

FAMILY PLANNING AS A HUMAN RIGHT UNDER THE UNITED NATIONS SYSTEM

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ABSTRACT

In this paper, the author traces the history of the developments on the basis of which it can be said that Family Planning has evolved as a human right under the United Nations System. In this connection, the author refers inter alia to the General Assembly Resolution on Population Growth and Economic Development, passed in 1962; the Economic and Social Council Resolution on Work Programmes and Priorities in Population Fields passed in 1965; and also the UN Secretary-General's Secretary General said that from the Universal Declaration of Human Rights description of the family as a natural and fundamental unit of Society in Article 16, it follows that any choice and decision with regard to the size of the family must irrevocably rest with the family itself. He also refers to the International conference to commemorate the twentieth anniversary of Human Rights which took place in 1968 at Teheran, and the Resolution of 'Human Rights Aspects of Family Planning', passed thereat. He also refers to the General Assembly Resolution Declaration on Social Progress and Development, 1969, as also the World Population Plan of Action, 1974, among others.

From this discussion, the author concludes that in the United Nations System as stands today, couples (parents) have a basic human right to determine the number and spacing of their children freely and responsibly, and the consequential rights to have access to the relevant information, means and methods for the implementation of their decision.

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The author further emphasised that a General Assembly Declaration on the Human Rights Aspects of Family Planning is the need of the hour. Such a Declaration would not, in itself be legally binding on the member States, but it will set in motion a process to move the family planning right not only towards legal obligation as a part of United Nations generated customary international law, an instance of "instant" custom, but will also pave the way towards practical application in laying down the attitudes of governments.

The population explosion national and international poverty, the harnessing of a runaway technology and the destruction of human ecology are some of the major problems which will determine man's capacity to survive in the remaining two decades of this century. Unless necessary priority is accorded to their solution on a scale commensurate with their magnitude and urgency, the transitory world order of today may well end in collapse.

There is a likelihood that the world population may be nearly double (6254.4 millions) in the year 2000, than what it was in the year 1975 (3967.9 millions). The population of our own country, which was 613.2 millions in 1975, is expected to be 1059.4 millions in the year 2000. Will mankind be able to organise itself sufficiently to withstand this challenge and provide a decent life for these multitudes? It must be remembered that there can be no separate future for the rich and the poor; there must be a common future for all of us or there will be no future for any of us. The same feeling is expressed in the Philadelphia Declaration 2, "Poverty anywhere constitutes a danger to prosperity everywhere".

Some parts of the world are presently undergoing what has been called "a demographic revolution". Whole segments of social and economic policy are being revised to conform to the present demands for orderly development. Issues which are linked to population growth and movement have been seen for the first time as having profound effects on a country's overall development pattern.

World population problems are diverse and complex and the methods for dealing with them are by no means simple and uniform. Of all these problems, that of population growth

has emerged as the most critical and urgent, and it is now more and more being linked to fundamental human rights and quality of life. The conscious "relating to basic human rights to the subject of world population in general and family planning specifically is of comparatively recent origin³. Because of the delicate nature of the subject and widely differing national attitudes, the United Nations discussed population questions for many years before committing itself to action.

In 1950s, U.N. thought it had no role to play in the matter of population and so its focus was only on statistical data regarding size, structure, growth and distribution of national populations. In 1960s, U.N. system provided technical assistance to national population activities on demand by the governments. In 1970s, in its international development strategy for the Second U.N. Development Decade, the General Assembly, first sought to stimulate the government of each developing country to consider whether its rate of population growth hampers its economic development and advised it to formulate national demographic objectives within the framework of its national development plan ⁴. Secondly, it designated 1974 as world population year recognizing that it would be a way of focusing international attention on different aspects of the population problem, at the same time acknowledging that the formulation and implementation of population policies and programmes were matters, falling under the internal competence of each country and consequently, international action in the population sphere should be responsive to the varied needs and requests of individual member States ⁵. It went a step further and even took operational responsibilities in some areas, but, of course, at the request of those governments. There was, thus, created a relationship of national population policies and objectives to international action and to the development of world community policy.

The population question can be related to "higher standards of living, full employment and conditions of economic and social progress and development ... solutions of international economic, social, health and related problems and human rights and fundamental freedoms ...". The fundamental constitutional basis for United Nations action in the field of population questions rests on Articles 1(3), 55, 56 and 62(1) of the charter. The General Assembly

and the Economic and Social Council of the United Nations acting under Arts. 10 and 13, and Arts. 62 (1) of the Charter, whether by a Declaration or by a Resolution or a Recommendation, are entitled to lay down world community policy. It does not go beyond "recommendation" in the sense of imposing legal obligations on Member States.

Thus, in so far as the population questions are concerned with "economic and social progress" or to "health" problems or to "human rights" and "fundamental freedoms", undoubtedly the United Nations organs are fully competent not only to consider such matters but as well to make recommendations to Member States. However, the limits on the U.N. authority to deal with population questions are based on Art. 2(7) "domestic jurisdiction" clause. Though, the exact scope of the "domestic jurisdiction" clause is controversial, it can be safely stated that the prohibition does not prevent discussion of any issue, and also does not apply to generalized resolutions recommending that States follow particular policies or practices on the subjects included within Art. 55⁶.

It is also well settled in International law that the dividing line between "essentially domestic matters" and those of concern to the world community, is ambulatory and varies according to the developments in International Law. It will be no exaggeration to say that the human rights aspect of population problem has ceased to be a matter "essentially within the "domestic jurisdiction" at the present juncture in this world.

As to the human rights aspects of the population problem, the pledge in the U.N. Charter Art. 56 to promote and to respect "human rights and fundamental freedoms" clearly extend to the human right to free choice in determining family size⁶. It is suggested that the General Assembly will be within its right to take up the question of respect for the family planning right, to define that right through a General Assembly declaration, and to make recommendation concerning the implementation of that right, and it will not be open to national governments to deny that authority to the United Nations 6.

Family planning as a right has not been mentioned either in the Universal Declaration of Human Rights or in any of the

two Covenants on Human Rights. A view, however, is developing that it was implied when the Universal Declaration of Human Rights stated that men and women of full age "have the right to marry and to found a family".

Emergence of the Family Planning Right

General Assembly resolution on population growth and economic development which defined the United Nations role as assisting governments in obtaining basic data in carrying out demographic studies, mentioned "health and welfare of the family" as "of paramount importance"⁷. It did not, however, mention family planning. In 1965 the Population Commission recommended that the United Nations should expand the scope of its assistance to include "training, the collection of basic statistics, research, and gathering of information and experience and action programmes". But it should refrain from expressing any particular population policies or attempting to promote adoption of such policies by Governments⁸.

The Economic and Social Council, in its resolution on work programmes and priorities in population fields, recalling the General Assembly resolution on population growth and economic development and Council resolutions on intensification of demographic studies, research and training, and on population growth and economic and social development, and bearing in mind the problems in the economic and social development of developing countries associated with the growth and structure of population and migration from the countryside to the cities, requested the Secretary-General to provide advisory services and training on action programmes in the field of population at the request of governments desiring assistance in the field^{9,10,11}, in the same year, a move in the General Assembly for expanded programme of assistance in the field of population was opposed by many States on religious grounds. There was, however, no dearth of the supporters of the policy. Thus, Mrs. Miske, the Mauritanian delegate stated:

"(A) Woman, in consultation with her husband must have the right to choose the number of children that were to be brought into the world and the extent to which birth control should be practiced ... (women in developing countries) lacked the material means of practicing birth

Control and were, therefore, condemned to the degrading task of continual reproduction. surely the United Nations could not condemn the women of developing countries to such an ordeal and must give them the free choice of deciding how many pregnancies they wanted 12.

In 1966 the General Assembly in its resolution "Population Growth and Economic Development", while recognising the need for further study of the implications of the growth, structure and geographical distribution of population for economic and**' social development,, recognized " the sovereignty of nations in formulating and promoting their own population policies with due regard to the principle that the size of the family should be the free choice of each individual family 13".

The right to "free choice" of family size was incorporated in a "Declaration on Population" issued on the Human Right Day, Dec. 10, 1966, by 12 Heads of States (including India):

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

The U.N. Secretary-General in his Human Rights Day statement in 1967 stated:

"The Universal Declaration of Human Rights describes the family as the natural and fundamental unit of Society (Art. 16). It follows that any choice and decision with regard to the size of the family must irrevocably rest with the family itself, and cannot be made by anyone else. But this right to parents to free choice will remain illusory unless they are aware of the alternatives open to them. Hence the right of every family to information and to the availability of services in this field is increasingly considered as a basic human right and as an indispensable ingredient of human dignity 14".

Teheran Conference and the Family Planning Right

The International Conference to commemorate the twentieth anniversary of Human Rights took place in 1968 at

Teheran. The Conference adopted Resolution XVIII: Human Rights Aspects of Family Planning".*. The Conference was clearly of the view that couples have 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. The Rapporteur emphasised that the family planning must be based on the free and responsible decision of each couple and stated that the resolution said 'yes' to planning by the family and 'no' to planning for the family. A number of complex human rights questions were taken up by the Teheran Conference in a brief period of three weeks. It was natural that many subjects coming before it received little close attention. Family planning was such a subject. It was detailed in less than six pages in the summary records and as a result there is little that can be said about the scope of the family planning right based on its consideration at the Teheran Conference.

Later Developments

General Assembly resolution declaration on social progress and development, (1969) Art. 4 stated: "The family as a basic unit of society and the natural environment for the growth and well-being of all its members, particularly children and youth, should be assisted and protected so that it may fully assume its responsibility within the community¹⁵. Parents have the exclusive right to determine freely and responsibly the number and spacing of their children". Article 22(b) of the Declaration appearing in Pt-III headed "Means and Methods" stated that the implementation of Article 4 principle required the provision to families of the knowledge and means necessary to enable them to exercise their right to determine freely and responsibly the number and spacing of their children.

The Commission on the status of women had also undertaken a study of the, relationship between the status of women and family planning. The study clarified the human rights aspects of family planning as well as stimulated governments to consider the degree to which they might act

**Proclamation of Teheran and Resolution XVIII of the Teheran Conference in Population Newsletter, No. 2, p. 21 (1968). Also U.N. Doc. A/Conf.32/41 (1968).*

To make family planning knowledge and means available in their countries 16.

The Economic and Social Council in 1970, taking note of resolution XVIII of the International Conference on Human Rights of May 12, 1968 and its own resolution 1326 of May 31, 1968 considering that issues centering on population trends and structures are relevant to all countries, if in varying degrees - in some in so far as high rates of growth may be intensifying pressures of population ,on resources and in others in so far as rates of growth may fall short of those deemed to be consistent with economic and social development - and that the global review of population policies and exchange of knowledge and experience in actions will become urgently needed, approved the proposal for a world population conference to be held in 1974 under the auspices of the United Nations. Noting this resolution of the Economic and Social Council, the General Assembly by a resoltuion later in that year, designated the year 1974 as World Population Year and requested the Secretary-General to arrange for a world population conference in 1974^{17,18},

The World Population Conference was held at Bucharest in August 1974 and laid down a World Population Plan of Action 19 • This was based on the reports of four symposiums held on various aspects of population problem. The operative part of the report of the symposium on 'Population and Human Rights', held at Amsterdam (January 21-29, 1974) was incorporated in Part I, B: 'Principles and Objectives of the Plan of Action' and stated:

"(f) All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so; the responsibility of couples and individuals in the exercise of this right takes into account the needs of their living and future children, and their responsibility towards the community".

Range and Content

From the above developments one may conclude that in the United Nations system as it stands today, couples (parents) have a basic human right to determine the number and spacing

of their children, freely and responsibly, and the consequential right to have access to the relevant information, means and methods for the implementation of their decision.

So far as the basic human right, regarding the free choice about the family size is concerned, it seems to be directed equally at compulsory antinatalist policies as well as compulsory pronatalist policies. The consequent implied right to information, means and methods is, at most, a derivative obligation of governments to mobilise resources to make available the "knowledge and means" necessary for the free exercise of the family planning right.

It has been pleaded that the family planning right, if it is desired to play a useful role in the matter of population in the international community, must now be articulated with some precision necessary to make clear its scope and content. This can be done either by a General Assembly Resolution or a Declaration, dealing only with family planning as a human right. In the existing circumstances when the family planning right is not yet fully developed, a Declaration by the General Assembly on human rights aspects of family planning is preferable to a Resolution.. While framing the declaration, the Commission on Human Rights, the Commission on Status of Women and the Population Commission must be involved in the process.

It would be desirable that the Declaration may, in the first instance, lay down a basic human right to determine freely and responsibly, the number and spacing of children. It may be clarified that the above right would include the consequential right to purchase and use all medically approved forms of contraception; the right of freedom from compulsory contraception, sterilisation or abortion may be made clear; this will, in turn, mean that subject to reasonable public health standards, governments may not forbid the sale or use of contraceptives or forbid the operation of birth control clinics, or the use of birth control practices extending to and perhaps including voluntary-sterilisation. What about abortion? As the family planning right has not received due attention, and not many discussions of that topic in the United Nations organs are available, the obligations of the governments cannot be laid down precisely in this matter. Thus, the study "Human Fertility and National Development" lays down: "Induced abortion is probably the

Single most widely used method of fertility control in the world today and has been associated with declining birth rates in many countries²⁰". The question of abortion raises difficult problem. It is connected with various human rights aspects, particularly in relation to the right to life and to the right of the woman and family to decide freely on such matters as those relating to physical integrity and mental health. No government representative has ever characterised voluntary abortion as a Human Right. 'They appear to hold the view that abortion at any stage of pregnancy is to be sharply distinguished from contraception. The State and international community should try to reconcile the rights involved in this matter. Whatever solution may be adopted, a system of control designed to protect human rights and involving the participation of parents, doctors, judges, social workers and others would be required. Any recommendations relating to abortion should have the fullest regard to the needs and socio-cultural values of the various countries, and should take into consideration complete medical knowledge of the implications and consequences of abortion, both for the mother and for her future children.

Conclusion

It will not be far from truth to say that whatever the socio-economic and political systems might be, excessive rates of population growth constitute a serious impediment for the effective exercise of basic human rights and should, therefore; be checked by family planning measures short of coercion. It is emphasized that a General Assembly Declaration on the Human Rights Aspects of Family Planning is the need of times. Such a Declaration would not, in itself, be legally binding on the Member States. It will, even if near-unanimous set in motion a process to move the family planning right not only towards legal obligation as a part of United Nations generated customary international law, an instance of "instant" custom but will also have the way towards practical application in laying down the attitudes of governments. In other words, it will simply an obligation on the part of governments under international law to take cognizance of and to show respect to the family planning right incorporated in the Declaration. Their hands would be strengthened in formulating national policies on the question of family planning, though without any commitment.

With the third United Nations Development Decade

Commencing from January 1, 1981, it is high time that this matter about the formulation of a Declaration about the Human Rights Aspects of Family Planning is taken in hand immediately and if possible, presented at the forthcoming Annual General Assembly meet in September 1980.

REFERENCES

1. UNITED NATIONS (1971) Statement of Mr. Adam Malik, President of the General Assembly, 1971 session.
2. UNITED NATIONS 15 U.N.T.S. 104, 106.
3. LEE, L.T. (1971) Law, Human Rights and Population: A Strategy for Action, *Virginia Journal of International Law*, 12: 309.
4. UNITED NATIONS General Assembly Resolution 2626 (XXV).
5. UNITED NATIONS General Assembly Resolution 2683 (XXV).
6. PARTAN, D.G. (1973) Population in the United Nations System.
7. UNITED NATIONS (1962) General Assembly Resolution 1838(XVII), December 18, 1962.
8. UNITED NATIONS (1965) Doc E/CN.9/202.
9. UNITED NATIONS (1965) Economic and Social Council Resolution 1084 (XXXIX), July 30, 1965.
10. UNITED NATIONS (1963) Economic and Social Council Resolution 933C (XXXV), April 5, 1963.
11. UNITED NATIONS (1964) Economic and Social Council Resolution 1048(XXXVII), August 15, 1964.
12. UNITED NATIONS (1965) 20 General Assembly Resolution (Second Committee Summary Records, 1016th Meeting).
13. UNITED NATIONS (1966) General Assembly Resolution 2211(XXI) December 17, 1966.
14. POPULATION NEWSLETTER (1968) 1:44.

15. UNITED NATIONS (1969) General Assembly Resolution 2542 (XXIV.
16. UNITED NATIONS Economic and Social Council Resolution 1326 (XLIV.
17. UNITED NATIONS (1970) Economic and Social Council Resolution 1484 (XLVIII) April 3, 1970.
18. UNITED NATIONS (1970) General Assembly Resolution 2683 (XXV) December 11, 1970.
19. UNITED NATIONS Do.E/Conf.60/CBP/4.
20. UNITED NATIONS (1971) U.N. Doc. ST/ECA/138.

FAMILY RELATIONS LAWS AFFECTING POPULATION IN INDIA

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ABSTRACT

In this paper, the author has examined the family relation laws in India and has shown that these laws reflect deeply-held religious beliefs and practices. He feels that the efforts to utilise family relation laws to accomplish the goal of national population policy, raise some basic questions about the relationship between status of women and religion-oriented family laws of different communities in India. Although divergent views are expressed on the basic questions, according to the author, it cannot be denied that family relation laws do considerably influence the achievement of national population policies and that, therefore, such laws should be reviewed both by the Central Government and State Governments in order to make them consistent with declared population policy of the Government of India.

The status of a Hindu woman has been considerably raised by the recent legislation, whereas the status of Muslim woman has not been raised, the doing of which, the author feels, will prove to be very important for population control. In this regard, he suggests enactment of a uniform civil code for marriages among all the communities in India, because he feels that in spite of the fact that we have provided to women equal political rights, equal rights for education, equal pay for equal work, etc., still a woman's position in the field of marriage laws among Muslims is very much lower than that of men.

The kind of the laws that can be used to implement population policies and to solve population problems can be

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Divided into categories: (1) Laws directly affecting fertility by intervening at some point in the procreation process (conception, abortion and sterilization); (2) Laws indirectly affecting fertility through regulation of social relationships related to fertility (marriage, divorce, child support, inheritance, etc.); and (3) Laws indirectly *affecting fertility through economic affects (tax, child allowances, maternity benefits, etc.)¹.

In this paper attempts have been made, to discuss the "Various, laws relating to marriage and divorce affecting Fertility in India. Before, we deal with India we shall also discuss briefly the international efforts to strengthen

International Efforts to Strengthening Family Relation Laws

Any reference to family relations laws leads necessarily into the subject of the status of women. The United Nations and its specialised agencies have made valuable contributions. It has spotlighted the areas of discrimination affecting women and formulating guidelines to be followed by governments at the national level as well as the efforts of various interested non-governmental organizations to bring about legal reform. Special, mention, however, should be made of the Commission on Status of Women, established in 1946, which has been working for equal rights of men and women in the political, civil, social, economic and educational fields, and was, in 1965, one of the first United Nations bodies to endorse family planning.

The Declaration on the Elimination of Discrimination against women adopted by the United Nations General Assembly in 1967 represents a milestone in the work of the United Nations to promote equal rights of men and women. Article 6 of the Declaration deals with the rights and obligations of the husband and wife at marriage, during marriage and at the dissolution of marriage, and stresses particularly that appropriate measures, be taken to ensure that: (a) Women shall have the same right as men to free choice of a spouse and to enter into marriage only with their free will and consent; (b) Women shall have equal rights with men during marriage and its dissolution.

The United Nations Seminars, held at a world-wide as well as regional level, have also had an important influence in arousing the interest of governments, non-governmental organizations and individuals in the various problems related to the status of women and, in turn, its relationship with family planning and population. The Inter-regional Seminar on Family in Changing Society, organized by the United Nations in London in July, 1973 discussed extensively the patterns of family. At this Seminar there were world-wide representations of people of different cultures and, therefore, its conclusion and recommendations reflect universally held points of view regarding the family and its relationships of its members. Some of the relevant findings are as follows:

1. The family fulfilled various basic biological, sociological and psychological needs of the individual and performed various functions which were regarded as essential to the stability of society. It should, therefore, be preserved and receive the full support that society could give in fulfilling these fundamental functions;
2. that there was a discernible trend toward the recognition of equal rights and responsibilities of men and women in matters affecting marriage and family;
3. despite the progress achieved it was still felt that much remained to be done in order for men and women to be recognised in law equal partners in marriage and to eliminate glaring forms of discrimination against women;
4. in many countries wide discrepancies existed between law and practice, especially in the area of family law, where traditions and customs often played an important part in influencing or delaying the implementation of the law; and
5. Legislation, nevertheless, could be significant instrument for change and constituted an important step towards the achievement of equal rights and responsibilities for women and men.

The Seminar *inter alia* endorsed the United Nations

Convention and recommendations on Consent to marriage, minimum age for marriage, and registration of marriages.

Thus, it is a fact that status of women is a significant factor in influencing family size, and that family planning offers an important means of raising the status of women.

Family Relations Laws Affecting Population in India

Indian Culture is ancient one. Over the centuries its social and political structure, its laws and its religious institutions have undergone rapid and profound change. India, today, is a multi-racial, multi-lingual and multi-religious amalgam of the original native stock. This led to conglomeration of lingual and religious differences, of numerous dialects and more numerous sects of ethics and cultural dissimilarities and of variations in case and in custom. This diversity has become the essence of India. Despite their many difference, the Indian people have much in common. Life under common economic and political systems and generations of social intercourse has resulted in a marked degree of integration and secularization. The impact of this cultural fusion on Indian life is most prominent in the people's social attitude and conduct and in the patterns of their interpersonal relations. There is almost a common moral code and outlook on life. It is these aspects of Indian life which have the greatest significance for law in its relation to population control.

The divergence of Indian life, on the other hand, cannot be denied. There are two major communities viz., Hindus and Muslims. Then in minority we have Christians, Parsis and Jews. All these minority communities have their own personal family relation laws. In this paper, we shall discuss the marriage laws of Hindus and Muslims and also Special Marriage Act, 1954 with amendments from time to time. The marriage laws of other communities have not been discussed as they are meagre.

Hindu Marriage Laws

A Hindu's life is a series of rituals and ceremonial events. Of all these ceremonies and events, three are most important, viz., birth, marriage and death. All the three of

Significance to the Hindu's attitude and conduct with respect to reproduction. But of the three, obviously the functions and purposes of marriage are the most intimately involved². The Hindu marriage is considered as a sacrament and is regarded, since Vedic times, as a social and religious duty. However, the Hindu Marriage Act, 1955 has brought far reaching secular changes while keeping its sacrament in spirit and observance. These changes in turn have provided an opportunity to think in terms of population control. The relevant provisions of the Hindu Marriage Act, 1955 affecting the population are discussed here:

A Hindu Marriage (not a civil marriage) can take place only on the fulfillment of the essential conditions of marriage laid down under Section 5 of the Act, viz.:

1. Monogamy: That is either party to marriage should not have a living spouse at the time of marriage. This clause has brought the concept of monogamy among Hindus. Prior to Act, Hindu law permitted polygamy except in a few States where anti-bimay laws were enacted. However, any marriage in contravention of this condition is void *ab initio* and is punishable under Section 17 of this Act read with Sections 494 of the Indian Penal Code and 495 of the Indian Penal Code extendable up to a term of seven years imprisonment. This voidness at marriage can only be declared by a decree of a court of law, otherwise it will continue to be valid. Secondly, this voidness can affect the right of inheritance or maintenance of the parties only and not the legitimacy of the children born out of such union. These children can claim inheritance in the property of their parents and also maintenance, but they have no such right against any other relation of their putative parents like legitimate children.

This provision has been tried to be evaded. In Rajasthan, especially in the districts of Sriganganagar, Bikaner, Churu and Nagaur, many people have disregarded this provision. These people are generally rich and are marrying another women inspite of the fact that they have marrying another women inspite of the fact that they have already one wife with them. Unfortunately, under Section 494 and 495 of the Indian Penal Code, action can only be taken when the aggrieved spouse makes a complaint. The Indian society because of illiteracy and backwardness is tolerating this malady. Neither the wife nor her relatives make complaint against the erring husbands.

In the case of the government servants, the Government of Rajasthan has already provided in the service condition that no one can be appointed in the government service if, the candidate has more than one spouse living with him. Moreover, no government servant can marry if, he/she has already a spouse living with him/her. Similar rules have also been provided by the State of Madhya Pradesh for their government servants. These rules can only operate when there is a complaint against the erring government servants. Moreover, these rules are almost ineffective because of Dealatory handling "with the cases. Even if, a complaint is filed, it takes years together to take action against the erring government servant. Further, the government servant takes the plea that he has no second wife. Of course, there is no check in keeping a concubine or mistress under the rules of the government.

The concept of monogamy has a very limited affect in the above cases. It is a unique way of evading the law because: (a) there is no loss to the affected party. Generally, the husband makes a will or transfers property in favour of the second wife; and (b) the children remain legitimate.

The effect of this evasion will affect the population control because the husband gets children both from the first and the second wife. This malady can be rectified in the following ways:

- a. Sections 494 and 495 of the Indian Penal Code be suitably amended so that any person can make a complaint and the offence be made cognizable;
- b. For every marriage registration must be made compulsory. Before making registration, the parties should satisfy the registration authority that they do not have a living spouse;
- c. Penal Laws should be made for checking the keeping of a mistress or concubine.

2. Minimum Age of Marriage: Another important relevant condition is the minimum ages of the parties to the marriage. Early marriage has been the part of the Indian culture and heritage because the ancient Hindu law commended marriage at young ages. Consequently, child marriages have been pre-

Valent in the society for centuries. A breakthrough was made by enacting the Child Marriage Restraint Act of 1929, amended in 1949 made it punishable for male above 18 to marry a girl below the age of 15 years for persons to perform, conduct or direct the marriage of males under 18 years and females under 15 years. This enactment has general application irrespective of the religion of the parties contravening in Section 5 has adopted this provision. The Government of India has recently further amended the Child Marriage Restraint Act 1929 in 1978 raising the minimum age for marriage for males to 21 years and that for females to 18 years.

These statutes, unfortunately, have little success in solemnization of child marriages. The Act has nowhere made such a marriage solemnized in violation of these requirements void or voidable, but only punishable and that too upon making a complaint. The provisions of this enactment are honoured more in breach than in observance. In Ajmer (a city in Rajasthan) along 10,000 child marriages were performed in one day as late as April 20, 1979. Thus, there is no check on such a malady. Neither the State of Rajasthan, nor the State of Madhya Pradesh has made rules requiring compulsory registration of marriages. Even the raising to higher ages would not solve any problem of curbing the nation's present high fertility rates. The following steps can be taken to see the enforceability of the spirit of the law:

1. Certain provisions be added for strict enforcement of the laws;
2. The offence be made cognizable;
3. Compulsory registration of marriage and the authority making registration of marriages should satisfy himself whether parties have attained the required minimum ages: and
4. Besides the parents, *baratis who* attend the performance of the marriage should also be punished for abating the law.

These are the two essential conditions of marriage relevant to our study, but the Act needs some more conditions to be incorporated. They are:

1. **Minimum education:** The Act has not made any provision relating to minimum education which is very much necessary. The couples who are illiterate do not understand the concept of planning of a family. The minimum education will make them to understand the need for a planned family. Thus, to certain extent this would reduce population problem.
2. **Minimum wages:** The Act should also incorporate the rule of minimum earning of the Couple. The fertility among poor is very high as compared to rich.
3. The Act should also provide that a person who has already three or more children from a former wife/ husband cannot remarry. Besides other advantages to the family and children, this would to a certain extent check on population growth.
4. **Compulsory family planning training:** It should be a necessary requirement that the parties will not be permitted to marry unless they have obtained training in the course family planning in some hospital, dispensary or primary health centre. This would compel the couples to understand the need of a small family. Thus, to great extent fertility rate would be reduced.

Registration of Hindu Marriages

Section 8 of the Hindu Marriage Act, 1955 provides that for the purpose of facilitating the proof of Hindu marriages, the State Governments may make rules. The Central Government has not kept this power with it to make a uniform law throughout the country." "Compulsory registration" was one of the important recommendations of the Committee on the Status of Women but the Central Government did not provide it even in the Marriage Laws (Amendment) Act, 1976. The importance of registration, perhaps, has not been appreciated by the Central Government. Neither the State of Rajasthan nor of Madhya Pradesh have taken steps in enacting laws on the subject. The State Governments have also not realized the importance of this provision. In almost all the civilized and advanced countries of the world, registration of marriage is compulsory. The registration of marriage to a great extent would make the enforcement of the conditions of marriage more

Stringent. It is desired that if, the State Governments are not taking steps in this direction, the Central Government should make the registration of marriages compulsory. The registration authority should satisfy itself "before registering the marriage that all the conditions of the marriage as laid down in the Section 5 of the Act has been fulfilled. This would to a great extent not only reduce litigation but also help in the reduction of fertility.

Other General Grounds

Under the Act, a marriage must be solemnized in accordance with the customary rites and ceremonies of either party thereto. Non-observance of the essential rites and ceremonies of at least one of the parties would fail to establish marital status among them. Besides requirements of monogamy and age, mentioned earlier, the law lays down the following conditions for solemnization of a Hindu marriage neither part, is an idiot or lunatic at the time of marriage, unless the custom permits; the parties are not within the degrees of prohibited relationship (certain relations by blood and affinity enumerated in Section 3 (g). Unless the customs permit, the parties are not *sapindas* relationship. *Sapinda* relationship extends to the descendants of a common ancestor up to five degrees when the person concerned traces his origin through the father and three degrees when tracing it through the mother.

The Act has declared void only marriages which contravene the rule of monogamy or of the prohibited degrees and *sapinda* relationship. All other unions are either voidable (optional at the instance of one party) or are valid but mildly punishable.

Divorce Laws

Sections 9 to 13 of the Hindu Marriage Act, 1955 contain a comprehensive code of matrimonial reliefs including juridical separation, decree of nullity in the case void and voidable marriage and divorce. Formerly under the old Hindu law there were no provisions for divorce because the marriage was always considered to be sacrament. Divorce being considered as a social innovation and an escape valve for the inevitable tensions of marriage was for the first time introduced by the Hindu Marriage Act, 1955. To keep the

traditional sentiments, however, the Act did neither favour nor encourage divorce, hence was not available by mutual consent. It was permitted only for grave reasons provided specifically under Section 13. However, Parliament after due consideration of the 59th report of the Law Commission gave a statutory shape to some of the recommendations while considering their own. It, therefore, enacted Marriage Laws (Amendment) Act, 1976. On a cursory look to it, one can find several provisions of the Hindu Marriage Act, 1955 have been completely mauled with further amendments⁵. The new law possesses a very progressive and dynamic character with a hope to bring much needed relief to the Hindus, especially to make the divorce among the Hindu community not only quick and easy, but expeditious too⁶. The amendments have tried to bring the Hindu Marriage Act to a great extent *at par* with the laws of the other communities. Thus, by adopting breakdown theory of the Divorce Law Reforms Act, 1969 of England, the Act has permitted divorce by mutual consent. But this mutual consent concept has brought one more problem *viz. that* not always wills the other party consent to a divorce. There are cases where parties' lead cats and dogs' life but one of the parties withholds consent to divorce simply to harass the other party so that he or she may not marry. On this the full Bench of the Delhi High Court observed in *Ram Kali v. Gopal Das*⁷ %

It would be unreasonable and inhuman to compel the parties to keep up the facade of marriage, even though the rift between them is complete and there are no prospects of the even living together as husband and wife.

The Law Commission, therefore, took up the task of reviewing the problem and in April, 1978 prepared Seventy First Report recommending the introduction of ***irretrievable breakdown of marriage as a ground of divorce***. Thus, a separation of three years with no hopes of reconciliation is proposed to be incorporated into the Hindu Marriage Act as an additional ground of divorce. The consent of the other party would be immaterial. However, to check unbridled divorces, certain safeguards have been suggested such as the interest of the children, and mandatory provisions for reconciliation efforts. The provisions of the relevant sections *i.e.* 9 to 13 of the Hindu Marriage Act, 1955 read with the amendments made by the Marriage Laws (Amendment) Act, 1976 may be summarised as follows:

Section 9: Restitution of conjugal rights: When either party has without reasonable cause has withdrawn from the society of the other, the aggrieved party may apply to court for restitution of conjugal rights. The burden of proving whether there has been reasonable excuse shall be on the person who has withdrawn from the society.

Section 10: Either party to a marriage may claim judicial separation in any of the grounds specified in Section 13(1) A, wife is given additional grounds mentioned in the Section 13(2). When this decree of juridical separation has been passed, the petitioner is under no obligation to cohabit with the respondent. But the court can rescind the decree of the petitioner and satisfies it just and reasonable to do so.

Judicial separation decree does not dissolve a marital tie. It merely suspends its operation for some time. Where no divorce decree is claimed after two years of the decree of judicial separation, marriage is not terminated automatically. For it, the decree under Section 13(1A) is essential⁸. This remedy gives time to the parties to reconsider their decision. Judicial separation suspends cohabitation till the decree is in operation, but the separate couple continue to be husband and wife.

Section 13: A divorce decree which is granted under the provisions of Section 13 of the Hindu Marriage Act terminates the maritalties completely. The following are the grounds of divorce:

- i. An act of adultery. Formerly a single act of adultery was not sufficient.
- ii. Cruelty, physical or mental.
- iii. Deserted the petitioner continuously for two years immediately preceding the presentation of the petition. The meaning of 'desertion' has been statutorily widened so as to include 'willful neglect'¹. Thus, an uncared or a neglected wife can claim the decree on the ground of her husband's desertion;
- iv. Change of religion or conversion;

- v. Incurable unsound mind or continuously or intermittently from mental disorder of such a kind or extent that the petitioner cannot reasonably be expected to live with the respondent. Formerly, a period of three years was necessary, now it is an instant ground for divorce;

VI Suffering from virulent and incurable form of leprosy;

Vii. renounced the world;

Viii. Suffering from venereal disease 'in a communicable form;

- ix. Disappearance for a period of seven years. The amendment confers jurisdiction to the court of the area where the petitioner resides to deal with a matrimonial petition in cases where the respondent either resides outside India or is not heard of for seven years;

- x. No resumption of marriage between the parties for two years after the passing of the decree of judicial separation; and

- xi. No restitution of conjugal rights after the decree of two years.

There are additional grounds available to the wife only viz,

- I. before the commencement of the Hindu Marriage Act, the husband had additional wife;
- ii. That the husband has, since the solemnization of the marriage, been guilty of rape, so demy or bestiality;
- iii. that in a suit under Section 18 of the Hindu Adoption and Maintenance Act, 1956 or proceeding under Section 125 of the Criminal Procedure Code, a decree has been passed against the husband awarding maintenance to the wife. Thus, a wife can claim divorce for non-maintenance by the husband. This law is very much beneficial to the womenfolk; and

- iv. that her marriage was solemnized before she attained the age of 15 and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years. But now this clause is superseded by the Child Marriage Restraint Act, 1978 which lays down the age of a girl as 18 years for marriage.

Section 13B: This new provision has been inserted by the Marriage Laws (Amendment) Act, 1976. Now the parties can seek divorce by presenting a petition stating:

- i. That they have been living separately for a period of one year or more;
- ii. That they have not been able to live together; and
- iii. That they have mutually agreed that the marriage should be dissolved.

The parties are required to wait for only six months after filing the petition for divorce by mutual consent though they are obliged to obtain it within 18 months.

Nullity of marriage void or voidable marriages: A marriage is void in the following cases:

- i. A bigamous marriage;
- ii. Marriage between sapinda relationship; and
- iii. The parties being related to each other within degrees of prohibited relationship.

A voidable marriage shall be on the following grounds:

- i. If one of the parties being idiot or lunatic at the time of marriage;
- ii. Where the girl is above the age of 15 years but below the age of eighteen years;
- iii. Where either spouse was impotent at the time of marriage and continues to be so, when the petition is filed in the court;

- iv. Where the consent of the petitioner was obtained by committing force or fraud. 'Fraud' has been further explained in the Marriage Amendment Laws; and
- v. Where the wife was pregnant at the time of marriage from some person other than her husband and the husband was not told of it.

A voidable marriage is valid till it is cancelled by the court at the instance of an innocent party to the marriage.

Petition for Divorce: A petition under Section 14 of the Hindu Marriage Act, 1955 can be presented only after one year of the marriage except:

- i. When denial divorce would cause exceptional hardship to petitioner; or
- ii. When it would cause exceptional depravity to the Conjugal rights of the respondents. However, Section 29(2) protect customary divorces and allow them to prevail where they are recognised.

No direct petition for divorce: A direct petition for divorce is not permitted. The spouse is asked to seek judicial separation first and then divorce. This is because of the fact that Hindus do not favour easier divorce. The interim period between judicial separation and divorce under Section 13(1A) has been reduced by one year instead of two years. Moreover, appeals from interim orders under Section 28(2) stand abolished.

Procedure of the Court

1. The Marriage Laws (Amendment) Act, 1976 lays down matrimonial proceedings to be conducted in camera. This is very much necessary. Under the old law no such provisions existed. In an open court, sometimes it becomes very difficult to the parties to give evidence freely and frankly.
2. Under Section 19, matrimonial petition can be presented before the District court within whose local limits original jurisdiction:
 - a. the marriage was solemnized; or

- b. the respondents at the time of the presentation of the petition resides; or
- c. the parties for the marriage last resided together; or
- d. the petitioner is residing at the time of presentation of the petition when the respondent has not been heard of for the last seven years.

3. Section 21A, and 21B and 21C have been added recently to Section 21 of the Hindu Marriage Act. These Sections regulate the transfer and disposal of matrimonial petitions, when presented in different courts by parties to the marriage. The court has been conferred the jurisdiction to deal with the case to which the petition was made at an earlier date by either spouse.

4. The courts are bound to decide the case within six months and in case of appeal, within three months.

5. Under Section 23A, newly added section, the respondent is also allowed to make counter claim for a decree of judicial separation or divorce in all these cases in which he or she can prove the petitioner's fault in relation to adultery, cruelty or desertion.

Reconciliation

The Marriage Laws (Amendment) Act, 1976 permit easier and speedier divorce. Formerly, it could be granted in hard cases only. Moreover, traditionally divorce is not welcome in Hindu society. Further, the sanctity of marriage becomes at stake in every divorce. A marriage cannot be dissolved, if there is hope of its reconciliation, either inside or outside the court. Section 23(2) lays down a primary as well as statutory duty of the court, to try for reconciliation between the estranged couple, before granting a decree of divorce to them. Unfortunately, the courts do their duty more in violation. The Law Commission, of late, has recommended for the establishment of separate courts for dealing with family matters, and also emphasized that these courts should have sympathetic attitude.

Remarriage of divorced persons: Section 15 permits

remarriage of the divorced spouses. Formerly" they had to wait for one year. Now waiting period has been deleted by the Marriage Laws (Amendment) Act.

The Marriage Law (Amendment) Act, 1976 is a progressive piece of legislation and it inducts a new sense of self respect and confidence in the hearts of the Hindu females. It is a revolutionary in character and conferred substantial benefits on the Hindu community in marriage and divorce matters within no time. A random sample survey of the cases in the District Court of Bikaner shows the institution of cases of divorce under Section 13 for the last five years as follows:

1975	15
1976	14
1977	31
1978	33
1979	38

Thus, it will be seen that after the Marriage Amendment Laws Act, 1976, the number of institution of the suits has been greatly increased.

The various provisions in the Hindu Law affected by various amendments have brought the principle of equality of men and women in accordance with Article 6 of Declaration of United Nations General Assembly, 1967 viz, Elimination of Discrimination against women. The status of Hindu women has now been improved to a great extent. This will ultimately bring reduction in population growth.

Muslim Laws

The life of a Muslim very much differs from that of Hindu. There are several religio-cultural factors. In India, as elsewhere in Muslim world, Islam has traditionally been held to favour a high fertility rate as well as permit polygamy, to the extent of four wives. The following beliefs of the people should be noted as being conducive to high fertility among Muslims:

1. Children are an asset to a society.
2. Many children will assure security to the parents in their old age.

3. Children are a visible evidence of the husband's love.
4. Availability of contraceptives contributes to immorality.
5. Fatalism i.e., the belief that nothing can be done to improve one's lot in life.

In Muslim society there are early marriages, joint or three generation families where decision making rests with an older relative such as, mother-in-law of the wife, patriarchal social pattern; mass illiteracy; status consciousness rather than "achievement reward" orientation of the society.

Marriage, traditionally, in Islam is a civil contract and not a sacrament. But from a Muslim point of view there are three aspects of marriage viz.,

Legal aspect : It is a contract i.e., (i) there can be no marriage without consent, (ii) as in contract, provision is made for its breach; and (iii) the terms of marriage contract are within legal limits capable of being altered to suit individual cases.

Social aspect: Theoretically, (i) Islam gives to women i. definitely high social status after marriage; (ii) restrictions are placed upon unlimited polygamy; and (iii) Islam discourages celibacy.

Religious aspect: There is Koranic injunction; regarding marriage. It is regarded as oasis of society Temporary marriages is forbidden. Spouses are strictly enjoined to honour and love each other.

In Islam there are three essential conditions marriage, viz.,

1. Capacity to marry
2. Form of marriage
3. No Legal impediments

Capacity to marry: Every Muslim of sound mind who ha attained maturity can enter into a contract of marriage Maturity is attained at the age of puberty and not according

To the Indian Marriage Act, i.e., at the age of 18. In case of minors, guardians to marriage can give consent. However, a female minor has the right of repudiation after she attains the age of fifteen but before she attains the age of eighteen years. But this right of repudiation is lost on consummation. This repudiation has got to be confirmed by a court until that time, the marriage subsists. In India, the families are mostly illiterate, belong to lower social status and marriage of minors is very common. The Child Marriage Restraint Act, 1929 with subsequent modifications has little effect because neither the marriage is declared illegal nor it provides a cognizable offence. There is no system of compulsory registration of marriage. Since the system of arranged marriage is prevalent, the question of consent of the marrying parties has no avail. It is the parents who give consent on behalf of their minor children.

In India, there is nothing like Muslim Family Laws ordinance of Pakistan which compels the marrying parties to register their marriage.

Form of marriage: A marriage takes place when there is an offer by the other in one meeting before sufficient competent witnesses. There are no other formalities.

No legal impediments to marriage: There are number of legal impediments to the marriage i.e., the grounds for prohibition viz., (i) number; (ii) religion; (iii) relationship (consanguinity or affinity); (iv) fosterage; (v) unlawful conjunction; (vi) *iddat*, (vii) miscellaneous prohibitions .

Number: According to Islamic Law, a man can have upto four wives but a wife can have only one husband. If a husband marries a fifth wife, it will be merely irregular, and the children of such a marriage will be legitimate. Thus, polygamy has been permitted in Islam leading to a high fertility rate in India.

In India Muslims are not prepared to accept any law which brings monogamy inspite of the fact such a law has been enacted in several Muslim countries.

Religion: A man can marry a Muslim or even a *kitabiyya*, but a Muslim woman cannot marry anyone except a Muslim.

A marriage with a Hindu woman will be irregular which can be rectified by converting the wife to Islam.

Relationship: A man cannot marry a woman, if they are related to each other by:

- a. consanguinity;
- b. affinity; and
- c. fosterage.

Unlawful conjunction: A man is also forbidden to have two wives at the same time, so related to each other by consanguinity, affinity or fosterage that they could not have lawfully married with each other, if they had been of different sexes. The marriage, if performed will be merely irregular.

Iddat: Where a marriage is dissolved by death or divorce, the woman is prohibited from marrying within a specified time. This period is called *iddat*. If marriage takes place during *iddat*, it shall be irregular.

Miscellaneous prohibitions: There are some of the prohibitions to marry, perhaps, not quite important, such as, doctrine of equality, illicit intercourse and undue familiarity, polygamy etc. Some of them are the rules of prudence rather than mandatory provisions of law.

Divorce: There are various kinds of divorce recognised in Muslim Law. The dissolution of marriage under Muslim Law can be affected in the following ways:

1. By death of the parties
2. By the act of the husband
3. By mutual agreement
4. Under Dissolution of Muslim Marriage Act, 1939.

By death of the parties: The death of either party to marriage *ipso-facto* dissolves the marriage.

By the act of the husband: Divorce given by the husband is known as *talaq* i.e., unilateral repudiation of the marriage by the husband without resort to the court. Mere pronouncements by the husband even under the condition of drunkenness, is sufficient to cause *talaq* to wife.

In *talaq-i-tafwiz* and *talaq-i-zihar* and *illa*, the wife has been given the power to take *talaq* from the husband under certain conditions.

Talaq is the most usual way to sever a marriage tie. Right of the husband is absolute and even arbitrary. The right is frequently exercised despotically. In almost all the Muslim countries regulatory laws have been enacted to check this malady but in India no such protection has been given to women because of opposition from most of the Muslim elites. They do not want to go their unbridles right regulated. Because: of political reasons, the government does not want to take steps in this direction.

Another feature of *talaq* is that, if the repudiation utterance was delivered by the husband thrice in a sitting, the dissolution of marriage becomes so irrevocable that the same couple cannot remarry unless the woman marries another husband who either died or divorced her. It is this arbitrary power of the husband to give *talaq* to wife who has very much lowered the status of women in Muslim society. This is also one of the causes for high fertility rate among Muslims.

Mutual agreement: Under *Khula* and *Mubarat* dissolution can take place with the mutual consent of the wife and husband'.

Dissolution of Muslim Marriage Act, 1939: In 1939 this Act was enacted to give right to the wife seeking dissolution of marriage in the court of law. The following are the grounds, briefly on which a wife can seek dissolution:

- i. that the whereabouts of the husband have not been known for a period of four years;
- ii. that the husband neglected or failed to provide her maintenance for a period of two years;
- iii. that the husband has been sentenced to imprisonment for a period of seven years or ' upwards;
- iv. that the husband failed to perform without reasonable cause his marital obligation for a period of three years;

- v. that the husband was impotent at the time of marriage and continues to be so;
- vi. that the husband has been insane for a period of two years, is suffering from leprosy or virulent venereal disease;
- vii. that she having been given in marriage by her father or other guardian before she attained the age of 15 years, repudiated the marriage before attaining the age of 18 years, provided that the marriage has not been consummated:
- viii. that the husband treats her with cruelty and
- ix. any other ground which is recognised as valid for the dissolution of marriage under Muslim Law.

Procedure

- a. As regards ground no. (iii) No decree shall be final until the sentence becomes final.
- b. As regards the ground no. (i), the decree shall not take effect for a period of six months and if, the husband appears within that period and satisfies the court that he is prepared to perform his conjugal duties, the court shall set aside the decree.
- c. As regards the ground no. (v), if the husband satisfies the court that within a period of one year he has ceased to be impotent, no decree shall be passed.

Despite the facility has been given to Muslim women to come equal with their husbands, under the provisions of this Act, but little effective use has been made. The reasons are obvious, viz., the Muslim society by nature is patriarchal, women are illiterate, they are not aware of their rights and above all the sociological reasons. The author made a survey of the Muslim women of every social strata. They narrated, if dissolution is sought under this Act, no woman can expect to marry because she will be considered to be quarrelsome and also doing something irreligious.

The survey of the Muslim Law of marriage and divorce

will show that they encourage the upward growth of population. Because of political reasons, no steps have been taken to provide regulations on the lines of other Muslim countries. The condition of Muslim women is very deplorable. In practice there is no sex equality between men and women. The wide rampant poverty and illiteracy have brought tremendous growth of population. There is, thus, a great need to reexamine and to interpret the *Koran* and *Shariah* with a view to bring complete equality of women with men.

Civil Marriage Law

The *Lex loci* bill drafted by the First Law Commission in 1841 did not rule out the power of the government to reform various personal laws. The motive behind this was not secularization of the law but to protect the then newly converted low caste Hindus to Christianity. The First Law Commission recommended the enactment of an Indian code of marriage and succession. In pursuance to this Indian Divorce Act, 1969 was enacted applicable to Indian Christians. Moreover, the Brahmosamaji being progressive religious sect not believing in certain aspects of the orthodox Hinduism and in the area of matrimonial relations rejected caste distinctions and cumbersome rituals, launched a movement for secular marriage law. Strengthened by these two factors, Henry Maine proposed Special Marriage Bill in 1872, but in its original form could not be enacted because of opposition from several quarters. However, in its mutilated form it was enacted in 1872 applying those persons who did not profess Hindu, Buddhist, Jain, Sikh, Muslim, Christian or Parsi religions. In 1923, this Act was amended so as to make Hindus possible to marry without renouncing their religion. Consequent upon the enforcement of the Indian Constitution and in accordance with the idea of Uniform Civil Code under the article 44 a new Special Marriage Act, 1954 was enacted. This new law permitted any two Indians to marry. This Act also contained the provisions of divorce. In 1963, this Act was amended in order to protect customs and usages conflicting with its rules relating to prohibited degrees in marriage. In 1970, the law relating to petitions for divorce grounded on earlier judicial proceedings viz, judicial separation and restitution of conjugal rights was amended. The, Marriage Laws (Amendment) Act, 1976 drastically amended several important provisions of the Special Marriage Act, 1954.

The most striking feature of this Act is that its provisions are not based on religion. It treats marriage as a solemn, social contract based on secular principles. No religious ceremonies or theological rituals are required for the solemnization of a marriage under its provisions. The Act, however, does not prohibit holding of any ceremony. The Act, clearly says that a civil marriage "may be solemnized in any form which the parties may choose to adopt". The Section 3 of the Act requires the parties only to declare that they take one another as their lawful spouse. The Act has the following relevant provisions:

Monogamy: The Act under Section 4(a) enforces strict monogamy. The violation of this provision would mean void marriage.

Marriage age: Section 4(c) of the Act requires completion of twenty-one years of age and eighteen years of age by men and women respectively. As against Hindu Law and Muslim Law, violation of this requirement makes the marriage null and void. When an existing marriage is to be registered under this Act, both the parties must have completed the age of twenty-one years.

Sanity: Section 4(b) of the Act insists on sanity of parties at the time of marriage. Under Section 24, a marriage in violation of this condition will be null and void. Thus, the provision lays down:

Neither party:

- i. is incapable of giving a valid consent to it in consequence of unsoundness of mind;
- ii. Though capable of giving a valid consent, has been suffering from mental disorder so such a kind or to such an extent as to be unfit for marriage or the procreation of children; or
- iii. has been subject to recurrent attacks of insanity or epilepsy.

Thus, the concept of unsoundness of mind has been explained under the Act.

Prohibited relationship: The last condition for a lawful marriage under the Act is absence of "prohibited" relationship between the parties. The personal laws of all the religious communities impose restrictions on marrying certain degrees of relationship. However, exceptions have been made where customs govern at least one of the parties. As regards the general principles relating to prohibited degrees in marriage, the following points are notable:

- i. the Act conforms to all the personal laws in equating half-blood and uterine blood with full blood;
- ii. In equating relationship by adoption with blood relationship, the Act fully agrees with Hindu Law. In Schedule I, parts I and II, the Act has specified all those relations whom a man and a woman cannot lawfully marry.

Nullity of Marriage: A marriage which contravenes any of the conditions for a lawful marriage, viz., (i) monogamy; (ii) sanity; (iii) prescribed age; and (iv) absence of prohibited relationship is null and void under Section 24. Before, the 1976 amendment of the Act, the right to seek declaration of nullity in respect of a void marriage was not confined to parties. Now, however, only either party to such a marriage can present a petition in order to obtain a declaration of nullity.

A marriage, under the Act, is voidable at the option of the aggrieved party on the grounds of (i) willful non-consummation of marriage; (ii) girl's pregnancy by another man at the time of marriage; and (iii) want of free consent resulting from coercion or fraud.

Divorce: The Act specifically mentions the grounds on which the courts can dissolve a marriage whether originally solemnized under its own provisions or contracted under any of the various personal laws but later registered under the said provisions. Section 27 lays down the following grounds on which divorce can be sought:

- a. after the marriage, either spouse had voluntary sexual intercourse with any other person;
- b. desertion for a period of two years immediately preceding the presentation of petition;

- c. sentenced to imprisonment for seven years or more;
- d. cruelty;
- e. unsound mind of such a kind or extent that the petitioner cannot reasonably be expected to live with the respondent;
- f. suffering from venereal disease in a communicable form;
- g. suffering from leprosy;
- h. has not been seen for a period of seven years;
- i. no resumption of cohabitation for a period of one year passing of degree for judicial separation;
- j. no restitution of conjugal rights for a period of one year.

Judicial separation: Under the Act, all the fore mentioned grounds for divorce also constituted grounds for judicial separation.

Restitution of conjugal rights: Like Hindu Marriage Act, 1955 where either spouse withdraws from the society of the other without a reasonable excuse, the remedy for the aggrieved party lies in seeking a decree for restitution of conjugal rights.

Divorce by mutual consent: Under Section 28(i), of the Act, parties can present a petition for divorce on the ground that they:

- i. had been living separately;
- ii. had not been able to live together;
- iii. Had mutually agreed that the marriage be dissolved.

Under Section 28(2) on a motion by both spouses after the expiry of at least six months, but not later than one year, from the date of the presentation of the petition, the court could dissolve the marriage.

Thus, this provision has made the divorce very easy and least time consuming.

Remarriage: Till 1976, the Act did not permit remarriage between the parties whose marriage was dissolved till the expiry of one year. But, after 1976 they can remarry without waiting for any period.

'Procedure for marriage and registration: The following are the provisions under the Act:

1. The State Government under Section 3 may appoint by notification in the official gazette, one or more Marriage Officers for the State;
2. When parties to marriage intend to solemnize marriage, they should give notice in writing in a prescribed form to the Marriage Officer of the district in which one of the parties resided for a period of thirty days.
3. The Marriage Officer will keep such a notice in a Marriage Notice Book, open for inspection to all.
4. He will also publish this notice on the notice board.
5. Any person may before the expiration of thirty days from the date of publication notice object to the marriage on the ground of contravention of Section 4 of the Act. The Marriage Officer shall read the objection to the parties to the marriage and shall enquire into the objection. If he disagrees with the objection, he will permit solemnization of marriage, but in case he upholds the objection, the marriage shall not be solemnised. The aggrieved party may go in appeal to the District Court within a period of thirty days. The decision of the District Court shall be final.
6. Before a marriage is solemnised, the parties along with Three witnesses shall, in the presence of the Marriage Officer, sign a declaration in the Prescribed form.
7. When the marriage has been solemnised, the Marriage Officer shall give marriage certificate to the parties.

8. All the marriages performed under the Act have to be got registered under Section 15 of the Act by the Marriage Officer who shall see that the conditions of marriage laid down in the Act are fulfilled.

This Special Marriage Act has brought the laws of marriage in India *at par* with marriage law of any civilised country. Unfortunately, only a very small number of people marry under this Act. From the records available at different headquarters in the State of Rajasthan only 29 marriages took place in the year 1979.

Conclusion

The above study of family relation laws in India will show that these laws reflect deeply held religious beliefs and practices, as well as Indian social and cultural relations. Efforts to utilise family relation laws to accomplish the goals of national population policies, thus, raise some basic questions about the relationship between status of women and religion oriented family laws of different communities in India and as to the extent to which the legal process should be used to bring about, or merely to reflect social change. Although divergent views due to politics and religious feelings are expressed on these basic questions, it cannot be denied that national family relation laws do significantly affect the achievement of national population policies, and that, therefore, such laws should be reviewed both by the Central Government and the State Governments and clarified so as to be consistent with declared policy of population and with the relevant United Nations declaration.

Unfortunately, in the States of Rajasthan and Madhya Pradesh, no steps in the direction mentioned above have been taken. Both the States have miserably failed to make rules affecting marriage relations laws. Both these States have left the matter with the Central Government. They have not realised that the legal status of women within the family is of importance to the family as an institution as well as to efforts to achieve other rights for women, such as rights affecting political, social, and economic activities.

In India there is a codified marriage laws for Hindus, Christians, Parsis but there is no codified law on marriage

for Muslims. Only customary law is applicable to them. The Hindu Marriage Act, 1955 Special Marriage Act, 1954 and Marriage Amendment Laws, 1976 have brought tremendous reforms in the status of Hindu women. The basic issues on which efforts to reform concentrated, among others, strict enforcement of child marriages, arranged marriages, easy arbitrary I divorce by the Muslim husbands, unrestricted practices of polygamy among Muslims. There is need for uniform civil code for marriages, among all the religious communities in India. In spite of the fact that we have provided to women equal political rights equal opportunities for education equal pay for equal work with special protections for women and almost equal position in social life. But still the women's position in the field of marriage laws among Muslims is very much unfavorable. Unfortunately, any attempt in the direction of uniform civil code on marriage is viewed by Muslim leaders, specially the political leaders, as contrary to the aspects of Islamic religion. Several times heated debates have been held in Parliament, public platform and academic circles on this subject, but we have not been able to convince our Muslim brethren in this direction.

Thus, it must be realized that:

1. There is a close relationship between the law status of women, early and universal marriage of girls, and high fertility.
2. In order for the age of marriage to have a marked effect on family size, education and employment opportunities must be made available to women.
3. The unilateral right of husband to divorce their wives at will or on grounds failure to bear children or to bear a child or a particular sex lowers the status of women and may also encourage high fertility.
4. Polygamy tends to increase the birth rate because of the large number of women who are married at any one time.

The Central Government and all the State Governments are, therefore, requested that:

1. They should ensure that laws provide for a minimum age of marriage for women of not less than 18 years, for the registration of all marriages, and for the contracting of marriage only with the full and free consent of intending spouses.
2. Women's organizations and other civic and educational bodies actively promote and support the acceptance of a later age at marriage for girls, of the free choice of spouse of the right to enter marriage only with free and full consent.
3. They enact or review legislation to ensure that women and men have equal legal rights at marital dissolution, and that the interests of children shall be fully protected.
4. That the Governments enact or review existing legislation so as to restrict polygamy in any form.
5. They with the help of non-governmental organizations, ensure that all women, and especially the less-educated women at the lower economic levels, should know their legal rights and be given legal aid to enable them to exercise them equally with men.
6. They make laws for the compulsory registration of birth as a means of providing accurate information for formulation and implementation by them of their national population policies.
7. They establish effective systems for enforcing such laws.

LAW AND POPULATION CHANGE IN INDIA

P. B. Desai*

ABSTRACT

This paper highlights such features of our demographic situation as are pertinent to the appreciation of the role of law in influencing the population trends in the desired direction. The author feels that population change should be viewed as an integral part of the complete process of social change within which it interacts with changes in other domains like the political system, social structure, socio-psychological milieu, economic conditions, technological state and environmental base. Such a view of population change, according to the author, imparts prominence to the role of law in purposefully guiding the course of social progress in the interest of countering abnormal elements ingrained in the change. Law then becomes ubiquitous, especially in a developing country in which the State takes upon itself the task of comprehensive development that is directed, as in our case, towards the transformation of a populous but loosely integrated nation into a united 'democratic, secular, socialist republic'.

A legal system oriented to such a development process cannot remain a passive instrument of penalising crime and deviation for the preservation of law and order. It assumes a positive role of helping to deal with the causes that generate crime and deviation. It may even act as a pace-setter in the process of wholesome social change. In the light of this perspective, the author draws attention to the prevailing demographic situation. In doing so, he does not presume to specify the elements of law that may be invoked in order to

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Deal with any component of population change but seeks to identify some of the more relevant determinants of the change with a view to indicate the scope for their due modification through the legal system. The author concludes his paper by emphasizing that the scope for social mobility should be maximized through constitutional, legal and administrative measures. He feels that to the extent it is done, the task of moderating the force of fertility would be rendered easier.

The purpose of this paper is to highlight such features of our demographic situation as are pertinent to the appreciation of the role of law in influencing population trends in the desired direction. The analytical aspects of the situation are the size and structure of population, its geographic distribution and its social composition. Each of these aspects appears problematic in the light of the avowed goals of national endeavor. This uneasy situation is obviously the product of past trends displayed by the closely interacting components of population change, viz. fertility, mortality, migration and social mobility. Population change is indeed an incessant and all-pervasive process in which all members of a society inevitably participate; it is, in our case, the outcome at the macro level of millions and millions of demographic events - births, deaths, marriages, changes of residence etc.

Population Change

The close interaction of the components of population change implies that it is not quite helpful to single out any one of them for exclusive legal and/or administrative intervention; in dealing with any one of them, it is necessary to consider its dynamic inter-relationships with each of the other components. The pervasive character of population change suggests that it retains a good measure of autonomy of its own and so the scope for direct intervention in population matters remains circumscribed. The strategy for influencing population change needs, therefore, to be quite comprehensive, and also indirect in the sense of its seeking to modify the more basic determinants of the behavior of its components. These determinants are widely embedded in other domains of life like the political system, social structure,

Socio-psychological milieu, economic conditions, technological state and environmental base. Population change may accordingly be viewed as an integral part of the holistic process of social change within which it interacts with changes in these other domains.

Such a view of population change imparts salience to the role of law in purposefully guiding the course of social progress in the interest of countering dysfunctional elements inhering that change. Law then becomes ubiquitous, especially in a developing country in which the State takes upon itself the task of comprehensive development that is directed, as in our case, towards the transformation of a populous but loosely integrated nation into a united democratic, secular, socialist republic. A legal system oriented to such a development process cannot remain a passive instrument of penalising crime and deviation for the preservation of law and order. It assumes a positive role of helping to deal with the causes that generate crime and deviation. It may even act as a pace-setter in the process of wholesome social change. To this end, it must get rid of its own inherited institutional rigidities and acquire such dynamism as would enable it to promote social forces that serve the cause of development and discourage those that hinder it.

Law, in this context, is used as a generic term as comprising not only the constitution, statutes, parliamentary and legislative enactments etc. but also customs, traditions and mores having legal or judicial sanctions as well as judicial and administrative decisions, rules and regulations. This rather all-inclusive approach to law is preferable to the current fashion of selecting a part of the whole gamut of laws and regulations in force as representing 'population law'; we are inclined to the view that there is no part of a legal system and no sphere of life which is not either directly or indirectly related to population phenomena. The wide scope, that accordingly exists for the role of law to play, say, in a population oriented development process is well illustrated by a classification plan for law and socio-economic development. This classification lists as many as 163 items under 32 groups forming three broad categories of general, economic and social development. The groups, which among them appear to be more pertinent in the present context, are: civil and human rights; freedom of movement property rights; ecology; communication and cultural media;

land use and energy; education; public welfare; public health; family status; children and child welfare; national; cultural and religious heritage and recreation. Significantly, the last eight of these groups, from education recreation, all of which may be said to be of direct relevance to the fertility component of population change, exhaust the scope of social development.

It is in the light of this perspective that takes into simultaneous consideration the pervasive character of the population phenomena and the ubiquitous, role of law in the context of comprehensive development that we may draw attention to the prevailing demographic situation. In doing so, we would not presume to specify the elements of law that may be invoked in order to deal with any component of population change but will seek to identify some of the more, relevant determinants of the change with a view to indicating the scope for their due modification through the legal system.

Demographic Situation

For a broad appraisal of the present demographic situation and recent demographic trends, we give a selection of the relevant statistics in the Appendix Tables. In the text we will briefly refer to these data which are all drawn from the official census sources. Since our purpose is only to spell out broad features which are pertinent in the present context, we will not present any quantitative data in the text. Nor will it be necessary to refer to all the data sets in the text. They are presented mainly to evoke interest in the consideration of quantitative dimensions of our demographic situation by those who are so inclined to look into these quantitative aspects. In any case, they suggest how stupendous are the problems involved for a country which is the second largest nation in the world. Among the countries of the world, we account for nearly 15 per cent of the world's population and we occupy less than 3 per cent of the world's land area. In terms of the number of persons per unit of land under cultivation we take our place amongst countries with a very high pressure of people on cultivable land; it is important to note, however, that in terms of the technological level of the use of that land we are almost at the bottom of the scale. Despite the patchy green revolution that we have experienced, our agriculture productivity is among the lowest in the world.

Confining attention to population, our strength is notably over 650 million persons. Our potential natural resources too are said to be quite large. Yet, they are still in a grossly underdeveloped and, therefore, in a greatly underutilized state. It is this imbalance between the present size of the population and untapped potential resources that constitute, in the overall, our development problem. The absolute size of the population becomes for us a stupendous strain for the very reason that the productive potential of the human resource too is greatly compromised by the lack of knowledge, skills, and techniques that can render the population into a tremendous asset.

The process which has brought about the situation began with the 1921 Census when our population was just over 250 million. In the first 30 years from that date we added only about 110 million persons, but during the next about 30 years we have added around 300 million persons to our population. The process of population growth has been continuous since the 1921-31 decade. In the first three decades it was comparatively slow, while in the next three it has shown a marked acceleration. It is only now that we have some indications that a phase of deceleration of the growth process may begin.

Population Growth.

The proximate causes of the rapid population growth are quite obvious. The death rate which was as high as nearly 49 per thousand per annum in 1911-21 has registered over the decades a progressive decline to about 19 in 1961-71. The corresponding fall in the birth rate, though quite progressive, had been from a level of 48 to only 41. Interestingly, a part of this small decline in the birth rate reflects changes in the structure of population rather than a fall in the fertility level. The factors underlying the decrease in mortality are control of epidemics and communicable diseases like malaria, smallpox etc., improved logistics of dealing with recurring droughts and some rise in the levels of living. The failure of fertility to decline may be broadly ascribed to the lack of social progress.

If we consider the more recent trends, there is some evidence that a decline in fertility has been initiated. As against the decennial birth rate of 4. For 1961-71, the

Latest Sample Registration Scheme estimate of birth rate for 1975-77 is over 34. Even this level when compared with the death rate, reduced to about 15 in that year, results in a rate of natural increase of nearly 2 per cent per annum. If, therefore, we wish to contain the increase in the size of the already large population, it would be necessary to intensify the decline in the birth rate. This means, in effect, that we will have to secure a larger measure of decrease in the fertility level of an enlarging group of persons in the reproductive age.

Structural Change

The impact of the rapid growth of population is evident in the structure of the population. A significant feature of the structure is the accentuated masculinity of the population which can be traced to widening of the sex differential in mortality in the course of its decline. Between 1921 and 1971, the number of females per thousand males in the population has been reduced from 955 to 930. This trend can be traced to a relatively inferior status enjoyed by the fair sex in our society. This problem of sex inequality is deeply entrenched in our social structure and cultural traditions.

The second aspect of the structural change relates to the age distribution of population. This has resulted from the age selectivity of mortality decline in conjunction with stable fertility. There has occurred over the period a broadening of the base of the age pyramid. According to the 1971 Census figures we had 42 per cent persons below 14 years of age in the population. If we consider all persons below 20 years of age, they form a clear majority in the total. Further addition of the next group shows that clearly three-fifths of the total population is below 25 years of age. The implications of this young population are abundantly clear. The growth potential of the population is tremendous. While the reproductive base' is expanding rapidly the volume of needed employment opportunities is also expanding with equal rapidity. If we want to contain this growth process, it seems imperative that we socialize this younger generation for responsible reproductive behavior and simultaneously improve, through education and training, their employability.

The question of socializing the younger generation for responsibility in reproduction is not an easy one for the

Reason that traditionally we are a much marrying society. Marriage is almost universal; it takes place early in the adolescent stage of life; almost all persons get married before reaching the age of 30. The mean age at marriage has risen over time but at a very slow rate. It has increased by now to over 17, which is not sufficient to make any significant difference in the level of completed fertility, or even in period fertility rates since the contribution to total births of women below the average is marginal. This question of promoting responsible parenthood is vitally related to the effort at raising the age at-marriage and of purposefully utilising the years of age so saved in building up the competence of the population concerned.*'

With regard to the distribution of the population we may first refer to the rural-urban classification. There has been over time an increase in the urban proportion of the population. This proportion increased from 11.2 per cent to 17.3 per cent between 1921 and 1951. Over the following two decades, it rose to nearly 20 per cent. As of today, the proportion is estimated to be over 21 per cent.

A significant feature of this process has been a relatively much faster, rate of growth experienced by Class I towns, which are called cities and have a population of 100,000 or more. In 1921, the cities accounted for only a quarter of the total urban population while in 1971, they claimed much more than half the urban population. Within this class, the larger cities have rapidly grown into mammoth metropolises. This kind of redistribution of population has already created unwieldy problems of redeveloping urban and metropolitan settlements. The process is indeed defying the implementation of master plans in almost all cities where such attempts have been underway for some time. This has created a problem, for example, of ameliorating the condition of urban poor living in slums and squatter colonies.

Geographical Distribution

Equally important is the question of geographical distribution of population. The pressure of population is felt all through the country, but the degree to which population balances with the available resources differs from one part to another. Ideally, the situation merits examination by the classification of the country either into resource regions or

into demographic regions, but such an attempt has not yet been made. So, we may take the political boundaries of the States to reflect the geographical distribution pattern of the population. In this connection we may direct pointed attention in the inter-State variation in the density of population. The gross density for the country as a whole was 167 persons per square kilometer in 1971. Among the 22 States it varied from as low as 21 persons for Jammu & Kashmir, 29 persons for Sikkim and 31 persons for Nagaland to 504 persons for West Bengal and 594 persons for Kerala. The wide range of variation in density need not call for any policy of population redistribution. What it implies is that in the planning of development process due consideration needs to be given to the uneven distribution of population. Population distribution is one aspect of the inter-State differentials in the level of development, which has been a cause of considerable concern.

Migration

The autonomous process of redistribution of population is reflected in the trends of migration, of which the rural-urban migration trends have been referred to earlier as urbanization process. The available evidence suggests that the incidence of migration as between States or provinces has been rather marginal. Only 3.6 per cent of the populations were enumerated in provinces other than that of their birth in the 1931 Census, the corresponding figures of persons enumerated outside their State of birth were 3.0 per cent in 1951 and 3.3 per cent in 1961. If we consider the more detailed data given by the latest 1971 Census, we find that a total 160 million persons were enumerated outside their place of birth; this accounted for 29 per cent of the total population. Of these, 70 per cent were females; the principal reason for this preponderance of females in the migration stream appears to be associated with their marriage. It is notable that rural to urban migration accounted for less than 15 per cent of the aggregate number of persons enumerated outside their place of birth, while the corresponding rural to rural stream formed as much as over 70 per cent of the total. On the whole, it would appear that our population is not spatially very mobile. There are only a few States which attract migrants for permanent settlement. Where this does occur on a significant scale, it tends to create serious problems. This is attested by the case of

Assam. But here there is also a question of surreptitious international migration.

Social

About social composition of population, we have great many diversities which lend credence to oft-repeated cliché that we much cherish unity in diversity'. Our population is known for internal differentiations based on religion, caste, mother tongue, ethnicity, culture etc. All these form traditional basis of divisiveness leading at times to social tension and even political unrest. The role of such parochial factors in the functioning of our democratic polity is well recognised. Perhaps, these diversities handicap our social progress. It is unfortunate that they persist despite social reform and legal measures that have at times been taken, for example, in respect of untouchability.

What is of particular significance is the association of social diversities with economic differentiation within the society. In this connection, we have given even constitutional recognition to Scheduled Castes and Scheduled Tribes to help them overcome the deep-rooted historical forces subjecting them to economic and social deprivation. The Scheduled Castes accounted for 14.6 per cent of the total population in 1971 and the Scheduled Tribes 6.9 per cent. Both these segments of the population are not uniformly distributed among the States. In Eastern India, the Scheduled Castes form very low proportions. The range of variation of this proportion among major States extends from 6.1 per cent in Assam and 6.8 per cent in Gujarat to as high as 24.7 per cent in Punjab. About the Scheduled Tribes, they are not represented in Haryana, Jammu & Kashmir and Punjab. Their proportion is sizable in Assam, Gujarat, Madhya Pradesh, Manipur, Orissa and Tripura, while in Meghalaya and Nagaland, their preponderance is very great for obvious reasons.

Literacy

One of the most pertinent internal differentiations of the population relates to the level of literacy and education. According to the 1971 Census barely 29.5 per cent of the population was literate. If we exclude the age group 0-4 from the total population, the literacy rate moves upto 33.8 per cent. This rate was 27 per cent for rural and about

60 percent for the urban population. The sex differential is even more striking, the male literacy rate being 45 per cent and the female, only 21 per cent. The educational levels of the literate population too present a dismal picture. In rural India, males with education upto and above the matriculation level formed barely 3 per cent of total males, while in urban areas the proportion was about 16 per cent. The corresponding proportions for females were 0.6 per cent in rural areas and about 7 per cent in urban areas.

Economy

Finally, we may refer to economic performance of the population. The proportion of workers in the total population was 32.9 in 1971. For rural population, it was about 34 per cent and for the urban it was 29 per cent. The proportion of males classified as workers was 53 per cent in the rural and 49 per cent in the urban population, while the corresponding figures for females were 13 and 7 per cent in rural and urban areas respectively. These census participation rates may not fully reflect the existing situation. There is probably a certain amount of undercounting of women as workers, which may be due to the very process of census enumeration.

An interesting feature of employment related to educational level is that a much smaller proportion of educated females are reported to be working as compared to the corresponding proportion for the educated males. The activity rate for females with matriculation or higher secondary level of education is only 13 per cent as against the corresponding proportion of 64 per cent for males. In the case of those with a post-graduate degree, other than technical degree, the activity rate is 43 per cent for females and 85 per cent for males. It is only in respect of those with technical education, particularly teaching and the medical profession that the female activity rate comes closer to the corresponding rates for the males. From this, it would appear that not only is the educational level for females comparatively much lower but also that educated females do not enjoy the same opportunities of employment as their male counterpart.

A very disquieting feature of the employment situation is the stagnation of its industry structure. While 71.8 per cent of the working force was employed in the primary sector in 1901, the corresponding proportion in 1971 was 72.6 percent.

Between these two dates, the proportion of employment claimed by the secondary sector was reduced from 12.6 per cent to 10.7 per cent, while that claimed by tertiary sector increased from 15.6 to 16.7 per cent. As of today, within the secondary sector, non-household industry accounts for 5.9 per cent of the working force, the household industry for 3.5 per cent, and construction for 1.2 per cent. The corresponding distribution of gross national product shows that the share of the secondary sector was 22.4 per cent that of tertiary sector was 33.6 per cent, while that of the primary sector was only 44 per cent. This serves to indicate how unfavorable is the income generating capacity of the primary sector in which the bulk of the working force is engaged.

Alternatively, we may consider the occupational distribution of workers. This indicates that unskilled workers, whether in the secondary or in the tertiary sector, form a very large section of the working force. According to the 1971 data, 44.2 per cent are classified as labourers, production process and related workers, transport equipment operators; 14.0 per cent, as sales workers; and 7.7 per cent, as farmers, fishermen, loggers, planters and related workers. While the census figures fail to give a precise idea of the efficiency with which the bulk of the working force is carrying on their productive activity, they are sufficient to suggest that a very large proportion of the working force is subsisting on marginal activities in the informal' sector.

This overview of the present demographic situation does not reveal any single aspect which we might consider to be satisfactory. The size of population is unduly large; its age structure rather burdensome; the structure is also indicative of the process of rapid population growth we have still to endure; mortality has been lowered but a great deal remains to be done in order to successfully reduce infant and childhood mortality; fertility is still in the stage of incipient decline; urban population is growing at a comparatively rapid rate, despite the fact that overall incidence of internal migration is not significantly large; within the urban sector the agglomerations have greatly expanded and are continuing to do so; there are several divisive factors which compromise the success of development effort; the educational level is extremely low and there is in this respect a comparatively poorer showing by the female population; the activity rates are low, and the structure of employment has not

Grown out of its traditional stagnation. In other words, we have a very large population steeped in social malaise and incapable by itself of improving the level of its economic performance.

It is evident that population problem is not unidimensional. We have drawn attention above to some of its more disquieting features. It is, however, not possible to wish away any of these features. That they are mutually interrelated too is evident. Their alleviation is a process in time and can only be attempted by seeking to modify the dynamic components of the process of population change, which, as noted earlier, include fertility, mortality, migration, and social mobility. In approaching this problem of modifying the trends of these components, law may play its due role in so far as it is possible to identify the determinants of these trends for appropriate action. It is obvious that mortality reduction will help the process of growth and will also further make the structure of the population more unmanageable; that reduction in fertility will contain growth and favorably modify the structure; that the monitoring of migration trends may help to prevent exacerbation of the problems of over-urbanization as well as of social tension and political unrest; and that increased social mobility will help the process of adaptation of population to its environment.

The question, however, is how to devise a strategy for an integrated approach to the question of ridding the process of population change of its dysfunctional elements. When the problem of growth became salient, we did embark upon a family planning programme and also gave it the support of legislative measures like the fixing of the minimum age of marriage and the medical termination of pregnancy. Our experience of this endeavour to reduce fertility, however, has not been as successful as was anticipated. This could have been due to the resistance generated by the sticky determinants of the fertility level which are embedded in our social structure and cultural milieu. It is therefore, necessary, for defining legislative options, that we direct more pointed attention to the determinants of the dynamics of population change. Accordingly, we will briefly indicate these determinants without any explanatory padding for the time being.

Dynamics of Population Change

To take up mortality first, its level is the function of environmental conditions, living standards and social organization. Social control of mortality has concentrated mainly on the delivery of public health and medical care. Even here the environmental factors have suffered neglect. With the progress of industrialization, there arises the danger of ecological deterioration particularly when the scope for shifting private costs on to the society is not successfully closed by legislative intervention. Apart from this, the conventional legal or administrative action is here limited to such things as food adulteration and certification of quality of market supplies.

The main crux of the remaining problem in the field of mortality relates to infant and childhood mortality. The commonly identified determinants of high infant and childhood mortality are maternal care, including nutrition during pregnancy, nutrition and care during infancy and childhood, clean water supply and sanitation, exposure to other environmental factors, and low level of maternal literacy and education. A particularly disquieting feature is the prevalence of preference for the male sex. This has the undesirable effect for female infants, who despite their better biological potential, are lost due to inadvertent but socio-psycho-logically based neglect. Infant mortality is considered to be a good indicator of social conditions and it is to the social and cultural milieu that attention needs to be directed for improving the situation, apart from whatever support that the government may provide in the form of maternal and child care services. It is possible that the solution of the question of improving the social situation in this regard may benefit from measures which can be taken under the aegis of social laws.

The determination of fertility is much more complex. Ultimately, the level of fertility is the function of environment in which the process of family formation occurs. This environment influences the level of mortality and generates through social organization family size norms which are consistent with the level of mortality. It is in conformity with these family size norms that marriages are arranged and fertility behavior within marriage is fashioned. Social control that can speedily influence the determinants of the

Mortality is rendered much more difficult in the case of fertility precisely for the reason that the latter phenomenon is greatly diffused within the society and involves modification of motivation on the part of innumerable reproductive units with their own individual explicit or implicit social goals.

The main problem, thus, relates to behavioral change on the part of millions of people passing through their effective reproductive span. Motivation for smaller families has been found to be associated with such stratification variables as income, education, occupation, urban residence etc. Improvement in these factors is a time consuming process. It is probably for this reason that official intervention has taken the form of an administrative action which relies on the notion that the supply of modern contraception will promote its widespread effective use.

The failure of this kind of strategy could have been anticipated if, proper sociological approach, so very necessary in this field, had caught the imagination of the policy makers. It can even be said that the legislative measures that came into support the programme were greatly belated. This has meant that we have allowed the newer generations to be socialized in the same traditional ways which generate high fertility norms. As noted earlier, the determinants of fertility are integral elements of social organisation. Therefore, there is abundant scope for the role of law to play in relation to fertility change if, we subscribe to the view that law could be a pace-setter in the process of social change.

From the point of view of fertility change, the single most important pre-requisite is the upgrading of the role and status of women. There is convincing evidence that education of females, their participation in economic activity outside home and the improvement in their role in the. Decision making process within the family lead to reduced fertility. In this regard, it is necessary to carefully reconsider the significance of laws relating to family, marriage, inheritance, adoption and the like, which impinge on the status of women.

About migration, we have already noted that its overall incidence is not significantly large. It is possible, however, that uneven population growth in conjunction with

the uneven spread of the development effort may create conditions promoting internal migration on a significant scale. Migration too is a motivational behavior on the part of the concerned individuals. In a poor society, the major content of this motivation is economic. It is, therefore, necessary to attempt to even out the opportunities for employment and earnings in so far as economic rationale involved in the location of, say, industrial activity, is so permissive. The question really is one of matching the pattern of the geographical distribution of economic activity and of economic growth to the pattern of geographical distribution of population.

In the area of migration, the rural-urban stream has received some attention. The attempt often has been to discourage inflow of migrants into an urban agglomeration by legal and administrative measures designed for implementation of the master plans. There is no evidence of any great measure of success in this matter. Master plans may be alright for individual cities but unless they form part of an effective general settlement policy based on a national land use plan, they will encounter difficulties of implementation.

About urban ward migration, its positive aspects should not be ignored. Motivation for migration implying a rational economic choice is, in fact, likely to promote rational approaches to fertility behavior, as well as, to changes in behavior patterns favorable to reduction of mortality. There is a good enough case, therefore, for promoting spatial mobility as a part of the modernization process, but this should not lead to further aggravation of already acute problems faced in unwieldy agglomerations. Probably, an urbanization policy could form a part of the overall settlement policy. Such an urbanization policy should seek to work out a pattern of settlements which is squarely based on functional inter-relationships, obtaining within a defined region, between settlements falling in different size classes.

Finally, the larger question of social mobility should receive increasing attention from the development policy. The lack of social mobility is the result of the persisting anachronistic features of the traditional static socio-economic structure, which are known to resist process of modernisation. Our social and cultural inheritance has shown

Considerable resilience in the face of official programmes related to services of health, education and social welfare. While inequitable distribution of assets prevents economic mobility, the entrenched caste-based social structure is inimical to social mobility. This subject is large and quite so fundamental to the process of development that we need not labour it further in the present context. What we must, however, emphasize is that the scope for social mobility should be maximised through constitutional, legal and administrative measures; and* that to the extent to which we do so, the task of moderating the force of fertility will be rendered easier.

REFERENCES

1. COHEN, LEE AND STEPHEN (1976) *Law and Development Classification Plan*. The Fletcher School of Law and Diplomacy, Tufts University, Medford, Massachusetts.

APPENDICES

TABLE 1

POPULATION SIZE, GROWTH AND PROJECTION AT NATIONAL LEVEL,
INDIA, 1901-1981

Year	Total population (In millions)	Rural population (in millions)	Urban population (in millions)	% increase during the preceding decade
1901	238.40	212.55	25.85	-
1911	252.09	226.15	25.94	5.7
1921	251.32	223.23	26.09	-0.3
1931	278.98	245.52	33.46	11.0
1941	318.66	274.51	44.15	14.2
1951	361.09	298.65	62.44	13.3
1961	439.24	360.30	78.94	21.5
1971	548.16	439.05	109.11	24.8
1981*	672.01	523.90	148.11	22.6*

*Estimated

TABLE 2
AVERAGE DECADAL BIRTH AND DEATH RATES, 1901-71
(PER 1000 POPULATION PER ANNUM)

Decade	Birth Rate	Death Rate
1901-11	49. 2	42.6
1911-21	48. 1	48.6
1921-31	46. 4	36.3
1931-41	45. 2	31.2
1941-51	39. 9	27.4
1951-61	41 .7	22.8
1961-71	41 .1	18.6

TABLE 3
BIRTH AND DEATH RATES PER MILE BASED ON A THREE-YEAR
MOVING AVERAGE, 1970-77

Year	Combined			Rural			Urban		
	BR	DR	NI	BR	DR	NI	BR	DR	NI
1970-72	37.2	16.1	21.1	38.7	17.6	21.1	30.2	10.1	20.1
1971-73	36.3	15.9	20.4	37.7	17.4	20.3	30.0	9.9	20.1
1972-74	35.3	15.7	19.6	36.7	17.3	19.4	29.4	9.7	19.7
1973-75	34.8	15.3	19.5	36.2	16.8	19.4	28.6	9.7	18.9
1974-76	34.4	15.0	19.4	36.1	16.5	19.6	28.4	9.7	18.7
1975-77	34.2	15.2	19.0	35.6	16.6	19.0	28.5	9.7	18.8

BR=Births Rate DR=Death Rate NI=Natural Increase

TABLE 4

SEX-RATIO, INDIA, 1901-1971

Year	TOTAL	Rural urban	
		Females per 1000 males	
1901	972	979	910
1911	964	975	872
1921	955	970	846
1931	950	966	838
1941	945	965	831
1951	946	965	860
1961	941	963	845
1971	930	949	858

TABLE 5
AGE STRUCTURE, INDIA, 1961 AND 1971

	(Percentages)	
	1961	1971
0-9	29.9	30.3
10-14	11.2	11.9
15-19	8.2	9.8
20-24	8.5	8.4
25-29	8.3	7.4
30-34	7.0	6.5
35-39	5.8	5.7
40-44	5.2	4.9
45-49	4.1	4.1
50-54	3.9	3.2
55-59	2.2	2.6
60-64	2.6	2.0
65+	3.1	3.2
All ages	100.0	100.0

TABLE 6
PERCENTAGE DISTRIBUTION OF POPULATION AGED 10 YEARS AND ABOVE
BY MARITAL STATUS: 1961 AND 1971

Marital Status	Year	Rural		Urban		Total	
		Males	Females	Males	Females	Males	Females
Unmarried	1961	31.9	15.8	39.5	24.2	33.4	17.2
	1971	35.1	20.2	43.0	29.2	36.8	22.0
Married	1961	61.8	67.5	56.4	61.1	60.7	66.5
	1971	59.9	66.3	53.8	59.3	58.5	64.9
Widowed	1961	6.6	15.8	3.7	14.0	5.2	15.5
	1971	4.6	12.9	2.7	11.0	4.2	12.5
Divorced/Separated	1961	0.6	0.8	0.3	0.6	0.6	0.7
	1971	0.3	0.5	0.2	0.4	0.3	0.5
Unspecified Status	1961	0.1	0.1	0.1	0.1	0.1	0.1
	1971	0.1	0.1	0.3	0.1	0.2	0.1

TABLE 7
TOTAL, RURAL AND URBAN POPULATION OF INDIA, 1901-71
(In millions)

Year	Total	Rural	Urban	% Urban
1901	238.40	212.55	25.85	10.8
1911	252.09	226.15	25.94	10.3
1921	251.32	223.23	28.09	11.2
1931	278.98	245.52	33.46	12.0
1941	318.66	274.51	44.15	13.8
1951	361.09	298.65	62.44	17.3
1961	439.24	360.30	78.94	18.0
1971	548.16	439.05	109.11	19.9

TABLE 8
PER CENT DISTRIBUTION OF POPULATION ACCORDING TO SIZE CLASS
OF SETTLEMENTS, INDIA, 1961 AND 1971

Size class of settlements	1961	1971	Difference In percent Points	% Variation
-200	4.06	2.79	-1.28	-14.4
200-499	13.13	10.34	-2.79	-1.8
500-999	19.11	17.24	-2.87	12.5
1,000-1,999	20.39	20.64	+0.25	26.3
2,000-4,999	17.66	19.23	+2.57	35.9
5,000-9,999	6.52	7.10	+0.58	35.7
10,000-19,999	5.37	6.62	+1.25	53.9
20,000-49,999	3.59	3.64	+0.05	26.7
50,000-99,999	2.17	2.68	+0.51	54.4
100,000-499,999	4.02	4.83	+0.81	50.1
500,000-999,999	0.74	1.12	+0.38	88.5
1,000,000+	3.24	3.79	+0.55	46.0

TABLE 9

PER CENT URBAN POPULATION IN DIFFERENT SIZE CLASSES OF Towns

Year	Classes					
	I	II	III	IV	V	VI
	22.9	11.8	16.5	22.1	20.4	6.3
1901	24.2	10.9	17.7	20.5	19.8	7.0
1911	25.3	12.4	16.9	18.9	19.0	7.4
1921	27.4	12.0	18.8	19.0	17.3	5.6
1931	35.4	11.8	17.7	16.3	15.4	3.5
1941	41.8	11.1	16.7	14.0	13.2	3.2
1951	48.4	11.9	18.5	13.0	7.2	1.0
1961	55.8	11.4	16.3	11.3	4.7	0.5
1971						

TABLE 10

VOLUME OF MIGRANT POPULATION AND SEX RATIO BY TYPES OF MOVEMENTS, INDIA, 1961 AND 1971 (POPULATION IN MILLIONS)

Migration streams	1961			1971		
	Males	Females	Sex Ratio	Males	Females	Sex Ratio
Rural to Rural	23.5	75.6	3,216	25.3	87.7	3,459
Rural to Urban	10.6	9.0	851	12.4	11.3	914
Urban to Rural	1.9	2.9	1,556	2.9	5.0	1,721
Urban to Urban	5.4	5.4	1,000	6.8	7.2	1,058
Unclassified	0.4	0.6	1,500	0.5	0.1	200
Total	41.8	93.5	2,237	47.9	112.2	2,342

TABLE 11

PERCENTAGE OF WORKERS ENGAGED IN DIFFERENT ACTIVITIES, 1971

	Rural India			Urban India			All India		
	T	M	F	T	M	F	T	M	F
1. Cultivators	51.6	56.0	33.0	5.1	5.2	4.2	43.4	46.2	29.6
2. Agricultural Labourers	30.7	25.3	54.3	6.0	4.7	17.5	26.3	21.3	50.5
3. Live stock, forestry, fishing, hunting, plantations, and orchards and allied Activities	2.5	2.2	2.5	1.7	1.5	2.0	2.4	2.3	2.5
4. Mining and Quarrying	0.4	0.4	0.3	1.0	1.0	1.0	0.5	0.5	0.4
5. Manufacturing, processing, servicing and repairing household Industries)	3.2	3.1	3.5	5.6	4.4	10.0	3.5	3.4	4.2
6. Manufacturing, processing, servicing and repairing other than household industries)	2.3	2.5	1.5	22.9	24.0	12.9	5.9	6.6	2.8
7. Construction	0.8	0.8	0.4	3.5	3.5	2.9	1.2	1.3	0.6
8. Trade and Commerce	2.4	2.8	1.0	20.0	21.5	8.2	5.6	6.4	1.8
9. Transport, Storage and Communication	0.8	0.9	0.1	9.9	10.8	3.2	2.5	2.9	0.5
10. Other services	5.3	5.7	3.4	24.9	23.4	38.1	8.7	9.1	7.1
11. Total workers	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

T = Total; M * Males; F = Females

TABLE 12

DISTRIBUTIONS OF PERSONS BY RELIGION, 1971

Religion	Total	Rural	Urban
Hindus	82.72	84.35	76.24
Muslims	11.21	9.95	16.21
Christians	2.60	2.43	3.26
Sikhs	1.89	1.91	1.82
Buddhists	0.70	0.65	0.88
Jains	0.47	0.24	1.43
Other religions	0.40	0.46	0.15
Religion not stated	0.01	0.01	0.01
	100.00	100.00	100.00

TABLE 13

PER CENT DISTRIBUTION OF POPULATION BY LANGUAGES SPECIFIED IN SCHEDULE VIII OF THE CONSTITUTION OF INDIA, 1971

Language	Per cent Population
1. Assamese	1.63
2. Bengali	8.17
3. Gujarati	4.72
4. Hindi	29.65
5. Kannada	3.96
6. Kashmiri	0.44
7. Malayalam	4.00
8. Marathi	7.71
9. Oriya	3.62
10. Punjabi	3.00
11. Sanskrit	-
12. Sindhi	0.31
13. Tamil	6.87
14. Telugu	8.16
15. Urdu	5.22

Table 14

TABLE 14 SELECTED

DEMOGRAPHIC DATA FOR THE STATES, 1971

States and Union Territories	Population 1971	Density (per sq.km.) 1971	Per cent distribution of population 1971	Growth Rate 1961-71	Components of Growth (1975-77)* SRS:			Prop. urban
					BR	DR	NI	
0 INDIA	548,159	166.7	100.00	24.80	34.2	15.2	19.0	19.9
1 Andhra Pradesh	43,502	167.2	7.94	20.90	33.6	14.7	18.9	19.3
2 Assam	14,957	150.2	2.73	34.71	31.1	14.9	16.2	8.9
3 Bihar	56,353	324.1	10.29	21.33	NA	NA	NA	10.0
4 Gujarat	26,697	136.2	4.87	29.39	36.8	15.2	21.6	28.1
5 Haryana	10,036	227.0	1.83	32.23	36.3	13.0	23.3	17.7
6 Himachal Pradesh	3,460	62.2	0.63	23.04	32.5	12.8	19.7	7.0
7 Jammu and Kashmir	4,616	20.8	0.84	29.65	31.9	11.8	20.1	18.6
8 Kerala	21,347	594.3	3.88	26.29	27.1	7.9	19.2	16.2
9 Madhya Pradesh	41,654	94.0	7.60	28.67	39.5	17.6	21.9	16.3
10 Maharashtra	50,412	163.8	9.20	27.45	28.4	11.8	16.6	31.2
11 Manipur	1,072	48.0	0.20	37.53	25.6	6.3	19.3	13.2
12 Meghalaya	1,011	45.0	0.18	31.50	NA	NA	NA	14.6
13 Mysore (Karnataka)	29,299	152.8	5.34	24.22	27.8	11.3	16.5	24.3
14 Nagaland	516	31.2	0.00	39.88	NA	NA	NA	10.0
15 Orissa	21,944	140.9	4.00	25.05	30.1	15.3	14.8	8.4
16 Punjab	13,551	269.1	2.47	21.70	31.5	10.9	20.6	23.7
17 Rajasthan	25,765	75.3	4.70	27.83	34.6	15.1	19.5	17.6
18 Sikkim	209	28.7	0.04	29.38	NA	NA	NA	9.4
19 Tamil Nadu	41,199	316.7	7.52	22.30	30.4	14.4	16.0	30.3
20 Tripura	1,556	148.5	0.28	36.28	30.7	9.7	21.0	10.4
21 Uttar Pradesh	88,341	300.1	16.11	19.78	41.2	20.7	20.5	14.0
22 West Bengal	44,312	504.4	8.08	26.87	NA	NA	NA	24.8
Union Territories								
1 Andaman & Nicobar Islands	115	13.9	0.02	81.17	37.8	9.0	28.8	22.8
2 Arunachal Pradesh	467	5.6	0.09	38.91	NA	NA	NA	3.7
3 Chandigarh	257	2,256.6	0.05	114.59	32.4	4.5	27.9	90.5
4 Dadra & Nagar Haveli	74	151.1	0.01	27.96	NA	NA	NA	0.0
5 Delhi	4,065	2,737.8	0.74	52.93	27.7	8.0	19.7	89.7
6 Goa, Daman & Diu	857	225.0	0.16	36.88	22.6	9.4	13.2	26.4
7 Laccadive, Minicoy & Amindivi Islands	31	994.1	0.01	31.95	NA	NA	NA	-
8 Pondicherry	471	982.7	0.09	27.81	29.5	10.6	18.9	42.0

*Based on a three year moving average. NA: Not Available

(Contd...)

	States and Union Territories	Sex Ratio 1971	Age structure				Per cent Literate	Prop. Scheduled Castes	Prop. Scheduled Tribes
			0-14	15-34	35-59	60+			
0	INDIA	930	42.2	32.1	20.5	5.2	29.5	14.60	6.94
1	Andhra Pradesh	977	41.6	32.0	21.4	5.0	24.6	13.27	3.81
2	Assam*	897	46.1	32.2	17.8	3.9	28.7	6.10	12.84
3	Bihar	954	41.8	31.8	21.1	5.3	19.9	14.11	8.75
4	Gujarat	934	42.7	32.8	19.8	4.9	35.8	6.84	13.99
5	Haryana	867	46.3	31.2	17.9	4.6	26.9	18.89	-
6	Himachal Pradesh	958	40.9	31.6	20.8	6.7	32.0	22.24	4.09
7	Jammu and Kashmir	878	43.1	33.4	19.1	4.4	18.6	8.26	-
8	Kerala	1,016	40.5	33.8	20.1	5.6	60.4	8.30	1.26
9	Madhya Pradesh *	941	43.8	31.8	19.8	4.6	22.1	13.09	20.14
10	Maharashtra	930	41.5	32.2	21.2	5.1	39.2	6.00	5.86
11	Manipur	980	44.9	30.9	18.6	5.6	32.9	1.53	31.18
12	Meghalaya	942	43.1	33.1	19.3	4.5	29.5	0.38	80.48
13	Mysore (Karnataka)	957	42.3	32.1	20.2	5.7	31.5	13.14	0.79
14	Nagaland	871	38.0	34.7	20.7	6.6	27.4	-	88.61
15	Orissa	988	41.4	32.6	21.0	5.0	26.2	15.09	23.11
16	Punjab	865	41.0	33.3	19.5	6.2	33.7	24.71	-
17	Rajasthan	911	44.3	32.1	19.4	4.2	19.1	15.82	12.13
18	Sikkim	863	39.6	36.6	20.5	3.3	-	-	-
19	Tamil Nadu	978	39.0	33.5	22.7	4.8	39.5	17.76	0.76
20	Tripura	943	42.4	31.2	20.0	6.4	31.0	12.39	28.95
21	uttar Pradesh	879	41.9	31.1	21.0	6.0	21.8	21.00	0.22
22	West Bengal Union Territories	891	43.5	32.4	19.6	4.5	33.2	19.90	5.72
1	Andaman & Nicobar Islands	644	38.2	39.6	19.7	2.5	43.6	-	15.72
2	Arunachal Pradesh	861	38.6	34.0	22.9	4.5	11.3	0.07	79.02
3	Chandigarh	749	35.5	42.0	19.0	3.5	61.6	11.30	-
4	Dadra & Nagar Haveli	1,007	47.2	29.4	20.1	3.5	15.0	1.80	86.89
5	Delhi	801	38.8	36.1	20.6	4.5	56.6	15.64	-
6	Goa, Daman & Diu	989	38.8	34.4	21.0	5.9	44.8	1.93	0.89
7	Laccadive, Minicoy and Amindivi Islands	978	41.2	33.3	20.4	5.1	43.7	-	92.86
8	Pondicherry	989	40.3	32.6	21.8	5.3	46.0	15.46	-

*Includes Union Territory of Mizoram

LAW AND POPULATION CONTROL IN MAHARASHTRA

S. D. Balsara*

ABSTRACT

In this paper, the author after recognising, that there is an eternal controversy about the place of law and public opinion in social reform, states that it is the considered opinion of those who are entrusted with the family planning programme that the progress achieved by voluntary methods as well as by incentives offered by the Government is wiped out by the lack of restraint on the part of the population as a whole and that the only way to achieve the objective within a reasonable time is by compulsion of law.

The author discusses the provisions of the Maharashtra Family (Restriction on size) Bill 1976, which was passed by the Maharashtra Legislative Assembly as well as the Legislative Council in July 1976 and forwarded to the President of India for his assent. After an elaborate discussion, the author concludes that it would be quite apparent that regulations in the form of incentives and disincentives are not going to solve this stupendous problem of population explosion. The only way to solve this problem is by legislation and by enforcing compulsory sterilisation.

There is an eternal controversy as regards the place of law and public opinion in social reform. Though everybody is agreed on the most urgent need of population control as a means for economic and social welfare and improvement of the standard of living of the individual and for economic development of the country as a whole, there is a sharp

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Difference of opinion as to whether this objective of population control should be achieved by cultivation of public opinion or by compulsion of law.

It is the considered opinion of those who are entrusted with the family planning programme that the progress achieved by voluntary methods, as well as by incentives offered by the Government, is wiped out by the lack of restraint on the part of the population as a whole and that the only way to achieve the objective within a reasonable time is by compulsion of law. This aspect has been discussed with reference to the State of Maharashtra in this paper.

Maharashtra Family (Restriction on size) Bill 1976

This bill was passed by the Legislative Assembly, as well as, the Legislative Council in July 1976 and forwarded to the President of India for his assent. The assent has not so far been received.

The persons who would come within the purview of the Bill are called eligible persons. The definition of an eligible person is: 'Eligible person' means a person residing in the State of Maharashtra who at any time has three children, or who has more than three children on the appointed date, and such person if, a male has not completed the age of 55, and if, a female, has not completed the age of 45, and includes a person who having either all three male, or all three female, children, has a fourth child. For the purposes of this clause, 'children' means the total number of living children whether born in the State or without it, which an eligible person alone has, or which he and his spouse have together; and includes children of an unwed mother and children given in adoption, but does not include children taken in adoption (Section 2(6)).

Under Section A of the Bill, it is the responsibility of every person, after the appointed date, to restrict the size of the family to not more than three and in the case of a person having either three male or all three female children to restrict the size of the family to not more than four children and of every person, who on that date has three or more than three children to ensure that such number of children is not exceeded, and for that purpose, every eligible person shall get himself sterilised at an approved institute.

The Director shall serve on every eligible person a notice to the effect that he is an eligible person and is required to be sterilised. Thereupon the person has to present himself for registration for sterilisation at an approved institution not later than 90 days from the appointed date.

Failure of an eligible person to get himself sterilised would involve imprisonment for a period which may extend to two years, and liability to be compulsorily sterilised. The imprisonment shall not ordinarily be less than six months. However, when an eligible person has been sterilised, the Government may remit the unexpired period of the imprisonment. All offences punishable under the Bill are made cognisable.

Under Section 14 an obligation has been imposed on persons having three children to make a declaration of living children.

The primary responsibility is of the male eligible person to get himself sterilised first. The responsibility of the female eligible person only arises in the event of her spouse being exempted from sterilisation (Section 4(5)).

The Board constituted under the Bill shall exempt an eligible person from being sterilised, if it is satisfied:

- a. that sterilisation may constitute danger to the life of the applicant, or
- b. that on the appointed date, the last child of the applicant is five years, or more than five years old, and the applicant duly, gives an undertaking in writing that he will restrict the size of his family irrespective of the number of wives to three or more than three children which he had on that date, and in case pregnancy occurs after the birth of such last child in any such family, to report the pregnancy to the Board not later than sixty days from the date of the pregnancy, and get the pregnancy terminated according to the provisions of the Medical Termination of Pregnancy Act, 1971, and likewise further undertake to get himself sterilised within sixty days from the date of the undertaking, or

- c. that the spouse or all the spouses of the applicant is or are dead, and the applicant has not married again, or
- d. that the applicant or his spouse is, on medical evidence, incapable of reproduction.

An eligible person who has been sterilised is prohibited against the restoration of capacity to procreate, except with the permission in writing of the Board. The permission shall not be granted, except (a) where all the living children have died or (b) from among the living children, the entire male or all the female children have died.

In the opinion of the author, the said Bill is very rational in its approach and after cultivating public opinion, should be enacted into law. One point that needs to be specially emphasised in cultivating public opinion is that sterilisation does not lead to impotency at all and that sterilisation is a reversible process.

Incentives and Disincentives offered by Maharashtra Government under Family Welfare Programme

The family welfare programme in Maharashtra is best administered as appears from statistics. The rate of cumulative performance per 1000 population, so far as sterilisation is concerned, is 82. The nearest rival is Tamil Nadu with 66, while the national average is only 46. Since 1957, upto October 1979, sterilisations done by vasectomy are 29, 66,102, while the sterilisation by tubectomy amount, to 18, 44,980. The IUD insertion total is 4, 55,960 in Maharashtra. The State has already won awards for best performance at all India level. It may, therefore, be worthwhile to consider the incentive and disincentive orders issued under the Family Welfare Programme of the Maharashtra State.

Special six days casual leave is given to the Government servants undergoing vasectomy sterilisation operation and fourteen days special casual leave is granted to female Government servants who undergo tubectomy operation. Special casual leave of four days is also given to a male Government servant whose wife undergoes tubectomy operation after the delivery. Maternity leave for eight weeks is granted for abortion done under Medical Termination of Pregnancy Act, 1971.

Besides offering special rotating shields, and trophies to institutions like Zila Parishads, Municipal Councils, Village Panchayats, the Maharashtra Government has also introduced a scheme of cash prizes of Rs. 2 lakhs to the Zila Parishads which achieve the target set for the year. Again the Maharashtra Government has introduced a scheme of cash award of Rs.10, 000 to the best village Panchayat (in each of the 25 Zila Parishads in the State) which has recorded the highest cumulative performance in the coverage of eligible couples by all methods of family planning.

The most important disincentive is the withdrawal of Maternity leave to non-industrial female State Government servants, who have three or more than three living children with effect from 15th August, 1968. Again, all educational concessions and benefits are withdrawn as regards those who do not restrict their family size to three living children or to their present size, if they have more than three living children as on 15th August, 1968. Further, it is provided that full economic rent will be charged to those Government servants, who have more than three children after 29th July, 1975. Such Government servants will also not be entitled to the concessional rent of 10 per cent. The concession of free medical treatment to freedom fighters and their family is withdrawn, if they do not restrict the size of their family to three living children or to present size, if they have more than three living children on 15th August, 1968.

The Maharashtra Government has spent Rs.888 lakhs during 1978-79 and Rs.1, 217 lakhs during 1979-80 on Family Welfare Programme. Out of these, in 1978-79 a sum of rupees one crore seventy three lakhs were given as incentives to the acceptors of sterilisation or IUD, motivators and others. In 1979-80, the amount allotted is rupees four crores fifty lakhs. The current year target for sterilisation is 2.46 lakh persons. Up to December end 2.26 lakhs have already been sterilised. Out of the amount spent by the Maharashtra Government, a large part is reimbursed by the Central Government.

State of Gujarat

It may be of interest to note the details of the incentives given by the Gujarat State also.

The State of Gujarat offers the following incentives:

1. Rs.20 as additional incentive to sterilisation acceptor and Rs.10 to the vasectomy motivator.
2. Payment from local bodies of a further Rs.10 to the sterilisation acceptor.
3. Additional incentive of Rs.300 for construction of a hut to the acceptor of sterilisation not having his own land.
4. Rs.50 cash award for purchase of clothes to farmers and agricultural labourers who accept sterilisation.
5. Additional Rs.3 cash incentive to motivator (making a total of Rs.16) for motivating each vasectomy case.
6. Factories having 500 and more workers are given cash incentive of Rs.15,000 and Rs.10,000, respectively for achieving 100 per cent and 75 per cent sterilisation target of the total workers.
7. Additional sum of Rs.3 and Rs.8 to a surgeon for performing vasectomy and tubectomy operation, respectively. Thus, the surgeon will get in all Rs.7 for vasectomy and Rs.15 for tubectomy operation.

Medical Termination of Pregnancy (MTP) Act, 1971

Among the voluntary measures for population control, the pride of place may be given to the Medical Termination of Pregnancy Act, 1971. Under Section 312 of the Indian Penal Code, causing miscarriage, whether with or without the consent of the woman, is a serious crime. Even the woman is made guilty under Section 312. The only excuse is when the miscarriage is caused in good faith for the purpose of saving the life of the woman. However, now the Medical Termination of Pregnancy Act of 1971 permits termination on the ground that:

1. The continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

2. There is a substantial risk that if, the child was born; it would suffer from such physical or mental abnormalities as to be seriously handicapped.

It is provided that where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman, further, 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.

In determining whether the continuance of the pregnancy would involve such risk of injury to health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

Quite a number of abortions now go on in the State of Maharashtra. From April, 1972 upto September, 1979 1,68,884 abortions have been caused under the MTP Act. It appears that even this figure is not realistic and many more have taken place, but because the parties want secrecy in this matter, even the centres which are recognized by the Government are not inclined to give access to their reports. In Maharashtra about 1,200 doctors have been trained in medical termination of pregnancy technique since April, 1972.

In addition to above, law relating to Rape under Section 375 of the Indian Penal Code and Prostitution under Article 23 of Indian Constitution are in force.

Conclusion

From the above discussion it would be quite apparent that regulations in the form of incentives and disincentives are not going to solve this stupendous problem of population explosion. The only way to solve this problem is by legislation and by enforcing compulsory sterilisation. Opposition to this measure, prejudice and ignorance has to be removed by suitable propaganda. As stated earlier, many persons equate sterilisation with impotency. If this and other prejudices are removed, the legislation for compulsory

sterilisation will be accepted and even wholeheartedly adopted by the public realising the enormous benefit it would confer on the nation, and the individual himself. There would be immense administrative difficulties in enforcing compulsory sterilisation and that if, such law was to be passed, a competent source of Maharashtra Government confided me to say that they would first proceed only against couples having five or more children. It is, therefore, suggested that the law itself may provide for gradual progress in the matter, first laying down compulsory sterilisation of persons with more than six children and in the course of about five years coming down on persons with three or four children. By a little imagination and proper cultivation of public opinion, we can still solve this problem, a root cause of most other problems in India.

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**LAW AS AN INSTRUMENT OF POPULATION CONTROL
IN INDIA: A SOCIOLOGIST'S VIEWPOINT**

Mahendra K. Premi*

ABSTRACT

Besides the impact of Medical Termination of Pregnancy (MSP) Act, 1972, the author also discusses the pros and cons of the following legislative measures from the viewpoint of their impact on the reproductive behaviour of the people in this country:

- a. Child Marriage Restraint Act, 1929 and its amendments culminating in the present Act of 1978;
- B. Hindu Widow Remarriage Act, 1856;
- c. Legislation regarding compulsory elementary education for children in the age group 6-14; and
- d. Legislation and rules governing female employment in organised industry and legislation banning child labour.

However, he thinks that except the Medical Termination of Pregnancy Act and probably the Act raising the minimum age at marriage for boys and girls, there are no direct legal provisions in India affecting people's behavior towards reproduction, like eugenics law or compulsory sterilisation law, etc. Therefore, the author concludes that many statutes in India although they may help in controlling fertility in one way or the other, have not been implemented fully, partly because the legal procedure involved in their implementation is very cumbersome. Moreover, he feels that there is

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A cultural lag in any society. The legal truth is found to be different from social truth and customs are often found more powerful than statutes. Also, a large majority of the people do not become aware of various laws, rules and regulations, even though these may be beneficial to them simply because we do not have any system of publicising the laws.

India is the first country in the world which adopted a official programme for family planning and population control soon after independence and made it as an integral part its five year plans. However, the country did not have an specific regulations to directly influence the pattern an rate of population growth before the enactment of Medical Termination of Pregnancy Act, 1972. The country also did no have a properly formulated population policy up-till the statement of the Union Minister of Health and Family Planning on April 26, 1976, which made specific provisions of several kinds in order to influence the population growth in a big way.

The nation started with the clinical approach during the early phase of the programme. It opened a number of clinics and hoped that the people would take advantage of the facilities ties. This approach was modified in 1963 to the communities extension approach which aimed at bringing the concept birth control in family planning and health services neare home through an extension net-work of primary health centre and sub-centres in the rural areas, and hospitals and family welfare planning centres in the urban areas; and on changing the attitudes, norms, and values of the people. Socials workers and auxiliary nurse-midwives (ANMs) were appointed t carry out the motivational work. Later on, with the introduction of the IUCD in early 1965, and with the adoption o cafeteria approach, the programme got another tilt. I gained momentum in 1966 when a Department of Family Planning in the Ministry of Health and Family Planning was established to administer the programme. A further change in emphasis in the family planning programme came with target setting fc the use of different types of contraceptives and from 196 onward with the emphasis on sterilisations.

As a result of two evaluations of the national family planning programme by the United Nations and another two by the Programme Evaluation Organisation of the Planning

Commission, important changes were brought about in the programme to make it more responsive to the needs of the people. In April 1976, the country frames its first National Population Policy 1. The assumption behind this policy was that population explosion was an offshoot of poverty and had to be tackled as part of an overall design for better life. The policy statement made it clear at the same time that to wait for education and economic development to reach that level where drop in fertility was automatic would be Utopian. However, the events that followed the declaration of the National Population Policy in 1976 proved that harsh measures like compulsion and rigorous disincentives can do immense damage to family "planning 2.

The new Government that came into power at the Centre in March 1977 took stock of the family planning programme soon after and formulated a new population policy in June in the same year wherein, while retaining all the essential features of the 1976 policy statement, it was declared unequivocally that compulsion, coercion and pressures of all sorts must be ruled out from the family planning programme for all times to come. The Government also recognised the need for integrating family planning with health services and maternity and child health programme and renamed it into "family welfare" programme. The Government also passed the law for raising the minimum age at marriage of girls from 15 to 18 years and of boys to 21 years.

From the above, it can be seen that except the Medical Termination of Pregnancy (MTP) Act, 1972 and probably the act rising the minimum age at marriage of boys and girls, there are no direct legal provisions in India directing people's behavior towards reproduction like eugenics law or compulsory sterilization law, etc. We shall, therefore, try to see as to how far other legal provisions have influenced human behavior towards reproduction in India directly or indirectly.

As the legal statutes governing the life and working conditions of people in the country are too many and many of them affect human behavior towards reproduction in one way or the other, it will not be possible to cover all of them in the present paper. I, therefore, propose to choose only a few of these laws, which to my mind, seem to be more important and relevant in the context of population policies.

Besides the impact of MTP Act, I propose to discuss the *pros* and *cons* of the following legislative measures from the viewpoint of their impact on the reproductive behavior of the people in the country.

1. Child Marriage Restraint Act, 1929 and its amendments culminating in the present Act of 1978.
2. Hindu Widow Remarriage Act, 1856.
3. Legislation regarding compulsory elementary education for children in the age group 6-14.
4. Legislation and rules governing female employment in organised industry and legislation banning child labour.

Medical Termination of Pregnancy Act, 1972

When the Government of India framed the bill for Medical Termination of Pregnancy and the Lok Sabha and Rajya Sabha passed it for making it an Act, the intention of the Government was not to use it as a major technique of bringing down the birth rate' unlike the experience of Japan and several of the East European countries to provide a measure to protect the health of women especially when (1) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or an injury to her physical or mental health, or (2) there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.³ The explanatory notes provide two cases where continued pregnancy is assumed to constitute a grave injury to the mental health of the pregnant woman, namely (1) where a pregnancy is alleged by a pregnant woman to have been caused by rape; and (2) where the pregnancy occurs as a result of failure of any device used by a married woman or her husband for the purpose of limiting the number of children.

The Act permits the termination of pregnancy by doctors in a hospital or by a registered medical practitioner, under specified circumstances. It is believed by many researchers, social scientists, administrators and the politicians that the Indian law on abortions is in keeping with the culture of the country and the demographic needs of the nation.

On the other hand, it is alleged by some of the religious leaders and social workers that the MTP Act is a "Black Act" in two ways: (1) it destroys a life in the fetus which is immoral and unnatural; and (2) its implementation is likely to increase promiscuity and illegitimate pregnancies which can easily be terminated under the umbrella of this Act; however, a question can be raised here: Is it more immoral to restrict the complete development of the fetus and end it in the first trimester itself than to bring an extra life to this world whose survival during its very first year even the first month, is doubtful and even if it survives, the manner in which it can be brought up is not worth human living at any level of subsistence? From the societal point of view, to me, the second alternative seems to be much more immoral than the first.

As regards the second contention, it will be useful to have a look at the incidence of induced abortions in the country prior to the enactment of the KIP Act. Although no hard statistics are available in this regard, intelligent guesses are that roughly 10-15 per cent pregnancies terminate in induced abortions for various reasons, some of them would also relate to promiscuity and rape. Thus, provision of the abortion law to make scientific facility legally and easily available to avoid births of the unwanted children and saving women's life from the quacks should be regarded as a more desirable step. The only thing is that the government should take steps to provide this facility more easily even in remote towns and growth centres. In course of time, with its acceptability as a health measure by the masses, its scope can also be extended for using it as a birth control measure.

Child Marriage Restraint Act, 1929 and Its Amendments

The Child Marriage Restraint Act was passed by the Government of India in 1929 to eradicate the social evil of child marriages from the country. Under this Act the minimum age of marriage for the girls was fixed as 14 years and for boys 18 years. The minimum age at marriage of girls was raised to 15 years in 1949. However, it is a common knowledge that child marriages have continued to be performed even till today in vast tracts of India for both social and economic reasons. During the 1961-71 decade, the average age at marriage of girls was 17.2 years and in some of the States it was much below (e.g. Bihar 15.5 years, Madhya Pradesh 15.2 years, Rajasthan 15.4 years and Uttar Pradesh 15.6 years).

As the law with regard to raising the age at marriage has its demographic and social implications, it would be useful to know (a) as to how this law is correlated with reproductive behavior, and (b) even after fifty years of the enactment of Child Marriage Restraint Act, why it could not be effectively implemented and what will be the fate of the latest amendment of this Act which raises the minimum age of marriage of the girls to 18 and of boys 21?

As regards the first question, several researchers have discussed the demographic impact of rising the minimum age of marriage for girls. The Ministry of Health and Family Planning has some time back announced an expected long-term fall of 15 and 19 per cent due to rising the age at marriage to 18 and 20 years, respectively 4. The reduction in fertility estimated by other researchers is set out below:

<u>Author</u>	<u>Percentage reduction in birth rate</u>
S.N. Agarwala	30 during 25 years
Zachariah and Talwar	25 immediately; 8.21 in long-term
Goyal	30
Mukherji and Venkatachari	23
Chidambaram	15 or less ⁴

On the other hand certain researchers have expressed their doubt on this claim and are of the view that raising the average age at marriage may not really bring any reduction in birth rate since while there is a certain gap between the time of formal marriage and *gauna* ceremony if, a girls is married early, this gap is wiped out in late marriages. Secondly, while there is a certain amount of adolescent sterility in early marriage, with late marriage this also is not operative. Again, probably for the same reason, the interval between marriage and first birth is much shorter (in a sample of women attending Family Planning Training and Research Centre in Bombay with average age at marriage of 19.5 years, this interval was 13.6 months as against 37.9 months in a national sample of rural women (NSS Seventeenth Round)⁵. Moreover, raising the age at marriage

TABLE 1
STATEWISE PATTERN.OF AGE, AGE AT MARRIAGE AND BIRTH RATES, 1961-71

State	Age at marriage (Years)	Birth Rate (Per 1000)
INDIA	17.2	41.2
Andhra Pradesh	16.4	39.2
Assam	18.5	48.4 ^a
Bihar	15.5	41.9
Gujarat	18.3	41.6
Haryana	N.A.	44.4
Himachal Pradesh	17.5	37.6
Jammu and Kashmir	17.8	41.5
Karnataka	17.9	39.9
Kerala	20.9	37.5
Madhya Pradesh	15.2	46.6
Maharashtra	17.5	41.0
Orissa	17.2	41.3
Punjab	18.8 ^b	36.9
Rajasthan	15.4	42.7
Tamil Nadu	19.6	36.8
Uttar Pradesh	15.6	42.5
West Bengal	17.8	44.3

Notes: ^aExcludes Meghalaya.

Figures relate to erstwhile Punjab as it was prior to its bifurcation into Haryana and Punjab.

Further, if the minimum age at marriage in India goes upto 18 years, it would imply an average age of marriage of above 20 years because all girls will not be married immediately after crossing the prescribed mark and this will help in truncating greatly the births during 15-20 years of age as also in modifying the schedule of age specific fertility rate in such a way that the total fertility rate in the country will definitely come down by 25 per cent or more.

Also delayed marriages lead to a greater survival of the first few children which otherwise is a major risk with very young mothers.

Thus, biologically and demographically one finds that quite complex processes operate when the minimum age at marriage is increased but, it is believed, that the overall impact of the present law in this regard will be to bring down a substantial reduction in fertility (25 per cent or more) in the years to come.

The second question becomes more important from the societal viewpoint. Even after half a century of enactment of the Child Marriage Restraint Act, why have the people not! Accepted this social change and why do they continue to marry their children early? The answer to this question involves sociological, economic and legal considerations.

Taking the legal considerations first, one would say that the provisions of the law are quite complicated. The law does not take cognizance of the violation of the Act unless the matter is reported to the police. The parties who have entered into a contract of child marriage would obviously not report the event. It can only be a social worker who would normally report such an event. But, then, the onus of proving that it was a child marriage in violation of the Act falls on this person which in turn, becomes a difficult job because we do not have a proper system of birth registration. Moreover, since marriage is a holy union for the performance of religious duties and not a contract, the mere fact that a marriage was brought about during the minority of either party does not render the marriage invalid. Finally, if one picks up the statistics on the number of child marriage cases reported to the courts over a period of time in any area and the number of cases in which conviction has taken place for violation of the law, one gets

Thoroughly disappointed. It is for this reason that rarely a case goes to the court of law with respect to the violation of Child Marriage Restraint Act.

Commenting on the low age at marriage in India, Kumudini Dandekar has advanced the thesis that it is because of the abject poverty of the masses (40% of the rural and 50% of the urban households live below the subsistence level) that the first consideration for such households is to weed out sharers of food whenever possible or to dump the burden of feeding on somebody else by marrying their daughters early⁴. This thesis, however, has several weaknesses. For example, if the parents get rid of a daughter, they also get a daughter-in-law unless the son is asked to establish almost immediately a separate household and to take care of himself and his wife. Secondly, when the marriage of the girl takes place at a comparatively young age, the *gauna* does not take place simultaneously and the girl remains at her father's house for another couple of years or more.

Economic questions related with early marriages are of a different order. Firstly, the cost of marrying a younger daughter, especially if she is married along with her siblings, is very low or almost negligible. Secondly, according to the prevailing socio-cultural norms, particularly in northern India, parents generally avoid utilizing the earnings of their daughters but find no harm in utilizing the earnings of the daughters-in-law. In traditional peasant societies, particularly having large proportion of landless agricultural labourers, where both men and women must work to eke out a meager subsistence, the early marriage of the daughters comes as a handy tool.

Besides the above factors, there is also a cultural basis for early marriage of the daughters. According to religious scriptures, particularly *Manuscript*, a daughter should be married as soon as she crosses the age of puberty. Further, parents consider daughter as someone else's property and a debt on them of an earlier life. They feel it as their moral obligation to marry them well in their life time. When the life span is short, the parents consider it much more reasonable to marry their daughters just after puberty and get rid of this social obligation. It may be added here that in areas where the life span has improved, the rise in age at marriage of the girls is perceptible.

In the light of the above discussion, one can easily see as to why the Act has not succeeded during the past half a century and unless the society is mentally and socially prepared to a change its norms in this regard one may not find much possibility of success in rising the age at marriage in the near future. It may also be added that education (formal and non-formal) of the girls and their getting into wage employment can act as great catalytic agents for bringing about the desired social change.

Hindu Widow Remarriage Act, 1856 and Its Amendments

Although the Hindu Widow Remarriage Act was enacted in 1856 and was further stressed and amended in 1955 with the passing of the Hindu Widow Remarriage Act (Act 15 of 1955), the same has not been accepted socially. In India high caste Hindu widows are prohibited from remarriage because the Hindu religion eulogises ascetic virtues, and remarriage after widowhood is contrary to this ideal. Restrictions on the remarriage of widows were not imposed on the lower-caste Hindus as they were not required to lead a very virtuous and ascetic life. This position exists in substantially the same form even today, though it is not followed so rigidly. However, some sub-castes like Jats and Gujars among the Kshatriyas (warrior caste) and Aheers have a long history of widow remarriages. They appear to have allowed remarriages, including levirate widow marriages, on practical considerations 6.

It may be said here that nearly 15 per cent of the women in the reproductive age group of 15-45 do not generally reproduce long before they reach the end of their reproductive period. The mean age at widowhood in the country during 1951-61 has been estimated as 34.0 years of those women who get widowed by age 45.

From the demographic and population point of view, the widow remarriage may lead to a certain increase in fertility. As a matter of fact, in the first instance the impact of widowhood on fertility is associated with the proportion of women becoming widow prior to child bearing span or in the child bearing span and the mean age at which they become widow. If there are restrictions on widow remarriage, it implies that a woman, after becoming a widow at a particular

age, cannot pass her remaining child bearing span in fertile union and cannot bear children. Thus, from the demographic point of view, restrictions on widow remarriage lead to a reduction in fertility and permitting widow remarriage would increase the birth rate in the population at least for a short run.

Besides the above demographic viewpoint, widow remarriage has a sociological viewpoint as well. By saying that Hindu marriage means a holy alliance of a man and a woman and with the practice of marriage of young girls still continuing, it is societal injustice with them particularly with those who become widow even before the consummation of marriage to condemn them to lead a life of a widow. Even, in case of those women who have become widow at a comparatively young age after having a child or couple of children, it becomes a societal responsibility for making either a proper provision for her subsistence or allowing her to marry again. The Widow Remarriage Act makes this provision and it needs to be implemented even though it may mean some adverse effect on fertility levels. On the other hand, this step will also help in raising the status of women in our social system which, in turn, can bring an attitude of responsible parenthood in these women.

Legislation Regarding Compulsory Education of All Children in the Age Group 6-14

In India, although education has recently come on the concurrent list but, by and large, it is a State subject and although the Directive Principles of the Constitution provide that the State shall provide elementary education to all children in the age group of 6-14 within ten years of the adoption of the Constitution, the target still remains to be fulfilled. For making elementary education compulsory for children in the prescribed age group different State governments have made their own rules. The picture with respect to the progress of elementary education can best be known in terms of the enrolment rates which can be computed state wise separately for the age groups 6-11 and 11-14 for males and females. However, as the Ministry of Education prefers to publish enrolment rate*, we present these data for 1977 in

* The enrolment rate implies the ratio of -children of a particular age group in schools in whatever classes they are to the population of that age group measured in percentage terms.

TABLE 2

ENROLMENT RATIOS IN CLASSES I-V AND VI-VIII OF SCHOOLS FOR
GENERAL EDUCATION, 1977

State/Union Territory	Classes I-V (6-11 Years)			Classes VI-VIII (11-14 Years)		
	Boys	Girls	Total	Boys	Girls	Total
Andhra Pradesh	83.1	59.8	71.7	34.5	16.8	25.8
Assam	81.3	58.8	70.3	42.6	24.8	34.1
Bihar	93.7	39.3	67.3	39.9	13.4	27.1
Gujarat	112.3	77.7	95.5	53.6	31.3	42.8
Haryana	89.3	46.9	69.1	60.5	21.6	42.4
Himachal Pradesh	117.3	77.4	96.9	76.9	30.8	53.6
Jammu and Kashmir	81.6	43.1	62.0	55.8	22.8	39.5
Karnataka	96.5	76.1	86.6	49.2	28.5	39.0
Kerala	108.9	105.2	107.1	91.9	83.1	87.6
Madhya Pradesh	79.9	39.9	60.6	39.1	14.3	27.2
Maharashtra	116.3	88.5	102.7	57.5	32.2	45.0
Manipur	164.5	117.7	140.6	70.8	33.4	51.3
Meghalaya	128.9	112.9	120.7	48.6	34.7	41.4
Nagaland	188.9	141.5	165.3	81.6	60.0	70.8
Orissa	101.2	60.3	81.2	35.0	16.0	25.7
Punjab	117.2	104.0	110.9	65.2	44.4	55.5
Rajasthan	80.0	27.4	54.7	40.4	10.6	26.3
Sikkim	142.9	85.2	114.2	31.4	13.9	22.7
Tamil Nadu	114.8	98.2	106.7	61.1	37.7	49.6
Tripura	89.1	62.2	75.5	42.7	26.2	33.9
Uttar Pradesh	110.4	70.4	91.2	52.2	18.4	36.4
West Bengal	103.7	63.3	83.7	43.7	21.8	32.8
Andaman & Nicobar Islands	134.5	106.8	120.5	78.1	49.4	63.3
Arunachal Pradesh	97.6	43.1	70.5	25.9	8.9	17.3
Chandigarh	67.6	58.9	63.4	56.5	52.2	54.5
Dadra & Nagar Haveli	114.0	56.7	84.6	34.2	12.6	22.8
Delhi	104.7	84.6	94.8	82.0	65.6	74.2
Goa, Daman & Diu	123.4	101.7	112.5	76.2	54.0	64.8
Lakshadweep	171.9	136.9	154.4	110.0	59.2	84.6
Mizoram	-	-	-	-	-	-
Pondicherry	* 116.2	91.1	103.6	81.4	48.8	64.8
INDIA	99.3	65.4	82.8	49.7	25.3	37.9

Source: Selected Educational Statistics 1977-78, Ministry of Education and Social Welfare, Government of India, New Delhi, 1978.

enrolment in primary classes in relation to the children aged 6-11 was 82.8 per cent. A certain proportion of the children in primary classes was below the age of six and another proportion above the age of 11 but certain children in the age group 6-11 were studying in the middle classes as well. (The overall effect of these variations will be that of inflating the published enrolled ratio by about 12-15 per cent in comparison to the enrolment rate.) The differences between boys and girls are large and it is noticed that not even two-thirds of the girls in the age group 6-11 were enrolled in schools in 1977. The situation was worse in the States of Bihar, Haryana, Jammu & Kashmir, Madhya Pradesh and Rajasthan and indicates that considerably more efforts are required to raise these enrolment ratios in the coming decades if we are serious about the compulsory education programme.

In the age group 11-14 not even two-fifths of the children were enrolled in schools in 1977. Although the enrolment of boys was roughly 50 per cent, only a quarter of the girls of this age groups were enrolled in schools. The statewise picture in this respect can be easily noticed from the table referred to above.

The impact of imparting education to children in the age group 6-14 on population growth and fertility regulation are many and it would be useful to have a clearer idea about them.

All the children of this age group, if, can be retained in the school system, in the first instance, it would mean that the girls will not be married early and it can help in implementing the provisions of the Child Marriage Restraint Act as amended in 1978.

The compulsory education of young boys and girls in this age group will not mean that all the children will withdraw from the school system as soon as they attain the age of 14 years. This, in fact, would imply that a larger and larger proportion of children will continue in the school system for secondary and higher education.

The education at the elementary level, and more so at the higher level will help the children understand the notions of responsible parenthood; they are also likely to

learn about population education and sex education which will mean that there will be no problem with regard to family size.

These grown up young adults will understand more clearly that children are not purely gift of God but their number and spacing can be planned according to individual's will and in the context of national policies.

As part of the responsible parenthood they will get a much better understanding of personal hygiene and child care and of balanced nutrition. This will help in bringing down the infant mortality on the one hand and pregnancy wastage on the other hand.

Thus, it is observed that making elementary education compulsorily available to all children in the age group 6-14 can make very significant headway in the programmes of population control. These children can also act as communicators for elders in the villages and in affecting their perceptions about the ideal family size and about the use of contraceptives to bring proper spacing among children and also towards limiting the family at a particular level.

Legislation Governing Female Employment in Organised Industry and Legislation Banning Child Labour

In India, more than four-fifths of the working women are employed in the primary sector either as cultivators or as agricultural labourers followed by employment in unorganised secondary and tertiary sectors as maid servants or self-employed in personal or other similar types of services. Numerous studies have now established that women's employment in those activities where they are not required to maintain regular hours of work has hardly any effect on their traditional fertility behaviour pattern. In fact, such women even feel that children help in augmenting family income and therefore, they continue to have as many children as they can.

Although the proportion of employment of women in organised sector is quite low (only about 7 to 8 per cent of total female workers) it is able to make a definite impact on such women by changing their attitude towards family size. Women employed in the organised sector - whether in offices

or in factories - have been getting significant exposure to the need for adopting small family norm particularly because their employment enjoins on them to have only a few children - in their case children do not become an economic asset from the age of seven or eight onward but continue to be a drain upon the household earnings till the age of 14 or 15, or even, longer - since their children, both boys and girls, go to school and make various types of demands on the parents. In view of this it has been felt that increased employment of women in the organised sector will ultimately lead to the adoption of small family norm and to a reduction in fertility rate.

In India, various labour laws have been enacted from time to time to regulate the employment of women in factories. By and large, these laws have been enacted as welfare measures so that women can carry on their responsibilities as housewives and also become an earning member in the household. For example, many of the clauses of the Factories Act, 1948 and its subsequent amendments; Employees State Insurance Act, 1948; Maternity Benefit Act, 1961; and Equal Remuneration Act, 1976; etc., have all been enacted with this purpose in mind.

However, legal prohibition on engaging women during night and on underground work and hazardous occupations has obviously restricted women employment. The obligation put upon employers to pay equal wages for equal work and, in addition, bear the cost of providing certain extra benefits and facilities to women workers is also reported to have been responsible for the decline of women employment in factories and mines⁷. Their proportion to total employees in the factories fell down from 11.4 per cent in 1951 to 9.34 per cent in 1967 and the proportion in mines fell down from 20.1 per cent to 13.5 per cent during the same time span. Besides, it is understood that urbanisation has mostly been responsible for the comparatively greater decline in the crude worker rate for females as the female work participation rates in all census years in the urban areas have been lower than in the rural areas. But, it is also a fact that employment of women in certain types of jobs, particularly in clerical and professional categories, or where their skills lead to a greater efficiency than that of male workers, has been improving over the past two decades or more.

It may be mentioned here that majority of the occupations where women are employed are unskilled or semi-skilled. It is precisely in such unskilled and semi-skilled occupations that the wage costs associated with women's employment become uneconomical to the employer, since there are no compensating advantages in employing women on such jobs.

Thus, one finds that the various welfare measures for women employed in organized sector of industry have restricted their participation in economic activity. There have also been certain discriminatory practices in vogue like employing unmarried women with the condition that they will resign their posts on getting married⁷.

From the above one can easily see the mixed impact of the statutes governing female employment. Whereas, they have definitely helped women in getting their due from the industry but, at the same time, they have caused a diminution in their proportionate employment in the organised sector. It has now been recognised that the status of women can be improved significantly if, they can get into wage employment, particularly white collar employment. Also, with the spread of education among women which may also include professional and technical training for them, new and better employment opportunities become available for them in non-manual, clerical, professional and administrative categories. In such circumstances their efficiency over the male counterparts will outweigh the employers additional costs to meet the statutory obligations. In view of this it would be imperative to spread education among girls and women and given them wage employment in greater and greater proportions.

As mentioned earlier, greater employment of women in the secondary and tertiary sector where hours of work are specified would imply severe restriction on these women on having unlimited pregnancies. They would try to accept small family norm and have as many children as they feel absolutely necessary for them. Here, it will not be out of place to mention that the provision of maternity' benefit as well as of crèches at the place of employment might lead to some women to have more children than desirable and some people might like to say that the statutes making these provisions may be struck down. However, if one recognises the fact that the children of these women do not become an economic asset right

from the tender age of seven or eight years, and remain a drain on family resources till the age of 15, or even 20 years, this itself should act as a great deterrent for having large families. Experience of some of the developed countries is also a pointer in this respect.

Legislation Banning Child Labour

The Government of India has been concerned with the ill-effects of strenuous employment on the health and development of children. It passed the Children (Pledging of Labour) Act in 1933 and, by the Employment of Children Act, 1938; it prohibited their employment below the age of 15 years in occupations connected with transport of passengers by railway and in work connected with handling of goods within the limits of any port.

Our Constitution is also unequivocal in protecting the interests of young children. Article 24 lays down that 'No child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment'. Articles 39(c) and 39(f) are also relevant in this connection.

The important legislative provisions currently in operation with a bearing on employment of children relate to minimum age of employment, working hours, health certification, employment on dangerous machines and the like. The minimum age for employment is fixed at 14 years under the Factories Act, 1948; 15 years under the Mines Act, 1952; and 12 years under the Plantations Labour Act, 1951⁷. There are several other Acts, particularly enacted by State Legislatures, which govern the employment of children and conditions of service in specific industries, and in shops and commercial establishments.

However, the existing statutes regulating the employment of children and their conditions of service relate to a very small part of the total economy. In fact, of the 10.7 million children who were found as mainly workers at the time of the 1971 census, 87 per cent were engaged in the primary sector of agriculture, livestock, forestry, fishing, etc. and another 7-8 per cent were engaged in household industry, transport and other services. Thus, the various statutes relating to employment of children in India relate to only

About 5 per cent of the child workers. Again, according to the 1971 census, the 10.7 million working children constituted one-sixth of the child population aged 10-14 years.

One of the features of the Indian economy is its agrarian characteristic in which men, women and children, all have to work according to the needs to eke out even a Subsistence living. This has led to the notion that children, especially males, are an economic asset to the family. It is for this reason that many parents continue to have desire for more children and do not feel the necessity of restricting their family size.

With the enactment of various laws banning employment of children, it is observed that their employment in large industrial undertakings and in Government and quasi-Government organizations has almost completely stopped. However, as mentioned above, the very large primary sector and the cottage and small scale industries sector as well as unorganized service sector provide the young children ample opportunities of employment partly because (1) they become unpaid family workers, (2) the existing wage differentials induce employers to give employment to young children at rock bottom wages, and (3) the employers exercise much greater control on them. A recent* study by the National Institute for Public Cooperation and Child Development has brought out clearly the pattern of employment of children in the city of Bombay⁸.

In the sector of personal services, the middle class families in the urban areas find it very handy to use the services of the young boys and girls for household work since it is much easier to take work from them at very little cost. For the same reason, the small hotel and restaurant owners prefer to employ young boys in their establishments.

It would be useful to consider here one more aspect of employment of children in industries. It has been occasionally said that the young children work as apprentice in the various types of industrial units and learn the trade by watching the senior hands; doing the main jobs. The degree of efficiency which the young workers achieve through this process does not come through the training imparted in the Industrial Training Institutes when the children have already grown to a particular age. Hence, in many small scale

Industries children are employed by their parents or other persons right from the age of six or seven years.

From the above discussion it is observed that while the statutes banning child labour in organised industry and plantation imply that such children cannot become economic asset till they attain a particular age, but such laws touch only the tip of the iceberg. There remains a very large primary and unorganized sector where no legislation to ban child labour exists.

It would not be out of place to mention yet another aspect related with employment of children. In many families the 10 or 12 years old son becomes the only bread-winning member in the family and the whole responsibility of feeding the other members falls on him, which forces him to take up some employment or the other. In this respect we, however, feel that it is the responsibility of the society and the State to take care of such households by providing them social security or a job to the widow or other adult member at least till such times that the boy reaches the age of earning a livelihood. Even our Constitution enjoins this responsibility on the State. Unless this is done, children will continue to be treated as economic asset by their parents.

From the demographic viewpoint, it can be easily seen that the legislation banning the child labour restricts children's status as earning members at the young age and this in itself implies a motive for adopting small family norm which is regarded as the most desirable thing under present circumstances.

Conclusion

From the discussion presented in this paper with respect to the laws affecting the life of the people in certain spheres, it would be observed that many of them have been enacted from time to time as welfare measures in keeping with the spirit of the Constitution. Some of them have directly or indirectly worked in the direction of controlling the family size, and hence the birth rate, but many others seem to act in just the opposite direction. Further, many statutes in India, although they help in controlling fertility in one way or the other, have not been implemented

fully, partly because the legal procedures involved in their implementation are very cumbersome.

Moreover, there is a cultural lag in any society. The legal truth is found to be different from social truth and customs are often found more powerful than statutes. Also, a large majority of the people do not become aware of various laws and rules and regulations even though these may be beneficial to them simply because we do not have any system of publicizing such laws.

Considering all this it would be useful at the time of framing the various laws to keep in mind their application aspect as well and, where necessary, to make them known to the public at large. In this respect even mass media can be" utilised very usefully.

Secondly, there is a need to undertake an exercise in which attempts can be made to bring together several laws relating to a specific sphere of human activity and analyse their *pros* and *eons*. Our present concern in this respect, is of course, with fertility regulation. Here one may find certain laws at cross-purpose and it would be necessary to sort out their overall influence. It may also be necessary to strike some of the statutes but, they may be relevant for various other reasons. This requires a detailed exercise by lawyers and social scientists, particularly concerned with family planning aspects, and should be undertaken in the next few years.

REFERENCES

1. MITRA ASOK (1978) *India's Population: Aspects of Quality And Control*, New Delhi: Abhinav Publications.
2. NATIONAL INSTITUTE OF HEALTH AND FAMILY WELFARE (1978) *A Survey of Public Opinion on Methods of Securing a Most Effective Implementation of the Family Welfare Policy: A Study Report*, New Delhi.
3. CHANDRASEKHAR, S. (1976) *Population and Law in India*, Bombay; Blackie & Son (India) Ltd.
4. DANDEKAR, KUMUDINI (1974) Age at Marriage of Women, *Economic and Political Weekly*, 9: 867.

5. JAIN, S.P. (1975) *A Status Study on Population Research in India*, (Vol. II), *Demography*, New Delhi; Family Planning Foundation and Tata McGraw Hill Publishing Co.
6. AGARWALA, S.N. (1972) *India's Population Problems*, Bombay; Tata McGraw Hill Publishing Co. Ltd.
7. MINISTRY OF LABOUR, EMPLOYMENT AND REHABILITATION (1969) *Report of the National Commission on Labour*, Delhi, Manager of Publications.
8. NATIONAL INSTITUTE OF PUBLIC COOPERATION AND CHILD DEVELOPMENT (1978) *Working Children in Bombay - A Study*, New Delhi (Mimeographed),

**LAW AND POPULATION: LAWS RELATING TO
CHILDREN AND CHILD WELFARE**

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ABSTRACT

In this paper, the author gives a good account of laws relating to children and their welfare. He feels that if, children are taken adequate care of, their mortality rate, which is presently fairly high, will come down. This, he feels will definitely help the cause of population control. The author deals with laws in regard to maintenance for children, labour laws concerning children, and other laws concerning children, like the (Central) Children Act, 1960.

Author urges that children should be taken better care of in every way and that this would provide the necessary motivation for an individual to limit the size of his family. According to him, law has important role to play in this matter. Though a number of welfare measures could be provided without the necessity of enacting a law, yet many such measures may not be adopted without imposing obligations on the government and officials and restricting individual liberty, necessitating promulgation of laws. Law may also be enacted for no other reason than simply to create a psychology in the community in favour of particular measures and to give a direction in which the society should move.

Controlling the growth of population is a complex affair. For an average couple, contraceptive is the device for preventing conception and birth of children. The mere availability of contraceptive devices and knowledge about them to the common man is, however, not sufficient. He may

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Be unwilling to use them due to various psychological, economic, social and physical factors. For instance, in a country where children are considered to be economic assets and child mortality is high, a couple may not be psychologically ready to have a small family. It is essential that the couple should be mentally prepared for birth control. To create a mental outlook various factors came into operation. These factors are called indirect factors affecting population, whereas such measures as contraception, sterilization, abortion, etc., are characterised as direct factors affecting fertility.

It is recognized that a spontaneous decline in fertility takes place as a result of improvements in the socio-economic living after a certain period. Improvement in the standard of living of a person creates a consciousness in him to limit the size of the family. Child welfare measures, apart from improving the socio-economic living of the family generally, have an effect on the mental outlook of the person in the matter of limiting the size of family. Firstly, if the infant mortality is high a person may be encouraged to have more children. It is said that a "high infant mortality and morbidity have a direct impact on fertility 1". Child health and nutrition programmes would by reducing infant mortality induce people to have less number of babies. Secondly, education, particularly education amongst girls, also leads to reduce fertility. This happens because of enlightenment and other ways. Thirdly, children in a poor country are regarded as economic assets which encourage people to have more children. A planned welfare programme for children, which includes their education, training, health, proper care and development and prohibits their employment below a certain age, reduces births. Compulsory education for children including facilities for their training coupled with prohibition of their employment will stop children being treated as economic assets bringing extra income to the family. Further, in the absence of a proper care and development programme a person may be motivated to have additional children for he may depend on the accidents of life for any of his children to be successful in life. This uncertainty is reduced, if proper and adequate facilities for the development of the personality of the child in its different facets exist.

All the above measures would provide the necessary moti-

vation for an individual to limit the size of his family. Law has an important role to play in this matter. Though a number of welfare measures could be provided without the necessity of enacting law, yet many such measures may not be adopted without imposing obligations on the government and officials and restricting individual liberty, necessitating promulgation of laws. Law may also be enacted for no other reason than simply to create a psychology in the community in favour of particular measures and to give a direction in which the society should move, though here the law itself may be impotent, in the sense of a helpless spectator, if people fail to behave in the desired manner.

Family planning cannot be a goal by itself, but it has to be viewed as a means to achieve the end of the welfare of the individual, family and community. Even if, a legal or other measure has a negative effect on population control, it may have to be given countenance, if it promotes the welfare of the individual. Accordingly legitimacy to illegitimate children for various purposes is a case in point. It is a child welfare measure and is to be recognized or accepted by the community as a whole.

Support of Children

For maintenance or support of children, apart from Section 125 of the Criminal Procedure Code (Cr. P.C.), 1973, which applies to all the communities, one has to look into the personal laws of the different communities. Section 125 of the Cr. P.C. provides:

1. If any person having sufficient means neglects or refuses to maintain -
 - b. his legitimate or illegitimate minor child, whether married or not, unable to maintain itself

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct.

Though, the Section uses the words "at such monthly rate not exceeding five hundred rupees in the whole" for the maintenance of wife or child, it has been held by the Supreme Court, that the provision does not mean that Rs. 500 is the maximum for all the dependents altogether, but that Rs.500 can be granted to each of the dependents². The term "on the whole" in the context "means taking all the items of maintenance together, not all the members of the family put together".

In addition to the Cr. P.C., Hindus are also governed by the Hindu Adoptions and Maintenance Act (H.A.M.A.), 1956 in the matter of maintenance. The two provisions are not mutually exclusively but supplement each other³. If a child has obtained an order of maintenance under the H.A.M.A., he can still maintain an action under the Code and *vice-versa*. There is no monetary ceiling in the H.A.M.A. on the amount of maintenance. In fixing the amount of maintenance regard is to be had to such factors as, position and status of the parties, reasonable wants of the claimant, own resources of the claimant, and number of persons entitled to maintenance by the individual. Under the Act, obligation of a person to maintain extends to his or her son, the son or unmarried daughter of his predeceased son, the son or unmarried daughter of a predeceased son of his predeceased son.

If maintenance order has been obtained under the H.A.M.A. and the person also takes recourse to the Cr. P. Code, the Magistrate in his order is to take into account the amount of maintenance granted under the H.A.M.A⁴.

Under the Hindu Marriage Act, 1955 also the court granting the necessary matrimonial remedy is to pass suitable orders for maintenance, education and custody of children. Similar provisions exist under the Special Marriage Act, the Parsi Marriage and Divorce Act, 1936 and the Indian Divorce Act, 1869 applicable to the Christians.

There are no statutes on the lines of the Hindu Adoptions and Maintenance Act for the Jews, Parsis, Christians and Muslims. Thus, Jews, Parsis and Christians are governed only by the Criminal Procedure Code. Muslims have, however, their personal law which imposes obligations on persons to maintain their children. A Muslim father is bound to maintain his son till he attains puberty, and his daughter

till she is married. If the father be poor, then the mother has an' obligation to maintain the children. If she too is without means then the grandfather is bound to maintain the grand-children 5. Further, "apart from children, those would be heirs of a Muslim who are within prohibited degrees of marriage are, during their minority in the case of males and upto marriage, in case of females, to be maintained by him or her. Thus, a brother must maintain his minor brother and unmarried sister''5.

There is no law imposing any obligation on the government to maintain destitute or neglected children. However, under the Children Acts the government has been given power to deal with neglected or delinquent children. This aspect is considered in a separate section below.

Child Labour Laws

One of the important aspects of child development and welfare is the employment of children in various avocations. There are both Central and State enactments on child labour -the former covering mainly employment in industries and mining, and the latter covering shops and establishments. At the international level there are ILO Conventions- India has ratified several ILO Conventions. Some of the Conventions have special provisions for countries like India; these lay down lower standards than those to be followed by developing countries. In the matter of labour laws relating to children, India tries to follow the standards set by ILO Conventions. So far, the ILO has adopted 18 Conventions and 16 Recommendations in relation to children.

The Indian Laws and the ILO Conventions mainly deal with four matters - (i) minimum age for employment of children; (ii) medical examination of children; (iii) maximum hours of work; and (iv) prohibition of night work for children.

There are several enactments which deal with the above four matters, e.g. the Factories Act, 1948; the Mines Act, 1952; Employment of Children Act, 1938 (concerned with employment of children * in hazardous occupations, such as, transport of passengers, goods or mail by railway, or by a port authority within the limits of a port, or workshop wherein is carried on the process of bidi-making, carpet-weaving, cement manufacture, cloth-printing dyeing and weaving, cement manufacture,

weaving, manufacture of matches, explosives and fireworks, mica-cutting, shellack manufacture, canning, etc.); Merchant Shipping Act, 1958; Motor Transport Workers Act, 1951; Plantations Labour Act, 1951; Bidi and Cigar Workers (Conditions of Employment) Act, 1966; and the State Shops and Establishments Acts covering such employments as shops, commercial establishments, restaurants and hotels, and places of amusements in urban areas.

By way of illustration the provisions of the Factories Act may be mentioned here. The Act prohibits employment of a child below 14 years in any factory. Children above that age can be employed subject to certain restrictions. Thus, children above 14 years and below 18 years are required to obtain a certificate of fitness from a registered surgeon before they can be employed. The Act also provides for initial and periodic examinations, at intervals of not less than 12 months, of such children. A child belonging to the age group of 14 years and below 17 years is not to be employed at night. A child between the age group of 14 and 15 years cannot be employed for more than 4-1/2 hours on any day and he cannot be employed in two shifts and is not allowed to work in more than one factory on the same day. Subject to what is already stated, a child between the age group of 15 years and 18 years is considered to be an adult for purposes of the various provisions of the Factories Act, provided he has a certificate from a registered surgeon that he is fit for a full day's work in a factory. There are provisions in the Act for prohibition of a child in a factory in tasks which are dangerous. The Act provides for creches to be established by the employer in factories employing 50 or more women workers for the use of children under six years of age. The Act makes provisions for penalties for contravention of its provisions. An employer is punishable with imprisonment for a term up to three months or a fine upto Rs.500 or with both. Penalty can also be imposed on a parent or guardian for permitting double employment of a child. The Factories Act applies only to factories which employ a minimum number of ten persons where a manufacturing process is being carried on with the aid of power or twenty persons where it is being carried on without the aid of power.

The other statutes also prohibit employment of children below a certain age and regulate their employment above that age. There are, however, variations with respect to several

Matters - age of employment, hours of work, medical examination, etc. For instance, provisions of the Mines Act with respect to employment of children are more stringent than the Factories Act, but such provisions are less strict in the case of employments in shops and establishments.

There is the Apprentices Act, 1961 which regulates the training of apprentices in industry so that programme of training may be organized on a systematic basis and the apprentices may get the maximum advantage of their training. The Act prohibits engaging children below 14 years as apprentices.

The survey of statutes reveals that the legislature has duly kept in view the welfare of child labour and prohibits employment of children below a certain age in different occupations. However, the laws are deficient as compared with the international standards as laid down by the ILO. Some of the reasons for this are economic backwardness necessitating a family to seek employment for children, lack of educational facilities and unorganized nature of some of the economic sectors and small size of manufacturing units making enforcement of the laws difficult. Thus, for employment of children, the various ages prescribed for different occupations are lower than the ILO standards. We do not have any law for agriculture labour. Smaller factories employing workers below certain minimum age are left uncovered by law. The same is the position with regard to medical examination. We do not have laws with respect to medical examination of children in non-industrial occupations, establishments which are not factories, establishments engaged in transport, and mines above ground. Further, the age upto which medical examination is required in factories and mines is less than the ILO standards. With regard to night work also our provisions are less stringent than those laid down by ILO Conventions 6.

In spite of several laws on the subject, child labour is prevalent on a large scale in India. Firstly, there is no adequate enforcement of the laws. It is well known that the employment of children is made clandestine in industries, mainly in smaller units. Owing to the inadequacy of inspection staff, legal provisions are often disregarded. Secondly, large sector of our economy is still beyond the purview of our laws. It has been stated: "The 1971 Census listed 10.7

million children as workers, but independent estimates such as ILO reports and the report of the National Commission on Labour indicate that the total child labour force may be much higher than the quoted figure. An analysis of the census data itself suggests that child labour could be under-reported. However, according to the 1971 census, children easily constitutes 6 per cent of the total labour force in the country and this makes India top in child labour. Again it has been stated:

The National Institute of Public Cooperation and Child Development in a study of the children in Bombay came out with some startling facts: 30 per cent of the children employed had started work between the age of six and nine; 27 per cent between 13 and 15. A large percentage of these children of different age groups had to work at an average 10 to 11 hours a day. According to a different study nearly 80 per cent of these working children in Bombay came from the families of migrant labour and 19 per cent from residential families. A pilot survey of working children in Madras, Madurai and Coimbatore showed that 31.6 per cent of children worked 10 to 11 hours, 23 per cent for 12 to 13 hours, 12 per cent for 14 to 16 hours. The number of child workers in West Bengal is estimated at 5.11 lakhs. Most of these children are employed in hotels, restaurants, sweet shops, and small engineering, foundries, and automobiles repair shops and as cleaners for buses and taxis. Bag pickers are also generally children below the age of 14. They generally work for private contractors, and are made to work between 12 to 16 hours. They are also employed for book publishing concerns and binding shops. Most of these young job seekers come from Midnapur and Howrah districts followed by Bihar. More than half of these children hail from agriculture labour families. After living in inhuman conditions for a few years these children get fed up and they leave their jobs and take to begging. Even so, they are not left unexploited. Among these children 48 per cent are illiterate, 26 per cent have not crossed even the primary stage and 98 per cent of them have left their homes to supplement the family income.

According to conservative estimates, it has been found that at least 50,000 to 1.5 lakh children between the tender age of 6 to 14 work in the carpet industry in Kashmir putting in long hours for a meager wage.

Care of Orphans and Physically or Mentally Defective Children

To provide for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children, there is the Central Children Act, 1960 which applies to the Union Territories. Besides this enactment, States have their own Children Acts.

Under the Central statute a child means a boy who has not attained the age of 16 years or a girl who has not attained the age of 18 years. There are State variations with regard to the definition of a child in relation to this age.

The scheme of the Central Act with regard to the treatment and care of children may be briefly mentioned here. The >statute makes a distinction between neglected and delinquent children. A neglected child is one who is found begging; or who does not have a settled place of abode or ostensible means of subsistence; or who is found destitute, whether orphan or not; or whose parent or guardian does not exercise proper care and control over him; or who lives in a brothel or with a prostitute or is found to associate with any person who leads an immoral, drunken or deprived life. The Act provides for the establishment of child welfare boards to investigate the problems of neglected children and to formulate treatment plans. Any police officer, or an authorised person, who is of the opinion that a child is apparently a neglected child, may take charge of such a child and is required to produce him before the board within 24 .hours. The child, unless he is kept with his parent or guardian, is to be sent to an observation home until he is brought before the board. After an enquiry, the board may either order the release of the child or order him to be sent to a children's home for a period till he ceases to be a child. Instead of passing the latter order, the board may place a neglected child under the care of a parent or guardian or other fit person on his executing the necessary bond. The board may commit a child suffering from a dangerous disease to an approved place for treatment.

There are a few differences between the Central statute and some of the State statutes. The differences are: instead of the child welfare board, the child may be dealt with by a juvenile court; the child may be sent to the remand homes

During the enquiry and certified schools on the conclusion of enquiry.

Under the Central Act, the procedure for dealing with delinquent children is the same, except that instead of the child welfare board, it is the juvenile court which deals with them. Further, after the decision of the court, a child is to be sent to a special school for delinquent children instead of the children home. Thus, there are separate institutions for delinquents and non-delinquents which is salutary.

The Central Act also makes provisions for after-care organisations after the child has left the children's home or special school. This is a necessity for if, proper follow-up action is not taken to rehabilitate children, the idea behind creating special institutionalised services to deal with neglected and delinquent children may largely be lost.

The Central and the State statutes provide for licensing out of inmates of children's homes and special schools. The purpose is to enable the child to live with a responsible person for purposes of educating him and training him for some useful trade or calling.

It is one thing to have laws and another to implement them properly and effectively. In relation to the administration of the Children Acts it has been stated:

With nearly a hundred million children living below the poverty line, the elite discussions as to who is a neglected child lose its meaning, because exploitation, exposure and abandonment are the direct consequences of degrading poverty... It is a sad reflection on our concern for destitute and delinquent children that in 1977, the Children Acts covered only 197 of the 370 districts in the country. The number of juvenile courts is about 80, while observation homes are in the region of 150. The number of children's homes is 90 while the certified schools and analogous institutions for delinquent children are 85. The total capacity of all these institutions is about 15,000 while every year 150,000 children are apprehended by the police either

Under the Children Acts or for more formal violation of law.... Hordes of children swam our railway stations, bus stands, temple precincts, cinema houses, hotels and shopping centres in our growing cities reflecting the naked poverty and neglect of centuries. Why cannot the police or any other agency - voluntary or governmental -take charge of them? The harsh truth is, there is no place where they can be taken to. Institutions are few, and where they are in existence, they are overcrowded and run with meagre resources 9.

There are two Central statutes for regulating institutions for the care of children. They are: The Women's and Children's Institutions (Licensing) Act of 1956 providing for the licensing of institutions for children; and the Orphanages and Other Charitable Home (Supervision and Control) Act, 1960 to provide for supervision and control of orphanages, homes for neglected women or children and other like institutions.

There is no statute specifically dealing with the mentally retarded children. The law steps in when they come under the category of "neglected children" under the Children Act. Panakal mentions the sad state of affairs in this regard as follows: "In the conspicuous paucity of special institutions, mentally deficient children often receive care and training in institutions provided under the Children's Acts. However, even after they complete 18 years, these institutions are reluctantly obliged to keep them as they have no other place to go to. Some institutions for mentally deficient children have inmates who are over 45 years old. This is not a pertinent issue for Children's Acts alone but should be examined in relation to amendments to the Lunacy Act".

Again the legislation as such does not deal with the physically handicapped children. However, the administration has come out by voluntarily creating some institutions in this regard. For instance, in Delhi one school for the deaf and dumb and two schools for the blind have been operating.

Cruelty, Abuse and Abandonment of Children

A few enactments deal with cruelty, abuse and abandonment of children. Thus, the (Central) Children Act,

1960 provides punishment for a person, having the actual charge or control of a child, if he assaults, abandons, exposes or willfully neglects the child or procures to be assaulted, abandoned, exposed or neglected in a manner likely to cause such child unnecessary mental and physical suffering. The Act also prescribes punishments for employing or using a child for begging, giving intoxicating liquor to a child in a public place or dangerous drug, and exploiting child employees. Similar provisions are to be found in, the State Children Acts. A few States have also separate beggary statutes to prevent the use of children for begging.

The Young Persons Harmful (Publications) Act, 1956 seeks to prevent dissemination of harmful publications amongst young person's to save their intellectual health and moral degeneration.

The Indian Penal Code has several provisions to prevent child abuse and abandonment of children. Section 317 of the Code provides punishments for a father or a mother or a guardian if, he exposes or leaves such a child under the age of 12 years in any place with the intention of wholly abandoning such a child. Section 361 provides punishments for kidnapping children from lawful guardianship. Section 363A specifically provides punishments for kidnapping or maiming a minor for purposes of begging.

Public Guardians

The law has stepped in to determine guardianship of minors and even to provide public authorities to act as their guardians to protect their person and property. The laws governing guardianship are: (i) the Guardians and Wards Act, 1890; (ii) the personal laws of the different communities; and (iii) the State court of wards, statutes. The idea of public guardians is to be found by laws covered by (i) and (iii). It was observed by the Patna High Court in *Manmohini Dasi v. Hari Prasad Bose* 11. "The State from the earliest times is supposed to be the guardian of the infants and the earliest Regulations gave, effect to this principle and made provisions for the custody of minors; and when the State assumes direct custody of an infant it undertakes to bring up the boy in the same manner as his natural father or guardian would have done 11.

The Guardians and Wards Act, 1890 exists along with the personal laws. "The Act itself makes it clear that it leaves the rules of personal law unaffected (though all applications for the appointment or declaration of a guardian are to be made under its provisions). The Act, thus, comes into operation when an application to appoint a guardian of a child has been made under it, and it prevails over the personal law in case of conflict with the latter 12".

Under the Guardians and Wards Act the District Court exercises the functions of the State as a protector of the minors. The Court appoints guardians of persons and properties of minors. In appointing a guardian the court is to be guided by what, consistent with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. The court is not to appoint a guardian against the will of the minor. This "makes it sufficiently clear that neither a Collector nor any other person can be appointed a guardian against his will 13". The concept of public guardian enters the statute in another way. An order for guardianship can be made by the court on the application, among others, of the Collector of the district or local area within which the minor ordinarily resides or in which he has property, or the Collector having local authority with respect to the class to which the minor belongs.

The Guardians and Wards Act saves the statutes relating to any Court of Wards, and the jurisdiction or the authority of any court of Wards is to prevail over the provisions of the former. There is no Central enactment on the Court of Wards, but there are State statutes on the subject. The provisions of the A.P. (Andhra Pradesh) Court of Wards Act, 1902 may be briefly mentioned. Under the Act the Board of Revenue is to act as the Court of Wards, and it may exercise its powers through the District Collector or any other person whom it may appoint for the purpose. The powers of the Court of Wards come into operation when a person dies leaving a minor heir or heirs on the report of the death of such a person. In such a case the Collector may take such steps as necessary for the temporary custody and protection of the property belonging to the minor. Subsequently, the Court of Wards may assume superintendence of the property and person of the minor.

Artificial Insemination

We do not have any law dealing with the question of artificial insemination. No court case involving the issue of artificial insemination has also occurred. The problem raises several issues: (i) Whether the offsprings of artificial insemination are to be regarded as illegitimate; (ii) whether a woman having artificial insemination could be said to have committed adultery; and (iii) whether artificial insemination by the woman without the consent of husband could be a ground of divorce. These problems arise only when the semen injected into the woman is that of a third person and not the husband. On the basis of the existing jurisprudence, the following answers may be attempted. Under Section 112 of the Indian Evidence Act as stated earlier a child born during the continuance of a valid marriage is to be regarded as legitimate, unless it can be shown that "the parties to the marriage had no access to each other." Now it may be that the husband and wife are living together but the husband is sterile, and the woman gets a child due to artificial insemination. Literal application of the section will mean that such a child is legitimate, but as a matter of policy it is too much to burden the father or his property when he is not at fault. Here the word "access" has to be interpreted in the sense of "access leading to the possibility or chance of conception", and accordingly a child born of artificial insemination (semen belonging to a third person) is to be regarded as illegitimate. Secondly, as regards adultery, the two essential ingredients of adultery, namely, carnal knowledge and penetration are absent in the case of artificial insemination, and hence the device may not be regarded as amounting to adultery. Thirdly, artificial insemination without the consent of the husband may amount to "cruelty" and thus a ground for divorce.

Legitimacy

It is not children who are illegitimate but the parents who bring them to the world. For no fault of theirs the society regards them as illegitimate and denies them the same benefits as are available to children born through marriage. There is no reason why children should suffer due to the wrong of their father and mother. Society, thus needs liberal rules in the matter of legitimacy.

Legitimacy presents two basic questions. One to determine legitimacy. And the other to give children born out of wedlock the same rights as are available to those who are born in wedlock. Our laws though not very strict, as a whole, are still deficient in some respects.

Determination of legitimacy is governed both by the Indian Evidence Act, 1872 and the personal laws of the different communities. Section 112 of the Evidence Act determines legitimacy of children born during the continuance of a valid marriage, or born after dissolution of the marriage. The section provides:

"The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

The point to note is that it is the birth during marriage which determines legitimacy and not conception. The conception may take place before the marriage but if, the child is born during marriage, it will be legitimate, and it is immaterial how soon after marriage the child was born.

Our laws, however, fall short of the U.N. Draft General Principles on Equality and Non-discrimination in Respect of Persons Born out of Wedlock, in that we do not have any law to provide that any person born of parents who may marry each other after birth of that person is considered to be born of that marriage. The Union Territory of Goa, Daman & Diu, where the Portuguese family law still operates, is the only place recognizing such a person to be legitimate. Thus Art. 2 of the Law of Protection of Children of Goa provides: "The marriage always legitimates the children born before the marriage, of the persons who contract it, whatever the status of these persons at the time of conception or of birth of children." The law in Goa also provides how legitimating can be done. It is by two methods:

1. by recognition of the children by their parents in the certificate of marriage or in the certificate of

birth of the same children or by will or by public deed, either prior or subsequent to the marriage.

2. By the children upon producing proof of their filiations by way of suit and judgment of the court.

The effects of legitimating only start from the date of marriage.

The rest of the country ought to have provisions on the lines of law in Goa.

Though there is the Central enactment on registration of births and deaths - the Registration of Births and Deaths Act, 1969 - yet it does not have any special provision to establish paternal filiations of an illegitimate child.

Legitimacy of children born of marriages which are void and voidable is determined by the personal laws of the different communities and there is no uniformity in this matter.' Under the Special Marriage Act, 1954 any child of a void marriage will be legitimate if he had been legitimate had the marriage been valid. Similarly, in the case of a voidable marriage, any child begotten or conceived before the decree of nullity is granted will be legitimate, if he had been legitimate, had the marriage instead of being annulled had been dissolved by a decree of divorce. The provisions of the Hindu Marriage Act, 1955 are the same. Under the Muslim Law, Hanafi School makes a distinction between void (batil) and irregular (fasid) marriages. Children of the former marriage are illegitimate but of the latter are regarded as legitimate. The Parsi Marriage and Divorce Act, 1936 and the Christian Marriage Act, 1872 are silent on the subject, and in the absence of a specific provision, the children of void marriages are to be regarded as illegitimate.

Disabilities of illegitimate children: In the matter of succession, illegitimate children suffer from certain disadvantages. Under the Hindu Succession Act, 1956, an illegitimate child only inherits from its mother and from its brother or sister (uterine), but does not succeed to the property of its father. About children of void or voidable marriages regarded as legitimate under the Hindu Marriage Act, 1955, they have right to succession to the property of their parents (father and mother) and not any other relations.

Under the Hanafi School of Muslim Law, an illegitimate child has no right of succession to the property of its father, but may inherit from its mother or through its mother from her relations.

The Indian Succession Act, 1925 applies to Christians, Jews and persons governed by the Special Marriage Act, 1954. There is no provision in the Act giving to illegitimate children the right of inheritance to the property of their parents. Thus, it has been held that an illegitimate child has no right to inherit the property of her mother ¹⁵.

In the matter of maintenance of illegitimate children, the position is as follows. Under the Hindu Adoptions and Maintenance Act, 1956 a Hindu (father or mother) is bound to maintain both his legitimate and. illegitimate children.

Under the Muslim law, a father is not bound to maintain his illegitimate children. Under the Hanafi law a mother has the legal obligations to maintain her illegitimate children.

Thus, in the matter of maintenance of illegitimate children, the provisions of the Hindu Law are the best. However, as stated earlier, Section 125 of the Cr. P.C., 1973 is the general provision relating to the maintenance of children which applies to all the communities. This section makes no distinction between legitimate and illegitimate children in the matter of obligation of a person to maintain his children.

REFERENCES

1. KARAN SINGH (1976) National Population Policy. *Population and Law*, 89.
2. RAMESH CHANDER V. & VEENA KAUSHAL (1978) *All India Reporter*, Supreme Court Judgments, p. 1807.
3. NANAK CHAND V. & CHANDRA KISHORE (1970) *All India Reporter* Supreme Court Judgments, p. 446.
4. In re TARALAKSHMI MANUPRASAD (1938) *All India Reporter*, Supreme Court Judgment, p. 499.
5. JAIN, S.N. (Ed.) (1979) *Child and the Law*, p. 163.

6. JAIN, S.N. (Ed.) (1979) *Child and the Law*, 9: 38.
7. PATNAIK, M. (1979) Child Labour in India: Size and Occupational Distribution. *Indian Journal of Public Administration*, 25: 669.
8. KAUL, RUPA (1980) Millions for Arms .But Pittance for Children. *The Economic Times*, New Delhi, January 6.
9. RAO, S. VENUGOPAL (1979) Laws Relating to Children. *Indian Journal of Public Administration*, 2.5: 625.
10. SHUKLA, K.B. (1979) Management of Institutions for Children: A Delhi Study. *Indian Journal of Public Administration*, 25: 725.
11. ALL INDIA REPORTER (1924) Pat. p. 755.
12. JAIN, S.N. (1979) *Child and the Law*, p. 140.
13. ALL INDIA REPORTER (1969) Manual, p. 718.
14. KUSUM (1977) Artificial Insemination and the Law. *Journal of Indian Law Institute*, 49: 283.
15. IN THE GOODS OF SARAH EZRA (1931) *All India Reporter*, Cal., p. 560.

IMPACT OF LAND CEILINGS ON THE SIZE OF FAMILIES

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ABSTRACT

In this paper, the author examines the impact of Land Ceiling Laws on the size of families in this country. He discusses the policy statements in regard to land ceiling in the various Five Year Plan documents and shows that these statements of policy were, by and large; vague and showed a marked ambivalence of approach of our planners. The author thinks that it seems nobody in the Planning Commission at the time of drafting the First Five Year Plan could possibly visualise that linking the concept of ceiling to the size of family may have the potential of adversely affecting and running counter to other social objectives, like having a small family. It is this ambiguity in the First Five Year Plan on the question of basis of ceiling that led to future controversy whether unit for ceiling should be an individual or the family.

The author expresses the opinion that a reference to the relevant provisions in all the State laws may not be appropriate here but it will suffice to note that the position in all the States conforms to the national Guidelines, under which the family in its artificial meaning has been accepted as the unit of ceiling. An allowance has been made for a larger family. With a view to giving an idea of the approach adopted in the laws enacted after 1972, the author reproduces the relevant provisions made in the West Bengal Land Reforms Act. He concludes the paper by saying that it is obvious that the provisions of the West

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Bengal Act are heavily biased in favour of a larger family and, therefore, he, suggests an amendment of the definition of family and also of the provisions making allowance for a family of more than five persons .

The Indian programme of agrarian reform aimed at achieving the broad objective of agricultural growth with social justice. While all schemes of social and economic planning aimed at achieving economic growth and development, the measures relating to agrarian reform were designed to restructure the agrarian system so as to confer rights of ownership of Land on the actual tillers of the land. As set forth in the First Five Year Plan, the objectives of the programme were firstly, to remove such motivational, and other impediments to increase in agricultural production as arise from the agrarian structure inherited from the past and secondly, to eliminate all elements of exploitation and social injustice within the agrarian system so as to ensure equality of status and opportunity to all sections of the population. These objectives were sought to be achieved by abolishing all intermediary interests between* the State and the tiller of the soil, regulating rent, conferring on tenants security of tenure, and, eventually ownership rights, imposing ceiling on agricultural holdings, distributing surplus land among the landless and bringing about the consolidation of holdings.

The conceptual and philosophical framework of the programme was formulated after prolonged deliberations by the Government including the Planning Commission. The programme in this sense was not only well conceived and well thought out but had received universal support and approval. In due course, therefore, laws were enacted to give effect to the various aspects of the programme albeit in a phased manner ¹. Like all other measures of economic and social reforms, the programme of agrarian reform also in due course resulted in bringing some unintended side effects, such as breakup of the institution of Joint family and of unwittingly contributing towards growth of large families. The aim of this paper is to identify these provisions in the emerging pattern of land tenure laws which unwittingly give positive impetus to a tenure holder to go for a larger family so as to be able to hold a larger parcel of landholding.

The Planning Commission in formulating a national policy on land reforms, thought it proper to devise ways of achieving equitable distribution of resources in agricultural land so as to prevent concentration of land in few hands. Pursuant to the social objective of reducing disparities in wealth and income, the Planning Commission suggested that:

Where land is managed directly by substantial owners and there are no tenants in occupation, public interest requires the acceptance of two broad principles, namely:

- i. there should be an absolute limit to the amount of land which any individual may hold. This limit should be fixed by each State, having regard to its own agrarian history and its present problems;
- ii. The cultivation and management of land held by an individual owner should conform to standards of efficiency to be determined by law 2.

The above statement of policy is vague and shows a marked ambivalence of approach of our planners. In this connection, Congress Agrarian Reforms Committee recommended in 1946 that in order to ensure equitable agricultural land distribution among those who are tillers and those who depend on land for their livelihood, it is necessary to impose ceiling on land ownership. The Planning Commission, however, examined the issue in a sort of collateral context but did not make a positive recommendation, at least in the First Five Year Plan, for adopting a legislation to impose a ceiling limit on one's right to hold. This may possibly be due to: firstly, the Commission considered the small and un-economic holdings as the root cause of the many difficulties in the way of agricultural development³. Therefore, the Commission did not recommend any rigid ceiling on agricultural holdings. In its view, a natural consequence of a policy of imposing a ceiling limit on individual holdings would lead to break up of large estates into small parcels and thereby help create numerous new uneconomic holdings. Secondly, the Commission at that time did not visualise any large scale redistribution of land as a result of the imposition of ceiling on agricultural holdings.

The distortion and the side effects which later chopped up have run counter to other equally important measures of

social and economic reforms. This could have been avoided, if the Planning Commission had examined the issue in all its aspects while formulating the fundamental postulates of the national policy on land tenures and land management.

The Congress Agrarian Reforms Committee had gone into the question and had worked out a broad outline on the question, without coming to some definite conclusions with regard to the basis of ceiling, whether an individual or a family, whether in its natural connotation or with an artificial meaning attributed to it. The Planning Commission, while adverting to this issue further added to the confusion. It seems nobody in the Commission at that time could possibly realise or visualise that linking the concept of ceiling to the size of family may have the potential of adversely affecting and running counter to other social objective of having a small family. It is this ambiguity in the First Five Year Plan on the question of basis of ceiling that led to the future controversy whether the Unit for ceilings should be an individual or the family. The First Five Year Plan contained the following observations:

As one method of determining a limit, which may often prove applicable in practical work and is here used by way of illustration, it may be useful to apply a rough and ready criterion such as, for instance, a multiple in terms of what may be regarded as a 'family holding' in any given area. A family holding may be defined briefly as being equivalent according to local conditions and under the existing conditions of technique, either to a plough unit or to a work unit for a family of average size working with such assistance as is customary in agricultural operations. Another possible method of indicating a limit may be to propose an average level of money income which the permissible holding may be expected to yield. The limit which may be appropriate has to be determined by each State in the light of its own circumstances but, broadly speaking, following the recommendations of the Congress Agrarian Reforms Committee, about three times the family holding would appear to be a fair limit for an individual holding 4.'

The observations were too general and failed to give any clearcut directions in the matter of enacting a law on ceilings. The observations at best had some persuasive value

in prompting the States to put a limit on the amount of land to be retained or resumed by the erstwhile intermediaries. In May, 1955, the Planning Commission set up a Panel on Land Reforms to formulate proposals for the Second Five Year Plan. The Panel on Land Reforms set up, a Committee on size of holdings. The Committee accepted the principle that there should be an absolute limit to the amount of land which any individual might hold. The Committee observed that:

The policy of imposition of ceiling would be able to make a contribution towards fulfilling the following objectives:

- i. meeting the widespread desire to possess land;
- ii. reducing glaring inequalities in ownership and use of land;
- iii. reducing inequalities in agricultural incomes; and
- iv. enlarging the sphere of self-employment 5.

Therefore, it was observed that without doing much fresh thinking on the subject, the Committee merely clarified what was said in the First Five Year Plan.

The Committee observed that:

'The level of the ceiling is usually indicated in terms of a multiple of the family or the economic holding. The question whether this basic norm should be determined by reference to acreage or to income was discussed. A view was expressed that the determining criterion should be what is termed as plough unit i.e. the area of land which an average family could cultivate with a pair of bullocks. We are, however, of the view that family holding should ensure the minimum income necessary for supporting a family which a plough unit may not always yield, although cases could be visualised in which it could yield substantially more. Some reference to income was, therefore, considered to be necessary. According to the data on national income, the annual income per earner engaged in agriculture amounts to Rs.500. Assuming 2 to 2.5 earners in the family of an agriculturist the annual income of an average agricultural family should come to Rs.1,200. No unit which yielded an income

less than the national average to an agricultural family could legitimately be considered as economic. On adopting this as a rough basis, we suggest that a farm which yielded a gross average income of Rs.1,600 or a net income including remuneration for family labour of Rs.1,200 and is not less than a plough unit or its multiple in area, may be considered as a family holding⁶.

This was indeed an attempt to do the impossible. To define a concept as elusive as what could possibly be the level of family holding, was in itself a difficult task. To make matters more difficult, it was intended that the approach of the national planners in this respect should be as flexible as possible. After, thus, defining the concept of family holding, the committee also went on to suggest what could generally speaking be the ideal ceiling limit to be adopted by various States. The Committee recommended that:

'The limit should be three families holding for an average family in which the number of members does not exceed five. One additional family holding should be allowed for each additional member subject to a maximum of six family holdings⁷.'

It will be seen from the above, that a premium was put on a larger family; indeed there was a built-in incentive as it were to encourage a tenure holder to go for a family of eight members, if possible, in which case the law was to hold out a promise of allowing a person to retain land equal to six family holdings. In the name of flexibility of approach, the policy guidelines were vague.

The Committee also considered the question as to whether the ceiling should be imposed on an individual as a unit or a family as the unit. The Committee, it must be said to the credit of the members, was very clear in its recommendations. The Committee suggested that:

'We are of the view that family is the real operative unit in land ownership as in land management. We, therefore, recommend that in the fixing of the ceiling, the aggregate area held by all the members of the family should be taken into account. For this purpose, a family should be deemed to consist of husband, wife and dependent sons, daughters and grand children ⁸.'

The Planning Commission, however, did not take much note of most of these recommendations before finalising the proposals for. The Second Five Year Plan. It reiterated and repeated the objectives of the land policy as contained in the First Five Year Plan.

Accordingly, the Second Five Year Plan recommended that 'Steps should be taken in each State to impose ceilings on existing agricultural holdings'. But on the most crucial issues namely level of ceiling and the unit of ceilings, its approach is full of vague generalizations. It referred to what was said in the First Five Year Plan and also to the recommendations of the Committee on the Size of Holdings of the Panel on Land Reforms and left the issue open for the States to deal with in a manner as they pleased. The views of the Commission on this sensitive issue were:

'In determining the level at which the ceiling would apply there is need for some convenient unit which could be indicated in a general way and later worked out in detail for different areas. In the First Five Year Plan, it was suggested that for this and other purposes multiples of what may be regarded as a 'family holding' in any given area may be used. A family holding may be considered from two aspects, namely, (a) as an operational unit, and (b) as an area of land which can yield a certain average income. In the First Five Year Plan, a family holding was described as an area equivalent, according to local conditions and under existing conditions of technique either to a plough unit or to a work unit for a family of average size working with such assistance as is customary in agricultural occupations. The income from a given area of land depends on the crops grown, the level of agricultural efficiency and the amount of investment which is made. A given area of land may yield different income to different individuals, depending on their skill, capacity and resources. As improved agricultural practices are adopted and agriculture becomes more efficient and diversified, income per unit of land should increase steadily. Thus, it is difficult to correlate a family holding to a given level of money income adjusted to supposed level of prices. The balance of convenience, therefore, lies in favour of each State specifying according to the conditions of different regions, classes of soil, irrigation

etc, the area of land which may be declared to be a family holding. The practical application of the concept of family holding is not without its difficulties and it might be of value to States, if a small group of experts with practical experience of settlement and revenue work could study the subject further.

'In view of the fact that only small fraction of agricultural holdings can be described as large holdings, it will be convenient to place the ceiling at about three family holdings, if the ceiling is determined with reference to individual owner's family. On the other hand, if the ceiling applies to the area held by a family, it would be necessary to prescribe some method for taking account of the number of members in a family. According to its social conditions and other relevant factors, each State may determine whether the ceiling should apply to individual holdings or to holdings of families, and especially in the latter event, the basis on which the size of the family should be allowed for the application of the ceiling. For instance, the Committee of the Panel on Land Reforms to which reference has been made above was of the view that where the number of members of a family is larger than five, the ceiling of the family holding may be raised to a maximum of six family holdings 10.*

It will be observed that the suggestion of linking the concept of a family holding with the average annual income was rejected by the Commission. What may amount to a family holding in a given case was left to the States to be decided in the light of their local experience. Thus, without saying with any precision as to what should or should not constitute a family holding, the Commission suggested that the ideal level of ceiling may be equal to three family holdings. Besides, without making a definite recommendation whether the unit of ceiling should be an individual or a family, it endorsed the view that if the number of members in a family is more than five then the ceiling may be raised to a maximum of six family holdings. In this respect the Commission went a step further than the Committee of the Panel on Land Reforms. The Committee had suggested that if the number is larger than five then one family holding over and above the ceiling of three family holdings may be allowed for each additional member subject to a maximum of six families

holdings. But the Commission recommended that if the number of members in a family exceeds five, the ceiling of three family holdings may be raised to a maximum of six family holdings.

The most unfortunate feature of the Second Five Year Plan, at least as far as its proposals on land reforms are concerned, was that it did not contain a clear directive as to whether the unit of ceilings should be family or an individual. It virtually left such an important issue to be decided by the States. This feature has made all the difference. This *ad hoc* approach has defeated the programme. Since the Commission failed to give a clear direction to the States on this issue, the result was a complete confusion. Not only that there was no uniformity in various laws that were passed in the States, in some cases the provision was used to sabotage the programme from within. The Commission had perhaps not realised that the concept of imposing ceilings on an individual holding was potentially dangerous so as to defeat the very purpose of adopting the measure. The argument advanced by the Commission that if the individual was the unit then it was not necessary to take into account the number of members in a family but if the family was the unit then the number of members in the family will be taken into account was logically unsound. It should have been just the contrary. If a family is allowed to hold land equal to three family holdings irrespective of its size or number of members therein, there was no need either to take into account the number of members or to provide for additional land for members beyond a particular number. It was only when the law fixed the ceiling limit with reference to an individual as a unit that all individuals in the family become entitled to hold and retain land up to the prescribed ceiling limit. That is why it was necessary that the law should have prescribed a particular ceiling limit on the land to be held and retained by a particular family. In this case, the law should have also defined a family. It could either accept the natural definition of a family such as the tenure holder, his wife, sons and unmarried daughters or could have adopted an artificial definition of the family by excluding adult sons or married sons and their family. In any case, by adopting such an approach the law would have ensured that the prescribed ceiling applied to the total area of land held by all the members of a family. Where the ceiling was imposed on an individual, all the individual members were entitled to

Hold and retain land upto a prescribed limit in their own individual names and not much land was available as surplus land for distribution among the landless and others. Even where the ceiling was imposed on a family as such, by providing for additional land for members beyond a particular number, an incentive for raising a larger family was held out and the very purpose of imposing the ceiling was defeated.

Further, the Commission did not take any corrective steps to set the matters right until it was too late. In the Third Five Year Plan, the Commission reiterated the objectives of the land reform as outlined in the First and Second Five Year Plans. The Commission noted that in the absence of clear guidelines in the Second Five Year Plan, the different States had adopted different principles in their legislation and there was no uniformity of approach. Even so, the Third Five Year Plan contained no new guidelines on the subject. On the contrary it expressed the view that 'once legislation had been enacted, amendments should aim primarily at eliminating deficiencies and facilitating implementation rather than at introducing fundamental changes in the principles underlying legislation¹¹.

The Fourth Five Year Plan practically ignored the problem and did not take any corrective steps beyond expressing dissatisfaction with the progress made by then. The Chief Ministers' Conference held in New Delhi in November, 1969 devoted a good deal of attention to the problem. The agenda notes circulated for the review of measures so far adopted and had suggested certain amendments in the existing ceiling laws. In his opening address, the Union Minister for Food and Agriculture, among other things, observed that:

"There are inherent weaknesses in the legislations. The ceiling limits are relatively high. It is not applicable in many cases to the aggregate area of land held by all the members of a family 12."

The Conference did not make any specific recommendations but merely noted that a review of existing legislation was called for. Another Conference of Chief Ministers was held in New Delhi in September, 1970. In the agenda papers circulated for this Conference it was *inter alia* pointed out that 'the ceiling should apply to the aggregate area of land

held by husband, wife and minor children 13'. The Conference did not make any recommendations but decided to refer the entire range of problems connected with ceiling on agricultural holdings to the Central Land Reforms Committee.

The Central Land Reforms Committee met twice in Delhi in April and August, 1971. It prepared certain guidelines for the consideration of the States. The Government of India issued these guidelines to all the States in September, 1971. The Conference of Chief Ministers was held in New Delhi in April, 1972 to consider the guidelines and raised certain new questions. The Central Land Reforms Committee again met in May, 1972 to consider these issues. Another Conference of Chief Ministers held in new Delhi in July, 1972 considered the guidelines afresh and arrived at certain agreed conclusions.

The agreed conclusions on the unit of application of ceiling were as follows:

- i. The unit of application of ceiling shall be a family of five members, the term 'family' being defined so as to include husband, wife and minor children. Where the number of members in the family exceeds five, additional land may be allowed for each member in excess of five in such a manner that the total area admissible to the family does not exceed twice the ceiling limit for a family of five members. The ceiling will apply to the aggregate area by all the members of the family.
- ii. Where both the husband and wife hold lands in their own names, the two will have rights in the properties within the ceiling in proportion to the value of the land held by each before the application of ceiling.
- iii. every major son will be treated as a separate unit for the purpose of application of ceiling. It should be ensured that there is no discrimination between major children governed by different system of personal laws 14.

The Chief Ministers' Conference held in July, 1972 also resolved that the States should amend their ceilings laws by 31st December, 1972 so as to give effect to the guidelines as

Agreed upon by the Conference. Accordingly, the laws in most of the States were amended soon thereafter and the unit of ceilings was accepted to be a family. The family was defined to include husband, wife and minor unmarried children. Major sons were treated to be a separate unit entitled to hold land separately. Where the number of members in a family exceeded five, every additional member was allowed to hold land over and above the prescribed ceiling limit. The amendments had faithfully followed the guidelines. But since the guidelines themselves suffered from. Certain inherent lacunae, no progress could be made in this direction.

In fact, guidelines failed to take note that the concept of a small family was equally important to promote economic development of rural India and still remains valid. The guidelines should have defined the family so as to include husband, wife and all sons both major and minor as also both married and unmarried. The ceiling should have been fixed with reference to family as such, irrespective of the number of members in a family. The fact that allowing larger area of land to a larger family would make one goes for a larger family should have been taken note of. The very idea of linking the number of members in family with the area of land to be allowed was potentially dangerous to the programme of land ceilings as also to other schemes of economic development. Besides, there was not: justification in raising the ceiling of land in a particular family by counting the wife of a tenure holder and the minor daughters. One was allowed land more than the ceiling limit, if the number of members in a family was more than five after including the wife the tenure holder and his minor unmarried .daughters. On the contrary, even the married and major sons should have been included in the definition of family and only a fixed acreage of land equal to the prescribed ceiling should have been allowed regardless of the size of the family so as to ensure that the law does not provide any incentive for a larger family. If one was allowed to hold land equal to the prescribed ceiling regardless of the size of a family, one would plan his family and appreciate the merits of a small family.

Be that as it may, the laws as they exist at present accept and adopt the national guidelines and put a premium on a larger family. The laws in most States accept the principle that larger a family, it can hold larger acreage of land. It is owing to such a legislative policy that the programme of

Population control has suffered a major setback in the rural India. It is, therefore, necessary to take immediate corrective steps and review the programme of ceilings on land-holdings in the light of the above. The definition of family in the ceilings legislation must be so amended as to discard the existing artificial meaning ascribed to it and its natural meaning should be accepted. The law should also be amended to clearly provide that no family, whatever its size, will hold land beyond a prescribed ceiling limit.

A reference to the relevant provisions in all the State laws may not be appropriate here*. It will suffice to note that the position in all the States conforms to the national guidelines. The family in its artificial meaning has been accepted as the unit of ceilings. An allowance has been made for a larger family. With a view to give an idea of the approach adopted in the laws enacted after 1972, we reproduce here the relevant provisions made in the West Bengal Land Reforms Act. It provides that:

1. The ceiling area shall be:

- a. in the case of a *raiyat*, who is an adult unmarried person, 2.50 standard hectares;
- b. in the case of a *raiyat*, who is the sole surviving family member, 2.50 standard hectares;
- c. in the case of a *raiyat* having a family consisting of two or more, but not more than five members, 5.00 standard hectares;
- d. in the case of a *raiyat* having a family consisting of more than five members, 5.00 standard hectares, plus 0.50 standard hectare for each member in excess of five, so however, that the aggregate of the ceiling area for such *raiyat* shall not, in any case, exceed 7.00 standard hectares;

*For details regarding the provision under the existing laws, see Government of India, Planning Commission, Report of the Task Force on Agrarian - Relations, New Delhi, 1973, Appendix I, pp. 1-94.

- e. In the case of any other *raiya*t, 7.00 standard hectares.
2. Notwithstanding anything contained in sub-section (1), where, in the family of a *raiya*t, there are more *raiya*t's than one, the ceiling area for the *raiya*t together with the ceiling, area of all the other *raiya*t's in the family shall not, in any case, exceed:
- a. where the number of members of such family does not exceed five, 5.00 standard hectares;
 - b. where such number exceeds five, 5.00 standard hectares, plus 0.50 standard hectare for each member in excess of five, so, however, that the aggregate of the ceiling area shall not, in any case, exceed 7.00 standard hectares.

The Act defines family' as follows:

'Family, in relation to a *raiya*t, shall be deemed to consist of:

- i. himself and his wife, minor sons, unmarried daughters, if any;
- ii. His unmarried adult son, if any who does not hold, any land as a *raiya*t,
- iii. his married adult son, if any, where neither such adult son nor the wife nor any minor son or unmarried daughter of such widow holds any land as a *raiya*t,
- iv. Widow of his predeceased son, if any, where neither such widow nor any minor son or unmarried daughter of such widow holds any land as a *raiya*t,
- v. minor son or unmarried daughter, if any, of his predeceased son, where the widow of such predeceased son is dead and any minor son or unmarried daughter of such predeceased son does not hold any land as a *raiya*t, but shall not include any other person.

Explanation I - For the purposes of this chapter, an adult unmarried person shall include a man or woman who has been divorced and who has not remarried thereafter:

Provided that where such divorced man or woman is the guardian of any minor son, or unmarried daughter, or both, him or her, together with such minor son or unmarried daughter, or both, shall be deemed to be a separate family.

Explanation II - References in this clause to wife, son or daughter shall, in relation to a *raiyyat* who is a woman, be construed as references to the husband, son, or daughter, respectively, of such woman*.

It is obvious that the provision is heavily biased in favour of a larger family and hence our suggestion for an amendment of the definition of family and the provision, Making allowance for a family of more than five persons.

REFERENCES

1. UPADHYAYA, M.L. (1973) Constitution and the Agrarian Reforms, Allahabad Law Review, p. 82.
2. GOVERNMENT OF INDIA, PLANNING COMMISSION First Five Year Plan, p. 190.
3. GOVERNMENT OF INDIA, PLANNING COMMISSION First Five Year Plan, p. 193.
4. GOVERNMENT OF INDIA, PLANNING COMMISSION First Five Year Plan, p. 189.
5. GOVERNMENT OF INDIA, PLANNING COMMISSION (1959) Report Of the Committee of the Panel on Land Reforms, p. 99.
6. GOVERNMENT OF INDIA, PLANNING COMMISSION (1959) Report Of the Committee of the Panel on Land Reforms, p. 100.
7. GOVERNMENT OF INDIA, PLANNING COMMISSION (1959) Report Of the Committee of the Panel on Land Reforms, p. 103.

Section 14K(c) read with section 14 M of the West Bengal Land Reforms Act, 1955. The sections were inserted by the West Bengal Land Reforms (Amendment) Act, 1971 with retrospective effect from February 15, 1971. The enactment has been included in the Ninth Schedule to the constitution vide the Constitution - (Thirty-fourth Amendment) Act, 1974.

8. GOVERNMENT OF INDIA, PLANNING COMMISSION (1959) Report Of the Committee of the Panel on Land Reforms, p.103.
9. GOVERNMENT OF INDIA, PLANNING COMMISSION (1959) Report Of the Committee of the Panel on Land Reforms, p.194.
10. GOVERNMENT OF INDIA, PLANNING COMMISSION (1959) Report Of the Committee of the Panel on Land Reforms, p.195.
11. GOVERNMENT OF INDIA, PLANNING COMMISSION Third Five Year Plan, p. 229.
12. GOVERNMENT OF INDIA, MINISTRY OF AGRICULTURE (1972), Ceilings on Agricultural holdings, New Delhi, p. 16.
13. GOVERNMENT OF INDIA, MINISTRY OF AGRICULTURE (1972), Ceilings on Agricultural holdings, New Delhi, p. 17.
14. GOVERNMENT OF INDIA, MINISTRY OF AGRICULTURE (1972) Ceilings on Agricultural holdings, New Delhi, p. 63.

LAW AND FERTILITY REGULATION

P.S. Sangal*

ABSTRACT

In this paper the author discusses the position of law in India in relation to methods of fertility regulation, viz. sterilization* contra-ception and abortion. The author observes that medical termination of pregnancy which has averted a very large number of unwanted births, is not considered to be falling under the umbrella of family planning measures and is, thus, deprived of the facilities and assistance available under the Family Planning Programme.*

The author concludes by suggesting that a proper detailed law about sterilisation should be enacted at the earliest by the Central Government which should lay down the proper norms and guidelines for sterilisation as a family planning measure .

The Role of Law in Fertility Regulation

Fertility regulation, depending as it does on attitudinal changes and change of outlook, is a very sensitive area where law should tread with caution. But at the same time, if people do not have adequate social awareness about their responsibilities, it falls on law, being an instrument in the hands of the State for achieving its socio-economic objectives, to lay down the social norms which in course of time by persistent persuasion and in-built pressure will become fully acceptable to the people. In a country like India which is tradition-bound and where illiteracy is rampant, the

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Role of law as a norm-setter in the population field becomes all the more important*.

This paper discusses the position of law in regard to three important modes of fertility regulation. These are: (1) Sterilisation, (2) Contraception, and (3) Abortion.

Sterilisation

In this country there is no legal provision permitting sterilisation and sterilisations are performed under the legal protection granted by Section 88 of the Indian Penal Code which says: "Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

Thus, a sterilisation operation performed with the consent of the person concerned and in good faith is not an offence. Good faith' means with due care and attention which means that if, there is negligence in the operation; the doctors are liable in damages.

Sterilisation is an accepted method promoted by the Government of India as a family planning measure and carries cash incentives to acceptor, motivator and the doctor.

However, sterilisation is properly regulated in the sense of consent requirements, age requirements, and requirements about licensing of individuals or agencies performing the act etc.¹

*What to say of national laws, now people have started thinking of even International Law setting norms in the field of population control. "It has been suggested that a principle may be emerging that would treat self-replacement as the right of an individual but would regard exceeding self-replacement as an aggression against society and against mankind as a whole." See "Population Control" in Chapter VIII in Gould & Barkun, *International Law and the Social Sciences*, p. 291 (1970).

Special incentives for sterilisation: Besides the usual cash incentives offered by the Central Government, some State Governments are coming forward with additional incentives also. Notable among these States, so far, are those of Gujarat and Madhya Pradesh. The Government of Gujarat has announced several additional incentives. The Government has sanctioned Rs.50 lakhs for an additional incentive of Rs.20 to each sterilisation acceptor and Rs.10 each to the vasectomy motivator. The local bodies in Gujarat have also declared an additional incentive of Rs.10 to each acceptor of sterilisation and have agreed to spend about Rs.20 lakhs from their own resources. The State Government has also provided Rs.96.80 lakhs for an additional incentive of Rs.300 for building a hut for the acceptor of sterilisation who does not own any land, a cash award of Rs.50 for buying clothes to small farmers and agricultural labourers accepting sterilisation. Cash awards have also been announced for factories, urban family welfare centres, primary health centres, district panchayats and municipal bodies .

The Madhya Pradesh Government also has sanctioned a large number of individual incentives for acceptors, motivators, government servants and health personnel for sterilisation. The amount of compensation has been raised from Rs.70 to Rs.125. A gift of Rs.100 will be presented to each mother who gives birth to her first child at the age of 21 or above. Women, who have their second child after an interval of four years after attaining the age of 25 or above, will be given gift of Rs.200 if she or her husband accepts sterilisation. This will be in addition to the compensation amount of Rs.125. Public men and workers, who help in popularising family planning will be paid an incentive of Rs.15 for each vasectomy and Rs.10 for each tubectomy motivated by them. Government servants, who help in promoting family planning, will also receive motivation money. State Government employees who get themselves or their spouses sterilised after two children will be given four advance increments.

The Haryana Government has decided that three districts which had made commendable progress in this field should be given grants of Rs.1 lakh, Rs.75,000 and Rs.50,000. The five leading panchayats in each district would be given Rs.10,000 each. The grants would be used for implementing various development schemes.

Eligibility requirements for sterilisation: The person volunteering to undergo sterilisation operation must fulfil the following conditions:

1. Must be married with the other partner living (widows/widowers should not be operated).
2. If male, the age must be below 50 years and preferably above 25 years, if female the age must be below 44 years and preferably above 20 years.
3. Must have two or more living children. In case where the person has only two living children, it must be ensured that the age of last child is above two years and children are not suffering from any serious disease.
4. The volunteer or his/her spouse has not already been operated for sterilisation in the past (condition may be waived, if earlier operation has resulted in failure).
5. There has been a birth or abortion during the last five years. In persons who have been using any contraceptives, this condition may be overlooked 4.

Consent: In every case the consent of the acceptor about his/her undergoing the operation must be taken in writing.

The consent of the husband/wife of the acceptor is not essential. However, in order to maintain the marital harmony, acceptor must give in writing along with his consent that he/she has consulted his wife/her husband 5.

Place of operation: Sterilisation operations like any other surgical operations should only be performed in hospitals and other medical institutions having necessary facilities of operation theatres, surgical equipment, anaesthesia, properly trained staff for operation theatre, surgical work and post-operative care. However, if it becomes necessary from time to time to undertake vasectomy operations by organising camps either to meet the increasing demand or to provide facilities where they are not available, it must be ensured that proper rooms are available, which can be used as operation theatre, sterilisation of equipment, pre-medical check-up, part-preparation, post-operative advice, etc.

Camps for tubectomy should not be arranged in any place other than a regular hospital or selected PHCs which are specially equipped for the purpose and can provide all the technical and physical facilities for the operation and postoperative care.

Whatever the place of operation - a regular operation theatre of a hospital or a room temporarily used for operation theatre must be able to maintain complete, asepsis. All the source of dust, common source of infection - entering the place of operation should be avoided 6.

It is not necessary that these operations should be done only by Government hospitals. Even private doctors could undertake them but in order to claim the incentive money for disbursement to the. Acceptors and motivators, they have to obtain licence from the State Government.

Contraception

The Government's policy is to induce more and more eligible couples to adopt contraceptives in order to curb the population growth. In pursuance of this policy, contraceptives are freely available except pills, because these are required to be given on the prescription of a doctor. However, in actual practice, pills are easily available even without a doctor's prescription. All the contraceptives are locally manufactured and their manufacture, sale, supply and distribution are controlled by the Drugs and Cosmetics Act, 1940, and the Drugs (Control) Act, 1950.

Under the new import policy of the Government of India, provision for the import of family welfare equipment is made under Item 25 **of** Appendix X which deals with import items under Open General License. It says that family welfare equipment/instruments, appliances, namely the following: (i) (a) Laparoscope; (b) Culdscope; (c) Hysteroscope; (d) Vacuum Suction apparatus; (e) as well as their accessories and spares; (ii) Rubber contraceptives (diaphragms only);and (iii) Intrauterine Contraceptive Devices (other than the Lippes' Loop and Cu-T200), colored condoms, diaphragms, jelly and foam tablets, as approved by the Drugs Controller (India), New Delhi, can be imported under Open General Licence by all persons 7. Thus, import of contraceptives has been very much liberalized.

Advertisement of drugs concerning miscarriage in women or for the prevention of conception in women is barred by Section 3 of the Drugs and Magic Remedies (Objectionable, Advertisements) Act of 1954. Section 15 of the Act, however, gives the Central Government the power to grant exemption in this regard if, in the opinion of the Central Government, public interest so requires. The fact is that contraceptives are advertised in the newspapers, radio and television by the Government of India itself.

The law of obscenity is laid down by the Indian Penal Code in Sections 292, 293 and 294 which take within the purview of obscenity a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object and cover its selling, letting to hire, distribution, public exhibition or in any manner putting into circulation. But Section 292, which is the main Section, has an exception to it which says that this Section does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure the publication of which is proved to be justified as being for the public good on the ground that such book, etc. is in the interest of science, literature, art or learning or other objects of general concern. Also the highest court of the land, namely, the Supreme Court of India has made a pronouncement in *R.D. Udeshi vs. The State of Maharashtra* 8 that when there is propagation of ideas, opinions and information of public interest or profit, the approach to the problem of obscenity may become, different because then the interest of the society may tilt the scales in favour of free speech and expression. Thus, advertisement of contraceptives, being in the public interest, is not affected by the law of obscenity.

Abortion

In this country, as probably in most other countries, women want to get rid of unwanted pregnancies. Before 1972 this was not legal except in a case when it was necessary to save the life of the mother. Because of this reason many induced abortions used to take place in a clandestine manner. The result was that the health of the women concerned was in most cases, put in great jeopardy because it were quacks and untrained persons who used to perform the operations and even then charged exorbitant fees. In some cases they even blackmailed the woman concerned. This kind of a situation was

sought to be remedied by the enactment of the Medical Termination of Pregnancy Act, 1971. This Act was called a health measure, though from the very beginning this is being used by ladies to get rid of unwanted pregnancies. But the fact that it was enacted professedly as a health measure, still keeps its position anomalous. If even now, it is transferred to the package of family planning measures, it will have a greater impact on the population problem*.

Termination of Pregnancy - When and by Whom'

This Act provides exceptions to the inhibiting provisions of the Indian Penal Code in regard to abortions and it says in Section 3(1) that notwithstanding anything contained in the Indian Penal Code, a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act. Then sub-section (2) provides that subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner:

- a. where the length of the pregnancy does not exceed 12 weeks, if such medical practitioner is or
- b. where the length of the pregnancy exceeds 12 weeks but does not exceed 20 weeks, if not less than two registered medical practitioners are of opinion formed in good faith, that
- i. the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or
- ii. There is substantial risk that if the child was born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

*Many doctors and other staff engaged in Medical Termination of Pregnancy work expressed this opinion during our interviews with them on this theme. One difficulty is created by the fact that money earmarked for family planning work is not made available for Medical Termination of Pregnancy.

Then there are two explanations (1) says that where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman; (2) says that 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. Sub-section (3) then says that in determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

Provision for Consent

Sub-section (4) lays down that no pregnancy shall be terminated except with the consent of the pregnant woman unless she has either not attained the age of 18 years or having attained that age is lunatic. In such cases the consent in writing of her guardian is necessary.

Provision Regarding Place

Section 4 stipulates the place where pregnancy may be terminated. It says that no termination of pregnancy shall be made in accordance with this Act at any place other than

- (a) a hospital established or maintained by Government, or
- (b) a place for the time being approved for the purpose of this Act by Government.

MTP in Cases of Emergency

Section 5(1), however, lays down provisions when section 3 and 4 given above, will not apply. It lays down that the provisions of Section 4 and so much of the provisions of Sub-Section (2) Section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediate necessity to save the life of the pregnant woman. Sub-section 2 of section 5

Then says that notwithstanding anything contained in the Indian Penal Code, the termination of a pregnancy by a person who is not a registered medical practitioner shall be an offence punishable under that Code. There is also an explanation attached to this Section which says that for the purposes of this section, so much of the provisions of clause (d) of Section 2 as relate to the possession, by a registered medical practitioner, of experience or training in gynecology and obstetrics shall not apply. Therefore, what this Section provides is that though in emergency cases in order to save the life of the woman, the medical termination of pregnancy can be effected even after 20 weeks' pregnancy by only one registered medical practitioner even though his clinic has not been approved for the purpose by the Government, and further that in such cases of emergency even the requirement of experience or training in gynaecology and obstetrics, which clause (d) of Section 2 of this Act prescribes for a registered medical practitioner under this Act, is waived. But even then it does not authorise a person who is not a registered medical practitioner to perform this operation because of the enormous danger to the health of the woman concerned in case of operation by an unqualified person.

Power to make Rules and Regulations

Section 6 gives to the Central Government the power to make rules to carry out the provisions of this Act. Section 7 gives to the State Governments power to make regulations prescribing the mode in which the registered medical practitioner shall give his opinion as required in Sub-Section (2) of this Act and about other matters. This section also authorises the State Governments to form regulations requiring the registered medical practitioner, who terminates the pregnancy, to give intimation of such termination and such other information relating to the termination as may be specified in such regulations. The regulations to be formed by State Governments may also prohibit the disclosure, except to such persons and for such purposes as may be specified in such regulations, of intimations given or information furnished in pursuance of such regulations. This section also lays down that any person who wilfully contravenes or willfully fails to comply with the requirements of any regulations made under this Section, shall be liable to be punished with fine which may extend to Rs.1,000.

Protection of Action taken in Good Faith

It is only in the fitness of things that Section 8 of this Act gives immunity against any suit or other legal proceedings to any registered medical practitioner for any damage caused or likely to be caused by anything which is in good faith done or intended to be done' under this Act.

Though as said above, MTP is not. Legally intended to be a family planning measure, yet from its inception in April, 1972 upto June, 1979, at least 1,260,000 births have been prevented by means of medical termination of pregnancy. Besides married women, the MTP comes very handy to unwed mothers who were before this law victim of all sorts of problems, social and otherwise. Keeping in view the usefulness of .MTP for preventing unwanted births, it is suggested that this should be brought within the umbrella of family planning measures so that the hospitals performing MTP are able to get all the facilities and assistance available under the family planning programme.

Conclusion

Having discussed the position of the laws in regard to sterilisation, contraception and abortion, we find that sterilisation is not supported by any proper legal backing which, it appears, is a serious flaw in the legal framework of fertility regulation. In the absence of a proper regulatory law, the executive authorities at different places may adopt different standards, which may lead to arbitrariness in the implementation of the family planning programme. It is, therefore, suggested that a proper detailed law about sterilization should be enacted at the earliest by the Central Government which should lay down the proper norms and guidelines for sterilisation as a family planning measure.

REFERENCES

1. GOVERNMENT OF INDIA Technical Guidelines for Vasectomy Operations, Ministry of Health and Family Welfare, New Delhi.
2. THE HINDUSTAN TIMES, New Delhi, March 19, 1979.

3. GOVERNMENT OF INDIA Technical Guidelines for Vasectomy Operations, Ministry of Health and Family Welfare, New Delhi, p. 2.
4. GOVERNMENT OF INDIA Technical Guidelines for Vasectomy Operations, Ministry of Health and Family Welfare, New Delhi, p. 1.
5. GOVERNMENT OF INDIA Technical Guidelines for Vasectomy Operations, Ministry of Health and Family Welfare, New Delhi, p. 2.
6. GOVERNMENT OF INDIA Technical Guidelines for Vasectomy Operations, Ministry of Health and Family Welfare, New Delhi, p. 6.
7. GOVERNMENT OF INDIA Import Policy - April 1979 - March 1980, Department of Commerce, New Delhi,
8. ALL INDIA RECORDER (1965) Supreme Court, New Delhi, 881.

POPULATION, EDUCATION AND QUALITY OF LIFE

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ABSTRACT

The author, in this paper, deals with population, education and quality of life in the broader context of human rights, educational policies as outlined in the Indian Constitution, National Education Policy and the National Population Policy. He also discusses the role of education in relation to population problem and better quality of life. The paper gives a glimpse of the broad perspectives of population problem which is vitally concerned with our national life.

In this paper the population education has been dealt with in a wider perspective, on basic three parameters (i) population, (ii) education, and (iii) quality of life based on human dignity. These three parameters need not, and should not, be taken into account in a linear continuum. In fact the phenomenon of population growth and the need for its stabilisation can best be understood if, the three basic parameters are seen in a non-static cyclic model where there is a two-way inter-relationship between the three.

The Perspective

Homo sapiens are the most widely distributed species on the planet earth. Commensurate with its extremely wide distribution, this species is also characterised by its ethics and other diversities. Nonetheless, its homogeneity is even more remarkable than its apparent diversities. Its well being and destiny is common and indivisible. The steady growth of its distribution all over the world, the rapid explosion of its numbers and the urge for their stabilisation are as universal as the spread of this species from Pole to Pole.

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The basic assumptions concerning human rights within which the whole problem needs to be viewed with care and caution are under the articles of Universal Declaration of Human Rights which says:

Article 16

- i. "Men and women of full age, without any limitation due to race, nationality or religion have the right to marry and to found a family. They are entitled to' equal rights as to marriage, during marriage and at its dissolution.
- ii. Marriage shall be entered into only with the free and full consent of the intending spouses.
- iii. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

Article 25.

- i. "Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
- ii. Motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock, shall enjoy the same social protection."

Article 26

- i. "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally, available and higher education shall be equally accessible to all on the basis of merit.
- ii. Education shall be directed to the full development of the human personality and to the strengthening of

Respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups and shall further the activities of the United Nations for the maintenance of peace."

The above mentioned human rights are meaningful only in the context of Article 29 which should occupy an overriding position. It reads': "Everyone has duties to the community in which alone the free and full development of his personality is possible"

Education in Indian Constitution

The Constitution of India has laid down the broad educational policies and apportioned the responsibility for education between the Central and State Governments. Primarily, all education including universities was made the responsibility of States (Seventh Schedule, List II, and Entry 11). The Centre's role has been specified in the Seventh Schedule List I - Union List (Entry Nos. 62, 63 and 64). The most topical among them has been the coordination of educational facilities (Entry 66). Besides the division of responsibility for education between the Centre and the States, the Constitution incorporated a Directive to ensure minimum fundamental education to all which required that the State shall endeavour to provide within a period of ten years from commencement of this Constitution, for free and compulsory education for all children until they complete the age of 14 years (Article 45) i.e. by 1960; Fundamental rights enshrined in the Constitution also provide that "no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, ' language or any of them (Article 29, 3.2)". As per 42nd Amendment of the Constitution, education has now been placed on the concurrent list. However, no specific legislation has so far been undertaken by the Central Government and as such for all practical purposes it still continues to be the States¹ concern.

National Policy on Education

National Policy of Education in 1968 has laid down the following which have a direct bearing on population education:

"Education has always been accorded an honoured place in Indian Society. The great leaders of the Indian freedom movement realised the fundamental role of education and throughout the nation's struggle for Independence, stressed its unique significance for national development.

Gandhi contributed a great deal in making education directly relevant to the life of the people.

In post-independence period education has been and is being considered as a factor vital to national progress and security. It has to play a role in economic and cultural development of the country. It has to lay emphasis on development of science and technology and the cultivation of moral and social values. The educational system must produce young men and women of character and ability committed to national service and development.

It emphasises the need for speedy implementation of Directive Principle under Article 45 of the Constitution.

Among other things it also emphasises the need to make strenuous efforts for equalizing educational opportunity for all sections and by removing regional imbalances.

The education of girls should receive emphasis not only on grounds of social justice but because it accelerates social transformation.

The liquidation of mass illiteracy is necessary not only for promoting participation in the working of democratic institutions and for accelerating programme of production especially in agriculture but for quickening the tempo of national development in general."

From Family Planning to Family Welfare

The national population policy since the First Five Year Plan has undergone radical changes. Starting with family planning as a mass campaign it relied heavily on a clinical approach. This was then followed with an extension approach before it moved in the direction of an integrated

Developmental approach. In the process, the emphasis was switched on from family planning to family welfare in which family planning advice and services were a small part of a total package of family health, welfare and social development.

The National Population Policy Statements issued in 1976 and 1977 would throw further light.

National Population Policy (1976) highlights that:

"Our real enemy is poverty, and it is as a frontal assault on the citadel of poverty that the Minimum Needs Programme has been initiated." "Integrated package of health, family planning and nutrition," is one of the five items of this programme.

Nonetheless, it is clear that simply to wait for education and economic development to bring about a drop in fertility is not a practical solution. The very increase in population makes economic development slow and more difficult of achievement. The time factor is so pressing and the population growth so formidable, that we have to get out of the vicious circle through a direct assault upon this problem as a national commitment."

In this connection, the Union Minister of Health made a statement in the House of Parliament on 16th April, 1976, which says:

"My Ministry is also in close touch with the Education Ministry with regard to the introduction of population values in the educational system, and the NCERT has already made a beginning in bringing out some textbooks on these lines. It is essential that the younger generation should grow up with an adequate awareness of the population problem and a realisation of their national responsibility in this regard. Indeed, if I may venture to say so, exhortations to plan families are more important for the younger generations than those who have already made their contribution to our demographic profile."

Policy on Family Welfare (1977)

"Family planning will be pursued vigorously as a wholly

Voluntary programme and as an integral part of a comprehensive policy covering education, health, maternity! And child care, family welfare, women's rights and nutrition.

It is our intention to take the programme forward in the real sense as an investment in man. Our approach is educational and wholly voluntary. There will, however, be no slackening of our efforts in this direction.

The Government attaches the highest importance to the dignity of the citizen and to his right to determine the size of his family. We have no doubt that by and large the people of India are conscious of the importance of responsible parenthood; given the necessary information and adequate services, they will accept the small family norm.

The direct correlation between illiteracy and fertility and between infant and maternal mortality and the age at marriage is well established by demographic studies. While on one hand the Government will pursue its policy of according high priority to the improvement of women's educational level, both through formal and non-formal channels, it will also bring legislation for raising the minimum age of marriage for girls to 18 and for boys to 21.

Population Education has so far not received the attention it deserves. The NCERT have developed some models for the introduction of population education in the school education system. These models have already been adopted by the Central School Organization. We would urge that the departments of education in the States should adopt these models; or their modified versions, in the syllabus in the schools. Forty-two per cent of our population is below the age of 15 years. It is this population which will soon be entering in the area of matrimony. We must take steps without further delay to see that the youth receive population education as part of their normal courses of study."

Magnitude of the Population Problem

The Interim Report of the Working Group on Population

Policy appointed by the Government of India (Planning Commission) and released in March 1979 reads:

"Population policy should reflect the concern for the 'individual's as well as the *community's* dignity, needs, aspirations, development and well, being, and emphasise not only demographic goals in terms of fertility rates, mortality rates and distribution of population but also employment and quality of life."

In the opinion of the Working Group "the success of the population control programme will depend upon:

- a. the involvement of people and the various social, economic and political institutions specially at the local level in organizing the programme, and
- b. on the successful implementation of the various programmes of social and economic changes, specially rural health, adult education, especially women's education, rural water supply, nutrition programme, rural development programme etc."

The Group further adds:

- a. "We strongly recommend that the nation commit itself to achieving the long term goal of net reproduction rate (NRR) of one by 1996 on an average and by 2001 for all States.
- b. The transition from the present level of NRR which is estimated to be around 1.67 to 1 by 2001 A.D. implies that the present family size of 4.2 children will have to be reduced to 2.3 children per couple. This further implies a reduction in death rate from 14 to about 9 and birth rate from 33 to 21. By 2001 the infant mortality rate would also have to come down to 60 from the current figure of 120 per thousand live births.
- c. If we succeed in this task the population of the country would be around 900 million by the turn of the century. It would take another 50 years before population size stabilises because of the age structure of our population. According to present

Estimates the nation's population would stabilize with a small positive growth around 1200 million by the year 2000 A.D."

Education as a Societal Intervention

The acceptance of the idea of a welfare state has brought to the fore the idea of perspective planning as against the routine but indispensable exercise of budgeting. Efficacy of planning, in turn, depends upon availability of sound and up-to-date demographic data-base on the one hand and the survey and assessment of our natural resources on the other. Equally important is the thorough understanding of the environmental-cum-ecological framework within which we have to operate not only for today but for the generations to come, ensuring that this planet would remain inhabitable and continue to provide livelihood to those who would follow us.

Population may or may not be a problem. But for educationists it is a complicated phenomenon with various dimensions - demographic, economic, political, social, psychological, spatial, temporal, anthropological, environmental and biological, and, last but not the least, moral, ethical and philosophical - which need to be studied independently as well as in an integrated manner.

Populations of every kind are governed by certain laws of nature. By very nature populations are dynamic and in no case can they ever be static. It is only in the case of the population of the Homo sapiens that there is a deliberate -may be planned or unplanned - intervention and an attempt to change its structure.

Our urge to procreate is as natural as is the case with any other species. But our desire to live long, coupled with gradual success has resulted in postponement of death, or extension of longevity. Efforts are also underway to fight and overcome the process of aging. Finally, the spectacular success in reduction of death rates through the application of science and technology has necessitated a more systematic and much more sustained effort to apply the same science and technology and accept scientific attitude in proportionate postponement of births. Relying on science for fighting death and conveniently declaring "faith in God" or "His will" in welcoming unplanned births, to say the least, is hypocritical.

Evolution of Population Education

Having discussed the role of education in general in tackling understanding population phenomenon, there have been universal efforts to provide sharp focus to this educational Endeavour which is known by a special name - "Population Education".

The important landmarks in the development of population education in India can be traced in the first National Seminar on Population Education, jointly organized by the Ministry of Education and Youth Services and Ministry of Health and Family Planning on August 2, 1969 in Bombay. Inaugurating the Seminar, Dr. V.K.R.V. Rao said this whole business of family planning and reduction of birth rate is not a 'once-for-all' affair, nor is it concerned only with the currently fertile population that is capable of adding to the country's numbers. Even as eternal vigilance is the price we have to pay for liberty, similarly, family planning education and programmes have to be on a continuing basis as each batch of new entrants into the fertile age group has to be injected with the desire for and the knowledge of family planning. It is here that population education becomes relevant as a motivational instrument that will inject these new entrants with the desire to adopt family planning as a way of life.

He further added and cautioned that it is necessary at the very outset to emphasise that population education at least as I see it, is primarily a motivational force for creating the right attitude to family size and the need for family planning and should not be mixed up either with sex education or knowledge of family plans methods.

Explaining the scope of population education Dr. Rao explained that what the children need is education about population, such as the relation between population and economic development, between a high birth rate and a high death rate, the relation between national income and per *capita* income, the difference in birth rates in different countries and their relevance to their differing degrees of economic development and levels of welfare; the costs of human resource development and availability of financing these costs with particular reference to the numbers involved, the economic and welfare aspects of large and small

Families and the extent to which family size is a matter of deliberate choice and human regulation rather than of accident or of forces beyond human control.

Finally emphasizing the relevance of population education to the quality of life he stressed that population should not be treated merely as a quantitative phenomenon or just as easy in numbers. It is the quality of the population

That is most relevant both as a factor of growth and an end-product of growth and numbers have to be treated in terms of effect they have on quality either by way of deterioration or of improvement.

The two significant recommendations of the National Seminar were:

- a. The task of education is to help the growing citizens to meet the challenges and demands which arise from changing social situations. The Seminar is, therefore, of the opinion that steps should be taken to educate the students at various levels to meet these challenges. Since the growth of population is a major challenge that the country is facing, the members of the seminar are agreed that population education should be an integral part of education at all levels; and
- b. The objective of population education should be to enable the students to understand that family size is controllable, that population limitation can facilitate the development of a higher quality of life in the nation and that a small family size can contribute materially to the quality of living for the individual family.

Population and School

The National Council of Educational Research and Training (NCERT) paper on "Population Education and Innovations: Status and Prospects" prepared during World Population Year 1974 outlines the relationship between population and school as under:

Population explosion is a complex phenomenon, with a variety of ramifications - biological and psychological,

Moral and ethical, social and cultural, and economic and political all of which need to be understood properly.

Population education may help students to understand the inter-relationships between population and development and possible repercussions between the two particularly when there is a continued imbalance between the two.

Population education in Indian schools is particularly significant since about 42 per cent of its population is below fifteen years of age, and presently as many as one-million married couples enter into reproductive age group every year.

Since population education is not a culture-free area, and is essentially value-oriented, it was but natural that the school should play an important role in the development of new values in the society rather patiently and systematically so that the pace of its social and economic development can be accelerated.

Population education may also help students as they grow in regard to their reproductive behavior to explore alternatives open to them along with their implications for themselves, their families and the country at large. Thus, they should be made aware that in their married life they should be called upon to take wise decisions on their family size -the decisions that are purely personal but at the same time with perhaps greatest public import.

The paper further sums up by saying that the above mentioned reasons for educating people on population policies and problems are meaningful in a democratic society, believing in persuasion rather than coercion, and in ultimate wisdom of its people in making correct choices from alternatives open to them.

Challenges

The experience of the developed world has shown that demographic transition is a function of socio-economic development and modernization. However, as stated earlier, we cannot afford to wait till we reach that stage. While the country has been trying its level best to accelerate the pace of economic development, we the educators have to contribute

Our little mite by accepting this challenge on an educational plane. We should be clear in our minds that we have to work against the odds such as:

- a. While on one hand the falling death rate is response ble for a sudden and alarming spurt in population growth, it is still high enough to dissuade the bulk of our population from practicing family planning. The infant and toddler mortality rates are still very discouraging.
- b. Knowing full well that rising population has been eating up the gains of development, showing no significant improvement in *per capita* income or standards of living, over 70 per cent of our population being engaged in primary industry feels no necessity of controlling family size, since to them every addition in the family is a potential asset to add to the family income without much of an investment; and further symbolizes social and economic security especially for old age.
- c. Whereas in the countries with developed economies the fall in birth rate has been a function of a high standard of living, we are required to swim, without any option as it were, against the current. Miserably low standards of living stand in the way of providing even the necessary motivation for practicing family planning, leaving aside knowledge and technical skills needed for the purpose.
- d. To be of any use population education in our country should help to understand what positive role our man power can play in increasing production and capital formation through labour intensive technology unlike the countries with developed economies.
- e. That family planning campaign in itself is not likely to make any appreciable dent on the problem unless it is supplemented by universal education, more effective and wide network- of public health and medical services* better child care and family welfare, nutrition supplies, particularly the extension of social and economic security for the old and infirm.

- f. If the developed countries are plagued with the problem of pollution and a fast deterioration of environment through rapid industrialization and reckless or blind use of technology, in the developing countries urban slums and even the non-availability of pure drinking water in rural areas are owing to nothing but poverty. It is, thus, pollution of poverty as against pollution of affluence.
- g. Finally, keeping in view the demographic Imperatives, the country with a planned mixed economy like ours needs to adopt a wise economic policy that would ultimately help to solve our population problem by achieving a breakthrough in the vicious circle wherein poverty leads to rapid growth of population and the later succeeds in accentuating the former.

What Education Can Do

Education can help us in -

- a. Understanding the population phenomenon.
- b. Appreciating population structure and the need for its manipulation.
- c. Bringing about induced changes in population structure.
- d. Realising the determinants and consequences of population changes which take place automatically or as a result of deliberate attempts.
- e. Focussing sharp attention on relation between man and environment, his role as a mere consumer of food, his place in the interdependent ecosystem and enlightened part he would have to play in maintaining ecological balance.
- f. Studying inter-relationship between growing numbers and dwindling *per capita* resources particularly those that are not replenishable or unlimited.
- g. Inculcating an urge in every human being to aspire, and work, for better quality of life.

- h. Preparing man to think in terms of economies based on recycling of resources, dissuading him from increasing his wants endlessly and getting into a vicious circle of consumerism.
- i. Helping citizens of tomorrow in formulating population policies and programmes.

Education, thus, can go a long way in clarifying the concept of better quality of life and also contribute in bringing about the same. Education while helping to understand the problem at wider level, in the global context and a national perspective, has really to help individual to behave responsibly, intelligently and meaningfully at the micro-level *i.e.* at the individual and family level. The battle of numbers, whether controlled or uncontrolled, is after all to be fought and won in each and every family. Large families and small populations will neither go together nor can poor families and a rich society. If the quality of. Life is to be improved it goes without saying that it should be experienced at the family level.

ROLE OF LAW IN POPULATION CONTROL

P. S. Sangal*

ABSTRACT

In this paper, the author has attempted to show that law and lawyers have a very important role to play in population control. The World Population Plan of Action adopted in Bucharest in 1974, specifically urges review and reform of those laws which affect the status of women, the rights of the child and family welfare. The fact that the Plan should have approached the various population factors and policies in terms of law, is not surprising at all, because law and policy belong, in essence, to the same continuum. As broad policy options are narrowed to a specific policy choice, a decision to adopt that policy must be reflected in the law to refine, coordinate, finance and implement the determined policy. In the absence of such law, a policy will remain ineffectual. Hence the yardstick for measuring a country's degree of compliance with the World Population Plan of Action lies 'not in its declared policy, but the actual enactment and implementation of the law adopted in pursuance thereof.

About the role of lawyers, the author says that lawyers can render invaluable service in the population field through the use and coordination of all branches of the law. Their involvements around the world in policy-making and their familiarity with an adversary system, where the merits of opposing views can be fully weighed, increase the usefulness of lawyers in so controversial a field as population.

After considering some constitutional amend-

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ments in this country which have a bearing on population growth, the author suggests a more prominent mention of population control in the Constitution of India, in_ the form of a Directive Principle of State Policy.

In our interdependent world, it is neither 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.

This statement was made by the UN Secretary-General, Kurt Waldheim in his foreword to United Nation Fund for Population Activities (UNFPA's) compendium, *The United Nations and Population: Major Resolutions and Instruments*, published on the occasion of the World Population Conference in Bucharest in August, 1974. The World Population Plan of Action subsequently adopted by the Conference not only affirms the Secretary-General's view, but also suggests the need for a "unified analytical approach to the study of these inter-relationships and to relevant policies". One such approach to which the Plan of Action gives "high priority" is "the review and analysis of national and international laws which bear directly or indirectly on population factors". The Plan specifically urges review and reform of those laws which affect the status of women, the rights of the child and family welfare.

That the Plan should have approached the various population factors and policies in terms of law is not surprising. For law and policy belong, in essence, to the same continuum. As broad policy options are narrowed to a specific policy choice, a decision to adopt that policy must be reflected in the law - law to refine, coordinate, finance and implement the determined policy. In the absence of such law, a policy will remain ineffectual. Hence, the yardstick for measuring a country's degree of compliance with the World Population Plan of Action lies not in its declared policy, but the actual enactment and implementation of the law adopted in pursuance thereof.

This emphasis on 'legal reform in the population field is also implicit in the Plan's call for the eradication of "alien and colonial domination ... and neo-colonialism in all

Its forms The Plan states: True development cannot take place in the absence of national independence and liberation. Alien and colonial domination ... and neo-colonialism in all its forms continues to be among the greatest obstacles to the full emancipation and progress of the developing countries and all the people involved.

Despite their political independence, many newly emergent nations have retained the antiquated population related laws which they inherited from former colonial powers. Ironically, some of those laws have even been discarded by these powers themselves for basic incompatibility with human rights, but are still on the statute books of the new nations. The retention of the French 1920 anti-contraceptive law by former French colonies in Africa despite its repeal by France in 1967, and the continuation of restrictive abortion laws in many of the former British colonies notwithstanding liberalization in the United Kingdom in 1967, is cases in point. Elsewhere, it is not difficult to discern the continued influence of Dutch law on population matters in Indonesia, the Anglo-French legal presence in the Middle East, which still reflects the divisions of the mandated system, and the Iberian influence on the legal structure of Latin American countries despite their country-old independence from Spain and Portugal.

Thus, it was a great achievement for the World Population Conference that all of these emergent countries should have united in Bucharest in declaring their common opposition to "neo-colonialism in all its forms", as well as their unanimous support for review and reform of population-related laws.

Role of Lawyers

Lawyers can render invaluable service in the population field through the use and coordination of all branches of the law. Their involvements around the world in policy-making and their familiarity with an adversary system, where the merits of opposing views can be fully weighed, increase the usefulness of lawyers in so controversial a subject as population. It is often said that as negotiators, as those who could help articulate policy, and as designers of instruments of policy, the lawyers should not be forgotten. Population policy would normally involve a complex balancing of interests and

opinions, rather than the simple drafting of legal statutes regarding contraception, abortion, the age of marriage, etc.; lawyers usually needed to take into consideration a jungle of existing conflicting laws which bore directly on matters of population policy; the regulation of the manufacture and importation of drugs, restrictive laws on what doctors and paramedical staff can and cannot do, conflicts of law between customary, received and post-colonial enacted law.

All of these qualities help lawyers to put their research findings into action instead of putting them on the shelves. But the systematic involvement of lawyers in the population field is of comparatively recent origin. In 1965, there was only one lawyer among some 1,000 participants and observers at the United Nations World Population Conference in Belgrade, and none of the hundreds of papers presented at the Conference dealt with the legal aspects of population and family planning. Since 1966, however, the study of population law has been accelerated thanks in large part to the following developments:

- a. the statement on population by twelve heads of State in 1966 (increased to thirty in 1967), which asserted that family planning is a basic human right;
- b. the Teheran Proclamation adopted in 1968 by the United Nations Conference on Human Rights stating that couples have the basic human right to plan freely and responsibly the number and spacing of children, together with a resolution that couples also have a right to be sufficiently instructed and informed on family planning;
- c. the General Assembly Declaration on Social Progress and Development in 1969 that the right to family planning includes not only the "knowledge" but also the "means necessary", for the exercise of this right;
- d. the adoption of the World Population Plan of Action by the World Population Conference in Bucharest in August, 1974, stressing, among other things, the need for review of national and international laws which directly or indirectly affect population factors, and for reform of those laws in order to more effectively implement human rights;

- e. the adoption of the World Plan of Action by the World Conference of the International Women's Year in Mexico City in June 1975, stressing the need to review, reform and enforce laws affecting the status of women.

Thus, in the brief span of nine years from Belgrade to Bucharest, population law had come to the forefront of concern in the population field.

Convinced that it was time to mobilise this untapped reservoir of human resources to join in a common endeavour, UNFPA has sponsored a number of projects since 1971 to involve the active participation of lawyers in the population field.

Definition and Role of Population Law

Population law may be defined as that "body of the law which relates directly or indirectly to ... population growth (and) distribution and those aspects of well-being affecting, as well as affected by, population size and distribution¹. The sources of this law include the customs of individual countries, as well as their constitutions, statutes, judicial and administrative decisions and administrative rules and regulations. "Law", as used here, embraces more than the governmental decisions on programmes that are "put into official form and translated into action". As Eugen Ehrlich points out: "At the present as well as at any other time, the centre of gravity of legal development lies neither in legislation nor in juridical science, but in society itself". Furthermore, he cautions: "To embrace the whole variegated body of human activities in legal provisions is about as sensible as trying to catch a stream and hold it in a pond; the part that may be caught is no longer a living stream but a stagnant pool - and a great deal cannot be caught at all²".

Population law appears in different forms and covers many fields. In addition to laws dealing with subjects directly concerned with fertility (contraception, sterilisation and abortion), there are many more laws whose subject matter indirectly affects fertility: obscenity, marriage age, polygamy, extended family, child allowances, old age security, employment of women, child labour, housing, education (both general and sex education), medical practice, customs, taxation, migration land tenure and inheritance.

Just as the impact of law upon the behaviour of the people varies from country to country and according to the subject matter, so do the categories of law which have significant bearing on population growth, distribution and well-being.

Thus, the population problem is multidimensional and can no longer be viewed solely as one of numbers and census-taking to be solved by the provision of contraceptives or family planning services. The World Population Plan of Action under-scores the inter-relationship between population, on the one hand, and socio-economic development, the status of women, etc., on the other.

From earliest times population laws have been pronatalist. The early codes dating back to Hammurabi and the Emperor Augustus contained such provisions. The United States of America's Declaration of Independence accused King George III of Britain as follows: "He has endeavoured to prevent the population of these States: for that purpose obstructing the Laws for Naturalisation of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands".

It has only been since World War II that the desirability of growth has been questioned and that human rights and other considerations have entered the population picture. The following may be noted among the factors causing this recent shift in emphasis:

- a. a general perception of the precipitous fall of the death rate, particularly in the developing countries, and of the dramatic increase in the rate of population growth;
- b. a better understanding of the danger both to mothers and children posed by malnutrition and of the consequent health hazard faced by large families in developing countries;
- c. the revolutionary change in the position of women in almost all developed countries and increasingly in the developing countries, where women are gaining equality, not only in political and economic life but also in domestic and sexual life; with the corollary.

that women should be free to decide for themselves whether or not to bear children;

- d. the increasing recognition of the problems of unwanted children, including emotional disturbance and juvenile delinquency, and of their consequences to the family and society;
- e. widespread illegal ,abortions and the growing realisa tion that contraception is preferable to abortion;
- f. changing attitudes toward morality and sex, with greater willingness to discuss openly such matters as contraception, voluntary sterilisation, abortion and Sex education;
- g. the development of new and more reliable contraceptives, such as intra-uterine devices and pills, and also relatively safe abortion operations;
- h. the concept of responsible parenthood, which has been more widely accepted among different religions and ideologies;
- i. the emphasis in United Nations declarations, proclamations and conventions upon various principles of human rights, including the characterisation of family planning as a basic human right;
- j. the attainment of independence and self-determination by most nations, which enables them to review and reform their laws in the light of their own needs and human rights principles.

Some Constitutional Amendments (India)

As is well-known, the Constitutional Law of a country is the law of laws and is the fundamental law which sets the norms for all other laws. Therefore, anti-natal constitutional changes are of great significance.

One such constitutional change is to add a new Entry, 20A, to List Ill-Concurrent List of 7th Schedule of the Constitution. This Entry 20A is "Population Control and Family Planning". It will be recalled that before this cons-

Constitutional amendment of 1976, population control and family planning were considered as emanating from Entry 6 of List II - State List - which read as "Public health and sanitation; hospitals and dispensaries". As is well known, State List enumerates legislative powers of the State Legislatures, unless a number of States authorise or ask Central Parliament to legislate on a certain item stated in the State list. Therefore, by adding this Entry 20A on "population control and family are planning" to the concurrent list, an important step has been taken in order to enable the Central Parliament to legislate without any authorisation from the States. Even though the States are also entitled to legislate on items in the concurrent list, the Central legislation takes precedence over the State Legislations.

Secondly, it was reported by some States to the Centre that while on the one hand the Centre was urging them to limit their population, those States which did well in this field face reduction of representation in Parliament while those with weak performance in family planning tended to get the increased representation. In order to remedy this situation, the Constitution of India has been amended by the 42 Amendment which introduced in article 81 of the Constitution a proviso. It will be recalled that article 81(2) of the Constitution laid down that there shall be allotted to each State a number of seats in the House of the People in such a manner that the ratio between that number and the population of the State is, so far as practicable, the same for all States; and, secondly, each State shall be divided into territorial constituencies in such a manner that the ratio between the population of each constituency and the number of seats allotted to it is, so far as practicable, the same throughout the State, Clause 3 of article 81 then explains that the expression "Population" means the population as ascertained at the last preceding census of which the relevant figures have been published. In order to remove the kind of anomaly above referred to, a proviso has been added here which says that the reference in this clause to the last preceding census of which the relevant figures have been published, shall, until relevant figures for the first census taken after the year 2000 have been published, be construed as a reference to the 1971 census. Similar provisos have also been added to Article 55 (Manner of Election of President), Article 82 (Readjustment after each Census),

Article 170 (Composition of Legislative Assemblies of States), and Article 330 (Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People).

Yet another anti-natal twist has been given not to the language of the Constitution strictly but to the working of the Constitution. In a federal system, it is well known, that the sharing of Central resources with the States is a matter of considerable importance. In all cases where population is a factor, as in the allocation of Central assistance to State Plans, devolution of taxes, duties and grants-in-aid, it has been decided that the population figures of 1971 will continue to be followed till the year 2001. It has further been decided that in the matter of Central assistance to State Plans, eight per cent will be specifically earmarked for the performance in family planning. This scheme has been put into action. As a consequence, the States which are not doing well in matters of family planning are registering their protest against this scheme. It was reported sometime back that the Bihar Government has written to the Centre protesting against the latter's decision to effect an eight percent cut in the State's annual plan outlay if it failed to achieve the family planning target fixed for the year 1978-1979³. It was further reported that upto February 22, 1979, the Bihar Government had to its credit only 50 sterilisation operations against the target of four lakhs. If the Centre sticks to its decision, the State with its annual plan outlay of Rs.200 crores would lose Rs. 16 crores in the current year. In its letter, the State Government described the Centre's decision as "pressure tactics".

Conclusion

Thus, law can be a very suitable instrument for solving the gigantic problem of population control in this country. It is suggested that in the Constitution of India, a more prominent mention than hitherto should be made of population control. To be specific, it is suggested that a mention should be made about it in the Directive Principles of State Policy.

So far as the role of lawyers in the population field is concerned, it is to be noted that in this country lawyers have not been used for population control so far. This is very clear from the composition of various committees and

working groups which the Government of India or its different agencies have been constituted in regard to population matters. Surprisingly, on none of these committees or working groups, has a lawyer been represented. This shows that the Government of India have not yet realised the important role which population lawyers can play in tackling the gigantic problem of population control in this country. The sooner it is realised, the better it will be for the country.

REFERENCES

1. LEE, L.T. (1974) Population Law: A New Curriculum for Law Schools (a background paper prepared for the UNESCO Workshop on the Teaching of Population Dynamics in Law Schools, 18-22 February, 1974, Paris) published, in UNESCO, *Readings on Population for Law Students*, ch. 1.
2. EHRLICH, E.M. (1922) the Sociology of Law, Harvard Law Review, 36:130, 133.
3. THE HINDUSTAN TIMES, NEW DELHI, February 23, 1979.