capable of dynamic extension or contraction to fit in the changing patterns of human civilization. This secular view has been recently confirmed by Tigar to have been the proper historic role of the doctrine.<sup>22</sup> Lindley interprets St. Thomas Aquinas (1227-1274) as having reasoned in the classical days that even "divine law, which comes from grace, does not annul human law, which comes from human reason."<sup>23</sup> A further support for Gross's view was expressed by Judge Koo in his Separate Opinion in the Case Concerning Right of Passage Over Indian Territory (Portugal v. India) (Merits)<sup>24</sup> when he asserted that the principle of justice is a principle of customary law founded on reason.

Gross explains that natural law plays, inter alia, three fundamental functions in the society:<sup>25</sup>

- (a) it acts as a source of equity and principles of justice, a model or standard setting role;
- (b) it acts as a censor of dysfunctional or unjust or iniquitous positive law; and
- (c) it is a potent tool for demanding and translating declared standards of good behaviour into practical action or a working reality.

This dynamic and changing character of natural law permits the extension of the scope of recognized human rights, which it underlies, to conform with new developments in human experience. This makes it possible to abandon some temptation in Western social thought to limit the sphere of fundamental human rights to those political and civil rights and privileges that have found historic expression in their positive law, if not practice.<sup>26</sup> There is certainly

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22. Tigar, M.E. (assisted by Levy, M.R.), Law and the Rise of Capitalism (New York: Monthly Review Press, 1977), 6, 9, 50-52.

23. Lindley, The Acquisition and Government of Backward Territory in International Law (London: 1926; reprinted Negro Universities Press, New York, 1969), 11

24. I.C.J. Reports 1960, 6.

25. Supra, 26-35.

26. Cranton, M. spoils his otherwise well written book by advancing a thesis that only traditional Western political rights can properly be called fundamental human rights, see What are Human Rights? (London, the Bodley Head, 1973) at 54, 65. He has obvious support among capitalist business tycoon as was recently expressed by their press in Wall Street Journal in an editorial "What are Human Rights", Nov. 25, 1977.

a break through in this area as Lord Denning, a contemporary eminent English jurist, conceded a few years ago.<sup>27</sup> Human experience can and has allowed the extension of the justice that underlies human rights to social and economic areas. Similarly, it becomes necessary to reject superfluous and protectionist claims made on behalf of the underdeveloped political economies that basic civil rights, such as the right to constructive criticism, that appear to have been first formally articulated in Western jurisprudence, are a luxury in the development process.<sup>28</sup> Indeed, post-Mao China has hardly weakened its socialist goals and practice by permitting through entrenchment in its Constitution of the right to free expression of constructive socialist criticism which was unnecessarily thwarted under the paranoia of Chiang Ching (widow of the late Chairman Mao Tse-Tung).<sup>29</sup> The current love-affair existing between the Chinese leadership and Western capitalism should find explanation elsewhere.

Natural law then provides standards of social justice which call for alteration of positive domestic or international laws that are seen to depart from reasonably set or desired standards. For instance, the quest for social justice inherent in the principles of natural law demand the elimination of such sophistic and draconian suggestions such as those recently made by some Bangladesh elites to enact legislation that provides for compulsory sterilization of beggars, who are able to procreate, on the pretext that this

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27. See Lord Denning, M.R. in the Forward to Bridge J.W., et al (editors) Fundamental Rights (London: sweet & Maxwell, 1973): See also Lee, L.T., Human Rights: The Greater Scope", Letters to the Editor, New York Times, April 13, 1977.

28. See a typical but sophisticated analysis of this thesis in Amuzegar, J., "Rights and Wrongs," Op. Ed., New York Times, Sunday, January, 1978; See also a rather less subtle advancement of this position by Lord Wilberforce, in his position as chairman of the International Law Association during its 58th Conference in Manila on 29/8/1978--reported in Times, 8/30/1978.

29. See Mathews, L., "China Eases Limitations on Class Biase," Boston Globe, Wednesday, March 15, 1978; and The Constitution of the People's Republic of China, Chapter Three (adopted on March 5, 1978).

would contribute significantly to the alleviation of the nation's population problems.<sup>30</sup> Such use of the right and obligations arising from family planning should easily be identified as abuse of power and law by the ruling class.

The foregoing brief survey of the nature and functions of natural law, being the store-house for human rights and principles of social and humanitarian justice, provide the framework for analyzing the propriety of family planning. The principles developed by the United Nations system in the 1960's respecting the right of family planning was guided by and done under the umbrella of natural law. But, human nature being what it is, there is hardly unanimity that family planning is so basic to human welfare and dignity that it ought to be supported without qualification.

(b) Abortion and Sterilization: The Affinity to Humanitarian Considerations

Family planning, especially through abortion, is now the focus of two contending viewpoints between anti-abortionists and pro-abortionists. The wider scope of family planning is often missed in the battle over abortion. "Pro-life" or anti-abortionists espouse the extreme polar viewpoint that they do not want to see societies with lax morals in which human (fetal) life is compromised institutionally for population growth control or abstract individualistic rights of mothers to decide on fertility once conception has occurred. With differing emphasis, these arguments abound in technologically advanced as well as in the less developed societies and are voiced by religious dogmats as well as Pseudo"Socialists". The extreme pro-abortionists, on the contrary, advocate unlimited freedom for individual mothers to decide on fertility regardless of the stage of pregnancy or any societal goals as to the required population size. We find neither position reasonable for purposes of national policies and, in the alternative, advocate a middle position.

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30. Interim Report of Legal Aspects of Population Planning in Bangladesh. Commissioned by and prepared for UNDP (UNFPA) under the auspices of the Population Control and Family Planning Ministry of the Ministry of Health, Government of Bangladesh, Bangladesh Institute of Law and International Affairs, 501, Bhanmondi Residential Area, Road No. 7, Decca-5., January 17, 1977. It states at p. 197:

There is a strong case for compulsory sterilizing the existing beggars particularly those who are able to procreate, in order to achieve the ideal of quality not quantity. A person who cannot maintain himself has no right to impose additional burdens on the society by his highly irresponsible and anti-social conduct of procreation. After begging is prohibited by law as suggested above, anybody found begging may be compulsorily sterilized.

Even the most ardent supporters of population control policies shrink from the view of compulsory sterilization; see, for instance, Lee, L.T., "Compulsory Sterilization and Human Rights," Populi: Journal of the United Nations Fund for Population Activities, Vol. 3, No. 4, 1976, 2-9.

Pro-lifers are clearly insincere and indeed guilty of hypocritical pacificism as one would certainly find among the most ardent supporters of policies that compromise human life such as in wars over territories, or wars for the defense of what they believe to be socialism or democracy. Some of the pro-lifers are fanatic racists who would, for instance, never allow themselves or their relations to fertilize children conceived by blood racially different from their own. When they are rich they secretly hire the services of qualified doctors to perform the operations and when they are poor, they employ crude and dangerous methods to secure abortions. Reports of such practices abound in literature today and are not to be viewed as imaginary stories.<sup>31</sup>

Indeed, the right to life is paramount, and, at the bottom, both sides agree on this. But, life is only meaningful and supportable if it is referring to dignified human life and not life under vegetative, sub-human standards. The pro-abortionists in the heat of the debate against Pro-lifers over-reach themselves when they assert that population control and rights to and of privacy and liberty necessarily justify divesting individuals of their social obligations to reproduce. The survival and continuity instincts in the human species do not permit unconditional and unlimited individualism. Besides, we live in statist social organizations where governments are not likely to assign away their very basic reason for existence--the power to regulate the conduct of human population within reasonable bounds. Asking states to give unqualified freedoms to individuals is similar to asking them to contract away the power to exercise fiscal policies--also one of the very bases of their existence.<sup>32</sup>

Departing from the extreme opposing polar positions, the alternative perspective to be offered here is based on humanitarian considerations founded on observed social practice. It is possible within such a non-partisan approach to influence the thinking of both sides in an effort to create some loose consensus desirable for achievement of the basic human right of family planning. This can be looked at within three different levels: 1) historical; 2) fidelity to other accepted moral and legal rules; and 3) therapeutic and eugenic considerations.

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31. See generally, Potts, M., et. al., Abortion (Cambridge: Cambridge University Press, 1977), 11-18 and 253-276.

32. See a discussion of this in Wisconsin & Michigan Ry. v. Powers, 191 U.S. 379 (1903).

1) Historically, abortion, if not sterilization, has been used extensively since the known history of human beings for purposes of avoiding fertility of socially undesirable pregnancies.<sup>33</sup> The medical and moral history of abortion in Western societies was recently judicially recognized and critically analyzed by the U.S. Supreme Court in Roe v. Wade.<sup>34</sup> The modern popular myth that society is becoming morally more lax is based, therefore, on ignorance more than on proper appreciation of the history of real human experience. As the Supreme Court noted in the above case, controversy has always existed on whether or not abortion is proper, and where proper, at what stages in the pregnancy it may be sanctioned. But abortion has not been restricted to Western societies alone prior to the twentieth century. Abortion is known to have been practiced and sometimes institutionalized in Oriental, Mideast and African societies.<sup>35</sup> The fact that the word "abortion" was not used to refer to the practice of fetal destruction should not delude us into thinking that the present practices are incongruent with practices in the "good-old-days." It is like war. Often it is easy to find people who, through genuine ignorance of history or through stubborn conscious chose not to accept reality and make-believe that human beings have become more warlike than they were thousands of years ago. What has increased is not change in human behavior, but rather change in communication patterns and our capacity to understand the deeds of fellow men in a wider world context.

2) The second line of argument seeks here to underscore the necessity for adherence to existing positive as well as moral laws that exist in virtually all societies. We shall illustrate this by examining Kenya's penal laws, with full awareness that very legitimate criticisms could be made in Kenya that the present criminal code is substantially colonial and English in its cultural orientation. Chapter XV of Kenya's Penal Code<sup>36</sup> lists what are called Offences Against Morality. Included therein are such common knowledge offences such as rape, defilement of immature girls, idiots or imbeciles, incest, and, of course, abortion. Punishment are also sanctioned and prescribed for those who relinquish their legal responsibility of providing necessities of life to persons in their charge.<sup>37</sup> Excepting abortion and the latter group of offenses, it is apparent that moral norms proscribe sexual relations between certain categories of persons

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33. See a description of the American experience in the 19th Century in Mohr, J.C., Abortion in America (New York: Oxford University Press, 1978).

34. Mohr, Supra; See also Lee, L.T., "International Status of Abortion Legislation" in Osofsky and Osofsky (eds.), The Abortion Experience (New York: Harper and Row, Publishers, Inc., 1973), 338 at 348-351.

35. Potts, et. al., supra, 410-453.

36. The Penal Code, Chapter 63, Laws of Kenya, Rev. Ed., 1970.

37. Ibid., Articles 216 and 239.

in society. The simple question we should try to face here is what is to be done if violation of these laws and the underlying moral prescriptions occur? It is counterfactual to argue that society should ensure that violations do not occur. There is no order that can guarantee non-violation of legal or moral edicts.

Taking this human nature into consideration, the argument here is that either we allow immature girls, idiots, and imbeciles to carry their pregnancies that may arise from their abuse to fertility or we may recognize, by the very fact of the penal provisions, that society is not prepared for such consequences and some means of remedying further embarrassment ought to be adopted. Abortion or sterilization are probably the only effective methods that can be employed in such cases of abuse or inadvertence. The rhythm method or coitus interruptus may, of course, be useful, but not in such cases. Failure to redress clear results of illegal or immoral actions make the laws meaningless. To go further, one can reasonably argue that any insistence on the development and fertility of pregnancies conceived of imbeciles, idiots, immature girls, or by relatives within prohibited degrees of consanguinity is a kin to permitting terrorist abductors or kidnappers to retain their victim even after they have been arrested. Or, it is like allowing a robber to keep the loot after his or her arrest and recovery of the stolen property. The desire for fidelity to law and morals to the extent possible require that abortion and sterilization be used to help achieve the social goals that underlies these clearly stipulated statutory wrongs.

To the extent that a person is to be held responsible for failure to discharge the obligations attached to being in charge of another for the provision of necessities of life (a normal humanitarian arrangement), it is imperative that potential parents be permitted to decide at the earliest and safe periods whether or not they desire conditions leading to such responsibility to arise. Abortion and/or sterilization may be useful tools for achieving the desired results. With regard to abortion, the Kenyan Penal Code Provides a special exception that is not common to other provisions just discussed. Therapeutic abortion or sterilization may be done under the statute.<sup>38</sup> The only difficulty however is the imprecision in this statutory provision that makes it difficult for medically qualified persons to dispense these remedies. Expressions of the need to liberalise laws on abortion by senior government officials as was recently voiced by Kenya's Attorney General may be greeted with some joy.<sup>39</sup>

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38. Ibid., Article 240.

39. See Speech in the National Assembly, reported in Daily Nation, July 12, 1979.

3) The examples provided above can be stretched to justify abortion and/or sterilization on the basis of humanitarianism. There is indeed some merit in arguments against temptation to sterilize idiots and imbeciles on purely legal rather than on medical grounds. Doctors should be able to help society in determining whether or not there is overwhelming likelihood that idiocy and imbecility are hereditary. Should expert consensus be in the affirmative, society would be well-advised to act responsibly by permitting abortion and sterilization in order to avoid multiplication and perpetuation of the problem. The reasons then become essentially eugenic, as elaborated in the next paragraph. The present author is not aware that socialism or capitalism condone the reproduction of inherently socially and economically unproductive population. From observation it is also true that no society exists today with communistic social organizations as in Skinner's utopian Walden Two<sup>40</sup> in which the prospects of children born to immature girls or through incestuous relations are provided with psychological and material benefits as all other children.

The third argument, alluded to in the preceding paragraph, for provision of abortion and sterilization for fertility regulation is supported by therapeutic and eugenic considerations. In technical terms, eugenic indications are constituted by adverse health conditions of parents that are transmittable to offspring whether they be hereditary or congenital. Therapeutic indications on the other hand are health conditions that directly endanger the life of pregnant women. Eugenic reasons for fertility control are therefore targeted towards the prevention of fertility of deformed infants while therapeutic interventions are for the preservation of the mother's life and health. Both conditions lead to constructive and compulsive "unwantedness" of fertility. Under these considerations, fertility control becomes then a measure of self-defense rather than a mala fide undertaking targeted at "murdering" the foetus.

To elaborate on our argument, reference may be made here to sickle cell disease, an hereditary disease resulting from abnormal hemoglobins which cause, inter alia, severe damage to the uterus, placenta, bone marrow, penis, ovaries, liver, lung and breast.<sup>41</sup> Sicklers form large percentages of the total populations (20%-50%) in many parts of Africa, Asia and the Mediterranean Coast. It is

40. Skinner, B.F., Walden Two (New York: MacMillan Publishing Co., 1948, 1976).

41. Konotey-Ahulu, F.I.D., M.D., Medical Considerations for Legalizing Voluntary Sterilization: Sickle Cell Disease as a Case in Point, Background Paper presented at the Second International Conference on Voluntary Sterilization, Geneva, February 25-March 1, 1973. Reproduced as Law and Population Monograph Series No. 13, 1973 (Medford, Massachusetts: Law and Population Programme, 1973).

especially from the experience of those who have done the most to observe this aspect of human rights. Equally important in the exposure of what really happens is that it helps to show the gap that still exists between ideals and achievement in many systems that espouse to be committed to the observance of family planning as a basic human right. The current world order is differentiated on the normative scale ideologically, religiously, and economically, both at intra-state and inter-state levels. Humanitarian principles, if they are truly based on reasonable natural law of equity and justice, should be able to transcend most of these differences. It is not necessary to have justiciable rights and obligations in order to have humanitarian legal relations. The example of world censure of apartheid in South Africa, at least at declaratory level, demonstrates the power of human reaction to humanitarian standards that fall short of expectational thresholds that are or are not readily justiciable. With these few remarks, we now proceed to look at state practices, first starting with abortion and then sterilization.

The countries included in reviewing abortion laws and practice are the United States of America, the United Kingdom of Great Britain and Northern Ireland, New Zealand, Zambia, Malta, Sri Lanka, Mauritius, Afghanistan, Albania, Bulgaria, Canada, France, El Salvador, Libyan Arab Jamahiriya, and Japan. The criteria used in choosing these countries are religion, political-economic ideology, level of technological advancement and, for Japan, the highest level of legal freedom and practical access to family planning. The period covered is as of April 1978 when the initial research for this paper was completed.

In the United States, with an advanced capitalist industrial economy, the practice of abortion is completely legal and is subject only to the will of the pregnant woman, and State regulation on "Compelling interests" of the public,<sup>50</sup> within the first three months of pregnancy.<sup>51</sup> Before the foetus is viable,<sup>52</sup> that is, within the second three months of pregnancy, abortion is

50. Roe v. Wade, supra; Doe v. Bolton, 410 U.S. 179 (1973).

51. Ibid.; or within the first trimester which has been defined as the first three months of pregnancy, see Act Regulating Abortions, 25 March 1974, Montana Laws and Resolutions 1974, Second Regular Session, Chapter 284, 94-5-618.

52. Viability is defined in Roe v. Wade, supra, as "about seven months (28 weeks), but may occur earlier, even at 26 weeks." The Montana Law of 1974, supra, defines viability as "the ability of a fetus to live outside of the mother's womb, albeit with artificial aid," 94-5-618.

legal subject to state laws that regulate the health of the mother.<sup>53</sup> After the foetus has acquired viability, abortion may be legal or illegal depending on state laws.<sup>54</sup> Generally, after the first trimester, that is the first three months of pregnancy, abortion is legal if it is necessary to preserve the life and health of the mother— what we earlier identified as therapeutic indications.<sup>55</sup> There is no law regulating abortions for eugenic reasons after the first trimester of pregnancy. By analogy, abortion is permissible for humanitarian reasons in the event of rape and incest within the first three months of pregnancy since within that period abortion is at will, anyway. The legal requirement for states to provide Medicaid reimbursement, under the Hyde Amendment,<sup>56</sup> to officially reported cases of rape and incest also suggests legal recognition of the right to abortion in cases of rape and incest. The U.S. Federal law does not permit unrestricted abortion after the first three months of pregnancy since the laws requires the balancing of rights of the pregnant woman and that of public health and prenatal life. Also excluded from specific mention is the issue of socio-economic necessity as a ground for abortion, except within the first three months of pregnancy. This latter issue was brought by the Roes, but the Supreme Court found that it was too remote and speculative to be allowed to stand as is one of the factors determining "health" of the mother. On the issue of access to medical treatment for abortion, federal law permits residents to claim financial aid from their states only in the limited cases of therapeutic indications, reported rape and incest.<sup>57</sup> Those who are poor and unable to afford the expensive private services are therefore handicapped in most cases.

In the U.K., an advanced capitalist economy abortion is still technically illegal under the Offences Against the Person Act,<sup>58</sup> Infant Life (Preservation) Act,<sup>59</sup>

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53. A number of states have promulgated laws and regulations on this: for example, Illinois 1975, Kentucky 1974, Massachusetts 1974, Minnesota 1974, Missouri 1974, Montana 1974, Ohio 1974, Pennsylvania 1974, South Dakota 1974; and Utah 1974.

54. Roe v. Wade, and Doe v. Bolton, supra.

55. Ibid.

56. Passed by Congress in December 1977 and reported in New York Times see footnote 16 above.

57. Ibid.; see also the Supreme Court decisions of 20 June 1977, Maher v. Roe, No. 75-1440, and Beal v. Doe, No. 75-554, both reported in New York Times, 21 June 1977.

58. Offences Against the Person Act, 1861, Sections 58-59.

59. Infant Life (Preservation) Act, 1929.

medical facilities for purposes of securing this therapeutic legal policy. The implication of this is that only those who can afford medical expenses may have access to safe medical treatment.

Mauritius, an underdeveloped capitalist economy with a largely Catholic population, completely outlaws abortion.<sup>78</sup> The law does not provide exceptions for therapeutic, eugenic, humanitarian, socio-economic or any other humanely construed ground for abortion. In such cases, abortions may only be undertaken clandestinely with all the attendant penal, as well as health risks.

Afghanistan, an underdeveloped capitalist economy with an essentially Islamic population, permits abortion only for therapeutic reasons.<sup>79</sup> It neither provides permission for abortion on other humanitarian considerations nor does it provide for public access to either subsidized or free medical services for purposes of effecting the permitted therapeutic abortion. The issue as to discriminatory access to safe medical services is, in this case, similar to that of Sri Lanka, above.

Albania, an underdeveloped socialist economy, outlaws all abortion with no indication as to whether any humanitarian considerations are relevant.<sup>80</sup> The only legal indication that abortion could be permissible as a means of preserving the life of the mother can be drawn only by analogy from the penal provision that makes it a crime not to protect the life and health of the mother when it is possible to do so.<sup>81</sup> Such negative provisions, it should be noted, create substantial crisis on decision and action on those involved. The ambiguity could be construed either liberally or very restrictively by the law enforcement agencies.

Though abortion is technically illegal in Bulgaria,<sup>82</sup> which has a relatively advanced socialist economy, it is legally permissible under various conditions. Abortion is illegal generally for first pregnancies except for

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78. The Penal Code, Ordinance 195 of 29 December 1838, paragraphs 1-3.

79. The Penal Laws of Afghanistan, Vol. II, Sec. II, Chapter IV (Abortion), 7 October 1976, Article 404 (2).

80. Revised Penal Code of the People's Republic of Albania, Section 155.

81. Sections 157 and 158 of the Code.

82. The Criminal Code, Section 135 and Law of 13 February 1951, cited in Legal Provisions Pertaining to Abortion (Library of Congress, 1965), and Penal Code (Amendment), 1968, paragraph 126.

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therapeutic indication.<sup>83</sup> A general exception to this illegality exists where available evidence indicates potential danger to the foetus--that is, an eugenic indication.<sup>84</sup> Rape and incest are express grounds for abortion.<sup>85</sup> Within the first ten weeks of pregnancy, abortions are legal for all women with at least two living children, women who are 40 years old or above, unmarried women, separated women, and alien women.<sup>86</sup> This last package, if disaggregated, amounts to humanitarian and socio-economic indications within our analytical framework. There is, however, no provision for access to medical services for purposes of abortion although a reasonable, though rebuttable, presumption can be made that the socialist political economy would provide free public access to public goods and institutional facilities.

Canada, an advanced industrial capitalist country, has restrictive abortion laws<sup>87</sup> that permit abortion only when the health or life of the potential mother is in danger.<sup>88</sup> Eugenic, humanitarian, socio-economic or any other adverse considerations are not sufficient conditions to justify legal abortions. The law does not provide for easy and cheap access to medical services either, even in cases of therapeutic abortion, which is expressly permissible.

France, an advanced industrial capitalist state with an overwhelming Catholic population, has laws that prohibit abortion only technically.<sup>89</sup> A recent public health code allows unrestricted abortion within the first ten weeks of pregnancy.<sup>90</sup> Thereafter, abortion is permissible for therapeutic,

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83. Instruction No. 0-27 of the Ministry of Public Health reproduced in Internation Digest of Health Legislation, Vol. 24 (1973).

84. Ibid.

85. Ibid.

86. Ibid.

87. Sections 251-252 of the Penal Code, Revised Statutes of Canada, Vol. II (Ottawa: Queen's Printer for Canada, 1970); Regina v. Morgentaler (1976), No. 10-000157-758.

88. Section 215 (4) of the Code; see also Abortion Research Notes: International Center for Abortion Research, American Institutes for Research, Vol. 4, No. 2, May 1975, 37.

89. The exceptions to this rule are in Public Health Code, Article 647, as amended by Law No. 75-17 of 17 January 1975. See, Journal Officiel de la Republique Francaise, 18 January 1975, 739.

90. Article 162-12 of Section II of Title II, Law No. 75-17, supra.

eugenic, and humanitarian (rape, incest) reasons.<sup>91</sup> Provision as to payment for abortion services, which is vital for access, especially for the poor, are not, however, given in the law. The present author's personal inquiry in France in 1978 indicated that in practice abortion is easier to get in some provinces than in others.

El Salvador, an underdeveloped capitalist state with an overwhelming Catholic population, has laws that technically restrict abortion.<sup>92</sup> However, recently it amended its law to permit abortions on therapeutic<sup>93</sup> and eugenic grounds,<sup>94</sup> as well as in cases where pregnancy is the result of rape (humanitarian).<sup>95</sup> These liberalized provisions do not, however, incorporate socio-economic hardships as a justification for abortion nor do they provide for cheap access to medical facilities.

Penultimately, with regard to state practices respecting abortion, Libyan Arab Jamahiriya, which has an overwhelming Islamic population and an underdeveloped pseudo-socialist political economy, has laws that technically restrict abortions.<sup>96</sup> Libya does permit abortion on therapeutic indications, and prescribes only limited punishment for illegal abortions performed for social honour purposes.<sup>97</sup> The latter could include rape and incest. The information available does not show whether or not access to free or subsidized medical services for abortion cases is institutionalized.

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91. Ibid.

92. Codigo Penal de la Republica de El Salvador, Ministerio de Justicia, Nacional, Pag. 19-1973; and Diario Oficial, Vol. 238 (January, 1974), especially Sections 161-163 of the Code.

93. Section 169 of the Code.

94. Ibid.

95. Ibid.

96. Penal Code, Law of 18 November 1953, Sections 391-392.

97. Article 115, Health Law No. 106 of 1973, Section 394 of the Penal Code, supra; Article 442 of the Executive Regulation of Health Law, and Decision No. 654 of the Ministry of Health, 1975.

Rivaled perhaps only by one or two other state practices, Japan has not only one of the most responsive laws regarding abortions, but she also combines this with a built-in comprehensive (not inclusive) criteria of mobilization or procedural mechanisms that help to translate the rights into reality. In common with the state laws already analyzed, Japan's penal provisions formally prohibit abortion.<sup>98</sup> Beyond that, however, Japan's special Eugenic Protection Law, which has been in existence since 1948,<sup>99</sup> permits abortion to be performed on therapeutic,<sup>100</sup> eugenic,<sup>101</sup> humanitarian,<sup>102</sup> and socio-economic grounds.<sup>103</sup> Here "socio-economic" grounds means that parents may wish not to have a child because they are not materially able to look after it as well as they may desire. This may be a proper approach in a capitalist economy like Japan but its widespread practice may affect the poor majority more than the ruling social class. With such implications one would argue legitimately that what is needed is a redistribution of a states' resources so as to divest the ruling class of their unsocial control of a peoples' wealth. The institutionalisation of family planning (birth control) on socio-economic grounds ought to be seen clearly as a class instrument within a class society and should not be endorsed as having a universal humanitarian appeal. Japan's law further expressly provides for precise and definite procedural aspects governing the securing of consent of the patients<sup>104</sup> and, most importantly, the state pays expenses for abortion operations.<sup>105</sup> Clarity in the law and provision for remedial measures that may be enjoyed by all the needy, rich or poor, make the model a novelty that may be emulated.

In summary then, some general observations are appropriate here before we proceed to examine the practices of sterilization. First, on looking at religion as a factor in family planning policy, Mauritius, El Salvador, and France are predominantly Catholic, but the latter two have more responsive and liberal laws than the former. France, in fact, has laws that are more progressive and liberal than a large number of non-Catholic Christian nations as well as Islamic ones. Libya and Afghanistan are both Islamic but however the former has laws that are more flexible and responsive than the latter. Religion taken alone may therefore be an important variable

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98. Law No. 45 of 1907, Sections 212-214; see Lee, L.T., "Japan," in Lee, L.T. and Larson, A. (eds.), Population and Law (Leyden: A.W. Sijthoff; Durham, N.C.: Rule of Law Press, 1971), 3.

99. Eugenic Protection Law, Law No. 156, 13 July 1948, as amended, translated and edited by Fukio Nakane (Tokyo: Eibun Horeisha, Inc., 1975).

100. Ibid., Article 3, paragraph 4 and Article 14, paragraph 1.

101. Ibid.

102. Ibid.

in shaping social norms but should not, as is typically assumed in many analyses, be assumed to be an impregnable obstacle to progressive development towards observance of the human rights of family planning. Political mobilization for social change of attitudes to accord with desired human practice may perhaps be the more formidable barrier than religious dogma. Secondly, at the ideological level, Bulgaria and Albania are both self-professed socialist countries but they have very different approaches to the realization of the human right of family planning. Bulgaria's laws are much more liberal and responsive than those of Albania. On this score socialism is not an inherent barrier to the achievement of human rights. Similarly, the United States has laws that are relatively more responsive than Canada. These are neighboring states with advanced capitalist political economies, and both profess to be liberal democratic systems. To this end then, neither free market economic orders, nor mere adherence to liberal democratic systems are sufficient to guarantee liberalization of laws to conform with universally recognized fundamental human rights of family planning. Bulgaria then stands more responsible than Canada in the attainment of the right to family planning through abortion just as the United States does in comparison with Albania. Thirdly, as to the level of technological or industrial development being a determinant of a country's ability to espouse, in practice and policy, the course of humanitarian principles, Canada and New Zealand in comparison with Zambia weakens this contention. On the same score, the United Kingdom's relaxed and progressive laws fare much better than those of Malta and Sri Lanka.

2/ As a general rule based on the foregoing empirical observation then, neither religion, ideology, political-economic philosophy, nor the level of politico-economic development are singly useful determinants of actual potentials for states' implementation of universally recognized human rights. To the extent that the sample provided includes systems that represent major different systems of governance; it can be hoped that the demonstration provided here, in both its positive and negative aspects, will act as useful examples to be drawn from or bad precedents that need be avoided in the continuing pursuit of humanitarian practice of human rights.

It is also proper to submit that to the extent that the translation of the formal right of family planning into a living reality depends entirely on access to informed medical care and services, the absence of readily available and legally guaranteed services only transforms the rights into legal fiction. At best there still would exist extra-legal practices of abortion, but with attendant high health risks. This is the case in most states, included here or otherwise. Since our conceptualization of humanitarian bases of family planning is predicated on the realization of human welfare and dignity, it would be factually imprecise and incorrect to congratulate states in their

mere declaration of fidelity to human rights when in fact they continue to deny a significant number of the population access to open (as opposed to clandestine) medically safe operations. It is on this that Japan's example of providing the necessary law as well as the means for its realization is a model that need be emulated in the efforts to translate principles of natural law into plans of action.

A fundamental question need be addressed here, that is, whether or not poor, underdeveloped countries can afford to rival Japan's example. The answer is yes, they can. A country can only be expected to provide the best it can afford and the provision of safe medical services must be interpreted reasonably in relative terms. Japan, and indeed the other rich industrialized and technologically advanced nations as those forming the bulk of the members of, for example, Organization for Economic Corporation and Development (O.E.C.D.) ought to be able to deploy the highest standards that pertain in Japan or even better. For the less naturally privileged and/or historically underdeveloped economies there is growing support from both bilateral and multilateral sources, mainly coordinated by United Nations Fund for Population Activities, among others which can be exploited for the purpose. The efficiency in the use of their scanty resources lies in the reliance on para-medical personnel which are now used extensively all over the world.<sup>106</sup> Medical experts are normally ill-distributed, few in number, and prohibitively costly to train. In fact, even in the most advanced economies like the United States, the use of para-medical personnel is now growing within the remote areas of the country.<sup>107</sup> The poor countries, therefore, need not live beyond their means in pursuit of humanitarian rights embodied in family planning using expensive methods in the craze to compete with the more well endowed nations. But they must do their best all the same which requires that they utilise their scarce resources more equitably and efficiently and by tapping help from some extra-territorial sources.

Another question which may reasonably be asked of the state practices on abortion is why they, almost universally, have penal provisions that prohibit abortion while at the same time having legislations, regulations, decrees or other formal legal promulgations that permit the practice? Concurrent existence of two formally conflicting legal norms both demanding observance leads to confusion and minimizes the efficacy of both. Ideally consistency and unambiguity should be sought in the legal system. However, the explanation of

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106. See generally, Paxman, M.J., et. al., Expanded Roles for Non-Physicians in Fertility Regulation: Legal Perspectives, Law and Population Monograph Series No. 41 of 1976.

107. See for example, Adams, B.S., Serving the People: The Expanding Role of the Non-M.D. Practitioner, Paper presented at Association of Planned Parenthood Federation of America, First Annual Joint Meeting, Atlanta, Georgia, October 1977.

why the dichotomy exists can be explained only within the socio-logical framework which need not be elaborated here in detail. It suffices to say here that the situation is a natural historical phenomenon which confronts social consciousness in periods of rapid social change. Populist romanticism in societal consciousness restrains against unqualified institutionalization of new progressive changes that correspond with actual needed values while at the same time wishing to claim ties with the known past, even when the past exists only in rhetoric. This is a social human fact. It allows us to say: those good-old-days! or point at the antiquated laws and say (hypocritically, or cynically): we are very moral!

Having established the nature and extent of state practices respecting abortion as a means of realizing the human right of family planning, a brief description of the practice of sterilization now follows. It should be noted here that some of the data used in this section has been drawn from a larger survey the present author carried out for the U.N.F.P.A. in 1978.<sup>108</sup> It is assumed herein that sterilization does not evoke as strong a religious resentment as abortion does. The countries selected here for analysis are, therefore, drawn not on the basis of their predominant organized religious institutions. Another observation is that sterilization, being a relatively permanent operation at least under the dominant existing medical technological know-how,<sup>109</sup> the frequency of its utilization for family planning purposes is comparatively less than in instances of abortion. Female sterilizations do require more expert attendance than those of males. The advantage of sterilization over abortion is that it is amenable to both sexes and equality of the sexes can, therefore, be expected regarding its usage.

The countries whose practice and municipal laws are analyzed here are India, Chile, Central African Republic, Brazil, Bangladesh, People's Republic

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108. The study in which the author was the principal investigator was done for the U.N. fund for Population Activities by the Law and Population Programme, Fletcher School of Law and Diplomacy and has now been published as Survey of Laws on Fertility Control (N. York, UNFPA, 1979); it should be noted, however, that the interpretation given here are entirely those of the author and do not reflect views of any organisation.

109. This is changing, however, as medical technology advances see footnote 47, above.

of China, Egypt, Malaysia, Finland, German Federal Republic, and Yugoslavia. The package provides a reasonable representation which include underdeveloped countries, socialist countries, and industrially advanced capitalist countries. The cases of Finland and Yugoslavia are specially chosen for their being reasonably well-developed and therefore may serve as examples for others. India's case is also presented for a special purpose, viz:, to show that India never enacted and enforced a draconian law prescribing forced sterilization as was alleged and popularly publicized prior to the 1977 elections. Whatever coerced sterilizations took place (that have somehow given family planning a bad name), if any, were done extra-legally with or without deceit and are not condoned by those publicists favorable to voluntary humanitarian practice of family planning.

India has no specific legal provision pertaining to sterilization although it has an official policy to encourage voluntary sterilization,<sup>110</sup> for both men and women.<sup>111</sup> A statutory bill that was proposed by the State of Maharashtra for legalization of compulsory sterilization was never made effective,<sup>112</sup> and the post-1977 government has made an offer to compensate the victims who may have suffered complications after the alleged coerced sterilizations.<sup>113</sup> For the legalized voluntary operations, the minimum age limitations suggested by the authorities is 25 years for men and 20 years for women--with a maximum for women at 45 years.<sup>114</sup> The government generally provides free medical services in cooperation with private agencies.<sup>115</sup>

In Chile there is no formally promulgated legal provision regarding sterilization. As from December 1974, however, voluntary sterilization of both males and females, where other forms of contraception have been tried unsuccessfully, was endorsed by a Ministerial Decree which allows sterilization for therapeutic, clinical, socio-economic and contraception failure

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110. People, Vol. 4, No. 3, 1977, 38-39; Family Welfare Programme: A Statement of Policy (New Delhi: Ministry of Health and Family Welfare, 29 June, 1977), paragraph 5.

111. Ibid.; the reason here is evidenced since both male vasectomies and female tubectomies are encouraged and used.

112. Maharashtra Family (Restriction on Size) Bill, August 1976.

113. Law File, IPPF Information Bulletin, October 1977, p. 4 and April 1977, p. 6; see also Financial Times, April 15, 1977.

114. Official response to U.N.D.P. Representative, Communicated to U.N.F.P.A. by letter of 26 December, 1977 (Files of Law and Population Programme).

115. Ibid.

reasons.<sup>116</sup> In practice, preference is given to couples who have had at least four living children.<sup>117</sup> Most operations are done in approved government and private hospitals. There is no information regarding the responsibility for the financial costs.

In the Central African Empire the legal situation is typical of many countries. In the absence of concrete empirical investigation, it is difficult to predict state practice since the formal law does not provide any indication of possible preference either way. The only nearest provisions that may widely be interpreted to cover prescription of sterilization is the one that forbids wounding, mutilations, amputations and deprivation of the use of a limb.<sup>118</sup> In such cases extra-legal actual practice of sterilization could be done with or without state condonation.

In Brazil, the Penal Code prohibits sterilization.<sup>119</sup> A decree passed in 1942 denies physicians the right to provide information to patients or the public on any treatment that prevents or interrupts gestation.<sup>120</sup> A separate Code of Medical Ethics, however, permits sterilizations under "exceptional circumstances;" and, it is a known fact also that public hospitals perform voluntary sterilizations mostly to and for women in the elite class.<sup>121</sup>

Bangladesh has no legal provision on the subject, although, in practice, the State promotes voluntary sterilization.<sup>122</sup> Male vasectomy, tubectomy, and tubal ligations are widely used.<sup>123</sup> Operations are done in government hospitals

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117. "Report on Sterilization," Maternal Advisory Committee of the Fifth Health Zone, Rule 3, 1973, reported in Circular No. 432, supra.

118. The Penal Code (Law No. 61.239 of 18 July 1961), Sections 183 and 184 in Journal Officiel de la Republique Centrafricaine.

119. Brazilian Penal Code, Decree Law No. 1.004 of 21 October 1969, Section 132, paragraph 2.

120. Decree Law No. 4113 of 14 February 1942.

121. Code of Medical Ethics, Article 52, cited in Rodrigues, W., et. al., Law and Population in Brazil, Law and Population Monograph Series No. 34 (1975), p. 15.

122. "Law and Population" The Hukum (Law) Journal, Special Edition, 1976, p. 60.

123. Interim Report on Legal Aspects on Population Planning in Bangladesh (Decca: Bangladesh Institute of Law and International Affairs, January 1977), 104-108; it is reported that between 15 February and 21 April alone, 75,852 sterilizations--50,068 vasectomies and 25,784 tubectomies--were performed. Annex to reply given to U.N.D.P. officer by Government authorities, transmitted to U.N.F.P.A. in January, 1978 (Files of Law and Population Programme).

and clinics including mobile clinics, apparently at subsidized costs.<sup>124</sup>

In the People's Republic of China the new Constitution of 1978 states generally that "(t)he state advocates and encourages family planning."<sup>125</sup> In practice, female tubal ligations and male vasectomies are commonly performed with state approval.<sup>126</sup> Requests for the operation are made by the patients voluntarily.<sup>127</sup> There is no information regarding who bears the costs for the operations although reasonable assumptions can be made, on the basis of general access to public resources in the political economy as part and parcel of its socialist orientation, by the citizens, that the operations are paid for by the public.

In Egypt there is no formal legal provision prohibiting performance of sterilization provided they are carried out by consent of and at the request of the patient, for either medical or non-medical reasons.<sup>128</sup> The State has initiated an experimental study project at government hospitals, the Universities of Assiut, Alexandria, and Cairo with the help of WHO and UNFPA. The object of the Programme is to investigate comparative advantages and disadvantages of different methods of surgical sterilizations of females.<sup>129</sup> The national policy is to relegate sterilizations to the status of other ordinary surgical operations and thus to require no special treatment in the laws. In practice only female sterilizations are encouraged, and this only for women above the age of 35 who have at least three offspring of which one ought to be male.<sup>130</sup>

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124. Ibid.

125. Article 53, The Constitution of the People's Republic of China, Adopted on March 5, 1978.

126. See "China," IPPF Situation Report (London: IPPF, April, 1974); for a general discussion of the sterilization in the Republic see, Chen, P., "China: Population Program at the Grassroots," in Brown, H., et. al. (eds.), Population: Perspective, 1973 (San Francisco: The American Universities Field Staff, 1973) and Fessler, L., "The People's Republic of China and Population Policy," Fieldstaff Reports, Vol. XX, No. 3 (Hanover, N.H., 1973).

127. Ibid.

128. Response from legal adviser, Population and Family Planning Board to U.N.D.P. Resident Representative, transmitted to U.N.F.P.A., January 15, 1978; (Files of the Law and Population Programme.)

129. Ibid., and Legal Implications of Population Problems; An Inquiry, Law and Population Project in Egypt, Vol. II (Cairo: National Center for Social and Criminological Research/U.N.F.P.A., 1975), 153.

130. Supra, footnote 128.

5. GENERAL CONCLUDING REMARKS AND THEORETICAL REPRISÉ

We have attempted in this paper to present a case for the observance of the basic human right of family planning within the larger framework of humanitarian considerations that underlie most of the universally recognized and respected fundamental freedoms and human rights. The case for family planning, as with most other such freedoms and rights, can be rationalized on principles of justice and equity--the very tenets of natural law.

Natural law has been conceptualized here as a fountain of justice, equity and good conscience filled with human experience and is drawn upon by reason to mitigate the occasional harshness, both in social relations and positive law. To measure the extent to which the newly emerged right of family planning, both at international and national levels, have developed and is practiced, we have resorted to the practice of states. Differences have emerged among state practices but a fundamental fact regarding the universality of the practice, especially through abortion and sterilization, has been established. There is noticeable general movement towards reform of laws and practice to make them conform with the realization of the right of family planning, beginning with instances of therapeutic, eugenic, socio-economic and other apparent humanitarian dictates. This is particularly favorable to the thesis in this study, that is, the practice of states is not useful only for academic reasons, whose major concern may be whether or not the right falls within the categories of Article 38 (1) of the Statute of the Court of Justice (which it does anyway), but more fundamentally that state practice indirectly acts as models that influence other state practices and mold the international standards. Humanitarian bases of international human rights finds support under the United Nations Charter<sup>144</sup> and are seen to qualify rather than override those provisions in the Charter which reaffirm State sovereign rights.<sup>145</sup>

Unfortunately, international and domestic public opinion in the field of family planning has, to a large degree, been assaulted by the warring between "pro-lifers" and "pro-abortionists" with the result that no dispassionate reflections have been allowed to synthesize. To the extent that legitimacy is sought for the right of family planning in this pluralistic world, the view

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144. Charter of the United Nations, Articles 1 (3), 13 (1) and 55.

145. Ibid., Article 2 (1) and (7).

adopted here is that the justifications primarily lie in human needs, broadly defined to incorporate physical, biological, medical and social-aspects of health and welfare. Demographic needs are culture-specific and may or may not be associated with family planning. This, however, is taken care of since states reserve the right to make policies within their borders, a right limited only with the requirements for voluntarism and the duty to honor the right of family planning in its humanitarian context.

The binding nature of the right of family planning as with other human rights, is erga omnes and not predicated on positive contractual relations.<sup>146</sup> This logically empowers the international community with an actio popularis basis for cooperative intervention<sup>147</sup> to ensure observance of the humanitarian right of family planning. Finally, the study has shown, among other things, that the full realization of the right is still not satisfactory in most states whether developed or underdeveloped, socialist or liberal democratic and capitalist, and regardless of dominant religious philosophies of the populations.

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146. This conceptual differentiation of the basis of standing to raise complaints within the international legal order is given by the Court in Barcelona Traction Light and Power Co. Case (Belgium v. Spain) (Second Phase), I.C.J. Reports (1970), at 32; See also generally, Okoth-Ogendo, H.W.O. "National Implementation of International Responsibility: Some Thoughts on Human Rights in Africa", 10, E.A.L.J. 1974, 1-16 at p. 1.

147. This was the basis of the Courts ruling in Southwest African Cases (Ethiopia and Liberia v. South Africa), Preliminary Objections, I.C.J. Reports (1962), 319, and that of the Dissenting Opinion of Judge Jessup in the case's Second Phase, I.C.J. Report (1966), 3; see a further development of this concept, albeit mainly on treaty rights in Schwelb, "The 'Actio Popularis' and International Law," 2 Israel Yearbook on Human Rights 46-56 (1972).