

POPULATION AND LAW: THE FUNDAMENTAL RIGHTS ASPECTS IN THE PHILIPPINE SETTING*

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The magnitude of today's population problem is well expressed in a declaration originally issued on Human Rights Day, December 10, 1966, by twelve heads of state, presented to then U.N. Secretary General U Thant, and signed the following year by eighteen other heads of state, including President Ferdinand E. Marcos. It reads in part:

"It took mankind all of recorded time until the middle of the last century to achieve a population of one billion. Yet it took less than a hundred years to add the second billion, and only thirty years to add the third. At today's rate of increase, there will be four billion people by 1975 and nearly seven billion by the year 2000. This unprecedented increase presents us with a situation unique in human affairs and a problem that grows more urgent with each passing day.

The numbers themselves are striking, but their implications are of far greater significance. Too rapid population growth seriously hampers efforts to raise living standards, to further education, to improve health and sanitation, to provide better housing and transportation, to forward cultural and recreational opportunities and in some countries to assure sufficient food. In short, the human aspiration common to men everywhere, to live a better life is being frustrated and jeopardized."¹

What aggravates the problem even more is that the countries with rapid growth rates and which account for two-thirds of the world's population are the undeveloped countries, already stalked by poverty, hunger, disease, illiteracy, inadequate housing and other related problems. It is estimated that "by the year 2000 the now developing countries may well number some 5.4 billion, the economically advanced nations, some 1.6 billion. Thus, while the modernized nations will increase by some 600 million during the next 30 years, the developing nations could increase by about 3 billion, or five times as much."²

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¹ STUDIES IN FAMILY PLANNING 1, no. 16 (January, 1967).

² *Rapid Population Growth*, 10 DEVELOPMENT DIGEST 3 (Jan., 1972).

This assessment of a global problem has particular relevance to the Philippine situation where a runaway population growth constitutes a major obstacle to every effort at reform and national development aimed at giving every individual not merely the bare necessities of living but a better life.³

The Fundamental Rights Issues

Law has come but lately in the consideration of the population problem. Studies now simultaneously undertaken in at least 23 countries of the world, including the Philippines, look into all laws directly or indirectly bearing on population growth.⁴ It is increasingly becoming apparent that laws on marriage, birth, the family, taxation, immigration, social security, health, food and drugs and penal laws, among others, influence population growth.

This paper will not deal with all laws bearing on the population problem. It will be confined to an inquiry into the fundamental rights aspect of law and population.

In the international field, there are declarations, covenants, resolutions and statements, which express an increasing concern over the population problem as it relates to human rights. Reference is made to these pronouncements because they indicate developments in the subject of this study. On the national level, the population problem will be viewed in relation to the constitution and the rights it guarantees to individuals.

The aspiration of mankind to secure human rights and fundamental freedoms for all, finds expression in such documents as the Universal Declaration of Human Rights, the Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, the Teheran Proclamation on Human Rights, the U.N. Declaration of Social Development and Progress as well as in the Bill of Rights of various national constitutions.

The inevitable links between population growth and the implementation of the rights and freedoms proclaimed in the Universal Declaration of Human Rights were duly noted by then U.N. Secretary General U Thant when he received the Declaration on Population Growth signed by the thirty heads of state on December 11, 1967.

³ See Sison, *Population Laws of the Philippines, infra*.

⁴ Tufts University, Fletcher School of Law and Diplomacy, Law and Population Programme Newsletter, May, 1973, p. 1.

⁵ STUDIES IN FAMILY PLANNING 2, No. 26 (Jan., 1968).

The Teheran International Conference on Human Rights in 1968⁶ declared: "Parents have a basic human right to determine freely and responsibly the number and spacing of their children" and at its 25th plenary meeting adopted a resolution drawing attention to the connection between population growth and human rights, thus: "The present rapid rate of population growth in some areas of the world hampers the struggle against hunger and poverty and in particular reduces the possibilities of rapidly achieving adequate standards of living, including food, clothing, housing, medical care, social security, education and social services, thereby impairing the full realization of human rights."⁷

The present approach to the alarming population problem is through family planning. It is taken as the first step towards population control because:

"from a broad political standpoint it is the most acceptable one; since closely tied to maternal and child care it can be perceived as a health measure beyond dispute; and since voluntary it can be justified as a contribution to the effective personal freedom of individual couples. On both scores, the practice ties into accepted values and thus achieves political viability."⁸

The United Nations System through specialized agencies like the UNFPA, the WHO, UNICEF and the UNESCO extends assistance to population programs as requested by governments. It has proclaimed 1974 as population year.⁹ Private organizations and foundations have likewise poured their resources and directed their efforts into family planning activities.¹⁰

In the earlier U.N. documents the legal underpinnings of population policies are discernible, but not explicitly stated. It is only in later pronouncements that the relation of law to family planning and population problems has been articulated.

Thus, while the Universal Declaration of Human Rights recognizes among others the right of privacy¹¹ the right to marry and

⁶ Proclamation, par. 16, U.N. Doc. A/CONF. 32/41 (1968).

⁷ Res. No. XVIII dated May 12, 1968.

⁸ Berelson, *Beyond Family Planning*, STUDIES IN FAMILY PLANNING 1, no. 38 (Feb., 1969).

⁹ General Assembly Res. 2683 (XXV) dated December 11, 1970, 25 U.N.G.A.O.R. Supp. 28 at 55, U.N. Doc. A/8028 (1970). The Economic and Social Council adopted on June 2, 1972, Resolution 1672 (LII) entrusting preparations for the World Population year to the U.N. Fund for Population Activities.

¹⁰ U.N. Fund for Population Activities, *Purposes, Principles, Programmes, World Population Year, 1974* (Aug., 1973).

¹¹ Article 12 provides: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

to found a family.¹² and declares that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state,¹³ no mention is made of family planning. However, General Assembly Resolution 2211 (XXI) of 17 December 1966 recognizes *inter alia* "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 the individual family."¹⁴ The Teheran Conference on Human Rights categorically states "that couples have a 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 General Assembly "Declaration on Social Progress and Development"¹⁵ of 1969 recognizes that the implementation of the right to family planning requires that families be given access to information about and the means necessary for the exercise of the right.

While these declarations, statements and resolutions may not as yet constitute binding obligations on the part of the various member states of the U.N. System, they indicate the growing trend to consider family planning as a basic human right which includes not only the determination of the number and spacing of children but also the right to receive information about different family planning methods.

In some state constitutions the legal bases for this right already exist. But the rights to marry, to form a family, and to determine the number and spacing of children, are so basic in character that these would exist even without constitutional recognition. These rights in fact antedate constitutions, bills of rights and the U.N. System. The very survival of the human race depends on them.

The Population Problem and the Philippine Constitution

The 1935 constitution had no specific provision bearing on the population problem. The authority to adopt policies and legis-

¹² Art. 16, par. 1 provides: "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."

¹³ Art. 16, par. 3 provides "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

¹⁴ 21 U.N. G.A.O.R. Supp. 16 at 42, U.N. Doc. A/6316 (1966).

¹⁵ Gen. Assembly Res. 2542 (XXIV), Art. 22 (b), 24 U.N. G.A.O.R. Supp. 30 at 49, 52, A/7630 (1969).

lative measures relating to population was drawn from the inherent police power of the state or implied from the constitutional provision on social justice. Against any arbitrary interference with fundamental rights in the implementation of population policies, the individual could invoke the guarantee of due process, equal protection of laws and other constitutional guarantees which protect the right of privacy.

When the constitutional convention met in 1971, the urgency of the population problem was considered. The result of the deliberations is Article XV, section 10 of the 1973 constitution which provides:

"It shall be the responsibility of the State to achieve and maintain population levels most conducive to the national welfare."¹⁶

The population policy enunciated is neither pro-natalist nor anti-natalist. It is sufficiently flexible to support measures encouraging birth, should the national welfare require an increase in population or measures aimed at checking population growth, should there be a too rapid increase.

But the responsibility imposed to maintain population levels most conducive to national welfare is unavoidable, because of the following principles declared in the constitution:

"The State shall strengthen the family as a basic social institution."¹⁷

"The State shall promote social justice to ensure the dignity, welfare, and security of all the people."¹⁸

"The State shall establish, maintain and ensure adequate social services in the field of education, health, housing, employment, welfare, and social security to guarantee the enjoyment by the people of a decent standard of living."¹⁹

Whatever direction the state population policy takes, it is pertinent to ask how far the state can interfere with the individual rights.

Certain other provisions qualify and limit the power to adopt population measures. For example, the 1973 constitution recognizes "the natural right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character."²⁰

¹⁶ Previous drafts employed the phrase "optimum levels of population."

¹⁷ Article II, sec. 4.

¹⁸ Art. II, sec. 6.

¹⁹ Art. II, sec. 7.

²⁰ Art. II, sec. 4.

The formulation and adoption of a population policy involve consideration of demographic, economic, political, religious, social, medical, educational, legal and other factors. When the Commission on Population was created, the President in an Executive Order declared that "the population problem must be recognized as a principal element in long-range national planning if governments are to achieve their economic goals and fulfill the aspirations of their people."²¹ Recognizing this, the population policy states that "for the purpose of furthering the national development, increasing the share of each Filipino in the fruits of economic progress and meeting the grave social and economic challenge of high rate of population, a national program of family planning *which respects religious beliefs* of the individuals involved shall be undertaken."²²

After the declaration of martial law the Population Act of 1971 was amended by Presidential Decree No. 79.²³ The preamble of the decree declares that the population program is an integral and vital part of social reform and economic development and refers to the objective of martial law to bring about a society designed to improve the quality of life of each Filipino and give him an opportunity to realize his full potential and attain individual dignity.

The declared policy as amended states that the family planning program shall respect "*religious beliefs and values* of the individuals involved."²⁴

The decree clearly states that one of the purposes and objectives of the Commission on Population is "to encourage all persons to adopt safe and effective means of planning and realizing desired family size so as to discourage and prevent resort to unacceptable practice of birth control, such as abortion by making available all acceptable methods of contraception to all persons desirous of spacing, limiting or preventing pregnancies."²⁵

The national population policy thus defined recognizes: (1) the vital importance of family planning in bringing about social reform and economic development in order to achieve a transformed society designed to improve the quality of human life; (2) the

²¹ Ex. O. No. 233, May 15, 1970, 66 O. G. 5187 (May 25, 1970).

²² Rep. Act No. 6365 (1971), 68 O.G. 16 (Jan. 3, 1972). Italics supplied.

²³ Pres. Decree No. 79 issued on December 8, 1972, 69 O.G. 9896 (Dec. 18, 1972).

²⁴ Pres. Decree No. 79 (1972), sec. 2. Italics supplied.

²⁵ Sec. 4 (f).

need to respect religious beliefs and values of the individuals concerned; (3) the distinction between acceptable and unacceptable methods of birth control; and (4) the desirability of encouraging family planning and making available the acceptable methods of contraception to all who may want them.

Towards the implementation of this policy, General Order No. 18, dated December 8, 1972 "enjoins all citizens of the Philippines, all universities, colleges and schools, government offices, mass media, civic and voluntary organizations, religious organizations of all creeds, and business and industrial enterprises to promote the concept of family welfare, responsible parenthood, and family planning." In Letter of Instruction No. 47, the Department of Education and Culture is directed "to inform all schools of medicine, nursing, midwifery, allied medical professions, and social work to prepare, plan and implement the integration of family planning in their curricula and to require from their graduates sufficient instruction in family planning as a prerequisite to qualifying for the appropriate licensing examination."

To a man with a dozen or more mouths to feed, who knows not where the next meal will come or how to clothe his children; whose jerry-built shack leaks when it rains and rattles with every passing wind, fundamental rights may be strange and esoteric. To him the realities are poverty, hunger, ignorance and disease. For him the population measures will have come too late. It is for his children, hopefully, and for the coming generations that the family planning program addresses itself. It is to stem the on-rushing tide of a too rapidly increasing population that the global efforts at family planning are directed and the Philippine population programs are specifically undertaken. Because the population problem deals with humankind as well as with the power of sovereign states to adopt population policies, it is essential to consider how far the power of the state can go. There thus enters into the problem the inevitable balancing of the power to adopt measures for the promotion of the general welfare as against the right of the individual to be protected from unwarranted encroachment. Recurring issues of fundamental character must be investigated, not as idle academic exercise, but as matters which much sooner than expected will touch the life of every man and woman.

The emerging international standard in the treatment of the population problem emphasizes the human rights aspect of family planning particularly the freedom of choice. This would shield

the individual from interference in his choice of birth control methods as well as against any form of compulsory population measure, whether pro-natalist or anti-natalist.

The announced Philippine national population policy hews close to these standards and even more specifically underscores the importance of religious beliefs and individual values in the implementation of its population policy.

In a predominantly Catholic population what those "religious beliefs" are, needs no extended treatment. The official position of the Catholic Church on the question of birth control will not be developed here. Suffice it to say that in the adoption of policies and their implementation no state can ignore the strongly held views and beliefs of a majority of its people. At the same time the contrary views of even a small minority and their freedom of action can not be entirely suppressed. Where to draw the line is a perennial problem.

To go down to specifics.

While the idea of family planning by limiting and spacing the number of children may still have to be sold to the vast majority of the Philippine population, there are those who not only accept the idea but will act upon it by adopting the most effective methods of birth control. Having in mind the applicable laws as found in the constitution and statutes in this jurisdiction, how much choice in family planning methods does an individual have?

*Right of Privacy and Population Control*²⁶

The right of privacy which under the Philippine Constitution is protected by guarantees of due process, of the right against unreasonable searches and seizure, and against self-incrimination is unavoidably linked with family planning.

The question of whether or not to have children and their number and spacing, used to be a matter of purely private concern but they became of public moment upon the adoption of family planning as a state policy. Robert S. McNamara has pointed out that the population problem is a paradox:

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

²⁶ This part is taken from a paper entitled "The Right of Privacy and Family Planning" read at the Tokyo meeting of the International Advisory Committee on Population and Law on October 31, 1972, in HUMAN RIGHTS AND POPULATION FROM THE PERSPECTIVES OF LAW, POLICY AND ORGANIZATION 36-40 (1973).

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

"It is an issue intolerant of government pressure and yet endangered by government procrastination."²⁷

The accelerated pace of family planning activities of government agencies and private organizations is accompanied by more frequent intrusion into matters which not too long ago were considered out of bounds. Questionnaires in various population and family planning surveys amply show this. The personal data obtained in family planning clinics likewise call for information which normally a person would withhold. The respondents in family planning surveys and acceptors of family planning methods offered in government or private clinics waive, knowingly or unknowingly, part of their privacy. Computerization of the data obtained makes the intrusion more sophisticated.

But the more significant legal problems of privacy as it relates to family planning spring from the interplay of the asserted right of the individual to decide whether or not to have children and the exercise of the state power by the adoption and implementation of population policies through measures affecting marriage, the family and child bearing.

The universality of man's striving for privacy is acknowledged both in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights. The latter provides:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."²⁸

The sovereign power to formulate and implement population policies undoubtedly exists, but it touches upon one of the most sensitive of human relationships. As one court has put it: "If the right of privacy means anything it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion, into matters so fundamentally affecting a person as a decision whether to bear or beget children."²⁹

²⁷ *The Population Explosion*, 19 FREE WORLD 4, 40, no. 3, (1970).

²⁸ Adopted by Gen. Assembly Res. 2200 A (XXII) of 16 December, 1966, Art. 17, secs. 1 and 2, in UNITED NATIONS, HUMAN RIGHTS, A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS 11 (1967).

²⁹ *Eisenstadt v. Baird*, 31 L. Ed. 2d 349, 362 (1972).

Does this mean that individuals are free to choose any birth control method whether by contraceptive drugs or devices, sterilization, or abortion? On the other hand can they choose to have as many children as they may want? To what extent can a state interfere in this decision?

Contraceptive Drugs or Devices

Not too long ago it was a crime in many jurisdictions to deal in or use contraceptives. The relaxation of restrictive laws on the importation, distribution, use or advertisement of contraceptive drugs and devices is of relatively recent development. In the statute books of some states, penal provisions on the use of contraceptives still remain.³⁰

Philippine laws prohibited the importation of "articles, instruments, drugs and substances designed, intended or adopted for preventing human conception or producing unlawful abortion, any printed matter which advertises or describes or gives directly or indirectly information where, how and by whom human conception is prevented or unlawful abortion produced"³¹ and their transmission through the mails.³² The enactment of Republic Act No. 4729 in 1966 regulating the sale of contraceptives according to the Secretary of Justice³³ impliedly repealed the anti-contraceptive provisions of these laws. The stepped-up family planning activities undertaken by the government as well as private organizations in this country requiring the importation and distribution of contraceptive drugs and devices would have been immobilized were it not for

³⁰ Lee, *Law and Family Planning*, 2 *STUDIES IN FAMILY PLANNING* 83 (April, 1971). WOLF, *ANTI-CONTRACEPTION LAWS IN SUB-SARARAN FRANCOPHONE AFRICA: SOURCES AND RAMIFICATIONS* (Law and Population Monograph Series No. 15, 1973).

³¹ *TARIFF & CUSTOMS CODE*, sec. 102(d).

³² *REV. ADM. CODE*, sec. 1954 provides: "*Absolutely nonmailable matter.*— No matter belonging to any of the following classes, whether sealed as first-class matter or not, shall be imported into the Philippines through the mails, or be deposited in or carried by the mails of the Philippines, or be delivered to its addressee by any officer or employee of the Bureau of Posts:

... (c) Articles, instruments, drugs, and substances designed, intended, or adapted for preventing conception or producing abortion, or for any indecent or immoral use, or which are advertised or described in a manner calculated to lead another to use or apply them for preventing conception or producing abortion, or for any indecent or immoral purpose.

(d) Written or printed matter and photographs, engravings, lithographs, and other representations of an obscene, lewd, lascivious, filthy, indecent, or libelous character, including all such matter which advertises or describes or gives, directly or indirectly, information where, how, from whom, or by what means any article, instrument, drug, or substance enumerated in the preceding subsection hereof may be obtained or made, of where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced.

³³ Secretary of Justice Opinion dated April 28, 1969.

this implied repeal. After the declaration of martial law, a presidential decree amending the Tariff and Customs Code, deleted the prohibition against the importation of contraceptives and retained only the prohibition relating to abortion.³⁴

In the United States, various state anti-contraceptive laws have lost their efficacy because of court decisions upholding the right not only to the use or distribution of contraceptives but to the employment of an even more radical birth control method, namely, abortion under certain conditions.

In a decision of far-reaching significance the U.S. Federal Supreme Court in the case of *Griswold v. Connecticut*³⁵ held unconstitutional a statute penalizing the use of contraceptives. Griswold, the Executive Director of the Planned Parenthood League of Connecticut, and Buxton, its medical officer, a licensed physician and professor in the Yale Medical School were found guilty as accessories for having given information, instruction and medical advice to married persons regarding contraception. The married persons who received the advice were not themselves parties in the case but the defendants who had given the advice were declared to have standing to raise the constitutional rights of the married people.

The Supreme Court through Mr. Justice Douglas held that the Connecticut anti-contraceptive statute when applied to a married couple, violated the right of marital privacy, a right older than the Bill of Rights and protected by several fundamental constitutional guarantees.

The right of privacy was later invoked by unmarried women in abortion cases as an independent constitutional right.³⁶ It should, however, be borne in mind that even constitutional rights are not absolute, and courts have in a number of cases held that they must yield to compelling state interests.³⁷

Sterilization

In some countries³⁸ voluntary sterilization as a contraceptive method is legally permitted and is increasingly utilized in family

³⁴ Pres. Dec. No. 34, issued on October 27, 1972, sec. 102 provides:

Importations.—The importation into the Philippines of the following articles are prohibited:

d. Articles, instruments, drugs and substances designed, intended or adapted for producing unlawful abortion, or any printed matter which advertises or describes or gives directly or indirectly information where, how or by whom unlawful abortion is produced.

³⁵ 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1625 (1965).

³⁶ *People v. Belous*, 80 Cal. Rptr. 354, 458 P. 2d 124 (1969).

³⁷ *Roe v. Wade*, 41 L.W. 4213, 4226, 93 S. Ct. 705 (Jan. 22, 1973).

³⁸ India, United Kingdom and states of the United States of America.

planning. In others, it is considered a crime coming under laws penalizing castration or mutilation although in practice the penal provisions are rarely applied.³⁹ The constitutional questions arising from compulsory sterilization are not unfamiliar in this jurisdiction. The trenchant remark of Justice Holmes in *Buck v. Bell*⁴⁰ a eugenic sterilization case, is well-known: "Three generations of imbeciles is enough." Coercive sterilization may not be regarded with favor⁴¹ and the Nazis demonstrated to what lengths it can be carried,⁴² but awareness of the mounting gravity of the population problem is producing changed attitudes, and as Stepan and Kellogg point out, developments involving voluntary sterilization as a method of family planning have "far outstripped the slow legislative process."⁴³

This is true in the Philippines. Even with serious doubts about its legal permissibility and before any official statement was issued on the question of whether or not sterilization performed with consent is covered by the penal code provision punishing intentional mutilation,⁴⁴ an increasing number were reportedly resorting to sterilization as a contraceptive method and medical clinics were established offering sterilization service.⁴⁵ Subsequently, the Commission on Population obtained an opinion of the Secretary of Justice to the effect that surgical sterilization through tubal ligation or vasectomy is not mutilation punishable by law. When the subject knowingly consents to it, the surgeon commits no crime.⁴⁶

Sterilization with consent involves an individual's constitutional right to the control of his/her person. While one has no absolute right to be, at all times and in all circumstances wholly free from restraint,⁴⁷ the decision to undergo voluntary contraceptive sterilization would come within the protection of the right of privacy.

³⁹ STEPAN & KELLOGG, *THE WORLD'S LAWS ON VOLUNTARY STERILIZATION FOR FAMILY PLANNING PURPOSES* 15 (1973).

⁴⁰ 274 U.S. 200, 207, 47 S.Ct. 584, 71 L.Ed. 1000 (1927).

⁴¹ *Skinner v. Oklahoma*, 316 U.S. 535, 86 L.Ed. 1655, 62 S.Ct. 1110 (1942).

⁴² 20 INTERNATIONAL MILITARY TRIBUNAL, *TRIAL OF THE MAJOR WAR CRIMINALS*, 547 (1948). See also HARRIS, *TYRANNY ON TRIAL; THE EVIDENCE AT NUREMBERG* 431 (1954).

⁴³ STEPAN & KELLOGG, *supra*, note 39 at 1.

⁴⁴ REV. PENAL CODE, art. 262 provides: The penalty of *reclusión temporal* to *reclusión perpetua* shall be imposed upon any person who shall intentionally mutilate another by depriving him, either totally or partially, of some essential organ for reproduction.

⁴⁵ According to the Population Commission, there are 19 hospitals offering sterilization services as of November, 1973.

⁴⁶ Secretary of Justice Opinion No. 131, dated September 17, 1973.

⁴⁷ *Jacobson v. Massachusetts*, 197 U.S. 11, 49 L.Ed. 643, 25 S.Ct. 358 (1905).

However, some compelling subordinating interest could supervene to justify state interference. Thus, the interest of a spouse may not be completely ignored particularly where the results of the sterilization are irreversible, although new techniques have reportedly been developed using sterilant substances with temporary effects. The state in the protection of the family as the basic unit of society could regulate sterilization, even with consent. Such regulation may be directed to ensure that the person seeking sterilization is fully aware of its consequences. This is particularly important where young persons are concerned.

While the problem in most states is a too rapid rate of increase, there are states where the population growth is found insufficient. The latter would understandably encourage child bearing and have more restrictive rules on birth control.

Abortion

The Revised Penal Code prohibits and punishes induced abortions whether intentional or unintentional, with or without consent.⁴⁸ The mildest penalty is six months in the case of a woman who commits it to conceal her dishonor, and the more severe, running up to twenty years are imposed on those who cause an abortion using violence on the person of the pregnant woman. The penalties in their maximum periods are to be imposed on a physician or midwife who, taking advantage of scientific knowledge or skill, causes or assists in causing abortions.⁴⁹

The Population Act of 1971, as amended, explicitly provides that abortion is an unacceptable method of birth control.⁵⁰ It also directs that religious beliefs and values of the individual concerned should be respected. Considering the predominantly Catholic composition of Philippine population, the latest Papal Encyclical against "voluntary abortion procured even for therapeutic reasons,"⁵¹ has special significance.

⁴⁸ Arts. 256-258.

⁴⁹ Art. 259.

⁵⁰ Pres. Dec. No. 79 (1972), sec. 4 (i).

⁵¹ *Humanae Vitae*, art. 14 provides: In conformity with these landmarks in the human and Christian vision of marriage, We must once again declare that the direct interruption of the generative process already begun, and, above all, directly willed and procured abortion, even if for therapeutic reasons, are to be absolutely excluded as licit means of regulating birth.

Equally to be excluded, as the teaching authority of the Church has frequently declared, is direct sterilization, whether perpetual or temporary, whether of the man or of the woman. Similarly excluded is every action which, either in anticipation of the conjugal act, or in its accomplishment, or in the development of its

However, despite the broad statutory prohibition against induced abortions and the absence of clear provision permitting them for therapeutic reasons, it does not follow that therapeutic abortions are necessarily criminal acts. In this jurisdiction there is no law or judicial rule directly supporting therapeutic abortion. But Mr. Justice J. B. L. Reyes in *Geluz v. Court of Appeals* said:⁵² "It is unquestionable that the appellant's act in provoking the abortion of appellee's wife, *without medical necessity to warrant it*, was a criminal and morally reprehensible act, that cannot be too severely condemned; and the consent of the woman or that of her husband does not excuse it."

The implication can be drawn that abortion may be warranted as a medical necessity under Article 11 of the Revised Penal Code which provides that no criminal liability is incurred by:

"4. Any person who, in order to avoid an evil or injury, does an act which causes damage to another, provided that the following requisites are present:

"First, that the evil sought to be avoided actually exists;

"Second, that the injury feared be greater than that done to avoid it.

"Third, that there be no other practical and less harmful means of preventing it."

In making the difficult decision of whether or not to terminate a pregnancy for medical reasons, the physician will have to take into account the life and/or health of the pregnant woman as against that of the unborn foetus. The cited provision may only be invoked if there is no other practical or less harmful way of avoiding what the physician has adjudged to be the greater injury. He would have the burden of proving that all the requisites to justify his action are present.

natural consequences, proposes, whether as an end or as a means, to render procreation impossible.

To justify conjugal acts made intentionally infecund, one cannot invoke as valid reasons the lesser evil, or the fact that such acts would constitute a whole together with the fecund acts already performed or to follow later, and hence would share in one and the same moral goodness. In truth, if it is sometimes licit to tolerate a lesser evil in order to avoid a greater evil or to promote a greater good, it is not licit, even for the gravest reasons to do evil so that good may follow therefrom; that is, to make into the object of a positive act of the will something which is intrinsically disorder, and hence unworthy of the human person, even when the intention is to safeguard or promote individual, family or social well-being. Consequently, it is an error to think that a conjugal act which is deliberately made infecund and so is intrinsically dishonest could be made honest and right by the ensemble of a fecund conjugal life.

⁵² G.R. No. L-16439, July 20, 1961, 2 SCRA 801, 805 (1961).

The above provision would not apply to abortion as a means of birth control. As Mr. Justice J. B. L. Reyes said in the case mentioned, the abortion, the third obtained by the woman in the case to get rid of an unwanted child, was a criminal and morally reprehensible act. The court ordered a copy of the decision to be furnished the Department of Justice as well as the Board of Medical Examiners for their information and investigation.

Abortion laws in other states vary.⁵³ Thus, in Japan, the Criminal Code penalizes abortion, the most severe penalty being forced labor for not less than six months nor more than seven years. But the Eugenic Protection Law of 1948, as amended, permits an authorized physician to perform an operation for interruption of pregnancy with the consent of the woman or the spouse in enumerated cases. The operation may be validly performed on a "mother whose health may be affected seriously by continuation of pregnancy or by delivery, from the physical or *economic viewpoint*."⁵⁴

In Korea, the Criminal Code penalizes abortion. There is no provision permitting it for medical reasons but there are court decisions which "legalize abortion" for medical reasons and because of their Confucian tradition of a father's absolute power over his child, the actual practice of abortion for reasons other than medical continue.⁵⁵

In Thailand, abortion is also a crime but exceptions are made in favor of women whose health may be endangered or who have been the victims of rape.⁵⁶

Indian Law permitting therapeutic abortions is in the process of being liberalized reportedly to include contraceptive failures.⁵⁷

Pakistanian law penalizes acts which cause miscarriage or injuries to the unborn child, but recognizes certain exceptions.⁵⁸

The Belgian law which penalizes abortions excludes those done for therapeutic reasons. Despite the large Catholic majority of its population and its restrictive laws, abortion is widely practiced.⁵⁹

⁵³ The discussion here is based on LEE & LARSON (EDS.), *POPULATION AND LAW; A STUDY OF THE RELATIONS BETWEEN POPULATION PROBLEMS AND LAW* (1971).

⁵⁴ Lee, *Japan*, in LEE & LARSON, *supra* at 16.

⁵⁵ Lee, *Korea* in LEE & LARSON, *supra* at 47.

⁵⁶ Fawcett, *Thailand*, in LEE & LARSON, *supra* at 79.

⁵⁷ Singh, *India*, in LEE & LARSON, *supra* at 110-111.

⁵⁸ Rahman & Lee, *Pakistan*, in LEE & LARSON, *supra* at 138-139.

⁵⁹ "La Famille Heureuse", *Belgium*, in LEE & LARSON, *supra* at 166.

Romania liberalized its laws on induced abortions, but when birth rates drastically dropped from 24.2 per 1000 population in 1956 to 14.3 in 1966 the liberal abortion policy was abruptly reversed and more restrictive rules were put into force.⁶⁰

The abortion laws in the United States differed from state to state, some more liberal than others. In January 1973, the Supreme Court squarely met the fiercely controversial issue of whether a woman has a constitutional right to terminate a pregnancy. In a number of cases simultaneously filed to challenge the constitutionality of the Texas criminal abortion laws, which penalized the acts of procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life, the Court gave due course to *Roe v. Wade*,⁶¹ a class action presented by a woman who was pregnant and single.

In a landmark 7-2 decision, the United States Supreme Court struck down the Texas law for "sweeping too broadly" and thus violating a woman's right of privacy.

The Court speaking through Mr. Justice Blackmun declared "that the right of privacy, however based is broad enough to cover the abortion decision, the right nonetheless is not absolute and is subject to some limitations, and that at some point the state interests as to protection of health, medical standards, and prenatal life become dominant."

The court pointed out that while the state cannot override the right, it has legitimate interest in protecting both the pregnant woman's health and the potentiality of human life, each of which grows and reaches a "compelling" point at various stages of the woman's approach to term. In the weighing of these competing interests the Federal Supreme Court established what the New York Times described as "an unusually detailed timetable for the relative legal rights of pregnant women and the states that would control their acts."⁶² According to the court:

- (a) For the first three months of pregnancy the decision to have an abortion lies with the woman and her doctor;
- (b) After the first three months of pregnancy and before the stage of viability, the state, in promoting its interest in

⁶⁰ David & Wright, *Abortion Legislation: The Romanian Experience*, 2 STUDIES IN FAMILY PLANNING 1 (October, 1971).

⁶¹ *Supra*, note 37.

⁶² Weaver, "High Court Rules Abortions Legal the First 3 Months," N.Y. Times, January 23, 1973, p. 1.

the health of the mother, may if it chooses, regulate the abortion procedure in ways that are reasonable to maternal health;

(c) Subsequent to viability which is placed at the last ten weeks of pregnancy, the period during which the foetus is judged to be capable of surviving if born, any state may prohibit abortions, if it wishes, except where they may be necessary to preserve the life or health of the mother.

The decision has not terminated the intense controversy over the abortion issue. To women in the liberation movement the decision has not gone far enough, their objective being abortion on demand. To others the decision has gone too far.

John Cardinal Krol, Archbishop of Philadelphia and President of the National Conference of Catholic Bishops said that there is no rational justification for allowing unrestricted abortion up to the third month, that "the child in the womb has the right to life, to the life he already possesses and this is a right no court has the authority to deny." Another Roman Catholic Cardinal (Cardinal Cooke) denounced the decision as a tragic utilitarian judgment on who shall live and who shall have life and who shall die, reminding the American people that judicial decisions are not necessarily moral decisions.⁶³

The United States Supreme Court rejected the claim that the protection of the due process clause extends to pre-natal life but avoided the question of when life begins. (The Catholic Church holds that life begins from the moment of conception.)

As in the United States the fundamental guarantees of due process and other rights on which personal privacy rests are found in the Philippine constitution. But would a challenge to our even stricter penal laws on abortion be decided along the lines of *Roe v. Wade*? In that case, the Court dealt with separate and distinct interests—that of the pregnant woman on the one hand and on the other, the state interest in preserving and protecting her health, and in protecting the potentiality of human life in the foetus.

The judicial balancing of interests is not done in a vacuum. Cultural, social, religious, as well as legal considerations come into play. A Philippine court dealing with such a challenge would take into account certain values existing in Philippine society.

⁶³ "Statements by 2 Cardinals", N.Y. Times, January 23, 1973, p. 20.

The 1973 constitution declares that the state shall strengthen the family as a basic social institution and recognizes in the parents a natural right and duty in the rearing of the youth not only for civic efficiency but also for the development of moral character. In dealing with the abortion issue, the moral aspect would be as relevant as the woman's health or her right to personal privacy. As noted earlier, the announced national population policy states that family planning programs shall respect the religious beliefs and values of individuals concerned and excludes abortion among the legally permissible means of family planning.

The termination of a pregnancy is not the exclusive concern of the woman. Should a conflict arise between husband and wife on whether a pregnancy should be terminated, assuming that an abortion may legally be had, how should the conflict be resolved?

In *Roe v. Wade*,⁶⁴ the petitioner was an unmarried woman. The detailed rules set down by the U.S. Supreme Court as to the availability of abortion, dealt only with the competing rights of the pregnant woman and of the state in protecting maternal health as well as the unborn foetus.

But the Philippine Supreme Court in *Geluz v. Court of Appeals*⁶⁵ has indicated that the husband in an appropriate case may have basis to recover from the person causing the abortion: (1) moral damages arising from the illegal arrest of the normal development of the foetus for the distress and anguish attendant to its loss, and the disappointment of his parental expectations and (2) exemplary damages, should the circumstances warrant.

The more important question however is independent of statutory basis for recovery: Are a husband's constitutional rights violated when his wife procures abortion without his consent? It has been held that the right "to marry, establish a home and bring up children" is an essential part of the liberty guaranteed by the constitution,⁶⁶ that the right to have off-spring is "basic to the perpetuation of the race."⁶⁷ The husband who objects to an abortion may assert that like the right to privacy, his right to marry and to have children, both essential to his happiness, antedate the constitution and the Bill of Rights.⁶⁸

⁶⁴ *Supra*, note 37. See also *Doe v. Bolton*, 93 S. Ct. 739 (1973).

⁶⁵ *Supra*, note 52.

⁶⁶ *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A.L.R. 1446 (1923).

⁶⁷ *Skinner v. Oklahoma*, *supra*, note 41 at 536.

⁶⁸ *Griswold v. Connecticut*, *supra*, note 35 at 486.

Another consideration in the abortion problem is the unborn foetus. Under the Civil Code while legal personality commences at birth, provisional personality is accorded the unborn foetus provided it be born later with the conditions specified, namely:

"For civil purposes the foetus is considered born if it is alive at the time it is completely delivered from the mother's womb. However, if the foetus had an intra-uterine life of less than seven months, it is not deemed born if it dies within twenty-four hours after its complete delivery from the maternal womb."⁶⁹

In the *Geluz v. Court of Appeals* case, the Supreme Court held that the Civil Code provision fixing a minimum award of ₱3,000 for the death of a person, does not extend to an unborn foetus since it is not endowed with personality. Under the system of our Civil Code "*la criatura abortiva no alcanza la categoria de persona natural y en consecuencia es un ser no nacido a la vida del derecho*"⁷⁰ therefore incapable of having rights and obligations. As a consequence, damages could not be recovered for injury to it, nor could the right to sue for damages derivatively accrue to its parents or heirs because Article 40 of the Civil Code, endowing the conceived child with provisional personality, attaches the condition that it should be born alive. It does not follow, however, that since an action for damages arising from injury or death does not accrue to the foetus, that it is protected from neither. The penal laws punishing abortion and the Population Act excluding it from acceptable methods of family planning ensure that the foetus shall have a chance to be born alive. Parenthetically, it may be of interest to note that in *Roe v. Wade*, the United States Supreme Court, held that the unborn foetus is not a person within the due process of law clause of the 14th amendment of the Federal Constitution.

Not the least of the interests involved in abortion cases is the interest of the state in promoting the general welfare. It has an interest in protecting the health of the pregnant woman, it has an important and legitimate interest in the potential human life of the foetus, it has an interest in protecting the family and in the preservation of the race. On these bases it has power to enact measures prohibiting or regulating the interruption of pregnancy, depending on various social, cultural and religious and other values.

⁶⁹ Art. 41.

⁷⁰ 1 CASSO-CAWERA, DICCIONARIO DE DERECHO PRIVADO 49.

Compulsory Population Measures

The present approach to the population problem is non-coercive. Family planning as a human right is recognized as pertaining to the family,⁷¹ but the ultimate decision will have to be made by individuals. But should voluntary methods fail and the population problem become more pressing, may a state impose compulsory methods of fertility control?

Various proposals dealing with the population problem suggest involuntary control methods, including mass use of fertility control agents or sterilants, substances yet unknown but believed available after five to fifteen years of research, to be added in water supplies or food; marketable licenses to have children; compulsory sterilization of men with three children, or induced abortion for illegitimate pregnancies.⁷²

No state has resorted to compulsory methods. Japan considered them. An attempt to adopt them in India aroused a storm of questions in Parliament and was withdrawn. Since then no other state has seriously considered the idea.⁷³

But those who have gone deeply into the population problem have not discounted the possibility of compulsory methods being imposed, should non-coercive ones fail and the national survival be threatened by overpopulation.

The measures at present employed by governments either give incentives to limit the number of births or disincentives to discourage them. For example, in this jurisdiction the income tax law was amended to limit to four children the exemption a parent may claim⁷⁴ and the law on maternity leaves has been amended to allow maternity leaves with pay in private employment only up

⁷¹ Teheran Proclamation on Human Rights, par. 16.

⁷² Berelson, *supra*, note 8 at 2.

⁷³ *Ibid.*, p. 4-5.

⁷⁴ Pres. Decree No. 69, issued on November 24, 1972, sec. 23 (c) provides:

Amount of personal exemptions allowable to individuals.—For the purpose of the tax provided for in this Title, there shall be allowed in the nature of a deductions from the amount of net income the following personal exemptions: (c) Additional exemption for dependents — The sum of one thousand pesos for each legitimate, recognized natural, or adopted child, wholly dependent, upon and living with the taxpayer if such dependents are not more than twenty-one years of age, unmarried, and not gainfully employed or incapable of self-support because mentally or physically defective. The additional exemption under this subsection shall be allowed only if the person making the return is the head of the family: Provided, however, That the total number of dependents for which additional exemptions may be claimed shall not exceed four dependents.

to the first four deliveries.⁷⁵ Since there is no constitutional guarantee either to tax exemptions or to maternity leaves with pay, no fundamental right is involved in their amendment or even withdrawal. But, it has been pointed out that there is an element of coercion in these measures which militate against the individual liberty of choice. The final question is whether a deprivation of liberty without due process of law is involved.

Conclusion

There are no easy solutions to the population problem. No one would suggest increasing the death rate. While emigration from one state to another may ease the population pressures in one state it will not lighten the global problem. Despite advances in this space age, transporting the earth's excess population to the moon or some other planet holds no hope in the foreseeable future.

The population problem is the problem of every man and woman. In the final analysis it is the individual will and conscience that will determine whether to limit birth and what methods to employ in bringing about the limitation.

But on this there can be no disagreement: the problem becomes more urgent with each passing day. It is a problem that none can afford to ignore. Since it touches upon individual rights antedating even constitutional guarantees, the population problem must be met with the least encroachment on those fundamental rights.

⁷⁵ Pres. Decree No. 148, issued on March 13, 1973, sec. 8 (c).

⁷⁶ The migration of highly trained manpower from developing countries to the highly developed ones, or brain-drain as it is more popularly called, creates its own problems.