Human Rights in Population Policies

A Study for SIDA

KATARINA TOMAŠEVSKI
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# Innehåll

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Summary

Population policies may subject the most private individual behaviour to direct governmental intervention and thus counterpoise individual freedom and the government's right to intervene. The main purpose of human rights is to restrict the power of governments over their population and therefore safeguards against abuse of this power are their core. Population policies can be analyzed from the human rights viewpoint using a sliding scale where those which broaden individual choice and facilitate the exercise of freedom and responsibility represent one extreme, and the other extreme those which deny individual choice. The latter represent a serious challenge to human rights.

Virtually all human rights can be infringed within population policies thus *all* basic human rights and fundamental freedoms ought to be applied in population policies as in other areas for which public authorities are responsible. Irrespective of the extent to which individual governments recognize the right to family planning, their population policies have to be consistent with human rights norms to protect the individual against excessive interference by the public authorities. The human rights standards which should apply are numerous: non-discrimination, equal rights for women, right to life, right to protection of personal integrity, liberty and security, prohibition of medical experimentation without free consent, right to legal personality, non-interference with privacy and family, equal rights in marriage, right to
found a family, right of the family to protection and assistance, freedom of religion, freedom of information, right to social security, right to remuneration sufficient for supporting one's family, right to adequate standard of living for the family (food, clothing, housing, medical care, social services), right to protection of motherhood, and right to health care.

Analysis of population policies by human rights criteria show that some are incompatible with human rights, for some issues regional human rights systems have adopted different views (notably abortion), for some there is as yet no human rights guidance (such as incentives to influence decisions on family size), while others contribute to the promotion of human rights (such as the raising of minimum age for marriage to prevent adolescent childbearing). Minimum human rights norms specify what governments should not by defining violations. Coercive measures of population control (such as compulsory sterilization or forced abortion) breach the obligation to respect individual integrity and liberty, discriminatory measures victimize women or specific racial or ethnic groups, while denial of access to information and services may preclude people from exercising their freedom and responsibility in family planning. The very population policies – notably the setting and enforcement of population targets – can be explicitly contrary to the respect of individual freedom. The use of disincentives to influence reproductive choice is not in principle incompatible with human rights, but specific disincentives may deprive people of their recognized rights as punishment for failure to meet governmental population targets and thus constitute human rights violations. Critiques of population control are not likely to have much impact unless they can prove that coercion does not effectively lower fertility rates. The failure of population control programmes which enforce official targets instead of changing attitudes among the general population shows
that demand for fertility regulation constitutes the decisive factor in lowering population growth. Supply alone, even when imposed upon people, has proven neither sustainable nor effective.

Human rights require people to take responsibility for their reproductive lives, and this they cannot do unless they are free to do so. Freedom and responsibility are two sides of the same coin — people cannot be held responsible when denied choice. Human rights make population policies self-sustainable by enabling people to take responsibility for their reproductive lives. Moulding popular attitudes and values is a long-term process and the imposition of birth control may be perceived as quick and effective, and in the case of sterilization is irreversible; it is, however, not sustainable — continuous enforcement is necessary.

In conventional human rights issues, such as protection against torture or prohibition of disappearances, much has been done to expose and oppose violations, but not yet in the area of population. Monitoring governmental compliance with human rights has yet to be introduced in this area, and this necessitates close collaboration between population and human rights bodies at the international and national level. Such collaboration is, at the global level at least, an exception rather than a rule. The International Conference on Population and Development may provide an opportunity to institutionalize such collaboration. As a result of its non-existence, few cases of apparent human rights violations carried out within population policies have been brought up internationally. One reason is that human rights norms applicable in population policies have been developed recently, and many have not yet been translated into national norms so to provide clear guidance to government officials and service providers. Another reason is the fact that alleged violations have to be brought to the attention of international human rights bodies, because these bodies can only react to complaints by or on behalf of victims.
Thus knowledge of human rights as they should apply within population policies is crucial. The role of non-governmental organizations in exposing and opposing human rights violations has not yet encompassed population-related violations. Commentators often point out yet another reason for this paucity of international attention to violations: the fact that victims of abuses are women, and protection of human rights of women lags far behind that of men.

Factors which influence - and often determine - women's reproductive behaviour often derive from discriminatory heritage, but are analyzed as a cause of reproductive behaviour, but not as a consequence of discriminatory heritage, namely a manifestation of gender discrimination. The identification of causes is obviously crucial for designing remedies. Because denial of reproductive choice results in harm to women's health, one can argue that the strengthening of women's rights would enhance the effectiveness of family planning. Much criticism thus focused on the fact that women are given the responsibility, but not the authority for decision-making, and human rights therefore focus on the empowerment of women so to make them able to choose, while family planning programmes should ideally facilitate their choice. The provision of means to exercise individual choice alone (access to contraceptives) does not create the motivation necessary to bring about changes in reproductive behaviour. Empowerment means enabling and motivating people to exercise their reproductive choice freely and responsibly.

Because international population assistance is a major method of influencing both the design and implementation of population policies in developing countries, it is important that human rights be adopted as a corrective so that internationally advocated and supported population policies would, as a minimum, not deny or violate human rights. Paradoxically, population targets - not
applied in Western industrialized countries because of respect of human rights – may be supported within their international population assistance. An initial framework for assessing national population policies by human rights criteria is presented in the *Checklist for assessment* below. Full application of human rights and fundamental freedoms has yet to become part of donors’ policies and programmes, and it could encompass three levels: (1) identification of those human rights principles and norms, and the minimum standards of their observance, which should be considered to violate human rights and should therefore never be internationally supported; (2) support for further elaboration of the specific contents of human rights as integral part of national population policies (particularly by detailed analysis of different incentives and disincentives), and for its putting into practice; and (3) development of programmes aimed at promoting those human rights which are most closely related to family planning, particularly for enhancing equal rights for women, such as raising of the minimum age at marriage or eliminating spousal veto over women’s access to family planning.

Human rights assessments of incentives and disincentives need yet to be carried out. Generally applicable norms are few and these refer to extreme situations where specific human rights are denied as punishment for non-compliance with population targets. Coercion and discrimination are also incompatible with human rights, whether called ‘incentives’, ‘disincentives’ or something else. To be able to determine whether a specific form of incentives or disincentives amounts to violation one has to study relevant circumstances through the lens of human rights standards. Such studies are necessary to determine whether human rights are observed in practice.
General framework

Defining human rights

Human rights set universally applicable standards that should apply to all governmental policies and guide governments on how best to integrate human rights into their population policies, nationally and internationally. Because human rights standards have been elaborated for world-wide application, they represent the minimum which every government can comply with, irrespective of the level of development of the country, its political system, religion, or cultural heritage.

Respect of human rights is never perfect nor is their definition ever complete. Thus norms are divided into the minimum, which should be guaranteed always and everywhere, and optimum, which changes in time and place. Human rights are a continuously evolving area. It is sufficient to recall demands upon governments to recognize new human rights relating to medically assisted procreation: these have expanded to a right to procreation, a right to medically assisted procreation, or even to demanding the recognition of surrogate motherhood as a right. The main purpose of human rights is, however, to restrict the power of governments over their population thus safeguards against abuse of this power constitute their core. Minimum norms specify what governments should nor by defining human rights violations.

There is wide gap between the level of the recognition and protection of human rights in population policies. Some countries
have no population policy because respect of human freedom takes precedence over wishes to mould population dynamics. This often leads to an assumption that human rights and freedoms as a corrective to population policies are recognized everywhere in the world, which is often not the case. Indeed some population policies may explicitly deny human freedom by establishing and enforcing population targets.

Human rights have developed in the last forty years in an area which was during previous centuries under the exclusive jurisdiction of individual states. International law traditionally governed relations between states and was precluded from inquiring into what was happening within states, namely how governments treated their population. Human rights are thus continuously challenged by invoking national sovereignty; international obligations cannot be imposed upon individual states, but have to be accepted by them. Faced with demands to respect and protect human rights, (some) governments invoke their right to have the final say in whatever happens within their borders to 'their' population. The United Nations thus regularly affirm national sovereignty regarding population policies, and follow this by a plea to governments to make them consistent with human rights requirements. In deciding to convene the 1994 International Conference on Population and Development, the United Nations General Assembly emphasized "the national sovereignty of all countries in formulating, adopting and implementing policies relating to population, mindful of their cultures, values and traditions, as well as of their social, economic and political conditions, and consistent with human rights and with the responsibilities of individuals, couples and families."

Difficulties in the global advocacy of human rights in population policies are well illustrated in policy statements of the UNFPA. The use of human rights language (for example, "UNFPA's
mandate has placed it in a key position to enhance the possibility for people to exercise their right of reproductive choice"), is followed by the affirmation of national sovereignty in population policies (for example, "the Fund has always adhered to the principle that every nation has the sovereign right to determine its own population policy"). Problems emerge when sovereign decisions do not respect human rights and fundamental freedoms. This happens because of supremacy of religious over human rights law, or is due to the determination of governments to decrease population growth by any methods they deem effective. The acceptance of human rights in population policies has not yet been achieved globally.

Governments are free to choose methods to translate universal human rights standards into domestic norms so to conform to their international obligations, but the interpretation of these obligations is within powers of the international community. The most significant implication of the universality of human rights are powers of international human rights bodies to monitor the compliance of individual governments with their human rights obligations. Minimum human rights standards form part of obligations which all states have accepted through membership in the United Nations, but not all governments are willing to conform. Governments are, however, no longer vested with the ultimate authority in determining what rights people have and when these rights have been violated. In conventional human rights issues, such as protection against torture or prohibition of disappearances, much has been done to expose and oppose violations, but not yet in the area of population. Monitoring compliance with human rights in the area of population necessitates close collaboration between population and human rights bodies at the international and national level. Such collaboration is, at the global level at least, an exception rather than a rule.
Because governments do not restrict their sovereign authority willingly, it is obvious that universally applicable human rights standards are confined to a set of basic human rights and fundamental freedoms so to enable all governments to guarantee them to their population. Universality would have little practical value if only few governments could live up to human rights requirements and most rights would thus remain distant ideals for much of the population of the world. The list of basic human rights is therefore short, and norms which governments are required to observe confined to a minimum. Few international human rights bodies have the authority to determine that a government is violating human rights. This authority is, in theory, limited by the rule of law. In practice, it is constrained by the power-structure of the international community. Due process of law applies in investigating and adjudicating violations, similarly to national procedures whereby people are investigated, tried, condemned, and sanctioned for committing criminal offenses. Few cases pertaining to population policies have been adjudicated internationally, however. One reason is that human rights norms pertaining to population policies have been developed recently, and many have not yet been elaborated so to provide clear guidance for government official and service providers. Another reason is the necessity to bring alleged violations to the attention of international human rights bodies because these bodies can only react to complaints by or on behalf of victims. This necessitates informed and committed organizations and individuals to apply the conventional methods of human rights work – exposing and opposing violations – in the area of population. Commentators often point out that another reason for this paucity of international jurisprudence is the fact that victims are women, and protection of human rights of women lags far behind that of men. This lack of attention to human rights in population policies has resulted in the lack of authoritative
international findings which would determine human rights violations within population policies, clarify governmental responsibility, and establish safeguards for their prevention.

Because of this paucity of international jurisprudence, analysis of population policies from the viewpoint of human rights is necessary to ascertain what governments should, and should not do, taking the existing human rights standards as the yardstick. Results of such an analysis are applied here to the most frequently encountered dilemmas relating to the application of human rights in population policies. These show that some practices (such as compulsory sterilization or forced abortion) are incompatible with human rights, for some issues regional human rights systems have adopted different views (such as abortion), for some there is as yet no human rights guidance (such as incentives to influence decisions on family size), while others actually enhance human rights (such as the raising of minimum age for marriage to prevent adolescent childbearing).

Defining population policies
In order to apply human rights to population policies one has first to define what population policies are, so to determine the object of analysis. This is not easy beginning with the very language: population policies and family planning are often used interchangeably. One can find, for example, coercive population measures described as family planning services. Human rights literature is not terminologically uniform either and refers to reproductive rights, right to procreation, or protection of sexual and reproductive health, while advocating alternatively reproductive rights, choice, autonomy, freedom, or self-determination. This variety in the terminology indicates that common language for human rights aspects of population policies has yet to be created.
Population policies emerged in the last thirty years with the aim of moulding the size and composition of the population. They encompass measures to influence the size of the population (its increase or decrease) and its distribution, including migration*, and thus entail the manipulation of basic societal processes. The very notion of 'development', which has been – with changing definitions – the core of post-war international co-operation, includes planned, unnatural, changes (most often justified by the need to foster economic growth) and necessitates interventions to make them happen. Demographic effects of the first decades of the post-war development created the need for population policies so to respond to the unanticipated changes in the population dynamics caused by development. At the initiative of the World Bank, a study into economic consequences of population growth was first carried out for India in 1958. The motivation to design policies for reducing population growth may have resulted from that study, which had found that death rates were not subject to manipulation, while birth rates could be decreased through a population policy. International attention to unprecedented population growth, which emerged in the 1960s, actually coincided with the beginning of falling rates of population growth in the world, with the exception of Africa. Controversies about the interplay between development and population continue, both about demographic effects of development, and about effects of demographic changes on development: population dynamics can have an adverse

*This study does not deal with migration. One important reason is that this vast and complex area would extend this study far beyond its present scope. Another one is that human rights framework is not comparable. Migration policies are substantively different because governments have the right to determine how many non-citizens, and which ones, may enter their country and specify the conditions and length of their stay. The application of human rights is thus limited in migration, while this is not so in population policies.
impact on development, but development can also have an adverse impact on population dynamics.

Although population policies are designed at the macro level, their political sensitivity and their linkage with human rights derive from governmental intervention into human reproduction. At the individual level, the most private individual behaviour becomes subject to direct or indirect government intervention. At the societal level, such intervention aims to alter the size of the population and its composition, including its age structure, and ethnic, racial or religious composition. Ultimately, the numerical balance between countries can be changed. Therefore endless controversies.

Population policies address the core of human rights by counterpoising individual freedom and governmental right to intervene. The first review and appraisal of the 1974 World Population Plan of Action categorically affirmed that governments had such a right to intervene:

"For a great and still growing majority of countries, population change is viewed without reservation as a proper subject of direct government intervention."

There is much difference between governments regarding the nature and scope of such intervention – some attach primacy to individual freedom and refrain from any direct intervention, others deny individual freedom and specify changes to be attained by specified individual behaviour. National population policies include population targets (either increasing or decreasing population growth) and describe direct interventions to modify fertility. The Population Policy Data Bank of the United Nations found in 1988 that out of 131 developing countries almost half (68) chose not to intervene in the levels of fertility, a slightly smaller number (61) aimed at decreasing fertility levels, and less than one-quarter
(24) to increase or maintain their existing fertility levels.

The need to decrease population growth, particularly regarding Africa, was not always shared by the governments concerned. In the 1970s more than a third of African countries had a pronatalist policy and some precluded access to family planning. Explanations were found in the necessity of concentrating on short-term economic growth, or in the fact that initiatives to curb the population growth were coming from the West. In the 1980s some African governments continued deeming that their population growth was satisfactory, while Western support aimed at curbing it. The case of Somalia in the 1980s was an illustrative example of widespread perception that policies aimed at reducing population growth were imposed upon African governments: "The official position on population is that, since the country is sparsely populated the major problem facing it is the lack of socio-economic development, rather than population growth. ... Although the Government does not report any measures aimed at directly influencing the rate of population growth, it is receiving international assistance to develop a population programme." An important reason for the lack of success in reducing fertility was closely linked to this lack of commitment: technological solutions did not and could not effectively change human reproductive behaviour; motivation seemed to be lacking both among African governments and in the target populations for who programmes had been put into place. Significantly, "African family planning programs have failed in large part not for lack of supply but for lack of demand." Views have changed in the meantime, exemplified by the plea of the South Commission for "a firm commitment to responsible parenthood and the small family norm". The experiences of those Asian countries where fertility did decrease as result of population policies prompted attention to human rights at the international population agenda.
Because international population assistance is a major method of influencing both the design and implementation of population policies in developing countries, it is important that human rights be used as a corrective so to ensure that internationally advocated and supported population policies do not deny or violate human rights. For example, the 1990 SIDA Guidelines for Activities within the Area of Population specify that support to family planning can be given when national programmes are "based on availability of advice and of contraceptives, voluntary utilization and choice of method".

Conceptual linkages

An important obstacle to incorporating human rights standards into population policies is the perception of an inherent conflict between human rights and the well-being of society. This perceived conflict was described in 1989 by the United Nations Population Division as follows:

"Two of the most important pillars of the World Population Plan of Action are the recognition of the right of couples and individuals to decide freely and responsibly the number and spacing of their children and the right of societies to adopt their population policies. In some instances, the two rights may be in conflict. If this is the case, Governments may try to reconcile individual and societal rights by creating the necessary conditions in order that individuals and families may be able to desire a number of children that will correspond more closely to what is perceived as a desirable fertility level for the society."

This perceived conflict results from a misunderstanding of human rights, where they are assumed to guarantee unlimited individual freedom and are thus abuse-prone. On the contrary, human rights norms are based on a balance between rights and duties,
freedoms and responsibilities, and that is emphasized throughout this text.

Little has been done, however, by international human rights bodies to facilitate the integration of human rights into population policies. One the main background studies for the 1993 World Conference on Human Rights criticised the general lack of attention to population policies by the human rights bodies, and emphasized that the United Nations Commission on Human Rights has paid "no attention to the standard-setting proposals made by United Nations symposia on population and human rights".10

Human rights in population policies are regularly discussed by focusing on the right to family planning. The various international human rights and population documents are cited to reinforce the argument that there is such a right, but analysis reveals obstacles to its global recognition and realization. Family planning as one out of many rights which ought to be discussed – all basic human rights and fundamental freedoms ought to be applied in population policies, irrespective of the extent to which individual governments recognize the right to family planning. The prohibition of discrimination, of medical intervention without free and informed consent, the protection of personal integrity and of individual liberty, should be applied in population policies much as in any other field where the individual needs protection against excessive interference by the public authorities.

The distinction between population policies and family planning is clear in theory: population policies set demographic goals and specify methods to attain them, while family planning programmes provide the means for exercising individual choice. Family planning programmes provide information and services to assist people – most often only women – to achieve their own fertility objectives by providing means to exercise their right to determine
freely and responsibly the number and spacing of their children. It is, nevertheless, blurred in practice. Family planning services are often part of the institutional mechanism to implement national population policy and the term ‘family planning’ used instead of ‘population policy’. Sometimes the reason is that ‘family planning’ seems more palatable than ‘population control’, which is even terminologically irreconcilable with respect of human freedom.

The emergence of family planning as a human right is fairly recent. The first international pronouncements on family planning originated in the 1960s. The postulate of the 1968 International Human Rights Conference is most often quoted: "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." When interpreting this provision, the key words – freely and responsibly – are seldom used in conjunction as in the original statement. Some commentators focus on freely, others on responsibly, but disregard the balance between freedom and responsibility which constitutes the core of human rights. It is thus important to advance the human rights debate by using these two terms in conjunction.

The mention of individual responsibility dates back from the Universal Declaration of Human Rights, and has been further elaborated in the Declaration on the Right to Development. While it is uncommon to discuss individual responsibilities in the Western tradition, all other regions accept a balance between rights and duties, freedoms and responsibilities in the very definition of human rights.

* Excerpts from the relevant human rights instruments are given in the Annex to this text.
General human rights guidance

Universally recognized human rights define the framework within which population policies should be designed. This framework consists of minimum norms, which should not be breached so to prevent human rights violations, and optimal ('maximum') ones to enhance human rights. This does not amount to saying that human rights provide the only guidance for population policies, which are adopted in order to balance population and resources, or to redress the aging of the population. Nevertheless, minimum human rights norms should not be breached regardless of the aims which population policies strive to attain. They specify what governments should not do, identify practices that violate human rights and seek their eradication, irrespective of the utility that such practices might have for governments. The underlying reasoning is that basic human rights constitute a value which ought to be protected at all cost. Thus, for example, detained suspects are protected against ill-treatment and self-incrimination regardless of the fact that this hampers the work of law enforcement agencies and people guilty of crime may escape detection and punishment.

International human rights law requires that all human rights be applied to all activities of the public authorities. Thus civil and political rights should apply fully to national population policies, both to policy-making and its implementation. This has been clearly stated by the Human Rights Committee, the supervisory body of the International Covenant on Civil and Political Rights. The Committee said: "When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory."\textsuperscript{11}

The 1974 World Population Plan of Action laid down three requirements upon population policies: (1) absolute respect for the fundamental rights of the human being, (2) respect for dignity
of the family, and (3) prohibition of coercive measures. Ten years later, the 1984 International Conference on Population postulated the right and duty of individual governments to adopt population policies suited to their needs, stressing that "programmes of incentives and disincentives should be neither coercive nor discriminatory and should be consistent with internationally recognized human rights as well as with changing individual and cultural values." Thereby it reconfirmed the three fundamental principles laid down in 1974.

**Individual freedom and responsibility**

Human rights are not a justification for irresponsible behaviour: the scope of freedom is determined by the corollary notion of responsibility. The rule of law which defines what governments should and should not do also defines human rights and specifies which rights, how and why can be limited, and when this is deemed necessary and legitimate.

Human rights require people to take responsibility for their reproductive lives, and this they cannot do unless they are free to do so. Freedom and responsibility are two sides of the same coin – people cannot be held responsible when denied choice. Human rights improve the effectiveness of population policies: "Authoritarian efforts to impose birth control have proved not only unacceptable to human dignity, but ineffective as well." However, moulding popular attitudes and values is a long-term process and the imposition of birth control may be perceived as quick and effective, and in the case of sterilization is irreversible. However, it is not sustainable - continuous enforcement is necessary.

Governmental intervention to mould human reproductive behaviour is not necessarily contrary to human rights norms. Gov-
ernments are allowed to limit individual freedom in order to pro-
tect rights and freedoms of others, notably children, when dealing
with reproductive behaviour of parents and prospective parents so
to protect the rights of the future generation. Human rights also
require the balancing of individual rights and the welfare of the
entire country: “If there are detrimental effects of high fertility on
society as a whole or on individual children through fertility be-
haviour of their parents, then governments have the right to inter-
vene.”

Theories of human motivation are many. Some hold a mechanis-
tistic view, whereby people can be effectively conditioned into
desired behaviour. Their reproductive behaviour becomes a means
to an end, which people do not necessarily share, while their in-
trinsic motivation is disregarded. The fact that preferences for
large families have an economic rationale may be overshadowed by
urgency of containing population growth, and population policies
built on the reduction of family size as their main goal. They often
prove ineffective because people continued desiring large families.
In conditions where additional work-force is necessary for family
survival, and no social security has taken over the duty of children
to provide for their elderly parents, preference for large families
continues. Advocacy of birth spacing, instead of insistence on
fewer children, proves more effective in changing reproductive be-
haviour.

Much criticism has focused on the fact that “women have been
given the responsibility, but not the authority or representation”
in population policies, and human rights focus on the empower-
ment of women so to make them able to choose, and family plan-
ning programmes should ideally facilitate their choice. The provi-
sion of means to exercise individual choice alone (access to contra-
ceptives) does not create the motivation necessary to bring about
changes in individual and family behaviour. Empowerment means
enabling and motivating people to exercise their reproductive choice freely and responsibly.

Definitions of individual responsibility are absent from international human rights law because of primacy of human freedom. Freedom is the rule, its limitation an exception: "where there is any conflict between the freedom of the individual and any other rights or interests, then no matter how great or powerful such rights or interests may be, the freedom of the individual shall prevail over them."17 Those governments that limit human freedom, invoking the need to safeguard general welfare, have the burden of proving that such a limitation is necessary and legitimate, and consistent with the respect of human dignity. Therefore there is no universally recognized list of human duties or individual responsibilities:

"In almost every society the balance of power is overwhelmingly in favour of the State. This is why the individual needs international protection for his fundamental rights and freedoms. Usually there is no corresponding need for an international protection of a State's claims against individuals."18

The notion of responsibility in population policies has become associated with the Roman Catholic Church. Vatican was reported to have insisted on changing terminology at the Earth Summit from 'family planning' to 'responsible planning of family size'.19 The Agenda 21 thus speaks about "the responsible planning of family size, in keeping with freedom, dignity and personally held values, and taking into account ethical and cultural considerations". The Inter-American Declaration on Family Rights, for example, is confined to the responsibility of parents: "Parents have the right to exercise their responsibility for the transmission of life and the protection of their children."20

The notion responsibility is different in human rights. The postulate of responsible parenthood is – not in the sense argued by
major religions – part of international human rights law. Parental responsibilities constitutes the key to the rights of the child. The *World Summit for Children* reinforced the emphasis on responsible behaviour by saying: “All couples should have access to information on the importance of responsible planning of family size”.21 The *Convention on the Rights of the Child* obliges governments "to develop preventive health care, guidance for parents and family planning education and services" in order to fully implement the children’s right to health.22 It repeatedly emphasizes the primary responsibility of parents for their children, and the best interest of the child as the guiding principle. National laws on the termination of pregnancy often include the inability of parents to provide for their future child, or even unavailable or inadequate housing, among grounds for permitted abortion.

It may seem paradoxical that parental responsibility has been dealt with so often in population policies, while individual freedom receives only a cursory mention. An important reason for this is the bias in international human rights law towards the recognition of the rights and protection of the best interests of the child; it specifies the rights of the child, but not a ‘right’ to a child. This is a profound change from the treatment of children in history – throughout history children were seen as the property of their parents.

**Population policies denying freedom and responsibility**

Population policies can be analyzed from the human rights viewpoint using a sliding scale where those which broaden individual choice and facilitate the exercise of freedom and responsibility represent one extreme, and the other extreme those which deny individual choice. The latter represent the most serious challenge to human rights by population policies. The principle of free and
responsible decision-making is obviously contradictory to the concept of population control, which denies individual freedom and imposes limits on reproductive behaviour. Failure to conform to these limits entails sanctions, which may constitute denial of specific human rights (such as the right to housing, to social assistance, or access of the child to education). In its most drastic form, enforcement of population control encompasses forced abortion and compulsory sterilization, thereby defying the universal protection of individual integrity.

Much as population control has been extensively criticised, little has been done to address it as a denial of human rights. One reason is that population control is practised in countries which do not have effective systems of human rights protection. Another reason is the obvious inability of international and foreign critiques to stop population control measures (with or without invoking human rights), and this is a likely result of their perceived effectiveness in curbing population growth. Resistance to coercive and compulsory measures is illustrated by the short-lived 1976 law on compulsory sterilization in India, or the now revoked 1972 law on sterilization of the former Czech and Slovak Republic, which targeted Gypsies. Aside from a couple of such well-publicised cases, coercive population policies continue. Exposure of abuses within population control hence does not automatically lead to the condemnation of the government concerned, nor indeed to their eradication. The publicity for sterilization camps in India in the 1970s did lead to public outrage, but not to their disappearance. Opposition to coercive enforcement of population targets continues in the 1990s, because the "most heavily promoted form of birth control is surgical sterilization. More than half the couples using contraception opt for this method."²³

Critiques of population control are not likely to have much impact unless they can prove that coercion does not effectively lower
fertility rates. The failure of population control programmes which "try to enforce official targets instead of changing attitudes among the general population"\textsuperscript{24} is increasingly documented. It was emphasized at the beginning of this text that demand for fertility regulation constitutes the decisive factor in lowering population growth. Supply alone, even when imposed upon people, has proven neither sustainable nor effective.

Population targets are explicitly contrary to respect of human freedom. However, they may be used as a planning device or management tool, but they can also represent required programme performance, which may induce public officials and/or providers of services to resort to coercion, or to manipulation of data to demonstrate that targets are being met.

Doubts have been voiced, for example, about data on the decline of fertility rate, publicised by China in April 1993: "most Chinese demographers reckon that the figures are fishy, and that something like 20 percent of births probably now go unrecorded."\textsuperscript{25} The official Chinese data show a fast lowering of the fertility rate, from 2.3 in 1990 to 2 in 1992. This was attributed by the Chinese minister of family planning to the "Communist Party's greater vigilance of the one-child family planning policy".\textsuperscript{26} Publicity for widespread use of coercive measures, such as abortion, sterilization and insertion of intrauterine devices, has led to international mobilization against specific methods used to attain the otherwise desirable aim of lowering the fertility rate. This included protests, withdrawals of financial support, and also the granting of refugee status to persons who fled to escape sanctions for non-compliance with the one-child policy.\textsuperscript{27} However, these much publicised extreme measures have been neither the sole nor the most effective method in lowering fertility rates: "China's one-child policy would have gotten nowhere if land reform, education and health services and relative food security for the vast majority
of the population had not come first. Indeed, human rights argumentation can be reinforced by evidence that coercive methods are not effective, and by support for those which are both compatible with human rights and effective.

Many Western countries reject population targets because respect for individual freedom takes precedence over desired changes in population dynamics. For example, the description of its (lack of) population policy by Australia says: "The right of people to freely decide the number and spacing of their children is paramount. Policies dealing with abortion and contraception are seen as moves towards facilitating this choice;" Austria's is similar: "The Government has stated that its policy regarding fertility is one of non-intervention as it is fully committed to the individual's right to family planning, although fertility has fallen below the level necessary to ensure replacement of the population." Paradoxically, population targets – not applied in Western industrialized countries because of respect of human rights – may be supported within their international population assistance.

**Incentives and disincentives**

Where fertility regulation is not coercive and couples decide the family size, their decisions can be influenced through information, education and counselling which is – or should be – part of family planning services. Desired family size often differs from the officially set objectives of population policies. Vast documentation has been gathered on differences in the desired family size between and within countries, and much research carried out into factors which influence such desires in order to assess the potential effectiveness of various methods used to change individual preferences. A variety of incentives and disincentives is used to bring individual reproductive behaviour into conformity with
objectives of the population policy. Incentives include measures which are internationally recognized human rights (such as maternity leave), or enhance the realization of such rights (such as family allowances), but they reach far beyond. A broad range of measures is subsumed under incentives and disincentives: free provision of family planning services, including contraceptives; financial assistance to single parents; financial rewards (in cash or in kind) to persons who have had sterilization or abortion; financial penalties applied to couples who exceed the stipulated number of children; penalization of women for resort to abortion, or inducements to undergo abortion or sterilization.

Incentives and disincentives can thus broaden individual choice and/or facilitate its exercise, they can aim to influence this choice towards the desired family size, or they can actually deny individuals a choice. Those measures which broaden individual choice obviously enhance the enjoyment of human rights, sometimes even create new individual rights. Those that deny individual choice represent, however they may be officially termed, a form of population control. Penalties may be called 'disincentives' and, for example, "women who refuse contraception are penalized: loss of work permits in Sri Lanka; quotas on the number of children for having access to health care in Bangladesh."30

They include direct measures to affect reproductive behaviour, and indirect measures to influence reproductive decision-making, often consisting of financial benefits and burdens. Making fertility control methods available, accessible and acceptable is the first and obvious incentive. Where access is limited (because of prohibitive price or religious prohibition of their use, for example) incentives consist of broadening the offer and reducing the cost, whether the cost is the price of contraceptives or non-conformity with religious norms.

Financial costs and benefits of childbearing and childrearing
constitutes the core of many incentives and disincentives. Cost-sharing between individual families and the society depends in many countries on the number of children. Some countries provide financial assistance to large families, others increase the financial contribution which large families have to make towards societal costs of children. Pro-natalist and anti-natalist governments obviously differ: the former try to make childbearing and childrearing as costless as possible, the latter increase financial cost of every additional child. From the human rights viewpoint, increasing the financial cost of additional children does not automatically negate freedom of decision-making for prospective parents – it influences their decision, as it is meant to.

International human rights law specifies that parents are primarily responsible for their children, in every respect, including financial. Child support is primarily the obligation of parents. The extent to which individual families have to contribute to societal costs of children varies in time and place, but some form of cost-sharing between the family and society is practised in many countries and is reflected in different human rights guarantees: in some countries children are entitled to health care and primary education free of charge, in others parents have to bear all these costs. Human rights norms postulate that children should be entitled to primary education free of charge, and should not be precluded from access to health care if their parents are unable to bear its cost, thus clearly demanding that government be the provider of last resort.

How much (financial) responsibility parents should bear in countries where population growth is considered too high is the object of endless controversy, but there is general agreement that some form of cost-sharing is necessary. The World Bank concluded that "society may benefit more by providing incentives that lower fertility than by bearing the social costs of high fertility." Disin-
centives which transfer some of the financial burden of high fertility to individual families do not automatically conflict with international human rights standards. International human rights law does not deal with national taxation, nor is there guidance relating to income tax reductions in pro-natalist countries or increased taxation for ‘excessive’ children in anti-natalist countries. Increasing the cost of additional children may raise human rights concerns, but is not necessarily incompatible with minimum human rights standards. However, much opposition has been voiced against increasing the cost of childbearing from the viewpoint of social justice, or, more recently, development ethics. The conventional argument is that poor families (which are often larger than the rich ones) are disproportionately affected. It may seem paradoxical that the human rights prohibition of discrimination outlaws measures affecting people on the grounds of their race, ethnicity, religion or sex, but there is no specific prohibition of discrimination against the poor. Specific anti-poverty policies have become part of international development assistance before the issue was included at the human rights agenda.

Disincentives may, however, deny rights to social or welfare services so as to punish people for ‘irresponsible behaviour’. The 1989 United Nations Expert Meeting on Population and Human Rights noted that disincentives “could infringe upon or cancel other human rights, as would be the case in situations where Governments has adopted disincentives that limited access to social services.”

Incentives may also be incompatible with human rights, notably financial incentives to promote mass sterilizations. They may be justified as compensation for the loss of time and for travelling costs, but constitute an inducement to undergo sterilization. The use of payment in cash or in kind as an inducement to undergo sterilization results in the targeting of the poorest. Irreversibility
of sterilizations makes free and informed consent an indispensable requirement, while conditions under which sterilizations are carried out indicate that consent is neither free nor informed. Significantly, consent is not considered to be valid if preceded by improper inducements: "Coercive programs (euphemistically called incentives) link food subsidy to sterilization, forcing impoverished women to be sterilized." The 1990 SIDA Guidelines for the Activities within the Area of Population emphasize that "special incentives to use a specific method of family planning, e.g. sterilization, conflict with the concept of free choice for those who request family planning."

Human rights assessments of incentives and disincentives should be, but are carried out. Generally applicable norms are few and these refer to extreme situations where specific human rights are denied as punishment for non-compliance with population targets. There is also general agreement that coercion and discrimination is incompatible with human rights, whether called 'incentive', 'disincentive' or something else. To be able to determine whether a specific form of incentives or disincentives amounts to human rights violation one has to study all relevant circumstances. Such studies are necessary to find out whether the general rule that incentives and disincentives have to comply with human rights is observed in practice.

Notes


8 SIDA – Guidelines for Activities within the Area of Population, Stockholm, November 1990, p. 3.


20 OAS General Assembly – Inter-American Declaration on Family Rights of 18 November 1983, Doc. AG/RES. 678 (XIII-0/83), para. 2.


25 The lost girls, The Economist, 18 September 1993, p. 64.


Application of specific rights and freedoms

The human rights framework for analyzing population policies is defined by international human rights law. The long list of human rights which can be infringed within population policies illustrates the multitude of human rights standards which should apply: non-discrimination, equal rights for women, right to life, right to protection of personal integrity, liberty and security, prohibition of medical experimentation without free consent, right to legal personality, non-interference with privacy and family, equal rights in marriage, right to found a family, right of the family to protection and assistance, freedom of religion, freedom of information, right to social security, right to remuneration sufficient for supporting one's family, right to adequate standard of living for the family (food, clothing, housing, medical care, social services), right to protection of motherhood, right to health care. Each one of these is examined in turn, with a focus on those issues where an internationally recognized right has been denied, violated or unduly restricted by some population policies, laws or practices.

Some issues are analyzed in more detail because their application to population policies is insufficiently understood, such as son preference. The lowly worth of the female child, visible in the extreme practice of femicide, has been made one of the principal targets in international efforts to overcome the continuing preju-
dice against the 'second sex'. The insufficient attention to human rights of women permeates both human rights and population policies hence these sections are necessarily longer. Economic and social rights are only mentioned, such as the right to social security and to adequate standard of living, because despite their universal acceptance, individuals in most countries do not have effective entitlements nor access to remedy for violations.

Because international human rights jurisprudence relating to population policies is as yet undeveloped, few specific cases could be cited and these most often originate in the European human rights system. Such cases provide valuable guidance towards the development of the general human rights framework for population policies. Nevertheless, the protection of human rights in the field of population does not follow the usual North-South divide – the extent to which human rights are recognized varies within Europe, which in other areas has raised human rights protection to a higher level than other regions.

Non-discrimination
Prohibition of discrimination is the core human rights principle, and has therefore been reaffirmed in all international instruments which deal with the application of human rights in population policies. It requires that all human beings enjoy equal rights, irrespective of their sex, race, colour, ethnic origin, religious affiliation, or political opinion. The basic characteristic of discrimination is the irrelevance of the criterion used to discriminate (skin pigmentation, for example) and harmful effects it has for the human in human rights.

Governmental efforts to decrease population growth sometimes target specific population groups, most frequently ethnic or religious minorities, and are thus obviously discriminatory. In their
extreme, such practices can amount to genocide. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide included the imposition of "measures intended to prevent births within [a national, ethnic, racial or religious] group" into the definition of genocide.

Measures to decrease fertility rates always target women and often disproportionately affect minorities, thus aggravating the unequal access of both women and minorities to health care and family planning. Discriminatory population policies are obviously incompatible with human rights. The Convention against Racial Discrimination lays down the obligation of governments to ensure equality in "the right to public health, medical care, social security and social services" and this regularly necessitates preferential measures for minorities and indigenous peoples to redress the impact of discriminatory heritage.

Non-discrimination entails a range of obligations for the public authorities, which reach far beyond the legal prohibition of discrimination. The Human Rights Committee declared that equal and effective protection against discrimination is an autonomous right, and extended protection against discrimination to all human rights, civil, political, economic, social and cultural. In a series of cases the Committee applied prohibition of discrimination to unemployment benefits, social security, immigration law, thus broadening access to remedy beyond civil and political rights. Thereby social rights and social policies have been brought into the realm of justiciability if discrimination is at issue. This is an important advance because economic and social rights were until recently considered to be unenforceable and not justiciable. Rights without remedies are obviously not very useful to anybody.

Eradication of discrimination entails corrective and compensatory policies in favour of those categories that are vulnerable to discrimination and those which have been subjected to it. The
Committee found that governments have an obligation to undertake "affirmative action designed to ensure the positive enjoyment of rights". Such affirmative action may consist of laws, policies, measures or actions needed to remedy discrimination in fact, that is, to redress de facto inequalities. When aimed at redressing inequalities, so to enable people to enjoy and exercise their rights on an equal footing, differential treatment is necessary and therefore "action needed to correct discrimination in fact is a case of legitimate differentiation".¹

International standard-setting has moved beyond detailed enumerations and descriptions of prohibited discrimination to reviewing the outcome of specific laws, policies or practices. These can be challenged if they have a discriminatory impact. Moreover, it is increasingly argued that the most effective way of combating discrimination is to switch the burden of proof: when differentiating, public authorities have the burden of proving that differentiation is necessary and legitimate and thus consistent with the prohibition of discrimination.

*Equal rights for women*

The challenge to inequality is inherent in the notion of human rights. The main postulate is that all human beings have equal rights, which are properties inherent to human beings. Sex was included in the universally prohibited grounds for discrimination by the United Nations Charter, and all further human rights instruments reinforced and extended further this prohibition. The most important change was attained by the Women's Convention (International Convention on the Elimination of All Forms of Discrimination against Women) which demands not only that women should be accorded rights equal to those of men, but that they should be able to enjoy all these formally accorded rights on an
equal footing with men. This requires that other-than-legal obstacles be identified and eliminated. Eliminating *de facto* discrimination is much more complex and difficult than enacting laws which recognize equal rights for all.

Literature on population policies regularly singles out the status of women as the principal obstacle to their effectiveness. Moreover, the mere availability of family planning services is often expected to produce significant effects in terms of decreased fertility, but may prove to have a limited effect on human reproductive behaviour: "Family planning, as a health measure, is partly one of practical containment, and it can be defeated by more primary influences." These 'primary influences', particularly the status of women, require a broadening of population policies to factors which influence or even determine their reproductive behaviour. They regularly derive from discriminatory heritage. Much has been written about their manifestations, be it women's preference for large families or son preference. Such attitudes are, however, analyzed as a cause of reproductive behaviour, but not as a consequence of discriminatory heritage, namely a manifestation of gender discrimination. The identification of causes is obviously crucial for designing remedies. For example, the 1990 SIDA Guidelines for Activities within the Area of Population include a pledge to ensuring that "an increased number of girls/women participate in primary education." The low participation of girls in primary education is a consequence of discriminatory heritage, thus eliminating it, namely equalizing educational participation for girls, should be the aim and also a yardstick against which progress is measured. When the objective is equal, rather than increased, but unequal, educational participation, an increase of educational enrolment of girls from 10 to 20 percent is not seen as success, but as continuing discrimination.

International population policies insist that women's empower-
ment represents the crucial – but most difficult – area for governmental intervention. Neither legal norms nor development policies can provide more than just a starting point, a catalyst for change. The emergence of gender discrimination on the human rights agenda broadened the reach of human rights from 'vertical' relations between individuals and governments, to 'horizontal' relations, namely between private individuals, within families and communities, and ultimately within couples. The human rights argumentation is that women should not be left unprotected from abuse which they suffer for being female, that governments have to take the lead in eradicating abuse even when it occurs within families and is justified by tradition or religion. Rights of individual women thus take precedence over respect of family autonomy.

An important facet of discrimination is that distinct grounds of discrimination cumulate. Thus a person who is female, black, and disabled is likely to be victimized by triple discrimination. Proposed safeguards against discrimination to protect disabled women stipulate:

"Appropriate legislation that guarantees the full exercise of the rights of women to decide on sexuality, pregnancy, new reproductive technology, adoption, motherhood and any other relevant issue should be adopted and implemented."4

In many countries the general prohibition of gender discrimination remains, however, inadequate. National constitutions typically include sex into long lists of prohibited grounds of discrimination, but fail to specify measures necessary to redress discriminatory heritage. Inequality thus persists. Even more often, national constitutions limit the prohibition of discrimination to acts of public authorities thus leaving unquestioned inequalities within the family. In Gambia, for example, the prohibition of discrimination is limited to discriminatory treatment by persons
who perform functions of a public office or a public authority: "There is no protection against discrimination which stems from a person's personal law. To the extent that personal law is discriminatory, the Constitution offers no protection. ... In marriage the woman is subject to her husband's authority and, despite the fact that Islamic law does not allow it, she may quite often be married to him without her consent." 5

The importance of indivisibility of human rights is visible from women's denied, or limited, access to decision-making when population policies are being formulated and adopted. These policies affect women, many refer only to women, while decisions are made by men. Research has shown that "the most forceful opposition to family planning comes from older males, especially from the devout among them". 6 Because of their biological role of childbearing, women can be transformed into instruments for the attainment of specified fertility objectives if national population policies deny their freedom of choice. Such coercive and discriminatory policies are obviously incompatible with human rights.

**Legal personality**

Women's biological role of childbearing, rather than being compensated by society as equal rights require, is used to perpetuate inequality. Where women are considered to be the property of their husbands and instruments for childbearing (of sons), unequal rights for women remain sanctioned by law. In many countries women remain minors throughout their lives; national law denies them full legal personality. They are considered the property of their fathers, husbands, and sons. Denial of their full legal personality entails an authorization or consent (of their father or husband) for their access to health services, including family planning. Women's access to family planning continues to be a criminal
offence in some countries, while in others it may be conditional upon the husband’s written authorization, thus denying women full and equal legal personality. Significantly, the Earth Summit urged governments to strengthen the legal capacity of women through constitutional, legal and administrative procedures in order to enable women to enforce their equal rights.  

The requirement of husband’s or father’s authorization is additionally burdensome for those girls and women who bear children out of wedlock. International prohibition of discrimination includes ‘status’ and thus implicitly encompasses children born out of wedlock (i.e. illegitimate children). Historically, children born out of wedlock were exposed to discrimination, the extreme being the concept of *filius nullius* (nobody’s children) in the ancient Roman law where such children simply did not exist – neither parents nor public authorities had any responsibility towards them. Specific provisions on the eradication of this discrimination have been included in the Convention on the Rights of the Child. The status of mothers of such children has attained much less attention internationally, although in some countries single mothers enjoy special legal protection and are entitled to social assistance.

Problems encountered by an unwed mother in countries where women are denied full legal personality regularly include obstacles to the registration of the child, to the recognition of parental authority (which is biased towards fathers), and to obtaining child support. A recent court case from Zambia illustrates such difficulties. An unmarried mother sought travel documents for her two children; her application was refused and she was required to prove the parentage of children. Her appeal prompted the judge to conclude that “this practice is discriminatory to mothers on no other basis than the fact that they are females” and to ask: “Now is it fair for this society to require of her to have been or to be mar-
ried in order for certain things to be made possible to be done for her children."

**Spousal veto**

Among obstacles to women's access to family planning, the husband's authorization is a direct consequence of unequal rights for women. In quite a few countries (for example, Burkina Faso, Malaysia, Morocco, Pakistan, Philippines, South Africa, Swaziland, Trinidad and Tobago, Vanuatu) the husband is empowered by law to veto his wife's access to family planning. An example from Ethiopia demonstrates how effective the removal of spousal veto can be. In 1982 the husband's authorization was no more required for women attending family planning clinics and the attendance at clinics increased by 26 per cent immediately.

The existing differences are well illustrated within Europe, which in many other areas prides itself on extensive and effective human rights protection. The 1983 family planning law of Turkey allows termination of pregnancy only with the consent of the husband. The European Commission on Human Rights, however, decided in 1980 in the *Paton* case that the husband does not have a right to be heard in connection with the abortion which his wife wishes to have. Indeed national courts in quite a few countries deny that husband's authorization, permission or consent is necessary.

Spousal veto over women's access to family planning information and services is in direct contradiction to the provision of the *International Convention on the Elimination of All Forms of Discrimination against Women* which says:

"States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on the basis of equality of men and women, access to health care services, including those related to family planning."
Many provisions of this Convention are not, however, applied even in all countries which are party to this Convention. Through the submission of reservations, governments have exempted parts of this Convention from application, and most often reservations have been submitted regarding equal rights of women in marriage and family, and full legal capacity of women.

Son preference
Gender discrimination may start before birth, which reflects the prevalent view of the lowly worth of the woman and preference for male children. A girl child is considered as a liability, not an asset to the family into which she is to be born. She becomes an asset to the family into which she is married if she can bear male children. The emergence of traditional practices on the human rights agenda in the 1970s, and the subsequent broadening and deepening of the understanding of what traditional practices are, and what effects they have on women, provides a significant contribution to the design of population policies. At first traditional practices harmful to women’s health and lives had been confined to genital mutilation, but it was soon realized that they reach much further and sometimes amount to femicide.

Son preference is a reflection of patriarchal society and is worldwide. This constitutes a fact that many would not associate with human rights. Parents who prefer a son to a daughter are not breaching any law nor could law ever attempt to ‘outlaw’ people’s wishes. Son preference becomes an important human rights issue when it results in discrimination against female children, ultimately in femicide. Perhaps the strongest incentive to address son preference within population policies comes from the World Bank, which has argued that it jeopardizes the lowering of fertility rates:
"In China the one-child policy has been challenged by an apparent preference for sons. The same bias in favour of sons exists in Korea, and has been partly responsible for keeping the total fertility from declining to replacement level. To counteract this bias, governments need public information campaigns and legal reforms of inheritance, property rights, and employment. Incentives might also be offered to one-child families with girls, such as lower educational and medical costs."10

The movement against gender discrimination in India placed son preference in the human rights context. Indian human rights organizations addressed the use of amniocentesis (originally designed to detect genetic abnormalities of a foetus, but widely applied to determine its sex),11 and prompted the adoption of legislation to outlaw this practice which in fact amounted to femicide: data revealed the fact that female, but not male foetus, was aborted.12 Statistical evidence of gender discrimination was gathered and became a publicly debated issue. The 1991 Indian census revealed the effects of gender discrimination: sex ratio decreased from 934 women per 1,000 men in 1981, to 929 in 1991.13 This small relative decrease in the sex ratio, translated into absolute numbers, becomes shocking: estimates of 'vanished women' have reached one hundred million for Asia,14 and are put at 30 million for China, where the sex ratio is similarly low (934 women per 1,000 men in 1991) and decreasing (the ratio was 941 in 1982).15

The ultimate cause of femicide – son preference – is more difficult to document. At the beginning of the 1980s, the *World Fertility Survey* included questions relating to sex preference for their next child in order to gather information on women's motivations relating to childbearing. Results provided the first data to document the known, but previously undocumented, son preference. Daughter preference existed in only two (Venezuela and Jamaica) out of 39 countries encompassed by this Survey. The strongest son preference was documented in Pakistan, Nepal and Bangladesh;
data show as many as five women wanted a son for every woman who preferred a daughter. This is illustrated in Table 1.

The obvious question is what to do when both the consequences and causes of discrimination against the ‘second sex’ are known. Nobody would expect a magic recipe whereby individual preferences of (female) parents would instantly change in favour of female children. Such preferences are, however, influenced by economic and social factors, and these are amenable to change. A study into health implications of sex discrimination, prepared for WHO and UNICEF, suggested that, in addition to measures against gender discrimination, causes of son preference be addressed:

"Long-term measures to deal with the phenomenon of son preference would include enactment and implementation of legislation against discrimination on the grounds of sex; provision of adequate social security for older people so that a son is no longer a must for security in old age; abolition of practices such as dowry and bride price; and changing laws to enable women to maintain their maiden name and pass it on to their children so that continuation of the family name is not threatened by non-birth of a son."16

**Women’s right to life and health**

Contrary to the debate in the USA where the ‘right to life’ has become a synonym for anti-abortion movements, in international human rights law the right to life pertains to human beings and thus applies from birth. This text therefore discusses the human rights aspects of abortion in a separate section below. The focus here are governmental obligations to safeguard women’s lives in their population policies. International human rights bodies, including those dealing with civil and political rights, have adopted a broad interpretation of governmental obligations to protect the human
Table 1

Index of son preference

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<tr>
<th>Country</th>
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<td>Pakistan</td>
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<td>Jamaica</td>
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Note: Index of son preference reflects the number of mothers who prefer their next child to be male to the number who wish the next child to be female.

right to life. Prevention of maternal mortality forms part of the governmental obligation to protect women's lives, because this obligation is not confined to safeguards against arbitrary executions or disappearance:

"The [Human Rights] Committee has noted that the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics."

The 1993 World Conference on Human Rights revealed the extent of the global mobilization towards equal rights for women. Women's health has been singled out as one important area by non-governmental organizations, which launched, for example, an initiative 'Moving forward for women's health' at the Commission on the Status of Women in March 1993. The World Health Organization has also contributed to the preparations of the Vienna Conference through a publication on the enhancement of women's health through the application of human rights, which reinforced its previous findings on the correlation between the recognition of women's rights and their health status.

The final document of this Conference, the Vienna Declaration and Plan of Action, contains detailed provisions concerning the human rights of women. Indeed many commentators consider the rights of women as one of the few areas where substantial progress has been achieved in Vienna. The Conference reaffirmed that "the human rights of woman and of the girl-child are an inalienable, integral and indivisible part of universal human rights", and included "safe maternity and health care" among the priority issues in the elimination of all forms of gender-based violence. The broad
definition of violence against women, which the Conference thus adopted, is not conceptually clear (as are many other parts of the final document), but is obviously aimed at strengthening governmental obligations in ensuring safe motherhood. The Conference recognized "the importance of the enjoyment by women of the highest standard of physical and mental health throughout their life span" and reaffirmed "a woman's right to accessible and adequate health care and the widest range of family planning services". Moreover, the Vienna Conference called for "the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism" and also defined forced pregnancy as a violation of human rights.18

Guaranteed access to health care services for all people remains, however, an issue of disagreement. At the time of drafting the text of Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), WHO was reluctant to acquiesce to the proposed obligation for the state to guarantee access to medical care, since it was committed not to "attempt to force States to adopt any particular method of [providing] medical care."19 It has therefore never advocated the provision of health services on the basis of individual entitlement. The human rights approach insists on the centrality of guaranteed access to health care. Article 12 of the ICESCR thus obliges governments to create "conditions which would assure to all medical service and medical attention in the event of sickness".

If access to health care is not guaranteed as a human right, women — or men or children — cannot enjoy it. However, women are additionally jeopardized in accessing health care because of their unequal rights. The WHA has urged governments to introduce laws and regulations to provide access to free medical service for pregnant women, particularly in cases of high-risk pregnancy,
at delivery, and during the child's first year when immunization is crucial for its survival.  

So much literature exists on the detrimental health effects of restrictions upon women's access to family planning that it can be omitted from this text, as well as a description of the recent mobilization towards enhancing safe motherhood for all women. Rather the issue can be approached from another perspective: because the denial of reproductive choice results in harm to women's health, one can argue that the strengthening of women's rights to and in health care would enhance the effectiveness of family planning. Persuasive findings point to the "central role of played by the enhanced status of women (enhanced social status, greater economic rights, and greater access to education) in bringing down fertility rates." Although these findings do not use human rights language, the contents of human rights requirements is fully reflected.

In May 1992 the World Health Assembly (WHA) called for the implementation of international policies aimed at improving women's health. It acknowledged that many previous resolutions had called for action, but recognized with dismay "the lack of adequate sex-specific data; and the fact that there is insufficient knowledge of the specific consequences of diseases for women." The WHA repeated its concern at the slow progress in improving women's health and in safeguarding their rights, and noted "the close relationship between equal rights for men and women and the participation of women in health activities and in the promotion of health for all, particularly as decision-makers." This parallel between the slow progress in women's health and in their enjoyment of equal rights may indeed reflect their interdependence. Definitions of reproductive health often include the substance of basic human rights, although not using human rights terminology. A WHO definition thus says, *inter alia*:
"Reproductive health means that people have the ability to reproduce as well as to regulate their fertility with the fullest possible knowledge of the personal and social consequences of their decisions, and with access to the means of implementing them."24

Family planning is a necessary component of programmes aimed to reduce maternal mortality. The loss of women's lives due to the denial of access to family planning has been well documented in literature. Suffice it here to provide just one example: "When contraception and abortion were illegal in Rumania, in 1988 the maternal mortality rate was reported as 159 deaths per 100,000 live births, 86 percent caused by complications from unsafe abortions. After legalization, the frequency of abortion persisted due to scarcity of contraceptive information and supplies, although the mortality rate fell by 50 percent in 1990."25

**Integrity, liberty and security**

The integrity of women is jeopardized more often than that of men: women are disproportionately targeted by coercive interventions to regulate their fertility, which belong to the public sphere. In the private sphere, women are often victimized because of their reproductive role. They may be penalized for infertility, for example. Human rights norms address primarily the public sphere, namely relations between the individual and the government, and thus most norms address population policies and practices. The growing international movement against the victimization of women by violence is increasingly addressing the role of the government in protecting women's integrity, liberty and security in the private sphere.

The *International Women's Year Conference* in 1975 in Mexico preceded its articulation of a right to family planning ("every couple and every individual has the right to decide freely and re-
sponsibly whether or not to have children...") by the insistence on the respect for physical integrity and inviolability of the human body. Although not specifying that women's rather than men's physical integrity is jeopardized and women should therefore be protected against coercive methods of population control, the Conference added an important human rights dimension to be included in population policies.

International prohibition of torture and ill-treatment relates to the protection of persons deprived of their liberty (who are in the custody of the state), but the basic rationale applies to persons at liberty who are victimized by private citizens, not members of military and security forces or law enforcement personnel. The latter is regulated by criminal rather than human rights, but governmental human rights obligations come into play where women are not protected against violence, or law which could in theory offer them protection is in practice not applied. Protection against violence and bodily harm is particularly relevant for women, and the recent global mobilization to adopt a strategy against such violence testifies to its pervasiveness and perpetuation. Victimization is often related to childbearing and women can be punished for infertility or for the birth of a daughter or for childbearing outside marriage. Female genital mutilation was the first major issue affecting women at the United Nations human rights agenda, and remains on the agenda within the broader issue of violence against women. Governments are obliged to prohibit cruel, inhuman or degrading treatment in its criminal law and to enforce this prohibition. The Civil Liberties Organization of Nigeria pointed to a form of degrading treatment of widows: "In eastern Nigeria on the death of her husband a wife is subjected to cruel and degrading treatment under the guise of burial rites. She will have to shave all her hair and must sleep on a mat and eat from broken utensils for months. She is not allowed to take a bath nor
change her clothes during that period. All her husband's property will be taken away and distributed among relations. It does not matter that she has children to look after."\textsuperscript{26}

Much evidence has been gathered proving that governments have not put into practice protection of women's integrity, liberty and security. Thus women may be killed or maimed by their husbands or mothers-in-law for their failure to bear children; girls may be killed by their family members for bearing children out of wedlock. Such problems may appear to fall outside population policies, but they have significant effects by disempowering women.

Moreover, women are in many countries targeted by criminal offenses related to family planning which are unique to women. Criminal offenses against public morals include those which only women can commit (such as abortion, for example), which would be considered to constitute exercise of human rights in many countries. Some forms of punishment found under 'disincentives' applied to penalize women who exceed the number of children which the government has set, who may be subjected to forced abortion and compulsory sterilization. The following description was provided by the World Bank in 1984:

"China is the only country to have implemented a system of assigning to communities (sometimes employees of a particular factory) a quota of births to be permitted each year. Individual couples within communities are then given permission to have a child, with priority given to couples who have followed the recommendations for marrying only after certain age, and who are older. The system of quotas, and the accompanying pressure to have an abortion when a woman becomes pregnant without permission, and an additional policy 'step' over and above the extensive system of incentives and disincentives."\textsuperscript{27}
Sterilization
Human rights norms prohibit medical interventions unless free and informed consent has been given by the person involved. This is shared between medical ethics and human rights. In ethics this principle prevents medical professionals from abusing their power over patients. In human rights, protection of individual integrity, liberty, and security necessitates safeguards against involuntary sterilizations, which constitute a violation of the right to personal integrity.\textsuperscript{28}

Detailed regulation of sterilization in the national law of many countries, specifying in particular the requirement of free and informed consent, and widespread use of sterilization in others, indicates how much human rights safeguards vary between countries. In some, detailed procedural norms have been developed so to prevent involuntary sterilizations. In others, mass sterilizations are carried out in the absence of any human rights safeguards. Available data on contraceptive methods used worldwide show that female sterilization is widespread and constitutes more than one-third, namely 37 percent, of overall contraception.\textsuperscript{29}

Safeguards against involuntary sterilization in Western Europe and North America affirm "that non-therapeutic non-consensual sterilization cannot be justified in law, on the ground that it violates fundamental human rights".\textsuperscript{30} A series of court cases towards the end of the 1980s, which dealt with sterilization of mentally ill women, focused attention on the importance of informed consent. A judge in one of these cases, which involved sterilization of a mentally handicapped girl summarized the relationship between sterilization and human rights:

"Sterilization is an operation which involves the deprivation of a basic human right, namely the right of a woman to reproduce, and therefore it would, if performed on a woman for non-therapeutic reasons and without her consent, be a violation of that right."\textsuperscript{31}
For individual's consent to be valid it has to be free, namely the person can provide or withhold consent without coercion and without sanctions for refusal, and informed, that is, the patient has to be informed about the medical intervention, its consequences and implications, about the implications of refusal, and about alternatives to the proposed intervention. Much documentation has been gathered about mass sterilizations carried out without free and informed consent: women may not be told that their consent is required, or asked to sign the consent form without being told what they are agreeing to, or not told that sterilization is irreversible.

Compulsory sterilization obviously contradicts protection of personal integrity and liberty, has been denounced as human rights violation and in some countries discontinued. Mass sterilizations, however, may be carried out with few questions raised about the observance of human rights. Widespread use of sterilization as a method of contraception (estimated at 70 percent of all contraception in India and 48 percent in China) casts doubt whether such large numbers of sterilizations are performed so to protect women against compulsion and coercion.

Officially reported use of sterilization for contraceptive purposes encompasses thirty-eight countries (Bangladesh, Bhutan, Bolivia, Botswana, Brazil, Burkina Faso, Central African Republic, China, Cyprus, Ecuador, El Salvador, Fiji, Guatemala, Haiti, Hungary, India, Indonesia, Jamaica, Kenya, Korea, Lebanon, Mexico, Morocco, Nepal, Pakistan, Panama, Papua New Guinea, Philippines, Seychelles, Singapore, Sri Lanka, Tanzania, Thailand, Tunisia, USA, Vanuatu, Viet Nam, and Zimbabwe). Although this list is long, it does not include all countries where sterilizations are used for contraceptive purposes, but is limited to those which officially reported its use. These reports, however, do not include a reference to the observance of human rights standards. The extent to which free and informed consent is sought for steriliza-
tion, or the use of inducements (often called 'incentives') to obtain woman's consent thus remains unknown. Large numbers of sterilizations raise concerns regarding free and informed consent, and such concerns are often justified. It is sometimes reported that women subjected to sterilizations are not informed about its irreversibility. In Brazil "sterilization was widely offered as a method of birth control. The result has been an alarming number of women of childbearing age who find themselves sterile. In 1986, according to the Brazilian Institute of Geography and Statistics, 44.4 percent of married women between the ages of 15 and 54 who had used birth control were now sterile." 34

Besides the general requirement of free and informed consent, human rights also require full application of non-discrimination, particularly important because sterilizations often target specific ethnic groups (for example, Gypsies in Central and Eastern Europe, 35 or the indigenous population of Tibet 36) or those vulnerable to inducement and/or unable to resist coercion (for example, the poor in Bangladesh 37 or India, 38 or asylum seekers in Hong Kong 39).

Experimentation
Shortly after the end of the Second World War, experimentation involving human beings without their consent was outlawed in the Nuremberg Code. This prohibition has been subsequently reinforced and broadened both in human rights and in medical ethics. National laws and ethical guidelines uniformly require decisions to be made on the basis of an acceptable balance of probable benefits and risks, where benefits should outweigh risks. Participation in experiments is also governed by the requirement of free and informed consent. Safeguards are particularly stringent when experimentation is used, as in population policies, for non-therapeutic purposes.
Governments have the basic obligation to protect the population from unwarranted risks and, as a consequence, the licensing of therapeutic substances and procedures is preceded by testing for safety. Delayed knowledge of harmful effects, exemplified by the case of thalidomide, reinforced the attention to safety and resulted in improved safeguards. These unfortunately do not apply universally and much literature has been devoted to problems raised by the proverbial double standard, where pharmaceuticals which cannot be used in industrialized countries (because approval has not, or not yet, been granted) are used in developing countries where safeguards to protect people from their harmful effects may not exist. Controversies surrounding Depo-Provera are a sufficient reminder of the need to address this problem: "Weak drug safety laws and a lack of basic health care for the majority in developing countries have meant that women in the Third World have been exposed to untested and dangerous contraceptives as well as to contraceptives that cannot possibly be used safely."  

Modern techniques of fertility regulation, originating in different scientific discoveries, have broadened the choice of family planning methods. They have also enabled both women and men to protect themselves against unwanted parenthood, and also introduced the possibility of medically assisted reproduction.

Access to benefits of scientific discoveries is unequal, as is access to health care in general. The right to benefit from scientific progress, stipulated in the International Covenant on Economic, Social and Cultural Rights as the right of everyone to enjoy the benefits of scientific progress and its applications has not been translated into an effective entitlement of individuals. No country recognizes such a right unconditionally, that is, as a claim individuals could have to application of a scientific discovery that they might consider beneficial. Individual countries recognize the right
of the woman, for example, to the best available technique of pregnancy termination, namely the one which is the least damaging and hazardous, but this remains an exception rather than a rule.

The application of scientific discoveries necessitates experiments involving human beings in order to determine their safety and efficacy. Vast literature has documented numerous instances where unsafe or hazardous fertility regulation methods were used on women in developing countries. Their side-effects were sometimes not known at the time, or countries where they had been used were not equipped to detect them and to deal with their harmful effects. Recent controversies surrounding the use of Norplant in developing countries have revealed a similar pattern of problems. This hormonal implant has been found both safe and effective with medical supervision and follow-up, and is not irreversible. Problems arise where there is no medical supervision and no follow-up, subsequent to the five years after which it ought to be removed. Difficulties in securing appropriate counselling and medical follow-up for long-term contraception, and unknown effects which the failure to remove hormonal implants after five years can have on women brought to the fore governmental responsibility for women's safety. One example: "Indonesia, which has promoted Norplant in its family planning program since 1987, cannot offer the necessary medical follow-up today. Half a million women who should be taking out the subcutaneous implant after five years are facing health problems now. They were never told."\(^1\)

Most recently, the final document of the 1993 World Conference on Human Rights noted that "certain advances, notably in biomedical and life sciences ... may have potentially adverse consequences for the integrity, dignity and human rights of the individual" and called for international co-operation to ensure full respect of human rights in their application.\(^2\)
Non-interference with privacy and family

An important part of human rights are safeguards against intrusions into private lives by the public authorities. All major international human rights treaties, global and regional, contain the protection of privacy and family life among basic human rights. Protection of privacy is often invoked against governmental measures regulating fertility or impeding individual's access to family planning services. However, international human rights bodies have determined that family planning does not pertain exclusively to the private sphere, because there is recognized public interest in human reproduction.

Privacy and family are not uniformly defined throughout the world and international human rights law therefore refrains from imposing definitions that would deny this diversity. The Human Rights Committee thus noted that both terms (privacy and family life) ought to be defined according to "the meaning given in the society", and stressed that the protection of privacy is a relative rather than an absolute right: "As all persons live in society, the protection of privacy is necessarily relative."[43]

International human rights instruments prohibit interference by the public authorities which is arbitrary, unlawful or abusive. Such provisions necessitate defining when interference with privacy or family is lawful, and this has been done in detail in the jurisprudence interpreting the European Convention on Human Rights. This Convention specifies that interference should be in accordance with the law and necessary in a democratic society, and may be used to protect, inter alia, the economic well-being of the country, public health or morals, and the rights and freedoms of others.

This enumeration of grounds and conditions for interference with individual privacy and family brings to light the fact that human rights may be and indeed are limited. Thus one can easily
understand that balance ought to be established between individual freedom and the economic well-being of the country. It is even easier to understand that governmental interference is justified in cases where child or wife abuse takes place within the family, and outside intervention is necessary so to preserve the lives and health of vulnerable members of the family.

However, governmental interference with individual's right to found a family often goes further than human rights standards would seem to permit. In recent court cases in the USA, for example, women found guilty of child abuse have been sanctioned to compulsory contraception so to prevent them from having children. These cases have prompted an in-depth reconsideration of the limits to governmental intervention and final court decisions will, without doubt, create an important precedent. In many other countries, the governmental right to limit individual privacy and family life is accepted in criminal law, in cases of sexual abuse, for example. Because the majority of sexual offenders are men, problems of sanctions (such as 'chemical castration') are rarely mentioned in the context of population policies. However, recent U.S. cases have indicated the importance of discussing the problem of the denial of parenthood as a sanction.

**Equal rights in marriage**

Gender discrimination is multi-layered: different grounds cumulate and women can be discriminated against as women, as mothers, and as married women. A married, compared to an unmarried woman can be discriminated against because of the inherited attitude that the man, husband, is the head of the family, the breadwinner. The Human Rights Committee therefore affirmed in 1989 that governments are required to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at
its dissolution, and added that "it is a positive duty of States to make certain that spouses have equal rights".\textsuperscript{44}

Even in industrialized countries, where women constitute a large proportion of the employed, few national laws have changed in order to eliminate the requirement for a married woman to prove that she is a breadwinner before she can claim entitlements as breadwinner, which men can obtain without the need to prove anything. This discriminatory treatment stems from the fact that men are still assumed to be breadwinners and women to be financially dependant upon their husbands.

In many countries marriage is arranged by the families of the couple. Indeed under customary law, applied in many African countries, a woman must often obtain the consent of her family to marry, regardless of her age. Practices like bride price and dowry undermine the status of the woman before and after her marriage. A woman cannot divorce unless the bride price is repaid to her husband's family by her own family, which received it. It is thus not surprising that human rights organizations in Africa report that the majority of cases of gender discrimination brought to their attention pertain to marriage and family rather than the public sphere, which constitutes the main target of human rights norms.

The institution of marriage encompasses in many parts of the world various forms of polygamy, thus conflicting with the very notion of equal rights of spouses. Unequal rights in marriage have become a frequent topic of inquiry for international human rights treaty bodies. They regularly challenge definitions of marriage which deny equal rights for women. For example, in its report under the International Covenant on Civil and Political Rights (ICCPR), Guinea stated that statutory requirements for marriage included "the payment of a dowry of G 500", and added: "Polygamy is permitted under Guinean law but is subject to the requirement
of consent by the female spouse or spouses." Because gender discrimination jeopardizes all human rights, unequal rights in marriage are dealt with as a breach of governmental human rights obligations. Precedent decisions in eliminating discrimination against married women have been adopted under the International Covenant on Civil and Political Rights. These affirmed equal rights of married women regarding citizenship, access to unemployment and social security benefits.

Such cases were brought up because married women are still required to have the permission of their husbands to enter employment in many countries. Women are not considered independent or equal (either to men or even to unmarried women) in migration or citizenship. The concept of the 'head of the family' in land ownership and land reform, or in loans and credits, jeopardizes the status of women in many countries. International norms guaranteeing the equality of rights of married women ought yet to be implemented in many countries.

Child marriages
The right of everyone to marry and to found a family is conditional upon free consent, and this cannot apply to children. Indeed, knowledge about the widespread practice of child marriages prompted the adoption of the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.  This Convention has had a minuscule number of ratifications: only 36, too few industrialized as well as developing countries, as shown in Table 2.

The small number of countries bound by this Convention reflects the fact that marriages of young girls are not only widespread, but tolerated, if not legalized. In African countries, most of which recognize the dual system of statutory and customary
marriages, there is an infinite variety of practices. The age of the bride can be seven or eight, or a girl promised to her future husband even before she is born:

"Girls are given away for marriage at the ages between 11 and 13 and start producing children at an early age. Birth to women between the ages of 11 and 13 who are not fully mature can permanently injure their health, and the maternal mortality rate is three times greater than that of the 20-24 year age group."47

Law generally prescribes younger ages for marriage for women than for men. Statistics on women’s age at marriage, where these are available, tend to reflect officially registered marriages in urban centres and thus report on the average age at marriage of 20. Official statistics are thus often misleading rather than revealing.

Child marriages regularly remain unrecorded and unreported, even in those countries which have enacted laws prohibiting them. Such laws are proverbially unenforced.

Data reported to the United Nations, although incomplete and sometimes outdated, are illustrative of the problem: Gambia does not have any minimum age for marriage, in Kenya the minimum age is 9, while eight countries keep the minimum age for girls at 12 (Chile, Ecuador, Ethiopia, Honduras, Lebanon, Sri Lanka, Trinidad and Tobago, and United Arab Emirates), in Iran it is 13, and twelve countries have the minimum age of 14 (Argentina, Bolivia, Colombia, El Salvador, Guatemala, Guyana, Madagascar, Malta, Mexico, Nicaragua, Peru, and Spain). All these countries thus recognize that girls of primary school age are in fact being married. It is indicative that Asian countries which have elaborated multi-pronged policies of decreasing fertility have raised the minimum age for marriage to 20 for girls (China and Korea).48

Plenty of research has been carried out to document detrimental effects of child marriages on girls, who start childbearing as children. The World’s Women reported: "In Mauritania, 39 percent
of girls are married by age 15 and 15 percent have already given birth. In Bangladesh, 73 percent of girls are married by the age 15, and 21 percent have at least one child." In Nigeria, which has no statutory minimum age for marriage, the fertility survey of 1981/82 found that 25 percent of women were married by the age of 14, 50 percent by the age of 16, and 75 percent by the age of 18." Recent research in Uganda revealed a similar pattern of child pregnancies, if not marriages: "A recent study of 210 adolescent mothers in eastern Uganda found that 70 percent had their first sexual encounter before the age of 14."51

Significantly, a World Bank study found that "there seems to be more of a trend toward earlier marriage and childbearing" in Africa, which indicates the lack of commitment to change this situation. Another World Bank study commented that "very few countries give much priority to raising the legal age of marriage as part of demographic policy – more likely because the institutional framework to do so is poor than because the costs of implementing such a policy are high."53 Advocacy of and support for raising the minimum legal age for marriage and for its enforcement could result in multiple benefits both for population policies and for equal rights for women.

Strong support for measures to prevent childbearing by children is found in the 1990 Charter on the Rights and Welfare of the African Child adopted by the Organization of African Unity (OAU) in 1990. This Charter begins with the pledge of governments to abolishing customs and practices which are incompatible with the rights of the child, particularly those discriminating against girls, and adds a special provision:

"Child marriages and the betrothal of young girls shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage and make registration of marriage in an official registry compulsory."54
Table 2
Parties to the convention on Consent to Marriage, Minimum Age
for Marriage and Registration of Marriages

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Right to found a family

The conceptual importance of human rights approach is evident from taking the founding of the family beyond “a passive submission to biology, to involve the right positively to plan, time and space the births of children”, thus procreation is no longer solely a biological function, but is subject to human control. Well known and endless controversies regarding human control over human reproduction resulted in human rights standards being elaborated much later than for other human rights, and their incorporation into population policies has yet to be accomplished.

At first human rights norms referred to the couple, then to the individual, and recently are again mentioning the couple. These changes reflect the growing awareness of unequal decision-making within the couple. The initial reference to couples had endorsed inequality, where decisions are made by men, while children are borne by women. The affirmation of the right of the woman to make decisions regarding childbearing, on its part, postulated as a right which is beyond the reach of many women, and governments have not undertaken the necessary measures to ensure that women can effectively make reproductive decisions. Hence the reversal back to couple as the unit of decision-making, with an increased emphasis on the necessity to involve both men and women on equal footing.

Right to family planning

The general human rights standards were set in 1948 in the Universal Declaration and in 1966 in the International Covenants on Economic, Social and Cultural, and Civil and Political Rights, but no reference to a right to family planning was included there. The World Health Assembly placed the right to family planning on the international agenda in 1965, stating that “the size of the family
should be the free choice of each individual family." One year later, the General Assembly of the United Nations accepted that "the size of the family should be the free choice of each individual family." In 1968 the first international pronouncement of a right to family planning was included in the Final Document of the International Conference on Human Rights: "Parents 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." Debates which led to this formulation reveal that it had been prompted by the publicity for catastrophic consequences of uncurbed population growth of that time, and it represented a plea to governments to make contraceptive information available to their population. Such reasoning is visible from the paragraphs preceding this first statement of a right to family planning: "the present rapid rate of population growth in some areas of the world hampers the struggle against hunger and poverty" and moderation of the present rate of population growth would enhance the conditions for the enjoyment of human rights for each person. The Conference therefore urged governments to consider "the implications for the exercise of human rights of the rapid increase in world population." The Plan of Action, adopted by the World Population Conference in Bucharest in 1974, went further in articulating the right to family planning: "All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have 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 responsibilities towards the community." This statement elevated family planning from 'a right' to 'the basic right', posited both couples and individuals to be entitled to fami-
ily planning, and also demanded means to exercise this right, namely access to contraception and not merely to information. The indivisibility of human rights was specifically affirmed in the 1974 World Population Plan of Action, which stressed that “full participation of the people in the formulation and implementation of population policies” constituted an independent human right, a safeguard that other rights and freedoms will be respected, and a key factor ensuring the effectiveness of population policies.  

This 1974 Plan of Action also reaffirmed that responsibility was a corollary of the right to family planning. An attempt was made in the 1985 Nairobi Forward-looking Strategies for the Advancement of Women to replace ‘responsibly’ by ‘informedly’. All other documents utilize, however, ‘responsibly’ and the Nairobi formulation was not repeated elsewhere. The 1984 International Conference on Population in Mexico urged governments to make family planning services universally available, but focused on individual responsibility, without mentioning freedom: “Governments can do more to assist people in making their reproductive decisions in a responsible way”, and continued emphasizing that couples and individuals should exercise this right to family planning “taking into consideration their own situation, as well as the implications of their decisions for the balanced development of their children and of the community and society in which they live.”  

Despite repetitive references to responsibility, all these documents fail to define what it means and what governments should—and should not do—to ensure that people behave responsibly in family planning.

A sheer number of international pronouncements on the right to family planning, or their wording alone, is insufficient evidence that the right to family planning is indeed an internationally recognized human right. International law is based on the principle that states cannot be bound by norms which they have not
accepted, and mere pronouncements lack legally binding force. The right to family planning forms part of international human rights treaties, which create obligations for states parties, and bind the majority of countries of the world. The first treaty provision relating to family planning was included in the International Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1979. This Convention obliges governments to take all appropriate measures to ensure for men and women alike "the same rights to decide freely and responsibly on the number and spacing of their children and to have access to information, education and means to enable them to exercise these rights."

Evidence that governments consider international norms on the right to family planning to be binding is provided in their explicit reservations to such norms when they are ratifying the relevant treaties. Thus in ratifying the Convention on the Rights of the Child, the Holy See submitted a reservation relating to the provision on family planning saying that it interpreted "the phrase 'family planning education and services' to mean only those methods of family planning which it considers morally acceptable, that is, the natural methods of family planning."\textsuperscript{63} Argentina specified that "a child means every human being from the moment of conception", thus outlawing abortion,\textsuperscript{64} while China declared its intention to apply the Convention only to the extent that it is consistent with Chinese constitutional provisions on family planning,\textsuperscript{65} which limit family size.

In addition to explicit provisions of international treaties, law also pays attention to practice, namely what governments do constitutes evidence of the existence of a specific norm. Thus data gathered by the Population Policy Data Bank of the United Nations on the number of governments which carry out, subsidize or support family planning provide additional evidence. In 1988 out of 170 countries, 136 supported family planning, while only seven
restricted access to it. True, not all countries are encompassed by this data bank, but it is indicative enough that a small minority denies access to family planning.

Motherhood and parenthood

Human rights require that women do not have to earn societal recognition and protection through motherhood, that women are, as much as men, entitled to full protection of their rights and freedoms because they are human beings. The implications of motherhood for equal rights of women emanate from the biological fact that women bear children and men do not. Societal and legal protection aims to compensate for this biological difference. This protection derives from the acknowledgment that childbearing and childrearing is a societal function hence compensation is earned by women who perform it, it is not granted them for the mere fact that they are women.

Human rights norms do not treat people as if they were equal because they are not. They demand that people be recognized as having equal rights. Thus disabled persons have been accorded a specific set of rights to compensate for their disability and prevent it from amounting to a handicap. Similarly, pregnant women and mothers with small children have been accorded special protection, not because they are women, but because childbearing and childrearing necessitates social and economic support. The main aim of human rights is to accord everyone equal opportunities for free and full development hence the methods of eliminating discrimination include redressing factual inequalities in the enjoyment of human rights.

Because only women can bear children, the exclusion of 'workers' who are or may become pregnant constitutes discrimination against women as men cannot be affected by this exclusion. Inter-
national norms therefore prohibit discrimination on the grounds of pregnancy and childbearing as a form of gender discrimination. The Convention on the Elimination of All Forms of Discrimination against Women condemned "dismissal on the grounds of pregnancy or maternity leave". National labour laws, following basic standards set by the International Labour Organization, generally provide protection against such discrimination. This protection is limited to the prohibition of discrimination on the grounds of pregnancy and maternity leave. The Court of Justice of the European Communities ruled in 1990 that dismissal on account of women's absences due to sickness related to pregnancy and childbirth does not violate human rights.\(^6\) The scope of protection influences women's reproductive decisions – the lack of access to employment or the threat of its loss forces women into choosing between motherhood and employment.

Human rights norms relating to parenthood address both parents rather than only the prospective mother. Protection of human rights is, nevertheless, focused on women because they bear children and obstacles to their access to information and services, and denial of the protection of motherhood, jeopardizes not only their rights, but their health and their lives. The focus on women alone may, however, contribute to continuing tolerance of irresponsible fatherhood, which is frequent worldwide. A balance is therefore necessary: "the western focus on the women's role in fertility makes women responsible for family planning but does not give them the power to go against or change their husband's wishes."\(^6\)

Childbearing is biologically determined, but childrearing is not. The sharing of parental duties is far from being accepted, let alone practised, worldwide. Women raise and educate their children and their attitudes towards their daughters determine what their daughters will teach their own daughters. Whatever human rights documents say or demand remains remote from everyday lives if
this is not known, internalized and practised. The change ought to be introduced and supported, sometimes even enforced, ‘top-down’ – this is what human rights are all about. Governments have to take a firm stand against gender discrimination and provide leadership towards its eradication to that women can enjoy equal rights.

An Expert Group Meeting on Population and Women, held in Botswana in June 1992, formulated a series of recommendations addressing, inter alia, the promotion of responsible fatherhood: “Governments should strengthen efforts to promote and encourage, through information, education and communication, as well as through employment legislation and institutional support, the active involvement of men in all areas of family responsibility, including family planning, child-rearing and housework, so that family responsibilities can be fully shared by both partners.”

Reproductive rights
Changes in the institutions of marriage and family in Western Europe and Northern America have resulted in the abolishment of a link between marriage and family, as originally envisaged in international human rights standards. Marriage is no more an indispensable precondition for the founding a family. De-linking marriage and parenthood has also resulted in demands for reproductive rights as rights of the individual rather than the couple, and in quite a few countries such rights have been effectively recognized. The emphasis on motherhood is due to the biological fact that childbearing does not pertain to both sexes. The advocacy of reproductive rights as rights of the individual may, however, reinforce traditional attitudes which hold that procreation is the domain of women. For biological reasons men cannot procreate alone, but human rights treat parenthood not as gender-specific but pertaining to both women and men.
The notion of reproductive rights is widely used in North America and Western Europe, and is sometimes interpreted as a right to have children. The government is required to respect freedom to procreate (non-intervention), and provide assistance as necessary (ranging from artificial procreation to regulation of adoption). People cannot, however, have a right to have children much as they cannot have a right to be healthy or to be tall. Demands that governments recognize an entitlement to parenthood for people who lack the biological capacity of procreation have not been accepted by international human rights bodies. The Human Rights Committee defined the right to found a family as "the possibility to procreate and live together", not going any further than "possibility". Technological developments have, however, created demands that a right to parenthood be recognized: effective treatments of infertility, embryo transfer, surrogate motherhood, have created demands for entitlements concerning procreation. The question whether there is a right to have recourse to techniques of artificial procreation, which could be subsumed under the universally guaranteed right to found a family, has been answered thus far only by one international human rights body, the European Steering Committee for Human Rights, in the negative. The Committee held that human rights cannot be interpreted to guarantee "a right to procreate, if need be, in the absence of natural capacity, by means of artificial procreation".

**Abortion**

Forced sterilizations represent the extreme of denying people (regularly women) the possibility of having children. Prohibition of abortion represents the other extreme: it prevents women from *not* having children by forcing them to continue unwanted pregnancy. Widespread use of sterilization has not attained much international publicity, but abortion was and remains an object of
heated debates. Much has been written in support of women's access to abortion as a matter of right, but the existing human rights norms are not universally accepted. Indeed, even in Europe – which is considered to have the best developed supranational human rights protection – such a right cannot be legally enforced in all countries.

Abortion is fully legalized and made free of charge in some countries while strictly prohibited in others. Such prohibitions often invoke the protection of life of the unborn child and treat abortion as homicide. Abortion had belonged to criminal rather than health law. It was prohibited and punishable, and it took a lot of time and effort to decriminalize it. In quite a few countries abortion still pertains to criminal law, and is not dealt with under health or human rights law. One example is Nepal, where women convicted of self-induced abortion are sentenced to lengthy terms of imprisonment. Another example is Ireland where the prohibition of abortion under the 1861 Offenses against the Person Act was reinforced following the referendum on constitutional amendment of 1983; abortion remains sanctioned as homicide.

International human rights instruments adopted by the United Nations have refrained from broadening the notion of the right to life to encompass the foetus. They include a general provision according to which every human being is entitled to the right to life, and governments are obliged to protect human life from birth, but may extend the definition of human being to the unborn child. The divisiveness of abortion was scrupulously avoided in the Convention on the Rights of the Child – the draftsmen refrained from the dispute whether an unborn child is a 'child' is the sense of enjoying human rights protection. The United Nations human rights bodies are avoiding this conflict-prone issues, with the exception of the Human Rights Committee. This Committee has consistently inquired into the legal status of abortion and
argued for the need to adjust national laws to the requirement of equal rights of women.

The *American Convention on Human Rights* mandates the protection of the right to life from the moment of conception, with a qualifying clause that this is so *in general*, thus allowing for exceptions. This provision has not yet been interpreted by its supervisory bodies, while scholars disagree whether such an explicit statement prohibits abortion, or the words 'in general' provide an opportunity for a less restrictive interpretation. Although the USA has not ratified this Convention, it was brought to the Inter-American Commission on Human Rights in a case which challenged its jurisprudence upholding the legality of abortion.71 The legality of abortion was upheld by the Commission, but it is likely that it would have declared abortion illegal under the Convention had the USA been a party to it. Contrary to this, the jurisprudence of the European human rights bodies upholds women's right to have an abortion and does not deem that foetus is a human being and thus entitled to the protection under the right to life. The Commission on Human Rights of the Council of Europe articulated its views on the primacy of women's rights regarding abortion already in 1980. It stated that a 'right to life' of a foetus could not be constructed so as to jeopardize the mother and added: "This would mean that the 'unborn life' of the foetus would be regarded as being of a higher value than the life of the pregnant woman."72

Reasons for the reluctance of global human rights bodies to address abortion are obvious from these differences in the two regional human rights systems. Many countries in the world place restrictions upon women's access to abortion, and prospects for an inter-governmental agreement on women's access to abortion as a matter of right are negligible. Recent changes of laws regulating abortion provide examples of liberalization (for example, Belgium and Bulgaria in 1990) and also of increasing restrictiveness in
access to abortion (for example, Poland and Germany in 1992). The unborn child emerged in the meantime as 'patient' in health law. A recent survey of the rights of patients in Europe pointed to the changing "legal position of the fetus in relation to that of pregnant woman, particularly as the availability of diagnostic and even therapeutic procedures has increased the chances to deal with the fetus as a patient."\textsuperscript{73}

Thus even in those parts of the world which are considered developed and often take a lead in human rights, access to abortion remains both restricted and controversial. The recent court cases in the USA testify to the continued resistance to allow women access to abortion; abortion remains one of the most divisive political issues. In Canada restrictions upon women's access to abortion were lifted in 1988 by a Supreme Court decision, when the Court held that "forcing a woman ... to carry a fetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus an infringement of security of the person."\textsuperscript{74} Women's access to information was upheld by the Court of Justice of the European Community (EC) in October 1991. The Court held that abortion constitutes a service hence it could be freely advertised throughout the EC.

In Central and Eastern Europe recent political and economic changes may have jeopardized access of women to family planning. Abortion has become a much debated issue during the reunification of Germany. In Poland recent legislation severely restricting access to abortion did not encounter sufficient opposition from women's and human rights organizations. In 1991 a workshop on women's health and reproductive rights, held in Prague, concluded that "as new laws are drawn up, it is vital that women's groups become involved in political activism to ensure that their rights are maintained \textit{both} at national and international level."\textsuperscript{75}
This plea is a good illustration of the need to prevent further deterioration of human rights standards for women, which may become one of the noticeable features of the current changes in the former Eastern Europe.

In the circumstances where the majority of governments officially restrict access to abortion, invoking the human rights rationale in favour of it does not appear as a fruitful exercise. However, human rights developed against resistance of governments and progress is made against continued resistance of some. What we have learned in any and every human rights issue is that the worst strategy is silence, namely that refraining to address a problem as a human rights issue makes the situation worse.

The strategy adopted by the medical profession provides a useful example of compromise accommodating divergent views of abortion. Not being able to reach a globally shared norm of conduct regarding abortion, the World Medical Association left the decision on abortion to "individual conviction and conscience which must be respected", and advised its members as follows: "If the physician considers that his conviction does not allow him to advise or perform an abortion, he may withdraw while ensuring the continuity of medical care by a qualified colleague." Similarly, the World Health Organization has refrained from debating whether abortion should be permitted or outlawed and focused instead on its medical aspects. WHO called upon governments in 1991 "to do everything possible to prevent and eliminate the severe health consequences of unsafe abortion;" this points to the mutual reinforcement of human rights and health arguments in discussing abortion. Indeed either/or controversies move attention away from the undesirability of abortion as a family planning method – it should be the ultimate resort. The widespread use of abortion in Eastern Europe indicates that it may be the only available method of family planning. In Lithuania, for example, the
annual number of abortions in 1992 was close to that of live births (48,400 abortions and 53,600 births).79 Such statistics are regularly unavailable for countries where abortion – whether legal or prohibited – constitutes the sole solution to unwanted pregnancy, and emphasize the necessity of moving the debate centred on legalizing or criminalizing abortion to access to other family planning methods: "laws on abortion should open the way to contraceptive practice that will reduce the incidence of repeated abortion."80

Religious and human rights law

International human rights law defines basic rights and freedoms and also their limitations. If limitations do not form part of analysis, human rights appear as a catalogue of rights which may be mutually conflicting and whose conflicts jeopardize their consistent application. For example, public health is explicitly envisaged as grounds on which individual rights and freedoms may be limited. Another important limitation is embodied in the protection of rights of others; nobody is thus allowed to abuse individual rights of freedoms if this negates the equal rights and freedoms of others.

Freedom of religion is often counterpoised to access to family planning, but also to access to health care in general. An apparent conflict is evident in the case of those religions which preclude vaccination of children because of objection to the piercing of skin. Both national and international jurisprudence has firmly rejected invoking freedom of religion where the life and health of a child is jeopardized on the grounds of a religious norm which prohibits a necessary and useful medical intervention. Indeed in the case of vaccinations parents are obliged to comply with mandatory vaccinations even if some children may suffer harm to their
health. The public health requirement of the protection of all children takes precedence over religious norms.

Because access to family planning information and services is part of international human rights law, individual countries cannot invoke their domestic law – religious or customary – as an excuse to breach or to refuse to implement their international obligations. The fact that many countries have submitted reservations to the specific provisions on family planning, accepting obligations only to the extent to which they conforms to their domestic religious or customary law, has created many objections and much criticism, but not yet a decisive action to uphold international human rights law. The law is clear, but as yet insufficient political will impedes its full application. The 1993 Vienna Conference on Human Rights called for the “eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices. cultural prejudices and religion extremism”, thus reinforcing the demand for full application of human rights law.

Religious norms are often invoked against the right to family planning. Catholicism and Islam both limit the application of human rights in this area. The 1983 Charter of the Rights of the Family of the Holy See defined the attitude of the Catholic Church towards the right to family planning as follows:

"The spouses have the inalienable right to found a family and to decide on the spacing of births and the number of children to be born, taking into full consideration their duties towards themselves, their children already born, the family and society, in a just hierarchy of values and in accordance with the objective moral order which excludes recourse to contraception, sterilization and abortion.
(a) The activities of public authorities and private organizations which attempt in any way to limit the freedom of couples in deciding about their children constitutes a grave offence against human dignity and justice."
(b) In international relations, economic aid for the advancement of peoples must not be conditioned on acceptance of programmes of contraception, sterilization or abortion."

The human rights documents emanating from Islamic organizations also follow an approach different from international human rights standards. Thus the Cairo Declaration, adopted by the 1990 Islamic Conference of Foreign Ministers, postulates that "the husband is responsible for the support and welfare of the family", expressing the Shari'a principle of men's guardianship over and superiority to women. A woman is deemed equal to man in dignity, but does not have equal rights: "[a woman] has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage." The notion of the family is based on marriage, and "both the fetus and the mother must be protected and accorded special care." Termination of pregnancy is clearly excluded, and access to family planning not envisaged as a right.

An important reason for difficulties in the application of human rights is the fact that quite a few countries have adopted religious law to govern both public and private sphere. This was not anticipated by the draftsmen of human rights instruments, who had assumed that freedom of religion would constitute one out of many human rights and national laws would be secular rather than religious. Ensuring compatibility of religious and human rights law has become one of the main controversies today, when the geopolitical map of the world has changed. It is sufficient to recall that at the time of the Universal Declaration of Human Rights merely 56 countries were members of the United Nations, while today the membership grew to 184.

Recent international jurisprudence has reaffirmed the limitations upon religious freedom when it jeopardizes the rights of the child. This has been done most explicitly in cases involving cus-
tody of children, where the religious convictions of one parent, belonging to Jehovah's witnesses and upholding the prohibition of blood transfusions, might have endangered the child's right to health and life and custody was awarded to the other parent. Much jurisprudence was created during the AIDS epidemic concerning the advertisements of condoms. In some countries condoms had been unmentionable in the public debate and in mass media because of religious norms. It is significant that quite a few countries adopted laws legalizing advertisements of condoms, overruling religious prohibitions, because of the imperative of the protection of public health.

The global differences in the approach to human reproduction is evidenced by change of terminology in both population policies and human rights. In Western Europe and North America the current focus on sexual health reflects a demand that human sexuality be accorded the priority it deserves by the mere criterion of its importance in human life and in the attainment of health as the state of complete physical, mental and social well-being. Also, this new terminology has departed from confining reproduction to women and refers to both men and women.

The novelty of sexual health as a concept defies a commonly accepted definition. WHO defined it in 1974 as "the integration of the physical, emotional, intellectual and social aspects of sexual being, in ways that are enriching and that enhance personality, communication and love." Agreement is emerging that sexual health should include the absence of diseases and disorders which affect reproduction, control of fertility (including the avoidance of unwanted pregnancy), and freedom of sexual expression and enjoyment, without exploitation, oppression or abuse. The addition of free sexual expression and enjoyment distinguishes it from reproductive health, and sexual health – previously a precursor of reproductive health – obtained an independent status.
Obviously, a separation between sexual and procreative aspects of human sexuality will not be accepted worldwide. Quite a few national laws reflect religious constraints on individual behaviour and cannot accommodate demands for freedom of sexual expression, nor a separation between human sexuality and procreation. Obstacles to introducing human sexuality as subject-matter into educational curricula have not been overcome everywhere, but experience has shown that this can be greatly facilitated by discussing them under the heading of health. Indeed human rights standards are useful in facilitating this further through their emphasis of the primacy of safeguarding human health, particularly that of children and the young, which can override obstacles deriving from religious norms.

International human rights law recognizes as a component of freedom of religion the liberty of parents to educate their children consistently with their own religious convictions. This has often been invoked against the introduction of sex education in schools. In the Danish Sex Education case, the European Court of Human Rights held that compulsory sex education did not infringe upon freedom of religion because the provision of ‘useful and correct information’ in ‘an objective, critical and pluralistic manner’ is in the public interest.85

**Freedom of information**

Access to family planning information derives from three components of the international human rights law:

(a) the exercise of free and responsible choice in family planning necessitates access to information for individuals to be able to decide responsibly, which it impossible without having access to information; the use of family planning services requires informed consent, which is a prerequisite for any medical inter-
vention and thereby necessitates full access to information;
(b) freedom of information (the right to seek, receive and impart
information through any media regardless of frontiers) is a
separate and explicitly guaranteed universal human right,
(c) because family planning constitutes part of the right to health,
access to information necessary for the protection of public and
individual health is specifically affirmed regarding promotion
and protection of health both for parents and for their children.

Access to information, although a human right on its own mer-
its, is crucial for the enjoyment of all other human rights and fun-
damental freedoms. Its relevance to population policies has been
amply documented through statistics of maternal deaths caused
by illegal, and thus regularly unsafe, abortions, which could have
been prevented by providing women with information and means
necessary to prevent unwanted pregnancies.

Both public health and morality constitute grounds for limiting
human rights, and family planning information is often the first
target for limitations on the grounds of morality, while advocated
as indispensable for protecting human health. In the field of popu-
lation, information may be suppressed on the grounds of morality
or religion, and laws denying access to family planning information
and services are often justified by the preservation of public mor-
als. The European Court of Human Rights has, however, broad-
ened freedom of information to information and ideas 'that
offend, shock or disturb ... any sector of the population'.
It has interpreted access to information as an individual right, the right
of the public to be informed, where that information related to
public health and safety. This view has been adopted by many
governments in overcoming religious prohibitions regarding infor-
mation related to family planning.

Much controversy has been created internationally by the
recent cases against the provision of information in Ireland (where
abortion is prohibited) about abortion clinics available in other European countries. The Irish Health (Family Planning) Act of 1979, which amended the censorship of Publications Act of 1929, envisages the prohibition of sale and distribution of any book by the Censorship of Publications Board if that book "advocates the procurement of abortion or miscarriage or the use of any method, treatment or appliance for that purpose". The Irish Supreme Court denied a right to impart information that would conflict with the constitutionally mandated protection of the unborn child. The European Commission of Human Rights has upheld the right of women to receive information without interference by the public authorities.

Legal obstacles to contraceptives continue in quite a few countries, but the existing information is insufficient for a global overview. However, it is obvious from data which exist that legal obstacles to access information on contraceptives undermine the effectiveness of population policies. Problems which emerge when international population assistance is provided, while individuals are precluded from access to family planning due to legal obstacles, are easy to imagine.

Right of the family to protection and assistance
The International Year of the Family, proclaimed by the United Nations for 1994, has drawn international attention to the insufficient attention that family has obtained in human rights, in development, or even in population policies. The focus of human rights on the individual vested each member of the family with a set of rights while rights of the family as a unit remain undefined. Moreover, the earlier tendency of governments to replace traditional family functions by social provision has further undermined the rights of the family as a unit. Detrimental impact of this proc-
ess has become obvious in many African countries where the dominant development pattern caused the disintegration of extended families, while their functions could not have been taken over by public bodies.

The International Year of the Family proposes the reversal of this orientation, and implicitly a departure from the excessive individualism typical of Western Europe and North America, suggesting that "programmes should support families in the discharge of their functions, rather than provide substitutes for such functions." 90

The final document of the 1993 World Conference on Human Rights stressed that children should grow up in the family environment, which is necessary for the full and harmonious development of their personality and the family "accordingly merits broader protection." 91 This follows the approach of international human rights law whereby protection of the family originates in the right of the child to a family. This was spelled out in the Inter-American Declaration on Family Rights as follows: "All persons, and especially all children, have the right to a family and the stability of the family institution." 92

Right to social security
Extensive research has been carried out into factors influencing decision-making on the family size and results have often pointed to old-age support in the motivation to have large families. It is significant to note that regional human rights instruments, those originating in Africa and in the Middle East, include the obligation of children to provide for their aged parents, thus incorporating into human rights family solidarity between generations. Such provisions seem alien to the Western notion of human rights, but are common in other regions. The obvious implication for the de-
sign of population policy is broadening the coverage of national social security systems as an indirect methods of influencing decisions on the family size. However, such indirect measures rarely form part of population policies, recently even less so due to financial stringency affecting the entire social sector in both developing and industrialized countries.

The right to social security is included in many international human rights instruments and, although formulations vary, the essence of this right is to secure minimum livelihood for everybody in circumstances beyond the person’s control that jeopardize his or her survival. Old age pensions are part of most social security schemes and thus eliminate, in theory at least, the necessity of parents to provide for their security in old age by relying on their children. In practice, particularly in Africa and Asia, the coverage of social security schemes is limited to civil service, industry and commerce, thus leaving beyond their reach the bulk of the population.

**Right to remuneration for supporting one’s family**

The general human rights norm relating to the right to work are based on the understanding that work constitutes the means of earning livelihood for most people, and thus for supporting their families. Specific provisions relating to remuneration therefore explicitly add that remuneration ought to be assessed from the viewpoint of the need to support the family.

The most detailed provisions in this areas are contained in the multitude of international instruments adopted by the International Labour Organization (ILO). These include specific standards concerning minimum wages, and include safeguards for trade union freedoms in negotiating and securing workers’ protection. This vast area of international standards is well documented and
analyzed hence it will not be dealt with here. It is important to note, however, that the *ILO Convention and Recommendation on Workers with Family Responsibilities* represents a departure from the previous treatment of men as breadwinners, and women as responsible for childrearing, and thus illustrates the progress attained in the eradication of stereotyping in the area of human rights.

The scope of legal entitlements for individual workers regarding family support depends to a large extent on the governmental policy regarding the sharing of family responsibilities. In countries where childbearing is encouraged, entitlements tend broaden to provide an incentive to workers. In countries where fertility levels are considered to be too high, entitlements may be linked to the adherence to one- or two-children and lost in the case of additional children, thus contrary to the original intention of this human rights provision. This has been addressed above in the section on incentives and disincentives.

**Right to adequate standard of living**

The human rights definition of an adequate living standard postulates the family, not the individual, as the bearer of this right and thus the 'unit of measure' in defining the standard of living. It encompasses food, clothing, housing, medical care, and social services. This right, much as other economic and social rights, has been relatively disregarded in international human rights standards. Despite frequent critiques of the continuing neglect of economic and social rights, not much progress has been accomplished. Irrespective of the international and national human rights guarantees, the prospects for the enjoyment of an adequate standard of living seem to have worsened in the last decade for much of the world’s population. The 1993 *Vienna Conference on Human Rights*
resulted in the agreement of all governments on the need to redress this neglect, and particularly to focus on economic and social rights in the dominant global development policies. This may result in some improvement in this area, but hopes for an improvement have to be weighted against continuing economic recession, with evidence that the standard of living is deteriorating even in industrialized countries.

The financial constraints regarding the right to an adequate standard of living are well-known and will not be discussed here. Rather, some controversial issues will be raised as they relate to population policies and could contribute to the articulation of human rights considerations, specifically as these relate to the role of the family.

Studies carried out by the United Nations into the impact of governmental services aimed to increase the standard of living (such as education, nutrition, health care, sanitation) have shown that effects on the family have not always been as beneficial as intended, and may have unintentionally contributed to the abolishment of traditional family functions. The decrease or elimination of the public provision of such services, often caused by fiscal austerity, has left dependant family members – particularly children – unprovided.

The role of the family in population policies therefore ought to be made explicit. It is often remarked that some forms of assistance ostensibly provided to improve the standard of living of the family, such as family allowances, although labelled as family support "are often measures aimed primarily at manipulating birth rates." The 1986 United Nations study on the family noted that "in some cases family allowance programmes are intended to increase the number of children without addressing themselves to the familial problems, other than economic ones, encountered in raising more children."
Notes


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Conclusions and recommendation

The preceding outline of main human rights issues constitutes a framework for assessing population policies. Human rights are based on the rule of law, which defines what governments should and should not do as a corollary to universally guaranteed human rights. However, human rights are also subjected to the rule of law and thus limited: any and every freedom entails responsibility hence international human rights law allows governments to restrict some rights and freedoms when this is necessary and legitimate to protect other values, such as health or welfare.

Two issues are likely to dominate further discussion of human rights in population policies:

* those practices which are incompatible with human rights (because they are coercive or discriminatory, or both), and
* women's access to family planning information and services, which some governments refuse to grant while others cannot implement, because of the lack of infrastructure, resources and personnel.

The human right to family planning is not universally accepted and thus does not form part of population policies in all countries; its scope and contents varies a great deal in countries that recognize this right. The right to family planning has not yet moved
from the proclamation to operationalization, in order to determine its precise scope, contents and implications of such a right. The recognized right to decide on the number and spacing of their children remains vague: such a decision can be reached freely but ought to be made responsibly. Irrespective of the recognition of the right to family planning in individual countries, other human rights and fundamental freedoms, which are universally recognized, should apply to population policies much as to any other area where governments can intervene into private lives. The purpose of human rights is to set the limits to such intervention and to protect individuals against the abuse of power by governments.

Human rights provide little guidance on individual responsibilities, in general or specifically in population policies. Such guidance can only be elaborated through a careful analysis of specific population policies through the application of human rights criteria. Such analysis is long overdue and a checklist of items which could guide such analysis is included below.

The insistence on the application of all human rights in population policies does not entail a disregard of the right to family planning, but enhances possibilities of its acceptance, against the background of the general respect of all human rights. The full scope of human rights and individual freedoms make the right to family planning truly meaningful: the basic postulate of human rights is that they are indivisible and interdependent.

**International population assistance**

The recognition and enjoyment of human rights in national population policies is influenced by many factors, by the relative balance of political forces within individual countries or the strength of religious institutions. The recognition of women's human rights and the worth of women in their roles other that childbearing and
childrearing play, of course, the dominant role in shaping population policies and recognizing human rights within them. Countries at a similar level of development often have different, even opposite, approaches to the application of human rights in population policies. Moreover, it is important to recall that all developing countries do not accept that human rights should apply as a corrective to their population policies and programmes. As we have learned in many other areas, human rights seldom improve automatically or 'naturally' with development. A concerted effort is thus necessary to translate human rights into a component of international population assistance.

A common approach of the donor community to human rights in international population assistance seems emerging. The affirmation that human rights should apply in population policies does not come only from population conferences and human rights bodies. The World Bank stressed that "a public policy to reduce fertility must be sensitive to individual rights today as well as to long-term social goals, and must recognize the distinction between encouraging lower fertility and coercion." Thus one of the major multilateral donors reinforced policies of individual donor governments on the respect of human rights in international population assistance. The 'Mexico City policy' of the U.S. government has recently been reversed, "lifting restrictions that prohibited some family planning organizations from receiving U.S. funding because of abortion-related activities". This recent commitment of the U.S. government (which provides 75 percent of bilateral assistance) to human rights in population assistance may today provide a basis for a concerted donor policy.

This text indicated that human rights have been relatively neglected in the international population assistance. This is illustrated by the genesis of the human right to family planning. This right remains defined in an abstract and general manner and is
lacking an operational definition, and also any type of monitoring or enforcement. Although both human rights bodies and those dealing with population assistance have agreed that some practices—particularly those which are coercive or discriminatory—violate human rights, this agreement has not yet been consistently applied in order to prevent human rights violations. Full application of human rights and fundamental freedoms has yet to become part of donors’ policies and programmes, the contents of human rights within international population assistance needs yet to be defined. This should be done on three levels:

(1) by the identification of those human rights principles and norms, and the minimum standards of their observance, which should be considered to violate human rights and should therefore never be internationally supported;

(2) through the support for further elaboration of the specific contents of human rights as integral part of national population policies (particularly by detailed analysis of different incentives and disincentives), and additional support for its putting into practice; and

(3) through the development of programmes aimed at promoting those human rights which are most closely related to family planning. Many types of programmes which would be beneficial for human rights, particularly for enhancing equal rights for women, such as raising of the minimum age at marriage or eliminating spousal veto over women’s access to family planning, do not form part of the donors’ guidelines despite their general commitment to human rights.

It is important to add that a legal guarantee of the right to family planning is indispensable, but insufficient, to make such a right effective. While law may deny the right to family planning, law can grant such a right, but cannot it an effective entitlement
unless family planning services, including contraceptives, are available and accessible. High commercial prices of contraceptives, where "a supply of contraceptive pills would cost more than 5 percent of average annual income" in Africa,³ reinforce the importance of making contraceptives genuinely accessible. International population assistance has obviously a crucial role. The Population Action International estimated that in 1991 three-quarters of the total cost of family planning was borne by the people and governments in developing countries.⁴

Significantly, the role of law in national population programmes has recently been accorded its long overdue importance. The World Bank has recognized that law may help or hinder population programmes, through affecting "the availability, distribution and advertising of contraceptive methods and abortion, limiting the potential of private sector and hampering public programs."⁵

**Human rights assessment of national population policies**

Safeguards for the protection of basic civil and political rights are seldom included in international population assistance programmes. Thus there is a need for a comprehensive human rights scheme against which such programmes could be assessed.

Such a scheme is necessarily focused on the application of international human rights standards in national law and in national population policies, which may not be part of law. It is important to emphasize that national law is a reflection of societal norms (thus it may embody a religious prohibition of any 'unnatural' contraception) but also a method of changing these norms (thus legislation on the advertising of condoms often represents a sign of government's commitment to change the religious norms prohibiting 'unnatural' contraception).

Different legal issues relevant for population policies are regularly analyzed in isolation, and seldom by the application of inter-
national human rights standards. The Committee on Elimination of Discrimination against Women (CEDAW), established under the International Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1993 a recommendation on equal rights relating to marriage and family, which lays down main components of the right to family planning for women and men: sex education and family planning, discouragement of pregnancies in girls under 18; availability of information on their reproductive rights to all women; availability of safe and reliable methods of contraception; legislative measures regulating interruption of pregnancy.6

Comparative studies have been done on the legal status of abortion, or access to contraceptives, or minimum age of marriage, but a general overview of all areas of law which are relevant for family planning is lacking. The main components of such an overview are presented in the checklist below to guide human rights analysis. Only when the legal framework of family planning is identified, it becomes known what is recognized as a human right and what is not in different regions and countries, and what limitations exist for the exercise of such a right. This points to the key issues which ought to be addressed when population policies of different regions and countries are discussed. The application of universal, namely globally accepted, human rights facilitates demands that specific rights be formally recognized, both in national laws and in population policies.

Human rights assessment of national population policies: Checklist

Protection against enforcement of population policies
- compatibility between official quantitative targets in national
population policies and respect of individual freedom;
- safeguards against coercive or compulsory methods of modifying fertility;
- human rights assessment of all methods envisaged in population policies;

Protection against discrimination:
- safeguards of the rights of minorities and indigenous peoples against discriminatory or coercive measures;
- measures to redress discriminatory heritage with regard to minorities of indigenous population that were previously denied equal rights and equal opportunities for their exercise;

Recognition of basic rights and freedoms
- constitutional and legal provisions relating to family planning;
- legal and economic protection of the family;
- equal rights of women in national constitution and law; available data on equal enjoyment of these rights; existence of national institutions to monitor eradication of gender discrimination; access to remedy for women affected by discriminatory laws, policies or practices;
- recognition of the rights of the child (non-discrimination, right to maintenance);

Legal status of direct methods of modifying fertility
- legal regulation of contraceptives, sterilization, castration, abortion;
- safeguards against compulsory and coercive measures;

Indirect methods for modifying reproductive behaviour
- compulsory education for girls (coverage, enforcement);
- access to income-generation and/or employment for girls and women;
– coverage of social security and old-age pensions;
– breastfeeding;

Access to health care:
– constitutional and legal entitlements in health;
– elimination of legal obstacles to women’s access to health care;
– elimination of financial impediments to access to maternal and child care and family planning;

Access to contraceptive information and services
– availability, accessibility and acceptability of family planning information and services;
– family life and/or sex education in school curricula;
– regulation of public advertising relating to family planning information and services;
– choice of family planning methods, including contraceptives;
– sale and/or distribution of contraceptives (availability, accessibility, acceptability);
– existence of counselling;
– legal obstacles to women’s access to family planning (parental or spousal consent);
– prescription requirements for contraceptives;
– safeguards for sterilization (free and informed consent);
– regulation of abortion (legal status, access, medical assistance);
– existence of contraceptive information and services targeting men;

Responsibility for the quality of services:
– control of the safety and efficacy of contraceptive services;
– existence of medical follow-up;
– monitoring of the observance of ethical and human rights standards;
– availability of complaints procedures and access to remedies;
Prevention of adolescent pregnancies:
- minimum age for marriage (legal minimum, available data on actual age at marriage, enforcement of the legal minimum);
- criminal law protection of girls (statutory rape) and its enforcement;
- legal status of child-mothers;

Equal rights in marriage:
- free consent to marriage (protection against involuntary marriage)
- measures to eradicate polygamy;
- enforcement of the registration of marriages;
- measures to eradicate dowry and/or bride price;
- regulation of marital rights and duties (personal rights, property rights);
- dissolution of marriage (equal rights guarantees, obstacles to enforcement);
- parental duties upon dissolution of marriage;
- legal enforcement of child maintenance;

Protection of women bearing children outside marriage:
- registration of children at birth (name, status) and its enforcement;
- status of illegitimate children;
- methods to prove paternity (obstacles to use);
- parental duties of fathers (and methods of enforcement);
- assistance to single mothers;
- elimination of sanctions (criminal, religious, social) against extramarital sex for women;

Protection of women under criminal law
- national law and policy on violence against women;
existence and enforcement of the prohibition of the abuse of women relating to their childbearing role (e.g. perceived infertility, birth of a female child);

**International Conference on Population and Development**

A multitude of controversial topics has already emerged in the preparations of the International Conference on Population and Development (ICPD 94). Most of these have been prompted by the central theme of the ICPD which is broad and encompasses *population, sustained economic growth and sustainable development*. Discussions during the preparations of the ICPD have already broadened the topics and potential controversies – even further by mandating the ICPD to discuss (and try to agree upon) "the interrelationship between population, development, environment and related matters". This makes the agenda vast and creates a danger that a focus on population policies could ultimately be lost and an opportunity to incorporate human rights into a global policy-document on population lost as well. This is particularly important against the experience of difficulties in attaining the agreement of governments on the basic human rights at the 1993 Vienna Conference on Human Rights. One can easily imagine a scenario where the core of discussions would become economic inequalities in the world, while purposeful human rights violations carried out within population policies would escape attention.

This vast agenda necessarily transplants the numerous controversial issues discussed under the title of 'development' and 'environment' to population policies. Because population policies are placed in the context of development, which is a divisive rather than unifying topic on the inter-governmental level, the often-
repeated disagreements about 'development' may well dominate the agenda of the ICPD: the Secretary-General's call to "treating population issues in their proper development perspective" assumes that there is anything resembling an agreement on what such a 'proper' development perspective may be. The discussions at the latest session of the Preparatory Committee, which encompassed debt burden, restrictive trade policies, and structural adjustment programmes, well illustrates this danger. The verbal conflicts from the recent Earth Conference may well be repeated: "in the final negotiating session, the United States moved to delete all references to consumption in the North, the Group of 77 retaliated by deleting references to the urgency of slowing population growth".

Much attention has been predictably devoted to resources, and one of the main themes of the ICPD is "the mobilization of resources for developing countries", specifically for their population policies and programmes. Recent experiences have shown how divisive conditionality is in international development assistance, and it would be unrealistic to expect it to be less controversial in the area of population. Because such conditionality often includes donor requirements upon developing countries to decrease population growth, it may inadvertently justify the use of coercive or discriminatory measures.

The attention to women in the preparatory documents for the Cairo Conference provide grounds for optimism. Women have been included among issues 'requiring the greatest attention' as follows:

"Linkages between enhancing the roles and socio-economic status of women and population dynamics, including adolescent motherhood, maternal and child health, education and employment, with particular reference to the access of women to resources and the provision of services."
The results of the recent Vienna Conference on Human Rights, where more has been accomplished regarding women than in 'conventional' human rights issues, provide a further possibility of making the rights of women the central theme in arguing the application of human rights in population policies. The conceptual framework developed by the secretary-General of the ICPD suggested adolescent fertility as a separate topic,\textsuperscript{12} and this could reinforce the broad global agreement on the importance of stressing indirect fertility regulation methods, such as the prevention of adolescent pregnancies, through enforcement of the minimum age for marriage.

In her proposed conceptual framework for the ICPD, the Secretary-General has listed pertinent human rights considerations among the essential principles for population and development, which would precede the operational plan of action. This list reads as follows:

(a) Individual rights and responsibilities;
(b) Societal rights and obligations;
(c) Gender equality and empowerment of women;
(d) Choice and the protection of reproductive rights;
(e) Intergenerational equity and responsibility;
(f) Opposition to coercion;
(g) The interrelationship of population and sustainable development;
(h) Protection of vulnerable groups, particularly women and children;
(i) Moral and ethical perspectives on population and development.\textsuperscript{13}

An analysis of this list reveals that human rights have been placed alongside 'societal rights', thus blurring the difference between human rights, which constitute obligations for govern-
ments, and 'societal rights' where people can have different ideas of what these should be (and who speaks in the name of 'society'), while there is no international guidance. Moreover, the addition of 'moral and ethical perspectives' - where much disagreement is an inevitable consequence of their variety - may further dilute the emphasis on human rights as existing obligations for governments. This may ultimately place human rights into the category of different, often incompatible, views of 'societal rights' or 'moral perspectives on population' and thus undermine the application of international human rights law.

Indications of difficulties relating to human rights are visible from the report of the Preparatory Committee. Thus 'many delegations' considered that 'the sovereignty of nations' was an essential principle in population policies, and also "a few delegations suggested that specific demographic targets should be set".14 If national sovereignty is affirmed in designing and implementing population policies, and these may include population targets (and thus implicitly justify their enforcement, which more often than not denies individual rights and freedoms), it is possible that human rights will be paid lip-service at the beginning of the ICPD final document, while the operative provisions of the document itself will legitimize their denial in practice.

It is customary for United Nations meetings and documents to attach great importance to the human rights language, while virtually none to law as the main method of securing the protection of human rights. The mention of law is thus scant in the preparatory documents for the ICPD, but it is encouraging that some references to law have been made. Thus the discussion at the Preparatory Committee singled out the need of "enactment and/or enforcement of laws pertaining to minimum age for marriage", and emphasized the need to structure all recommendations into four categories (legal, economic, educational and cultural). It also men-
tioned "the need to remove legal barriers to the provision of family planning methods."\textsuperscript{15}

The idea of discussing all substantive recommendations of the ICPD with regard to the specific area of implementation – legal, economic, educational or cultural – creates an opportunity to strengthen human rights norms by associating them with the legal protection that such rights necessitate. This framework is summarized in the Checklist for the human rights assessment of national population policies above.

\textbf{Notes}

\begin{enumerate}
\item Statement by Timothy Wirth, the U.S. representative to the Second Preparatory Committee for the International Conference on Population and Development of 11 May 1993, USUN Press Release No. 63-(93).
\item The World Bank – \textit{Effective Family Planning Programs}, Washington, D.C., 1993, pp. 82-83.
\item ibid., para. 4 (e).
\end{enumerate}


Appendix: Relevant Human Rights Standards

Population policies

... the sovereignty of nations in formulating and promoting their own population policies [ought to take] due regard to the principle that the size of the family should be the free choice of each individual family.


... population policies, where they exist, should be consistent with such universal realities as social and economic development, the juridical, political, social and cultural equality of women, respect for the rights of parents and children, the strengthening of families, the right of parents to transmit life and to determine consciously and responsibly the number and spacing of their children, ...

... according to the public statements of the great majority of the representatives of States ... it is the right of each nation to determine its own population policy in the unrestricted exercise of its sovereignty.

Countries which consider that their population growth rate hinders their national development plans should adopt appropriate population policies and programmes.


Right to found a family
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.

Marriage shall be entered into only with the free and full consent of the intending spouses.

Article 16 (1) and (2) of the Universal Declaration of Human Rights: adopted by the General Assembly of the United Nations by its resolution 217 A (III) of 10 December 1948.

The right of men and women of marriageable age to marry and to found a family shall be recognized.

No marriage shall be entered into without the free and full consent of the intending spouses.

Article 23 (2) and (3) of the International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

Prohibition of child marriages
States Parties ... shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.
Article 2 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, adopted by General Assembly resolution 1763 (XVII) of 7 November 1962 and entered into force on 9 December 1964; repeated with the addition of minimum age no less than fifteen years in the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, adopted by General Assembly of the United Nations resolution 2018 (XX) of 1 November 1965,

Child marriage and the betrothal of young girls before puberty shall be prohibited, and effective action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

Article 6 (3) of the Declaration on the Elimination of Discrimination against Women, adopted by General Assembly resolution 2263 (XXII) of 7 November 1967.

The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

Article 16 (2) of the Convention on the Elimination of All Forms of Discrimination against Women, adopted by General Assembly resolution 34/180 of 18 December 1979 and entered into force on 3 September 1981.

Child marriage and the betrothal of young girls shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage and make registration of marriage in an official registry compulsory.

States Parties ... shall take all appropriate measures to ensure that children who become mothers before completing their educa-
tion shall have an opportunity to continue with their education on the basis of their individual ability.

Articles 21 (2) and 11 (6) and of the Charter on the Rights and Welfare of the African Child, adopted by the General Assembly of the organization of African Unity in 1990 and not yet in force.

**Right to determine the number and spacing of children**

Parents have a basic human right to determine freely and responsibly the number and spacing of their children.

*Paragraph 16 of the Proclamation of Teheran, adopted by the International Conference on Human Rights at Teheran on 13 May 1968.*

Parents have the exclusive right to determine freely and responsibly the number and spacing of their children.


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 responsibilities towards the community.


States Parties ... shall ensure, on a basis of equality of men and women, the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the in-
formation, education and means to enable them to exercise these rights.

*Article 16 (1) (e) of the Convention on the Elimination of All Forms of Discrimination against Women, adopted by General Assembly resolution 34/180 of 18 December 1979 and entered into force on 3 September 1981.*

Governments should, as a matter of urgency, make universally available information, education and the means to assist couples and individuals to achieve their desired number of children. Family planning information, education and means should include all medically approved and appropriate methods of family planning, including natural family planning, to ensure a voluntary and free choice in accordance with changing individual and cultural values. *Recommendation 25 for the future implementation of the World Population Plan of Action, adopted by the International Conference on Population, Mexico City, 6-14 August 1984.*

**Equal rights of spouses**

States ... shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children. *Article 23 (1) of the International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966 and entered into force on 23 March 1976.*

All appropriate measures shall be taken to ensure the principle of equality of status of the husband and wife, and in particular: (a) Women shall have the same right as men to free choice of a spouse and to enter into marriage only with their free and full consent; (b) Women shall have equal rights during marriage and at its disso-
lution. In all cases the interest of the children shall be paramount; (c) Parents shall have equal rights and duties in matters relating to their children. In all cases the interest of the children shall be paramount.

Article 6 (2) of the Declaration on the Elimination of Discrimination against Women, adopted by General Assembly resolution 2263 (XXII) of 7 November 1967.

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) The same rights and responsibilities during marriage and at its dissolution; (g) The same personal rights as husband and wife, ...; (h) The same rights for both spouses in respect of ... property.


Protection of the family
The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.


The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsi-
ble for the care and education of dependent children.


The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.


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 responsibilities within the community.


**Prohibition of interference with privacy and family**

No one shall be subjected to arbitrary interference with his privacy, family, ... Everyone has the right to the protection of the law against such interference ... 


**Protection of motherhood**

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.

In order to prevent discrimination against women on account of marriage or maternity and to ensure their effective right to work, measures shall be taken to prevent their dismissal in the event of marriage or maternity and to provide paid maternity leave, with the guarantee of returning to former employment, and to provide the necessary social services, including childcare facilities.

Article 10 (2) of the Declaration on the Elimination of Discrimination against Women, adopted by General Assembly resolution 2263 (XXII) of 7 November 1967.

Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.


Social progress and development shall aim at the continuous raising of the material and spiritual standards of living of all members of society, with respect for an in compliance with human rights and fundamental freedoms, through the attainment of the following main goals: The protection of the rights of the mother and the child; concern for the upbringing and health of children; the provision of measures to safeguard the health and welfare of women and particularly of working mothers during pregnancy and the infancy of their children, as well as of mothers whose earnings are
the sole source of livelihood for the family; the granting to women of pregnancy and maternity leave and allowances without loss of employment or wages.


In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave ...; (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities; (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.


Reproductive health

States Parties shall take appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

States Parties shall ... ensure to rural women the right to have ac-
cess to adequate health care facilities, including information, counselling and services in family planning.

... States shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

*Articles 12 and 14 (2) (b) of the Convention on the Elimination of All Forms of Discrimination against Women, adopted by General Assembly resolution 34/180 of 18 December 1979 and entered into force on 3 September 1981.*

States Parties shall pursue full implementation [of the right of the child to the enjoyment of the highest attainable standard of health] and, in particular, shall take appropriate measures (d) To ensure appropriate pre-natal and post-natal health care for mothers; (f) To develop preventive health care, guidance for parents and family planning education and services.


**Equal parental responsibilities**

Parents shall have equal rights and duties in matters relating to their children. In all cases the interest of the children shall be paramount.

*Article 6 (2) of the Declaration on the Elimination of Discrimination against Women, adopted by General Assembly resolution 2263 (XXII) of 7 November 1967.*

States Parties shall take all appropriate measures to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility
of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 5 (b) of the Convention on the Elimination of All Forms of Discrimination against Women, adopted by General Assembly resolution 34/180 of 18 December 1979 and entered into force on 3 September 1981.

States Parties ... shall ensure, on a basis of equality of men and women, the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount.

Article 16 (1) (d) of the Convention on the Elimination of All Forms of Discrimination against Women, adopted by General Assembly resolution 34/180 of 18 December 1979 and entered into force on 3 September 1981.

With a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.

Article 3 (1) of the ILO Convention 156 concerning equal opportunities and equal treatment for men and women workers: Workers with family responsibilities.

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents ... have the primary responsibility... The best interests of the child shall be their basic concern.
The parent(s) ... have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

*Articles 7 (1), 18 (1) and 27 (2) of the Convention on the Rights of the Child, adopted by General Assembly resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990.*

Responsibility for guaranteeing children the necessary protection lies with the family, society and the State. Although the Covenant does not indicate how such responsibility is to be apportioned, it is primarily incumbent on the family ... and particularly on the parents.

*General comment 17 of the Human Rights Committee, adopted on 5 April 1989, and relating to Article 24 (Rights of the child) of the International Covenant on Civil and Political Rights.*

**Rights of the child**

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

A child temporarily or permanently deprived of his or her family environment ... shall be entitled to special protection and assistance provided by the State.


**Unborn child**

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception.

The first moral principle imposed upon the physician is respect for human life from its beginning.

Diversity of responses to [conflict between the vital interests of a mother with the vital interests of her unborn child] results from the diversity of attitudes towards the life of the unborn child. This is a matter of individual conviction and conscience which must be respected.

... where the law allows therapeutic abortion to be performed, the procedure should be performed by a physician competent to do so in premises approved by the appropriate authority. If the physician considers that his convictions do not allow him to advise or perform an abortion, he may withdraw while ensuring the continuity of medical care by a qualified colleague.

Declaration of Oslo: Statement on therapeutic abortion, adopted by the 24th World Medical Assembly (Oslo 1970) and amended by the 35th World Medical Assembly (Venice 1983).

Status of children born out of wedlock
Every person born out of wedlock shall be entitled to legal recognition of his maternal and paternal filiation in so far as compatible with the principle of the protection of the family.

The rights and obligations pertaining to parental authority shall be the same, whether the child is born in wedlock or out of wedlock.

Information in birth and other registers containing personal data which might disclose the fact of birth out of wedlock shall be
available only to persons or authorities having a legitimate interest with respect to filiation.

In referring to persons born out of wedlock, any designation which might carry a derogatory connotation shall be avoided. *Articles 1, 9 and 15 of the Draft general principles on equality and non-discrimination in respect of persons born out of wedlock, elaborated by the United Nations secretariat in October 1974.*

The father and mother of a child born out of wedlock shall have the same obligation to maintain the child as if it were born in wedlock. Where a legal obligation to maintain a child born in wedlock falls on certain members of the family of the father or mother, this obligation shall also apply for the benefit of a child born out of wedlock.

A child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of members of its father's or mother's family, as if it had been born in wedlock. *Articles 6 and 9 of the European Convention on the Legal Status of Children Born out of Wedlock, adopted in Strasbourg on 15 October 1975 and entered into force on ....

... a child shall mean every human being up to the age of 18 years whether such a child is born out of wedlock or in wedlock.


... measures of protection are aimed at removing all discrimination in every field, including inheritance, particularly as between ... legitimate children and children born out of wedlock.

Providing for the right to have a name is of special importance in
the case of children born out of wedlock. The main purpose of the obligation to register children after birth is to reduce the danger of abduction, sale of or traffic in children, or of other types of treatment that are incompatible with the enjoyment of the rights. General comment 17 of the Human Rights Committee, adopted on 5 April 1989 and relating to Article 24 (Rights of the child) of the International Covenant on Civil and Political Rights.

**Limits to individual rights and freedoms**

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

*Article 16 (2) of the Universal Declaration of Human Rights: adopted by the General Assembly of the United Nations by its resolution 217 A (III) of 10 December 1948.*

... the State may subject [human] rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.


**Limits upon religious freedoms**

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development, ...

Article 5 (5) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted by General Assembly resolution 36/55 of 25 November 1981.

Individual duties and responsibilities

Everyone has duties to the community in which alone the free and full development of his personality is possible.


All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, ...

Genocide

... genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (d) Imposing measures intended to prevent births within the group.


Safeguards against experimentation

This prohibition applies to ... medical or scientific experiments not necessitated by the medical treatment of a protected person, ...


... national sovereignty, human dignity and human rights should be fully respected in any programme comprising experimentation regarding methods relating to fertility. Such methods should first be approved by the Governments both of the country of origin and of the country in which they are used.


... no one shall be subjected without his free consent to medical or scientific experimentation.


... it is prohibited to subject the persons [who are in the power of the adverse Party] to any medical procedure which is not indicated
by the state of health of the person concerned and which is not consistent with generally applicable medical standards which would be applied under similar medical circumstances.

*Article 11 (1)* of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977 and entered into force on 7 December 1978.

Clinical trials and experimental treatment shall never be carried out on any patient without informed consent, ...

*Principle 11, paragraph 15 of the Principles for the protection of persons with mental illness and the improvement of mental health care, adopted by General Assembly resolution 46/119 of 17 December 1991.*

**Prohibition of sterilization**

Sterilization shall never be carried out as a treatment for mental illness.

Human rights set universally applicable standards that should apply to governmental activities in all areas, thus including population. Because human rights standards have been elaborated for world-wide application, they represent the minimum which every government can comply with, irrespective of the level of development of the country, its political system, religion, or cultural heritage.

An analysis of population policies from the viewpoint of human rights is necessary to clarify the practical meaning of specific human rights standards. The aim is to ascertain what governments should, and should not do, taking the existing human rights standards as a yardstick. Results of such an analysis are applied here to the most frequently encountered dilemmas relating to the application of human rights in population policies.

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