

CIVIL & POLITICAL RIGHTS AND THE RIGHT TO NONDISCRIMINATION

POPULATION POLICIES, HUMAN RIGHTS, AND LEGAL CHANGE

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I. HUMAN RIGHTS ASPECTS OF POPULATION POLICIES

Until recently, the human rights implications of population policies have received relatively little attention by those formulating and implementing such policies and, indeed, by human rights advocates. The major debates in the population field have focused on issues such as what are the best contraceptive methods to achieve a lowered birthrate and the best ways to deliver those methods; whether greater emphasis should be placed on economic and social development as opposed to the provision of family planning; whether it is acceptable to include abortion services in family planning programs; and whether there even exists any population "problem."¹ The effects of population policies on the human rights of persons who are the intended beneficiaries of such policies historically have received little discussion.²

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1. See generally PETER J. DONALDSON, *NATURE AGAINST US: THE UNITED STATES AND THE WORLD POPULATION CRISIS, 1965-1980* (1990); Jason L. Finkle & Barbara B. Crane, *Ideology and Politics at Mexico City: The United States at the 1984 International Conference on Population*, 11 POP. & DEV. REV. 1, 1-27 (1985); Jason L. Finkle & Barbara B. Crane, *The Politics of Bucharest: Population, Development, and the New International Economic Order*, 1 POP. & DEV. REV. 87, 87-114 (1975); Donald P. Warwick, *The Ethics of Population Control*, in POPULATION POLICY: CONTEMPORARY ISSUES 21 (Godfrey Roberts ed., 1990).

2. It is true that many population policies and documents have invoked human rights. The two major international documents on population, the World Population Plan of Action (WPPA) and the Recommendations for the Further Implementation of the Plan, for example, contain several references to human rights. UNITED NATIONS, REPORT OF THE UNITED NATIONS WORLD POPULATION CONFERENCE (1974); UNITED NATIONS, REPORT OF THE INTERNATIONAL

There are a number of reasons for this state of affairs. One is the nature and history of the population movement, which traditionally has viewed its task in narrow terms.³ Convinced that high population growth rates impede socioeconomic development, leaders have tended to concentrate on the provision of contraceptive services in order to lower the birthrate, thus achieving greater economic growth and improved social welfare. Individual human rights issues associated with such policies have been subordinated to these concerns, except insofar as they may converge with the desire of individuals to adopt family planning methods. Contraceptive acceptors and demographic targets have been the focus of most attention, while incentives and disincentives have been viewed as playing an important role, with coercion justified in some cases.

A second factor is the relegation of the kinds of human rights perceived to be implicated in population policies to second-class status. These rights often have been classified as social and economic rights or women's rights, to which large parts of the human rights community have historically accorded less attention than civil and political rights.⁴ These rights, moreover, have been viewed as private rather than public rights, involving private behavior unsuitable for the attention of human rights advocates.⁵ Until very recently, international human rights organizations concentrated almost exclusively on the investigation and reporting of violations of civil and political rights, including such issues as torture, unjust imprisonment, and political persecution, rather than combatting serious abuses perpetrated against women in less public settings.⁶

CONFERENCE ON POPULATION (1984). These references, however, are usually very general in nature, or are so qualified by language relating to national sovereignty, national goals and values, prohibitions against external interference, and responsible parenthood as to have little practical meaning. See generally Reed Boland et al., *Honoring Human Rights in Population Policies: From Declaration to Action*, in POPULATION POLICIES RECONSIDERED: HEALTH, EMPOWERMENT, AND RIGHTS 89 (Gita Sen et al. eds., 1994).

3. See generally DONALDSON, *supra* note 1; see also RUTH DIXON-MUELLER, POPULATION POLICY & WOMEN'S RIGHTS: TRANSFORMING REPRODUCTIVE CHOICE (1993); BETSY HARTMANN, REPRODUCTIVE RIGHTS AND WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL AND CONTRACEPTIVE CHOICE (1987).

4. ARTHUR H. ROBERTSON & JOHN G. MERRILLS, HUMAN RIGHTS IN THE WORLD (1989); see also Richard L. Siegel, *Socioeconomic Human Rights: Past and Future*, 7 HUM. RTS. Q. 255, 255-67 (1985).

5. See Rebecca J. Cook, *International Human Rights and Women's Reproductive Health*, 24 STUD. FAM. PLAN. 73, 73-86 (1993); see also Karen Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 MICH. J. INT'L L. 517, 517-610 (1992).

6. Boland et al., *supra* note 2; see also, e.g., IAN MARTIN, THE NEW WORLD ORDER: OPPORTUNITY OR THREAT FOR HUMAN RIGHTS (1993); Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-vision of Human Rights*, 12 HUM. RTS. Q. 486, 486-98 (1990); Cook, *supra* note 5, at 73-86.

One result of this lack of focus on human rights in population policies has been the widespread violation of human rights. "At the same time that countries have proclaimed their adherence to human rights, they have carried out repressive population policies—policies that have" had a destructive impact on the lives of individuals, particularly women, who are the persons most immediately affected by the implementation of population policies.⁷

One of the worst offenders in this respect has been Romania, which until 1990 was pursuing one of the most oppressive pronatalist population policies in the world.⁸ Believing that a steadily increasing rate of population growth was necessary for continued socioeconomic development, and worried by Romania's falling birthrate, the Government imposed harsh demographic measures that prohibited most abortions and forms of contraception. At the height of this policy, the Government instituted forced gynecological examinations in the workplace and monitored pregnancies to ensure that no abortions would occur. The result of these measures was tragic: a maternal mortality rate of 148.8 per thousand, by far the highest in Europe; the highest infant mortality rate in Europe at twenty-six per thousand; at least 500 deaths per year due to unsafe, illegal abortions; thousands of women suffering from the consequences of such abortions; and twice the expected number of women suffering from sterility.⁹ In addition, tens of thousands of newborn children were abandoned because they were unwanted or their parents could not afford to keep them. Most eventually found their way to state orphanages, where they lived in substandard conditions without basic

7. Boland et al., *supra* note 2, at 95. A number of governments, chief among them China, are convinced that their successes in decreasing the rate of population growth are in significant part due to the coercive measures they have imposed on their populations. They argue that individual freedom to choose in matters of reproduction must be curbed to guarantee the economic and social welfare of future generations. In other words, injustice caused by restriction of the right to reproduction is less important than the injustices caused by an overpopulated world with dwindling resources. This is the explicit conclusion of the population section in a recent human rights statement issued by China. Xinhua General News Service, WHITE PAPER ON HUMAN RIGHTS, Nov. 2, 1991, available in LEXIS, News Library, Arcnws File. For further discussion, see Boland et al., *supra* note 2, at 96.

8. See Reed Boland, *Recent Developments in Abortion Law in Industrialized Countries*, 18 LAW, MED. & HEALTH CARE 404, 411-12 (1990); see also Henry P. David, *Abortion in Europe, 1920-91: A Public Health Perspective*, 23 STUD. FAM. PLAN. 1, 1-22 (1992). At the very time that President Ceausescu was hosting the 1974 World Population Conference he was further tightening this policy.

9. UNITED NATIONS, DEMOGRAPHIC YEARBOOK, 1987, at 387 (1989); see also UNITED NATIONS POPULATION FUND, REPORT ON MISSION TO ROMANIA MARCH 5-15, 1990, cited in C. Hord et al., *Reproductive Health in Romania: Reversing the Ceausescu Legacy*, 22 STUD. FAM. PLAN. 231 (1991).

hygiene, heat, medicines, and food. Often they were exposed to HIV infection.¹⁰

Lest one conclude that forced childbearing is an isolated phenomenon that disappeared with the fall of the Ceausescu regime, it should be noted that similar policies were in effect in Albania until 1991 and produced similar results.¹¹ Some in Poland currently justify that country's new restrictive abortion law by the need to raise the rate of population growth, which has continued to drop in recent years, despite the new law.¹² Moreover, in a significant part of the world (particularly Africa, Latin America, and the Middle East), access to abortion is severely restricted or banned outright, and means of contraception often are not readily available.¹³ According to estimates of the World Health Organization, as many as 200,000 women die each year from the effects of poorly performed abortions, while many more experience complications.¹⁴

In some respects a mirror image of Romania, but equally flagrant in its human rights violations, China has pursued the most aggressive antinatalist population policy in the world.¹⁵ In China, coercion plays a key role in government population planning and takes many forms. Much of it is psychological in nature and is addressed to women who are perceived to be violating the mandates of the one-child-per-couple policy adopted by the Central Government.¹⁶ They typically are subjected to the intense pressure of neighbors, co-workers, family planning officials, and Communist party members to modify their behavior by agreeing to use contraception—most often IUDs (which they are forbidden to remove)—undergo sterilization, or, if they are pregnant and already have one child, obtain an

10. See Boland, *supra* note 8, at 404-18; see also David, *supra* note 8, at 1-22.

11. See Reed Boland, *Abortion Law in Europe in 1991-1992*, 21 J.L. MED. & ETHICS 2, 76-77 (1993). Bulgaria enacted similar legislation, although without the health consequences experienced in Romania and Albania. See Boland, *supra* note 8, at 404-18.

12. See *Population Policy for Coming Years Drafted*, PAP Polish Press Agency (PAP Newswire), July 25, 1994, available in LEXIS, News Library, Curnws File.

13. See Stanley K. Henshaw, *Induced Abortion: A World Review*, 1990, 22 FAM. PLAN. PERSP. 76, 77-78 (1990); see also Reed Boland, *Abortion Law World-wide: A Survey of Recent Developments*, in Festschrift für Jan Stepan 89 (J. Bednarikova & F. C. Chapman ed., 1994).

14. See CARLA ABOUZAHRA & ERICA ROYSTON, WORLD HEALTH ORGANIZATION, MATERNAL MORTALITY: A GLOBAL FACTBOOK (1991).

15. See, e.g., JOHN S. AIRD, *SLAUGHTER OF THE INNOCENTS 1* (1990); JUDITH BANISTER, *CHINA'S CHANGING POPULATION* (1987); Tyrene White, *Postrevolutionary Mobilization in China: The One-Child Policy Reconsidered*, 43 WORLD POL. 53 (1990).

16. There are many exceptions to the one-child policy, particularly for ethnic minorities and the rural population. The policy was briefly relaxed in the mid-1980s, but soon thereafter strengthened. See Nicholas D. Kristof, *China's Crackdown on Births; A Stunning, and Harsh, Success*, N.Y. TIMES, Apr. 25, 1993, at A1; Uli Schmetzer, *In Controlling China's Population, Girls "Disappear,"* CHI. TRIB., Apr. 27, 1993, at 1.

abortion. Often this pressure is accompanied by explicit or implicit threats of physical force. In some cases, actual physical force is applied and women have been ordered to have an abortion or undergo sterilization. Indeed, many local laws call for such measures in response to violations of family planning guidelines.¹⁷ Local laws also call for the sterilization of the mentally retarded.¹⁸ In addition, the Government withholds various privileges, among them medical, educational, and housing benefits, from those who fail to adhere to guidelines, and imposes fines to force compliance. One result has been an increase in female infanticide and the abortion of female fetuses after the performance of prenatal tests, as many couples limited to having one child would prefer it to be male.¹⁹

Technology designed to increase contraceptive options has also resulted in human rights abuses when used improperly. Almost all forms of contraceptives have potential adverse side effects, and education, counseling, screening, and follow-up care must be provided if they are to be safely prescribed. In many parts of the developing world, little of this is available. The experience of Indonesia with Norplant offers an instructive example. A recent report issued by the National Family Planning Coordinating Board described serious deficiencies in the program, including: physicians

17. See, e.g., *Family Planning Regulations*, in JOINT PUB. RES. SERVICE, JPRS-CHI-87-044 (Sept. 8, 1987); *Henan Provincial Rules and Regulations on Family Planning*, in FOREIGN BROADCAST INFO. SERV., FBIS-CHI-90-106 (June 1, 1990) [hereinafter *Henan Rules*]; Wolfgang Kessler, *In gebsten Galopp ins Jahr des Pferdes: Neues Recht der Geburten planning in der VR China*, 23 VERFASSUNG UND RECHT IN ÜBERSEE 109, 112-26 (1990) (listing Zhejiang's new family planning ordinance).

18. See *Henan Rules*, *supra* note 17, art. 22; Nicholas D. Kristof, *Chinese Region Uses New Law to Sterilize Mentally Retarded*, N.Y. TIMES, Nov. 21, 1989, at 1. In December 1993, the Government of China unveiled a draft of a eugenics law for the entire country. Among the measures to be used were sterilizations and abortions. Due to foreign criticism, the Government subsequently disavowed portions of the draft. See Steven Mufson, *China Softens Bill on Eugenics*, WASH. POST, Dec. 30, 1993, at A17.

On October 27, 1994, the Government enacted a revised version of this draft, entitled the Law of the People's Republic of China on Maternal and Infant Health Care. *Law on Maternal, Infant Health Care Aims to Improve the Quality of Births*, BBC SUMMARY OF WORLD BROADCASTS (Nov. 3, 1994), FE/2143/S1 pt. 3. Although some of the more objectionable language of the draft was removed or toned down, the law still provides that health care facilities are likely to affect marriage and reproduction, including serious hereditary diseases, legal contagious diseases, and relevant medical disorders. If a person is diagnosed as having a serious hereditary disease deemed medically unsuitable for reproduction, he or she will be allowed to marry only after taking long-lasting contraceptive measures or being sterilized. Health care facilities also are required to provide fetal monitoring for pregnant women, and, if they discover that a fetus has contracted a serious hereditary disease or has a serious deformity, they are supposed to advise that the pregnancy be terminated. The adoption of rules for implementation of the law is left to the discretion of local governments, which, presumably, could retain much more explicitly coercive rules already in effect. *Id.*

19. See Nicholas D. Kristof, *Peasants in China Discover a New Way to Weed Out Girls*, N.Y. TIMES, July 21, 1993, at 1, 6; see also Schmetzer, *supra* note 16, at 1; cf. Jeffrey Wasserstrom, *Resistance to the One-Child Family*, 10 MOD. CHINA 345 (1984).

and program personnel who lacked basic knowledge of the drug and basic training in its use; recipients who had not been properly examined, screened, counseled, or informed about the drug; substandard and unsanitary conditions in dispensing the drug, among them the reuse of portable syringes; and lack of responsiveness to complaints and requests for removal of the drug.²⁰ In addition, Norplant has been administered in part by means of "safaris." These are operations in which family planning personnel and soldiers enter a village, gather the populace together, and lecture upon the advantages of family planning, often with an implied threat that the village will be punished if family planning methods are not adopted. Safaris historically have played an important part in Indonesia's family planning program, typically resulting in mass acceptance by village women of contraception—often of the one kind being promoted at that particular moment by the Government.²¹

Given the recent widespread publicity of these sorts of abuses, there has been a growing recognition that population policies have a profound impact on human rights and, indeed, may succeed or fail on the basis of the way in which they are able to incorporate human rights concerns.²² As the above examples illustrate, the most fundamental of these concerns is that of reproductive rights. Central to almost all discussions of population policies has been the idea that the reproductive capacities of individuals must be regulated. That is, in order to lower or, more rarely, raise the birthrate, ways must be found to change the rate of reliance on family planning methods—most commonly by increasing the use of contraception. Such ways, of necessity, have important implications on the basic rights of people to control their own fertility and bodies, and to make decisions about whether and when to have children.²³ These

20. See NATIONAL FAMILY PLANNING COORDINATING BOARD OF INDONESIA, 1992 INDONESIA NORPLANT USE DYNAMICS STUDY, FINAL REPORT (1993).

21. See, e.g., Arthur Caplan, *The Norplant Safaris: Birth Control Implant Leads to Population Control by Governments*, SEATTLE TIMES, July 7, 1991, at A13; Leah Makabenta, *Indonesia: Population Success Story Has Its Shady Side*, INTER PRESS SERVICE, Nov. 5, 1992, available in LEXIS, News Library, Arcnws File; Dave Todd, *Expert Sounds Alarm on Indonesian Birth-Control Program*, THE GAZETTE (Montreal), Nov. 26, 1991, at A1.

22. Key among those lobbying for a human rights approach to population policy has been the international women's health movement. See Clandis García-Moreno & Amparo Claro, *Challenges from the Women's Health Movement: Women's Rights Versus Population Control*, in POPULATION POLICIES RECONSIDERED, *supra* note 2, at 47. Participants in that movement have produced a document outlining their human rights approach to population policies. See Adrienne Germaine et al., *Setting a New Agenda: Sexual and Reproductive Rights*, in POPULATION POLICIES RECONSIDERED, *supra* note 2, at 31.

23. In addition, other human rights are implicated in population policies: the right to health, particularly reproductive health; the right in some instances to education, housing, nutrition, and social benefits; and, most notably, the rights, apart from reproductive concerns,

implications often have been ignored in the past due to concerns with demographic goals, numbers of acceptors of family planning, incentives and disincentives, and the single-minded provision of contraception.

Despite a common perception to the contrary, reproductive rights find strong support in international human rights documents, even though such rights are rarely mentioned by name. The International Covenant on Civil and Political Rights,²⁴ the international human rights document accorded the greatest respect by human rights proponents, for example, contains guarantees that are highly relevant to reproduction. Among these are the right to life;²⁵ the right to not be subjected to torture, cruel, inhuman, or degrading treatment or medical or scientific experimentation without consent;²⁶ the right not to be held in servitude;²⁷ the right to liberty and security of person;²⁸ the right not to be subjected to arbitrary or unlawful interference with privacy or the family;²⁹ and the right to marry and found a family.³⁰ In addition, in three different articles, the Covenant guarantees the right to be free from discrimination on the basis of sex.³¹

Each of these rights implies a right to make fully voluntary decisions about childbearing and, if properly conceptualized, bears directly on the protection of women from unsafe abortion possibly resulting in death, coercive family planning measures, untested or possibly harmful methods of contraception, and denial of the means to plan a family.³² There are many examples of how these rights can be applied. Death caused by unsafe abortion is as serious as death resulting from political persecution. Damage to health caused by

of women. These rights are categorized as the right to participate equally and fully in all areas of society and to be able to shape their own lives. This includes equal rights with respect to education, employment, nationality, family relations, property, political life, inheritance, and land tenure.

24. Civil and Political Covenant, *infra doc. biblio.*

25. Civil and Political Covenant, *infra doc. biblio.*, art. 6(1).

26. Civil and Political Covenant, *infra doc. biblio.*, art. 7.

27. Civil and Political Covenant, *infra doc. biblio.*, art. 8(2).

28. Civil and Political Covenant, *infra doc. biblio.*, art. 9(1).

29. Civil and Political Covenant, *infra doc. biblio.*, art. 17(1).

30. Civil and Political Covenant, *infra doc. biblio.*, art. 23(2).

31. Civil and Political Covenant, *infra doc. biblio.*, arts. 2(1), 23(3), 24(2).

32. The right to health guaranteed in the Economic Covenant, *infra doc. biblio.*, art. 12, is also highly relevant to reproductive rights. For example, it can be applied to protect women from family planning measures that have resulted in injury or danger to health, such as unsafe or untested methods of contraception. See Civil and Political Covenant, *infra doc. biblio.*, art. 7. Many other international human rights treaties contain similar provisions. For a full discussion of human rights treaty provisions and their applicability to reproductive health issues and women's health, see REBECCA J. COOK, *WOMEN'S HEALTH AND HUMAN RIGHTS* (1994).

uninformed use of unsafe contraception constitutes medical experimentation without consent, as well as cruel and degrading treatment. Coerced family planning, including forced abortion, is as much an invasion of privacy and a violation of liberty and security of one's person as is unjust imprisonment or government censorship of private correspondence. Coerced parenthood is a very real form of servitude to the mother. Similarly, the right to freedom from sex discrimination is infringed if a person is forced to undertake or refrain from undertaking certain behavior related to reproduction, such as abortion or family planning, solely because that person is a woman capable of bearing a child. This right is also infringed if a woman can obtain contraception or an abortion only if her husband or a male relative approves. Despite their private aspects, these are true violations of civil and political rights, and are the result of specific policies consciously imposed by governments. They are as serious and as oppressive as more traditionally acknowledged violations of human rights.

Indeed, with the 1979 adoption by the United Nations of the Convention on the Elimination of All Forms of Discrimination Against Women,³³ the connection between formal human rights and reproductive rights has been made explicit. The Convention guarantees, on the basis of equality of men and women,³⁴ the right to access information on health and information and advice on family planning;³⁵ the right to protection of the function of reproduction;³⁶ the right of access to health care services, including family planning;³⁷ and the right to decide freely and responsibly on the number and spacing of their children and to have access to the education and means to exercise these rights.³⁸

II. APPLICATION OF HUMAN RIGHTS ARGUMENTS TO POPULATION POLICIES

In some sense the application of these human rights arguments and treaty provisions is in a stage of infancy. Outside of the United States human rights strategies seldom have been used to challenge repressive reproductive health policies. Nonetheless, there are signs that this

33. See Women's Convention, *infra doc. biblio.*

34. Women's Convention, *infra doc. biblio.*, pmbl.

35. Women's Convention, *infra doc. biblio.*, art. 10.

36. Women's Convention, *infra doc. biblio.*, art. 11.

37. Women's Convention, *infra doc. biblio.*, art. 12.

38. Women's Convention, *infra doc. biblio.*, art. 16. The Convention also gives special protection in health and family planning to rural women. *Id.* art. 14.

situation is changing. Due to an increasing emphasis on human rights in international and national discourse, the entry into force of new treaties such as the Women's Convention, and recent developments in constitutional reform that have resulted in the establishment of stronger national human rights protections and mechanisms, it is becoming easier to use the legal system to challenge violations of reproductive rights.

On the international level, for example, the United Nations and regional intergovernmental organizations have established bodies to monitor treaty compliance and issue official interpretations of various treaty provisions.³⁹ In addition, the Human Rights Committee, the monitoring body for the Civil and Political Covenant, is competent to receive individual complaints of human rights abuses alleged by individuals in countries that accept the jurisdiction of the Committee. Regional bodies in Europe and the Western Hemisphere are similarly competent to hear such claims.⁴⁰ The Commission on Human Rights recently appointed a Special Rapporteur on Violence Against Women, empowered to investigate and recommend measures to deal with violations in this area, including those in private life.⁴¹

Bringing individual complaints under these treaties is time-consuming and cumbersome, while enforcement procedures, both with respect to judicial decisions and treaty interpretation, are weak. It therefore may be more practical in some cases to bring about positive change by initiating local legal actions that invoke international human rights standards or their local variations.⁴² There are also, however, serious obstacles to utilizing this approach. Among them are the lack of an independent parliament or judiciary, fledgling legal systems ill-equipped to deal with human rights and constitutional challenges to local laws and policies, and ambiguity as to the applicability to domestic law of treaty provisions ratified by governments. Nonetheless, this approach has been employed recently in a number of situations with varying degrees of success. Examination of four such efforts illustrates the specific legal strategies employed to redress major violations of reproductive rights, as well as some of the

39. See Women's Covenant, *infra doc. biblio.*, arts. 17-22; Civil and Political Covenant, *infra doc. biblio.*, art. 44.

40. See Civil and Political Covenant, *infra doc. biblio.*, art. 20; European Convention, *infra doc. biblio.*, arts. 19-55; American Convention, *infra doc. biblio.*, chs. 6-8.

41. *U.N.-Human Rights: Official to Campaign Against Domestic Violence*, INTER PRESS SERVICE, July 9, 1994, available in LEXIS, News Library, Curnws File.

42. See Cook, *supra* note 5, at 73-86. In addition, before an individual complaint can be brought before the Human Rights Committee, a complainant must exhaust local remedies.

problems, both procedural and conceptual, faced by those working towards these changes.

A. *Restrictions on Abortion*

The first example of the use of a human rights approach to bring about legal change at the local level involves one of a number of ongoing efforts to reform the restrictive abortion laws that still exist in many parts of the developing world. In 1992, a challenge was brought against the constitutionality of Colombia's abortion law, which prohibits the performance of all abortions and subjects both the pregnant woman and the person carrying out the abortion to one to three years' imprisonment.⁴³ The plaintiff argued that this blanket prohibition, among the strictest in the world,⁴⁴ violated provisions of Colombia's Constitution. The constitutional provisions in question guarantee the right of couples to decide freely and responsibly the number of their children⁴⁵ and the rights to freedom of conscience and religion, which the plaintiff asserted included the right of individuals to conduct their lives in conformity with their innermost judgments.⁴⁶ The plaintiff also claimed that the right to life guaranteed in Article 2.2 of the Constitution did not protect the "unborn"⁴⁷ because in the eyes of the law, a person is a physical being that has been born and has lived outside of the womb.⁴⁸

In a March 1994 split decision with a lengthy dissenting opinion, the Constitutional Court rejected this challenge.⁴⁹ The Court began its analysis of the issues with a discussion of the right to life, which it concluded was the most valued of all rights and was protected by the Colombian Constitution from conception. It stated in emphatic terms that, given this fact, the State had an obligation to establish an effective legal system of protection for this right from conception and

43. CÓDIGO PENAL. It states: "Article 343. Abortion. A woman who causes her own abortion or permits another person to cause it, is liable to one to three years' imprisonment.

Whoever, with the consent of the woman, carries out the act referred to in the previous paragraph is liable to the same punishment." *Id.* art. 343. The penalty is lowered to four months to one year if the pregnancy is the result of violent or abusive sexual intercourse or involuntary artificial insemination. *Id.* art. 345.

Article 344 states: "Abortion without consent. Whoever causes an abortion without the consent of the woman, or upon a woman under 14 years old, is liable to three to ten years' imprisonment." *Id.* art. 344.

44. General principles of criminal law relating to necessity probably would allow an abortion to be performed to save the life of the pregnant woman. *Id.* art. 29.

45. CONSTITUCIÓN POLÍTICA COLOMBIA, art. 42, ¶ 5, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, Release 91-6 (Nov. 1991).

46. *Id.* arts. 18, 19.

47. *Id.* art. 22.

48. CÓDIGO CIVIL art. 90.

49. Decision C-133, 23 JURISPRUDENCIA Y DOCTRINA 745, 745-58 (Colom. 1994).

that, in principle, this system must exclude the possibility of permitting acts that voluntarily and directly are designed to end the life of the unborn.⁵⁰ The Court held that because unborn life is helpless, it requires the special protection of the State.

Once it had reached this conclusion, the Court easily disposed of the human rights arguments raised by the plaintiffs. First, countering the assertion that the unborn are not persons, it pointed to provisions in the Civil Code and the Code of Minors that specifically give protection to the unborn.⁵¹ It then stated that the right to decide freely and responsibly about the number of children and the right to freedom of conscience and religion are less important rights than the right to life. The Court opined that the former can be exercised only before conception, while the latter may be exercised only when there is no interference with the rights of others, including the rights of the unborn. Moreover, turning the tables on the plaintiffs, the Court itself resorted to human rights discourse to support its decision. Noting that Article 93 of the Colombian Constitution authorizes the use of international treaties to which Colombia is a party in interpreting human rights provisions of the Constitution, it cited language in both the Convention on the Rights of the Child and the American Convention on Human Rights to demonstrate that the treaties confer various protections on unborn life.⁵²

The outcome of the case raises important issues. One, alluded to earlier, is the ability and willingness of local courts to examine challenges based on women's reproductive rights. Legal mechanisms must exist within which to use human rights arguments and obtain a fair hearing. Colombia is in some ways unusual in this respect. It

50. For its conclusion that life begins at conception, the Court relied on the views of only one person, Jerome Lejeune, a professor of basic genetics at the René Descartes University. The Court also interpreted Colombia's Constitution as providing for protection of conception because the Constitution does not state otherwise. To support this interpretation, the Court pointed to the fact that when the Constitution was being drafted, a clause designed to give a woman freedom in choosing whether to be a mother was rejected. The Court also highlighted constitutional provisions protecting the right to life of children and charging the State with protecting women during pregnancy and after giving birth.

51. See CÓDIGO CIVIL art. 91; see also CÓDIGO DEL MENOR art. 5.

52. The opinion of the majority in the case can be criticized on a number of grounds. For example, it failed to consider more than one scientific opinion on the beginning of life. It ignored evidence that the Assembly drafting the Constitution also rejected a proposed Article that would have protected life from conception. It interpreted international human rights documents in a superficial and misleading fashion. It failed to discuss the one case brought under the American Convention on Human Rights that relates to the status of the unborn. See Case 2141 (Baby Boy Case), OAS/Ser.L/V/II.52, doc. 48 (1981), *reprinted in* 2 HUM. RTS. L.J. 110 (1981) (ruling that language cited by Colombian Constitutional Court does not confer right to life on unborn children). In addition, many of its arguments, particularly on the value of life, are conclusory and unsupported.

recently adopted a new Constitution that significantly widens the opportunities for bringing such cases.⁵³ The Constitution creates new procedures for protecting human rights, including the right of personal petition. It establishes a number of human rights that are self-executing, and thus do not depend on government enactment of legislation for enforcement. As the Court noted, the Constitution also authorizes courts to use international documents to interpret these rights. In addition, despite the rather absolutist tone of this ruling, the Constitutional Court in Colombia appears to be reasonably impartial in its decisions, and in other cases has adopted controversial opinions.⁵⁴ There are many countries where this congruence of factors does not exist. In others, however, including a growing number of countries with modern constitutions, this sort of challenge is becoming more a fact of life.

A related issue is one of timing. Was it a good strategy for the plaintiff to have brought this suit when he did, or should he have waited until he might have had more chance of success? It is possible that by initiating a challenge to Colombia's abortion law, he compelled the Court to take a position that it otherwise might not have taken. The Court's conclusions on the right to life of the unborn may hamper future efforts by the Colombian legislature to reform the abortion law.⁵⁵ On the other hand, given that the dissenters in the case wrote a well-reasoned argument favoring the liberalization of Colombia's abortion law, it may be that the case for changing the abortion law now has attained an aspect of moral legitimacy that it did not possess before.

53. See, e.g., Donald T. Fox & Anne Stetson, *The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia*, 24 CASE W. RES. J. INT'L L. 139 (1992); Martha I. Morgan & Monica M.A. Buitrago, *Constitution-Making in a Time of Cholera: Women and the 1991 Colombian Constitution*, 4 YALE J.L. & FEMINISM 353 (1992); Keith S. Rosenn, *A Comparison of the Protection of Individual Rights in the New Constitutions of Colombia and Brazil*, 23 U. MIAMI INTER-AM. L. REV. 659 (1992).

54. See Decision No. C-221/94, 23 JURISPRUDENCIA Y DOCTRINA 823 (Colom. 1994) (ruling that penal provisions prohibiting consumption of drugs are unconstitutional); Decision No. C-105/94, 23 JURISPRUDENCIA Y DOCTRINA 594 (Colom. 1994) (ruling that all legal provisions making discriminations between children born in wedlock and out of wedlock are unconstitutional); Decision No. T-097/94, 23 JURISPRUDENCIA Y DOCTRINA 611 (Colom. 1994) (ruling that fact that person is homosexual, as opposed to engages in homosexual activities, in itself cannot be used as reason for barring that person from armed forces); Decision T-505/92, 21 JURISPRUDENCIA Y DOCTRINA 1101 (Colom. 1992) (ruling that public health services have obligation to treat persons suffering from AIDS who are indigent).

55. Near the end of the opinion, the Court drew back a bit from its unstinting support for the right to life. It acknowledged that there may be serious conflicts between the rights of the unborn and the rights of women, and suggested that it is up to the legislature to resolve these conflicts. Whether such a resolution could involve legal abortion under some circumstances seems doubtful, given the Court's statements earlier in the decision.

An important question in this sort of litigation is whether legal action should be undertaken only in cases in which there is a very good chance of prevailing. The purpose of such a strategy would be to avoid blocking or delaying further legislative reforms, as well as to lay the groundwork for future challenges when the force of human rights arguments may be more fully acknowledged. Alternatively, forcing the issue may be a better strategy.

A third issue raised by this case concerns the use of human rights arguments and instruments by those supporting repressive policies to rebut challenges to those policies. A plaintiff's application of such arguments could open a Pandora's box of opposing applications that is better left closed, and place a plaintiff in the dilemma of reading to find ways to counter such applications. It is then difficult to counter the use of such arguments. These considerations are particularly crucial whenever a right to abortion is asserted based on various rights enumerated in international treaties, as many of these treaties also guarantee some sort of right to life that can be cited.⁵⁶ In the Colombian case, that is exactly what the Court did by pointing to the right to life provisions of the Colombian Constitution and two international treaties. Plaintiffs need to find ways to deal effectively with this contingency.⁵⁷

B. Repressive Population Policies

A second example of the use of a human rights approach to bring about legal change at the local level also involves court action, but of a different sort: the claims of individuals who have fled a country due to repressive population policies and seek asylum abroad. In recent years, courts in several countries (among them Canada, the United States, and Australia) have been faced with a growing number of these asylum claims.⁵⁸

Two Canadian cases with differing outcomes illustrate some of the relevant issues. The earlier of the cases, *Cheung v. Canada*,⁵⁹ involved the asylum application of a woman who fled China in order to escape

56. For one example, see Civil and Political Covenant, *infra doc. biblio.*, art. 6.

57. There are answers to these right-to-life arguments. Some involve legislative history of the drafting of the conventions, the context in which they appear in the conventions, and case law under the conventions.

58. In the United States, see, for example, *Guo Chun Di v. Carroll*, 842 F. Supp. 858 (E.D. Va. 1994), and *Xin-Chang Zhang v. Slaterry*, 859 F. Supp. 708 (S.D.N.Y. 1994). In both cases, the courts granted asylum to Chinese nationals fleeing their country because of persecution related to family planning. For information on Australia, see Duncan Graham, *Australia: Chinese Refugee Forcibly Fitted with IUD Device*, THE AGE, July 2, 1993, available in LEXIS, World Library, Txtanz File.

59. 2 F.C. 314, 325 (Fed. Ct. 1993).

forced sterilization after she gave birth to her second child. Despite believing her story, the Immigration Board that initially considered her application denied her request for asylum. It ruled that she did not have a well-founded fear of persecution on one of the grounds provided for in the Immigration Act: "race, religion, nationality, membership in a particular social group or political opinion."⁶⁰ It held that because the one-child-per-couple policy was a law of general application, the objective of which was population control, not persecution, the applicant was not subjected to any treatment that other Chinese citizens were not subject to if they violated the policy. She thus was not part of a particular oppressed social group, as she had claimed.

On appeal, the Federal Court reversed this decision.⁶¹ First, relying on previous case law, the court determined that the applicant did belong to a particular social group within the meaning of the law: women in China who have one child and are faced with forced sterilization.⁶² Second, it held that coerced sterilization is a form of persecution, even if it results from the enforcement of a law of general application.⁶³ The court reasoned that persecution could be present if the punishment under the law was so draconian as to be completely disproportionate to the law's objectives. It concluded that forced sterilization was such a punishment.⁶⁴

To bolster its view of the persecutory nature of the Chinese Government's actions, the court strongly invoked human rights as set forth in both Canadian and international law. It turned first to Articles 3 and 5 of the Universal Declaration of Human Rights, which guarantee the right to "life, liberty and security of person"⁶⁵ and the right not to be subjected to "cruel, inhuman or degrading treatment or punishment."⁶⁶ The court characterized forced abortion as a "serious and totally unacceptable violation of [the] security of the person" and as "cruel, inhuman and degrading treatment."⁶⁷ It then

60. *Id.* at 317-19; see Immigration Act, R.S.C., ch. I-2 (1985) (Can.).

61. *Cheung v. Canada*, 2 F.C. 314, 325 (Fed. Ct. 1993).

62. *Id.* at 322. It stated that such women share similar social status and hold a similar interest not held by their Government, have basic characteristics in common, and are identified by a purpose that is fundamental to their dignity, i.e., the desire to maintain their reproductive liberty. *Id.*

63. *Id.* at 323.

64. *Id.* Before it reached this conclusion, the court also stated its belief that forced sterilization in China was not the result of enforcement of a law of general application, but the result of unauthorized acts ordered by overzealous local authorities. *Id.* at 322-23.

65. Universal Declaration of Human Rights, *infra doc. biblio.*, art. 3.

66. Universal Declaration of Human Rights, *infra doc. biblio.*, art. 5. This document is the first international human rights treaty to be adopted after the Second World War.

67. *Cheung*, 2 F.C. at 324.

pointed to the Canadian decision *Re Eve*,⁶⁸ in which the Supreme Court of Canada prohibited nontherapeutic sterilization of a mentally disabled person as a serious intrusion on the basic rights of the individual.⁶⁹ The court concluded that the "practice of forcing women to undergo sterilization is such an extreme violation of their basic human rights as to be persecutory."⁷⁰

A subsequent decision of another panel of Canada's Federal Court stood in contrast to this ruling.⁷¹ The plaintiff in that case was another Chinese citizen, who, after agreeing to be sterilized when his wife gave birth to a second child, fled the country.⁷² The court rejected by a two-to-one vote the argument accepted in *Cheung* that the plaintiff belonged to a particular social group with a well-founded fear of persecution. The plaintiff had claimed that he was a member of a group of parents in China with more than one child who disagree with forced sterilization.⁷³ Instead, the court ruled that the plaintiff's fear was caused by something that he had done, not by his status. It also disagreed with the conclusion in *Cheung* that violations of basic human rights as the result of the application of a legitimate state law could amount to persecution.⁷⁴ This decision has been appealed to the Canadian Supreme Court.⁷⁵

These two cases raise several issues in addition to those raised by the Colombian case. The most important of these relates to the boundaries of human rights discourse. For example, it is not difficult for most people to perceive coerced sterilization or abortion as a human rights abuse. But what about less blatant forms of coercion used by the Chinese and other governments to enforce population policies? Does any of the following involve coercion of such a serious nature as to amount to persecution: the withdrawal of social, health, and employment benefits; the provision of incentives in the form of

68. 31 D.L.R. 4th 1 (Fed. Ct. 1986).

69. *Re Eve*, 31 D.L.R. 4th 1, 37 (Fed. Ct. 1986).

70. *Cheung*, 2 F.C. at 325.

71. *Chan v. Canada*, 3 F.C. 675 (Fed. Ct. 1993).

72. *Id.*

73. *Id.* at 690.

74. *Id.* at 696. The court also rejected an argument that the plaintiff had been persecuted for expressing a political opinion. *Id.* at 693-95. It distinguished its decision from *Cheung* based on an intervening Supreme Court case setting forth a definition of who constituted a particular social group. See *Canada v. Ward*, 2 S.C.R. 689 (1993). The court's reliance on this case is somewhat misleading as *Cheung* is cited with approval in it. The only way in which the two cases really can be distinguished is on the basis of sex: one involved a man and the other a woman. Indeed, the court may have been influenced by the unstated fact that earlier in the year the Immigration Board had issued guidelines calling for special consideration to be given to women fleeing from repressive population policies. See *Sterilization as Persecution*, THE GAZETTE (Montreal), Apr. 7, 1993, at B2.

75. *Man to Fight on for Refugee Status*, THE GAZETTE (Montreal), Feb. 11, 1994, at B1.

money or preferential treatment; or the application of intense psychological pressure from officials, neighbors, and co-workers? And if such coercion does constitute a human rights abuse, what rights are implicated—the civil and political rights referred to so far, or perhaps economic and social rights? Similarly, if women fleeing repressive population policies can be considered a particular social group for protection under refugee laws, can women fleeing genital mutilation or repressive social and legal norms that sanction sex discrimination achieve the same status? How far can these concepts be stretched, and should they be stretched as far as possible?

Critics of an expansive view of human rights argue that bringing these sorts of injustices into the formal human rights arena significantly dilutes the force of international human rights instruments and organizations. They also contend that Canada and the United States will be inundated with refugees if these broad sorts of abuses are recognized by refugee law. The public/private distinction in human rights discourse also is implicated in this context. Critics ask how a court should determine whether applicants are telling the truth when they claim to be the victims of repressive state population policies, as these violations so often concern private behavior. Behind all of these questions is the larger issue of whether the United States or Canada can and should be a haven for anyone who claims asylum, even legitimately.

Finally, the issue of the repressive nature of China's population policy illustrates how human rights activities can be tied inextricably to national and international politics and, to a substantial degree, shaped by those politics. For example, opposition to Chinese population policies has, since the early 1980s, been a touchstone of the Reagan and Bush administrations and various right-to-life politicians and groups in the United States.⁷⁶ Due to the source of this opposition, a number of those who might have been expected to

76. In 1990, President Bush signed an executive order requiring "enhanced consideration" to be given to individuals expressing fear of persecution because of forced abortion or sterilization. Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (1990), *reprinted in* 8 U.S.C. § 1101 (1988 & Supp. V 1993). In 1992, the General Counsel for the INS issued a directive strengthening this requirement. See Al Kamen, *Defying Politics on Boat People: INS Counsel Confounds Administration Convention on Haitians*, WASH. POST, Jan. 17, 1992, at A19. In January 1993, shortly before he left office, the Attorney General promulgated a final rule formalizing President Bush's Executive Order. See *Guo Chua Di v. Carroll*, 842 F. Supp. 858, 862-64 (E.D. Va. 1994). This rule never was published and never came into effect. See Lizette Alvarez, *China's "One-Couple, One-Child,"* CHI. TRIB., June 1, 1992, at 8; Simon Beck, *SOUTH CHINA MORNING POST*, Jan. 30, 1994, at 7; Marlow Hood, *Riding the Snake*, L.A. TIMES MAG., June 30, 1993, at 12; Randolph Ryan, *Birth Rights? Asylum Case Cites China's Family Limit*, BOSTON GLOBE, May 10, 1994, at Metro 1.

be outspoken about China's abuses have muted their criticism for fear of being identified with the right-to-life movement.⁷⁷ Paradoxically, despite the vocal opposition of this movement, it has also been difficult for the United States or any government or international organization to adopt any significant measures to counter China's repressive policies; China is simply too populous and important a country to be ostracized by the international community or individual governments. Thus, Haiti or South Africa can be isolated for human rights violations of a traditional nature, but China escapes meaningful censure for both traditional human rights abuses and the pervasive and widespread abuse of women's reproductive rights.

C. Prenatal Sex Selection

The third example of the use of a human rights approach to bring about legal change at the local level deals with prenatal sex selection, a phenomenon that recently has generated growing concern in both developed and developing countries, among them India. This example involves legislative action to eliminate restrictive reproductive policies, rather than a court challenge to such policies.

As far back as the early 1980s, many women's and social groups in India were troubled about the growing use of prenatal sex selection tests, such as amniocentesis and ultrasound, as a step in the process of aborting female fetuses. One of the primary causes of the growth of this practice has been the inferior role that women traditionally have been accorded in Indian society.⁷⁸ In many families, they have been valued less highly than men because they are unable to carry on the family name and are thought to be unable to contribute as much as men to the work necessary to feed families and support their parents in old age. In addition, females have been considered a burden because of the great importance Indian culture places on

77. After coming to office, the Clinton administration initially reversed this policy and opposed plaintiffs making this argument in immigration hearings. See Simon Beck, *Reno Rejects Birth Policy in Asylum Bids*, SOUTH CHINA MORNING POST, Dec. 15, 1993, at 9; Simon Beck, *SOUTH CHINA MORNING POST*, Feb. 13, 1994, at 5; *Moneyline: Illegal Chinese Immigration Costs U.S. Billions* (CNN television broadcast, July 19, 1994), transcript available in LEXIS, News Library, Curnws File.

78. For discussion of the status of women in India and the relationship of the law to this status, see SRIKANTA GHOSH, *WOMEN AND CRIME* (1993); *WOMENPOWER: STATUS OF WOMEN IN INDIA* (Ashak Kumar ed., 1991); *QUEST FOR GENDER JUSTICE: A CRITIQUE OF THE STATUS OF WOMEN IN INDIA* (S.L. Raj ed., 1991); IRAKASH PNDU SINGH, *WOMEN, LAW AND SOCIAL CHANGE IN INDIA* (1989); MOHINDERJIT K. TEJA, *DOWRY: A STUDY IN ATTITUDES AND PRACTICES* (1993); H.C. UPADHYAY, *STATUS OF WOMEN IN INDIA* (1991); R. VENKATACHALAM & VIJI SRINIVASAM, *FEMALE INFANTICIDE* (1993); Gita Gopal, *Gender and Economic Inequality in India: The Legal Connection*, 13 B.C. THIRD WORLD L.J. 63 (1993); A. Newman, *For Richer or Poorer, Til Death Do Us Part: India's Response to Dowry Deaths*, 15 ILSA J. INT'L L. 109 (1992).

dowry. Although dowry is officially illegal, families often must pay many times their annual income as dowry so that their daughters can be married. In the process, they often borrow from family and friends and fall deeply in debt.

One response to this situation by some families has been the infanticide of female newborn children or their neglect to the point of early childhood death. With the advent of prenatal sex selection, this maltreatment of females has been carried one step further to the abortion of female fetuses. The Indian Government's official drive to convince women to give birth to male children and thus lower the rate of population growth has added to the pressures. If couples may only bear one or two children, the pressure is all the greater to determine beforehand that these children will be male and, if not, to abort them. It is believed that every year ten percent of all Indian women undergo sex preselection tests⁷⁹ and 50,000 female fetuses are aborted.⁸⁰ Indeed, India has one of the most unbalanced ratios of women to men in the world: 929/1000 in 1991—down from 972/1000 in 1901.⁸¹ Due to all causes of neglect, an estimated thirty-seven million women are "missing" in India.⁸²

To counteract this practice, many women's groups and social activists have lobbied Parliament for over a decade to prohibit, as a form of sex discrimination, prenatal sex selection except in very limited circumstances.⁸³ The concern has become particularly acute with the recent proliferation of mobile ultrasound clinics in the countryside.⁸⁴ In 1994, these groups finally achieved their goals with the enactment of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act.⁸⁵ Under the Act, all genetic counsel-

79. Nabanita Sirear Drona, *Females as Defects*, IRISH TIMES, May 30, 1994, at 10.

80. Mahesh Uniyal, *India-Population: Bans Sex Tests to Stop Female Feticide*, INTER PRESS SERVICE, Aug. 10, 1994, available in LEXIS, News Library, Curnws File.

81. John-Thor Dahlburg, *The Fight to Save India's Baby Girls*, L.A. TIMES, Feb. 22, 1994, at A1. The normal ratio is 105 males to 100 females at birth, but an average of 100 to 100 by adult life.

82. Ellen Hale, *Our Crowded Planet: A Woman's Burden: Modern Technology Makes Women Disposable in Asia*, GANNETT NEWS SERVICE, July 10, 1994, available in LEXIS, News Library, Curnws File.

83. John F. Burns, *India Fights Abortion of Female Fetuses*, N.Y. TIMES, Aug. 27, 1994, at 5; see also *Indian Social Groups Welcome Sex Test Ban*, REUTERS WORLD SERVICE, July 27, 1994.

In 1988 the legislature of the Indian state Maharashtra enacted legislation placing restrictions on these procedures. Maharashtra Regulation of the Use of Pre-natal Diagnostic Techniques Act of 1988, 4 MAHARASHTRA GOV'T GAZETTE 109-18 (1988), reprinted in 15 ANN. REV. OF POP. L. 316, 316-24 (1989).

84. See Burns, *supra* note 83, at 5.

85. Act No. 57 of Sept. 20, 1994; see also Christopher Thomas, *Foetal Sex Tests Banned in Boy-Crazy India*, THE TIMES (London), July 28, 1994, available in LEXIS, News Library, Curnws File; Uniyal, *supra* note 80. There was some opposition in women's groups to this Act. See Burns, *supra* note 83, at 5.

ling centers must be registered and doctors are prohibited from revealing the sex of tested fetuses or advertising for prenatal gender testing. In addition, testing is to be carried out only for legitimate scientific purposes, such as to detect genetic and congenital abnormalities and diseases or other abnormalities specified by a board established under the Act. These tests may be performed only on women who are over thirty-five years old, have had two or more spontaneous abortions, or have been exposed to radiation, infection, chemicals, or drugs harmful to the fetus. Pregnant women with a family history of mental retardation, physical deformities, or genetic disease also may be tested. Persons working in the clinics, as well as women using clinics and their families, are liable for fines and imprisonment for violating the Act.

In one sense, adoption of the Act can be viewed as a successful challenge to a particularly virulent form of sex discrimination which has been called part of the "social fabric of prejudice" of India.⁸⁶ It raises, however, some important and disturbing issues that must be confronted every time discriminatory acts are addressed by legislative action. Some relate to the specific content of the Act. For example, it punishes women who undergo sex preselection tests unless they have been forced to do so. This provision ignores the fact that, although perhaps not literally forced, Indian women are under intense pressure from their husbands and in-laws to obtain the tests. Refusing to be tested can lead to scorn, rejection, mistreatment, and even death at the hands of irate in-laws. In effect, the Act penalizes those who are themselves victims.⁸⁷

Even if this deficiency was corrected, however, there would remain other troubling issues. First, will the Act be effective? Despite the required registration of centers, the fetal testing procedure is so easy to perform that it will be very difficult to monitor compliance in any meaningful way. Testing simply may be driven underground, where doctors will charge extortionate fees to carry out tests. The experience with two other social evils prohibited by Indian law, infanticide and dowry, is instructive. Because the laws regulating them are not strongly enforced, neither has been eradicated. A second concern is whether the new legislation will result in an increase of more pernicious acts of sex discrimination, such as female infanticide or willful neglect of female children. When questioned about this, some

86. *Indian Social Groups Welcome Sex Test Ban*, *supra* note 83.

87. The Act does nothing to register actual ultrasound equipment, which is highly portable and can be moved from place to place to establish clandestine clinics.

women have responded that it is better to abort a fetus than to kill a child or subject it to the hard life that they themselves have experienced.⁸⁸

Third is the issue of whether the Act conflicts with a woman's fundamental right to make her own decisions about reproduction. Its approval poses difficult questions. For example, is discrimination against female fetuses a more serious denial of rights than denial of the right to an abortion; or is aborting a fetus because it is female any different in result than aborting a fetus for any other reason? And does denying a woman the right to abort a fetus on this ground seriously compromise her reproductive rights as a whole? Given the importance of reproductive rights and the near certainty that the Act cannot be enforced, there may be better ways to address the problem. Possible solutions include attempting to change the attitude of Indian society about the value of female children, enforcing the dowry laws more strictly, or, as one Indian State has tried to do, providing financial incentives to parents who raise female children.⁸⁹ Although these strategies may not work, it is possible that pursuing them may cause less harm than banning sex preselection tests. These are complex issues, and they will attract increasing attention as prenatal sex selection becomes more commonly used in all parts of the world, as well as prenatal testing for all kinds of genetic traits, many of which are considered to be medically or socially undesirable.

D. Spousal Veto Requirements

A final example of the use of a human rights approach to bring about legal change at the local level involves the policy of requiring a woman seeking to use family planning to obtain her spouse's consent. A recent Constitutional Court case from Costa Rica focuses on this issue and illustrates perhaps the best-case scenario for all actions involving reproductive rights.⁹⁰ The plaintiffs in the case, a number of women's groups and individual women, challenged the constitutionality of the interpretation by medical authorities of Costa Rica's recent 1990 Decree legalizing sterilizations for therapeutic purposes. They claimed that, despite the absence of specific authorizing language in the Decree, these authorities were requiring married women to obtain the permission of their spouses before a

88. Dahlburg, *supra* note 81, at 1.

89. Dahlburg, *supra* note 81, at 1.

90. Case No. 2196-92 (Costa Rica Aug. 11, 1992) (unpublished).

sterilization was performed. They argued that this interpretation was in violation of various provisions of Costa Rica's Constitution guaranteeing equality of the sexes and of spouses. They also claimed that it violated provisions of the Convention on the Elimination of All Forms of Discrimination Against Women, which prohibit discrimination with respect to legal capacity and family planning. The medical authorities in the case denied interpreting the Decree in this fashion.

The Court rejected the plaintiffs' challenge, ruling that there was no evidence that the medical authorities had required married women to obtain their husbands' permission to be sterilized. Nonetheless, due to the importance of the issue, the Court took the opportunity to provide an interpretive opinion on the question raised by the plaintiffs. It then proceeded to deliver a forceful human-rights-based defense of women's autonomy. It reasoned that an interpretation of the Decree such as that charged by the plaintiffs would be in violation of the principles of liberty, equality, nondiscrimination, and the equal treatment of spouses. The Court asserted that these considerations had inspired the Women's Convention, the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights, as well as the Costa Rican Law on the Social Equality of Women.⁹¹

Moreover, the Court gave expansive support to these rights. It concluded, among other things, that the decision of a woman of legal capacity with respect to decisions about her life could be made subordinate to no one, including her husband. It noted that the democratic system of Costa Rica was based on a theory of liberty that allowed every person to grow and develop freely in all areas of life, including sexual areas. It held that the right to health and life required that a woman be the only person given authority to make a decision on therapeutic sterilization. In support of its decision, the Court noted disapprovingly that, under the alleged interpretation of the Decree, maternity would become the obligation of a woman, to be valued above her right to health and life. The Court further stated that its opinion applied to single, widowed, and divorced women as well as to women in *de facto* relationships and married women who were over the age of fifteen but under the age of legal majority.

This decision is the result of a convergence of fortuitous factors: a government that has taken seriously its commitment to the human rights treaties that it has ratified; a legal system that, like Colombia's,

91. Act of Feb. 22, 1990 on the Promotion of the Social Equality of Women, *translated into English in* 17 ANN. REV. POP. L. 472, 472-79 (1990).

recently has been reformed to be more receptive to constitutional challenges;⁹² a court that is willing to go beyond what is technically necessary to support human rights arguments; and a relatively easy case in the sense that a requirement that a husband approve his wife's sterilization finds no support in the text of the Decree and is clearly in violation of all sorts of legal prohibitions of sex discrimination. The decision, moreover, sets an important precedent for the future. To be sure, the case does not involve the most significant reproductive issue that could have been addressed. The Court made clear, in fact, that it was dealing only with therapeutic sterilization, not sterilization for family planning purposes, which still is prohibited in Costa Rica. Nonetheless, the opinion supports the full equality of women not only in decisions about therapeutic sterilization, but in all areas of life. It also acknowledges that human rights include freedom of sexual expression, full personal development, and, most significantly, freedom from becoming a mother at the expense of health. These human rights statements certainly could be used in the future to argue against many kinds of sex discrimination, as well as abortion laws that result in harm to women's mental and physical health, and that deny the full development of their personalities.

CONCLUSION

The effort to reform abusive population policies and restrictive reproductive health laws through human-rights-based local legal action faces major challenges. Among these are the ability of the legal system to address these issues, the suitability of particular topics for legal action (either legislative or judicial), and the particular legal strategies to be employed. On many occasions, these efforts are influenced strongly by national and international political considerations. Nonetheless, as some of the case studies examined above illustrate, it is increasingly possible to tackle these issues and prevail by using human rights arguments and conventions. As countries place increasing importance on human rights conventions that they have ratified, and incorporate human rights standards into their legal systems, these kinds of cases undoubtedly will become more common. Those engaged in the struggle for humane population policies and full reproductive rights need to take this opportunity to shape human rights arguments to support such positive goals.

92. See generally Robert S. Barker, *Taking Constitutionalism Seriously: Costa Rica's Sala Cuarta*, 6 FLA. J. INT'L L. 349 (1991).