THE LEGAL CONTROL OF BIRTH CONTROL

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"The human race", according to Himes(1), "has in all ages and in all geographical locations desired to control its own fertility . . . . . while women have always wanted babies, they have wanted them when they wanted them and they have wanted neither too few nor too many." Inevitably, however, this desire of women to regulate the birth of their children has attracted the interest of the law and it is the attitude of the law in this matter which forms the subject of this paper.

The first point which needs to be stressed is that at no time has English law ever tackled the problem of birth control as such directly: it has always approached the problem as one of assessing the legal implications of a given method of birth control from the point of view of some pre-existing conceptual category of the law. What effect has a contraceptive sheath on consummation of marriage? Is sterilization an illegal operation? And so on. Any assessment of the legal control of birth control must therefore commence with an examination of the categories employed by the law for this purpose.

A number of distinctions must, however, be drawn at the very outset. First there is the distinction between birth control within marriage and extra-marital birth control. The legal control of birth control is exercised very largely by means of an application of the concepts of the matrimonial and criminal law. In so far as the concepts of the matrimonial law are applied the law is indifferent as to the practice of extra-marital birth control, but in so far as the concepts of the criminal law are employed for this purpose they apply equally to matrimonial and extra-marital birth control.

Second, within marriage, and because of the application of the concepts of the matrimonial law there is a further distinction between those methods which are adopted by the consent of both parties and those which are insisted upon by one party against the wishes of the other, for again, and within certain limits, the law is indifferent to the practice of birth control if adopted by the consent of both parties in a marriage, provided, of course, that the methods they adopt do not invoke the sanctions of the criminal law.

CONSUMMATION OF MARRIAGE

Bearing in mind the above distinctions we must consider the first of the conceptual categories of the matrimonial law which is relevant for our purpose, namely, that of consummation of marriage. The concept of consummation as it exists in English law today is a strange relic of mediaeval scholasticism distorted by the accidents of English legal history. The concept originated in the scholastic controversy over the criterion to be employed in determining the formation of marriage(2). There were thus those who insisted that copula carnalis was necessary for the formation of marriage and those who claimed that the only essential was the mutual consent of the parties. The latter view won the day but the idea of the necessity for **copula carnalis** nevertheless survived in two forms. First, with the growth of the concept of the absolute indissolubility of marriage the distinction between the consummated and the non-consummated marriage was retained and the concept of absolute indissolubility was only applied to the former. Second, the idea of the necessity for **copula carnalis** survived in the concept that impotence — the inability to perform the act of coitus — was a diriment impediment to marriage: a marriage to which one of the parties was incapable of consummation was considered to be void.

It is in this second form that the idea of consummation has survived in English matrimonial law although, owing to the accident of English legal history, a marriage to which one party is impotent is not considered to be void, in the sense of being considered never to have come into being, but merely voidable, i.e., valid until nullity proceedings are brought during the lifetime of the parties(3). It should finally be noted that the concept of consummation was considerably extended in English law and its whole nature rather radically altered by the Matrimonial Causes Act, 1937 which provided that a marriage could be annulled on the ground of wilful refusal to consummate, the wilful refusal to consummate being treated as being on the same plane as an inability to consummate(4).

The problem that now arises is what constitutes consummation of marriage in the eyes of the law. The law draws a clear distinction here between the ability to procreate and the ability to copulate, and consummation in the eyes of the law, is effected simply by sexual intercourse([5]). To say this, however, is not to solve the problem for the question that immediately arises is, what constitutes sexual intercourse for this purpose. The answer, as given by the English courts, is that consummation is effected by "ordinary and complete intercourse"([6]). The courts, however, have recoiled from the task of determining just what constitutes "ordinary and complete intercourse" and have reached the position that for consummation there need only be a single act of penetration([7]).

Just what is the significance of retaining the idea of the necessity for consummation now that it has been reduced to such an attenuated form is rather difficult to see. We are not here, however, concerned to find a justification for the concept of consummation. The question, for our purpose, is simply whether its retention affects the use of birth control methods. The answer appears to be that since the extension of the concept to include wilful refusal to consummate, its retention does slightly affect the use of birth control.

It is clear law that the use of a contraceptive sheath([8]) or submission to a sterilization operation([9]) does not prevent consummation of a marriage on the ground that these methods only effect ability to procreate and not the ability to copulate. Further, although not finally decided, it seems probable that the use of coitus interruptus will not prevent consummation, on the ground that the use of this method nevertheless allows of sufficient penetration for the purpose of consummation ([10]). Although therefore the retention of the necessity for consummation does not affect these methods of birth control it does inhibit complete abstinance as a method of birth control, for however morally virtuous this method may be considered its effect in law will be to render the marriage of the parties voidable.

It is of course true that once the marriage has been consummated further abstinance will have no legal effect so far as consummation is concerned but since, for this method to be effective abstinance must be complete the necessity for consummation may be regarded as inhibiting slightly resort to abstinance as a method of birth control.

At this point, however, the distinction between methods adopted by the consent of both parties and those insisted upon by one party against the wishes of the other becomes relevant for the courts will only annul a marriage on the ground of non-consummation if they are satisfied as to the "sincerity" of the petitioner and where the parties have agreed to abstain from intercourse the court will not normally allow a petitioner to complain of the non-consummation to which he has agreed([11]).

The concept of consummation, therefore, only controls birth control in so far as one party insists upon complete abstinance as the sole method against the wishes of the other. Since, however, one act of penetration, even with contraceptive precautions, will constitute consummation the degree of control exercised by this concept can be seen to be very slight.

CRUELTY

The second category of the matrimonial law which is employed to control birth control is that of cruelty. A marriage may be dissolved on the ground of cruelty if one party is guilty of conduct([12]):

> Of such a character as to have caused danger to life, limb or health (bodily or mentally) or as to give rise to a reasonable apprehension of such danger.

Within the last few years the concept has been developed that if one party insists upon certain birth control methods such as the use of a condom or resort to coitus interruptus, against the wishes of the other he or she may be guilty of legal cruelty thus enabling the other party to have the marriage dissolved([13]). It should be stressed that the legal control of birth control is here limited to cases where one party is insisting upon such methods against the wishes of the other, and is further limited to those cases in which the health of the other party is affected thereby.

The problem, as it presents itself in these cases, may be illustrated by reference to the recent decision in Bravery v. Bravery([14]) which involved birth control by means of resort to a sterilization operation. A woman petitioned for divorce on the ground of cruelty alleging that her husband had, after the birth of their first child and without her consent undergone sterilisation. The Court of Appeal held, by a majority, that there was insufficient evidence of her alleged lack of consent and held further that in any case there was no evidence that her health had in any way suffered as a result

of her husband's conduct. Her petition was therefore dismissed but the court expressed the view that had she in fact not consented and had her health suffered she would have been entitled to a decree([15]):

> As between husband and wife for a man to submit himself to such a process without good medical reason (which is not suggested here) would, no doubt, unless his wife were a consenting party, be a grave offence to her which could without difficulty be shown to be a cruel act, if it were found to have injured her health or to have caused reasonable apprehension of such injury.

Although it is not difficult to sympathise with such an opinion it must be admitted that it is a little difficult to reconcile with other concepts of the matrimonial law. The question that must be asked is, of what is the wife complaining in this case. Sterilisation does not interfere with normal and complete sexual intercourse([16]), so that she cannot complain on that score. The only thing of which she can really complain is that her husband will be unable to give her any further children. But of what is she complaining here? The law gives no remedy to women who are married to infertile husbands. The only thing that it seems can be said of these cases is that neither party to a marriage is entitled to add to the natural obstacles of conception, and that if either party does so against the wishes of the other that may constitute legal cruelty entitling the other to a dissolution of marriage.

The fact seems to be that after the decision in **Baxter** v. **Baxter**([17]) the courts were faced with the fact that the concept of consummation had been rendered even more useless than before and they therefore set out to develop the concept of divorce so as to avoid the impeccable logical futility of **Baxter v. Baxter:** a development which is therefore inevitably difficult to reconcile with that decision.

ASSAULT

When we turn to consider the concepts of the criminal law in so far as they are employed to control the practice of birth control we find a sharp change in attitude from that which resulted from the application of the concepts of the matrimonial law. The first major problem which arises for consideration under this head concerns the legality of sterilization operations, i.e., is the surgeon who performs such an operation guilty of a criminal offence by so doing. In the absence of specific legislation the only offence of which he could be guilty in such cases would be that of assault, common or aggravated, and the problem therefore resolves itself into one of determining whether a surgeon who sterilizes a patient with the consent of that patient will be guilty of a criminal assault. There is some authority for the view that he is so guilty. Thus referring specifically to the question of eugenic sterilization the Departmental Committee on Sterilization in the United Kingdom stated([18]):

> The legal position in regard to the eugenic sterilization of persons of normal mentality is less certain, but most authorities take the view that it is illegal. This is the view commonly adopted by the medical profession and acted upon by hospitals, and we understand that the medical defence organizations agree in refusing to indemnify any practitioner undertaking eugenic sterilization. In theory the point is not entirely free from doubt, but in practice it appears to be almost universally accepted that eugenic sterilization is illegal and involves the surgeon concerned in the risk of legal proceedings, even though the full consent of the patient has been obtained.

If eugenic sterilization is illegal then a fortiori contraceptive sterilization will be. The same view was also expressed by Counsel in his opinion to the Medical Defence Union([19]):

> The operation amounts to causing grievous bodily harm within s.18 of the Offences Against the Person Act, 1861. It cannot be rendered lawful by the consent of the person to whose detriment it is done: no person can license another to commit a crime.

It was expressly added that eugenic reasons are not lawful reasons for performing a sterilization, and therefore, again, fortiori contraceptive reasons would presumably not be lawful reasons. This problem was more recently considered in the case of **Bravery** v. **Bravery,** to which we have referred above, but the Court of Appeal were unable to reach agreement on this point. Denning L.J. (as he then was) took the view that a sterilization operation if performed without "just cause" would be illegal, but he differed from the views expressed above in that he considered eugenic reasons sufficient "just cause" to render such operations lawful, failed however to convince his colleagues (Evershed M.R. and Hodson L.J.) who stated([20]):

> We also feel bound to dissociate ourselves from the more general observations of

> Denning L.J., at the end of his judgement, in which he has expressed his view (as we understand it) that the performance on a man of an operation for sterilization, in the absence of some 'just cause or excuse' (as was not, in his view, shown to exist in the present case) is an unlawful assault, an act criminal per se, to which consent provides no answer or defence.

We have elsewhere argued([21]) that the consent of the patient would be a defence to the surgeon in all cases in which he performed such an operation at the request of the patient and if we are correct in this opinion then there would be no obstacles to a person having himself sterilized although, as we have seen, if the person submitting himself to sterilization is married then he may be guilty of cruelty if he acts without the consent of his spouse.

It may be remarked that if the view of Denning L.J. is correct then there would be a remarkable contrast between the view taken by the law in so far as the concepts of the matrimonial law are applied to control birth control and the view taken once the concepts of the criminal law are invoked. Thus if Denning L.J. is correct one particular form of contraception would be singled out from the others and its use proscribed by the application of penal sanctions.

The question that arises is, of course, what justification could there be for such a change in attitude. What is the difference between a doctor who fits a Dutch or Dumas cap and one who inserts the electrode of an electrocautery? The only point to which Lord Denning was able to refer as justifying the distinction between sterilization and other methods of contraception was the fact that sterilization carried with it no possibility of a change of mind of the parties([22]). This, with respect, is a very questionable point of distinction. In the first place the possibility of reversal does remain in cases of sterilization, although admittedly the chances of success are not very encouraging. Secondly, it seems clear that the use of at least some forms of mechanical contraceptive induces secondary sterility([23]), whilst in any case the prior use of any form of contraception reduces the chances of conception after the contraceptives techniques have been abandoned simply on the ground that the older a woman is the less is her chance of conceiving: the longer therefore that a woman uses contraception the smaller grows her chance of conceiving once she has abandoned contraception([24]). The difference, therefore, between sterilization and other forms of contraception, on this point, seems to be no more than a difference of degree.

Before leaving the problem of sterilization, however, there is one final point which should be stressed, namely, that even on Lord Denning's view, the possibility of sterilization is not excluded in all cases, for his Lordship regarded sterilization as lawful if performed with "just cause and excuse"([25]) and this, therefore, raises the problem of what may be regarded as a "just cause". His Lordship clearly excluded the possibility of purely contraceptive sterilization holding that:

> The operation then is plainly injurious to the public interest. It is degrading to the man himself. It is injurious to his wife and to any woman he may marry, to say nothing of the way it opens to licentiousness.

As we noted above, however, his Lordship regarded eugenic reasons as constituting a just cause for such operations and it is arguable that just cause could be held to exist for the sterilization of grande multiparae on the ground, as shown by Sheares ([26]), that the mortality rate among grande multiparae is three times that among primaparae.

It is difficult, therefore, to come to any positive conclusions regarding the validity of sterilization operations. There is clearly authority for the view that they are illegal, at least unless just cause is shown. There is now authority for the view that eugenic reasons constitute sufficient just cause for this purpose and it is clearly arguable that the high mortality rate among grande multiparae is sufficient justification for the sterilisation of such women, but beyond this the balance of authority is clearly against the legality of such operations.

ABORTION

Although perhaps not usually so considered abortion is, of course, a method of birth control, and the only one regarding which the law makes specific provision, making resort to this method of birth control a serious criminal offence([27]). The justification for this curious attitude is to be found, as was the justification for the concept of consummation, among the relics of mediaeval scholasticism which litter the pages of English law.

The law of abortion has its origins in mediaeval speculations as to when the soul entered the foetus, for once the soul was con-

sidered to have entered the foetus its destruction was considered to be analagous to murder and therefore punished accordingly([28]). The view which prevailed in England was that the soul entered the foetus at the time when it first moved in the womb. Since "quickening" was taken to be the first sign of embryonic movement([29]) the view taken by the common law was that foeticide before quickening was no offence but foeticide after quickening was "great misprison of felony" — it could not, in the common law, be classed as murder for to constitute murder the victim had to be a "person in being" which an embryo was not.

The distinction between post — and ante — quickening foeticide was abolished by statute in 1803 and thereafter it became abortion to "procure a miscarriage" at any time and the assumption is, therefore, that any interference with pregnancy after fertilisation constitutes the crime of abortion and it is this carrying back of the crime of abortion to the moment of fertilisation which renders the law of abortion a significant factor in the legal control of birth control, for it is clear that some forms of so-called contraceptives, such as the Graffian ring, act, not as contraceptives, but as abortifacts by preventing implantation of the zygote. It follows that in theory anyone who supplies or fits such a Graffian ring, as well as the woman who has such a ring fitted is liable to conviction under the Act([30]).

The same is also true of the new "oral contraceptives" which are being developed, for at least some of these seem to act either by preventing implantation of the zygote or by causing early absorption of the implanted zygote([31]). In so far as this is true they are abortifacts and the supply and administration of them would be abortion within the meaning of the Act.

It is, of course, very difficult to see the justification for the attitude of the law towards abortion. The law has no apparent objection to persons endeavouring to prevent fertilisation from taking place, unless possibly they resort to sterilization to effect this purpose, but once fertilisation has taken place then any interference with the zygote is treated with almost ferocious savagery. An American court, commenting upon this problem spoke as follows([32]):

> In a strictly scientific and physiological sense there is life in an embryo from the time of conception and in such sense there is also life in the male and female elements that unite to form the embryo.

The ovum, before fertilisation, is of no apparent concern to the law but once it has been fertilised any interference with it is visited with the full fury of the criminal law. It is difficult to see why the moment of fertilisation should be treated as crucial Parthenogenesis may not yet have been proved to have occurred in man but its mere possibility shows that fertilisation cannot be regarded as the **sine qua non** for the production of a zygote, and it is an interesting speculation whether a parthenogenetic zygote would be protected by the criminal law or not.

The fact of the matter is that the whole concept of abortion rests on a theological basis allied to a preformationist embryology which may have rendered the concept understandable for the period in which it was developed but which render it completely unacceptable for the modern world. Its retention will prove a major factor in inhibiting the use and development of the newer oral "contraceptives". Even at present the law is honoured more in the breach than in application ([33]) and it is high time that it was removed from the statute book.

We can see, therefore, that the legal control of birth control is an extraordinary mixture of contradictory attitudes based on relics of mediaeval scholasticism coupled with some very unsound biology. So far as the application of the matrimonial law is concerned the courts are only concerned to see that the marriage has been consummated by the single act of penetration which they require after which their only concern is to see that neither party in a marriage adds to the natural hazards of conception to the detriment of the health of the other spouse. So far as the application of the criminal law is concerned the courts take no notice of birth control in so far as it is limited to preventing fertilisation from taking place, unless possibly sterilization is used for this purpose, but once fertilisation has taken place then any form of birth control becomes a heinous criminal offence. Surveying such an extraordinary situation which represents the mature wisdom of English law on the problem of controlling the universal desire of women to control the birth of their children one may be pardoned for thinking that Sir Edward Coke was exaggerating slightly when he stated([34]):

> Reason is the life of the law, nay the common law itself is nothing else but reason ... The law which is perfection of reason.

REFERENCES

1 Medical History on Contraception (1936) quoted by Glanville Williams, The Sanctity of Life and the Criminal Law (1958) at p. 54.

2 On the scholastic controversy as to consummation see Esmien, Le Mariage en Droit Canonique 2nd. ed. (1929).

3 On the English law relating to consummation see Jackson, The Formation and Annulment of Marriage (1951).

4 This extension of consummation has been severly criticised on the ground that it is illogical to annul a marriage on grounds which arise subsequent to the marriage. "Wilful refusal to consummate the marriage is also a ground for nullity of the marriage in Malaya. As to Singapore, see S. 14(1) (g) of the Divorce Ordinance (Cap. 40). As to the Federation of Malaya, see. S. 15(1) (b) of the Divorce Ordinance, No. 74 of 1952".

5 "A person is in law impotent who is incapax copulandi apart from the question whether he or she is incapax procreandi". G. v. G. (1924) A.C. 349 per Lord Dunedin at p. 353.

6 This was the test laid down by Lord Stowell in the classic case of D. v. A. (1845) 1 Rob. Ecc. 279 at p. 298.

7 This result follows from the result of the decision of the House of Lords in Baxter v. Baxter (1948) A.C. 274 on which see Powell 'The Concept of Marriage in Ancient and Modern Law' (1950) 3 Current Legal Problems 46.

8 This was the actual decision in Baxter v. Baxter, supra which overruled Cowen v. Cowen (1948) p. 36.

9 The earlier conflict on this point between J. v. J. (1947) 2 All E.R. 43 and L. v. L. (1922) 38 T.L.R. 687 was resolved in favour of the proposition stated in the text by the House of Lords in Baxter v. Baxter, supra although the opinion of their Lordships on this point was, of course, technically only obiter.

10 On the problem of coitus interruptus see Bartholomew (1958) M.L.R. 244 - 246.

11 On the problem of sincerity see G. v. M. (1885) 10 App. Cas. 171 and Bartholomew, op. cit. at pp. 247 - 250.

12 Rayden. Divorce 5th. ed. at p. 80. "Cruelty is also a ground for the dissolution of a marriage in Malaya. As to Singapore, see S. 6 of the Divorce Ordinance (Cap. 40). As to the Federation of Malaya, see S. 7 of the Divorce Ordinance, No. 74 of 1952".

13 This development appears to have commenced with the decision in White v. White (1948) 64 T.L.R. 332. See also Walsham v. Walsham (1949) p. 350; Cackett v. Cackett (1950) p. 253 and Knott v. Knott (1955) p. 249.

14 (1954) 3 All E.R. 59.

15 At p. 61.

16 This is, of course, a consequence of the decision in Baxter v. Baxter. supra.

17 Supra.

18 Cmd. 4485 (1934) 6.

19 As quotes in British Obstetric and Gynaecological Practice (Gynaecology) ed. by Aleck Bourne (1955) at p. 721.

In Malaya the offence is known as "voluntarily causing grievous hurt". As to Singapore, see S. 322 of the Penal Code (Revised Laws, 1955). As to the Federation of Malaya, see S. 322 of the Penal Code (F.M.S. Cap. 45) as extended throughout the Federation of Malaya by virtue of the Penal Code (Amendment and Extended Application) Ordinance, 1948.

20 Supra. at p. 63.

21 'Legal Implications of Voluntary Sterilization Operations' (1959) 2 M.U.L.R. 77.

22 Supra. at p. 67.

23 See Gyllensward, 'The Incidence of Involuntary Marital Childlessness' (1954) 43 Acta Paediatrica 358.

24 See Pearl, Natural History of Population (1939) and Campbell 'Infertility: Its Incidence and Hope of Cure' (1958) 1 B.M.J. 429.

25 See Bartholomew, (1960) M.U.L.R. in the press.

26 'Sterilization of Women by Intra-Utrine Electro-Cautery of the Uterine Cornu' (1958) 65 J. Obst. Gynaec. B.E. 419.

27 Abortion in England is a felony by the Offences Against the Person Act, 1861 S. 58.

"It is also a serious offence in Malaya. As to Singapore, see S. 312 of the Penal Code (Revised Laws. 1955). As to the Federation of Malaya, see S. 312 of the PenalCode (F.M.S. Cap. 45) as extended throughout the Federation of Malaya by virtue of the Penal Code (Amendment And Extended Application) Ordinance, 1948".

28 On this point see Glanville Williams, The Sanctity of Life and the Criminal Law (1958) Chapt. V.

29 The confusion between the first signs of embryonic movement and the rise of the uterus from the pelvis to the abdomen was pointed out in a reporter's note to R. v. Wycherley (1838) 8 C & P 262.

30 See Stallworthy, Walker, Malleson and Jackson, Problems of Fertility in General Practice 2nd. ed. (1953) Chapt. XVIII.

31 See Henshaw 'Physiologic Control of Fertility' (1953) 117 Science 572 which contains an extensive bibliography on the subject.

32 Foster v. State (1923) 196 N.W. 233.

33 See on this the authorities cited by Glanville Williams op. cit. at pp. 189 - 196 and in particular his conclusion (at p. 193) that "It seems sufficiently accurate, then, to say that there is not in England more than one prosecution to every thousand criminal abortions". The liklihood of a prosecution being brought against the mother is now considered to be so low that in R. v. Peake (1932) 97 J. P. 353 it was ruled that a woman could not refuse to answer a question on the ground that it might incriminate her — in the sense of involving her in a prosecution for abortion — on the ground that there was no substantial possibility of a prosecution being brought.

34 Co. Lit. s. 138.