# MEDICO-LEGAL ASPECTS OF STERILISATION*

By L. C. Green

While, at first sight, it might not seem to be so, there are in fact a number of aspects of family planning, and of sterilisation in particular, that fall within the purview of the international lawyer.

In the first place, the world is faced with what has become generally known as the "population explosion", and it is partly through the medium of such international institutions as the United Nations, the World Health Organisation, and Unesco that efforts are being made to internationalise on an organisational and legally controlled basis some of the broad problems inherent in control of this expansion.

In so far as sterilisation itself is concerned, it is necessary to bear in mind the definition of 'health' to be found in the Constitution of the World Health Organisation, which is of significance for both the lawyer and the doctor. By the Preamble to the Constitution, "health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. (Moreover) the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."[1]

The problem of the nature of "health" has faced both the lawyer and the doctor before. This was the essential issue in *R.* v. *Bourne*[2] in which the question of legality concerned an abortion and not a sterilisation operation. The defence revolved round the contention that mental health was equally important with physical health in order to legalise what would otherwise be an illegal operation. Under the combined effect of the Infant Life Preservation Act, 1929[3], and the Offences against the Person Act, 1861[4], an induced miscarriage is only permissible if done in good faith for the purpose of preserving the life of the mother. The learned judge directed the jury that "those words ought to be construed in a reasonable sense, and, if the doctor is of opinion on reasonable grounds and with adequate knowlege, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor, who, under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother." The jury accepted the judge's view and acquitted.

This view of the legality of a particular operation draws attention to a fundamental issue underlying the problem of voluntary or therapeutic sterilisation, namely, the legality of any operation and the validity of the consent given to its performance. The problem of his liability for assault should be ever-present in the mind of a doctor, for any operation performed without consent, even though it might be a legal, as distinct from the generally understood idea of an illegal, operation, may open the door to an action for damages for civil assault.

The Constitution of the World Health Organisation refers to health as being dependent on a "state of complete physical, mental and social well-being", and this may well be considered by some as the authorisation for socio-economic sterilisation and, for that matter, for every kind of operation of a social character. This aspect of the problem is of significance for the plastic surgeon whose cosmetic operations might, from the legal point of view, not fall within the classification of those which may be described broadly as medical, in the curative sense. The modern realisation of the importance of physchosomatic conditions might well militate in favour of the view that a young female suffering from some facial or other physical disability should be permitted to make use of surgical means in order to remove the disability which is interfering with her "state of complete physical, mental and social well-being."

In addition to the Constitution of the World Health Organisation, there are one or two other international instruments which are of relevance. In the first place, there is the Universal Declaration of Human Rights, 1948[5]. This is not the place to enter into an analysis of the dispute among international lawyers as to whether this is a binding document, the standard of behaviour by which all governments and peoples ought to measure their conduct, or a mere piece of paper of no legal significance whatever. What is important is that the General Assembly went on record, not unanimously but *nemine contradicente*, that everyone, regardless of race, culture, language or religion, has the

*This paper is based on an address to the Singapore conference on sterilisation organised in 1962 under the auspices of the International Planned Parenthood Federation.

*right* to found a family[6]. This once more raised the problem of consent, particularly as the Declaration also provides that no one shall be subjected to cruel, inhuman or degrading punishment[7], and this itself touches a specific aspect of the legal nature of sterilisation.

Finally there is the Genocide Convention of 1948[8]. Broadly, this Convention is directed against organised crime the purpose of which is to deny the character of a group *qua* group. Genocide does not only involve actual extermination, but includes the imposition of measures intended to prevent births within the group[9]. The significance of this type of activity as an international crime was made clear in the trial of Adolf Eichmann[10]. Although Eichmann was not charged with genocide *per se*. he was accused[11] and found guilty of a crime against the Jewish people, in that he "devised measures the purpose of which was to prevent childbearing among the Jews of Germany and countries occupied by her . . . (and) for the sterilisation of the offspring of mixed marriages of the first degree among Jews in Germany and in areas occupied by her."

From the point of view of genocide, the essence of sterilisation measures must be that they are directed against the members of a group because they are members of that group. This means that doctors practising female or male sterilisation of patients coming to them could not be considered as falling within the scope of the Convention. On the other hand, it has been suggested that 'Jack the Ripper'[12] might have been liable for genocide!

Apart from these international aspects of sterilisation, there are four specific problems with which the lawyer is concerned. One is the problem of punitive sterilisation for sexual offenders, which has been advocated, and the concomitant legislation passed, in a number of countries, particularly the Scandinavian, although in the United States the tendency is to regard such measures as unconstitutional. In some places it is even advocated for the treatment of homosexuals[13].

In so far as heterosexual misconduct is concerned, it must be borne in mind that sterilisation is no answer to the problem of the mass rapist. With the possible exception of brain surgery, the only surgical treatment for this type of sexual offender is castration. As Sir Richard Burton has pointed out in his footnotes to the *Arabian Nights*[14], from the point of view of the harem, ordinary sterilisation may have advantages rather than drawbacks! This also appears to be the view of the Minnesota judge who pointed out that male sterilisation "frequently improves the health and vigour of the patient"[15].

Scandinavia has long been regarded as the group of countries whose criminal policies are most progressive and whose example is frequently cited by penal reformers. Provision is made in some of the penal codes for the compulsory sterilisation of dangerous sexual offenders. This is the position under a Danish statute of 1935, although the powers have never been used. On the other hand, with psychopathic criminal detainees, voluntary sterilisation is regarded by the courts as a justification for release a short time after the operation has taken place[16]. It would appear from this that the principle of consent is preserved. It is submitted, however, that when the temptation of early release is offered to the 'volunteer', it is a little difficult to regard his consent as being freely given.

The approach of the Norwegian criminal law is somewhat different. Unlike the position in Denmark, the Norwegian court can only recommend sterilisation or castration as a matter of treatment, and not as a punishment. Nevertheless, it may be carried out without the individual's own consent. While provision is made for voluntary submission to the operation, a statute of 1934 gives an expert committee authority to order the sterilisation or castration of persons with certain mental abnormalities, "if there is reason to believe his abnormal sexual instincts will lead him to commit sexual offences". The request to the committee must come from the individual's guardian, the local chief of police, or the director of the institution in which he is detained[17].

In the United States, penal treatment is a matter of state competence, and a number of state legislatures have propounded sterilisation legislative measures, which frequently include punitive sterilisation[18]. 28 of the states possess such legislation, and in only Minnesota and Vermont is it on a purely voluntary basis, although Maine, North Carolina and South Dakota contain provisions for both voluntary and compulsory sterilisation. In most cases the operation is directed against mental defectives detained in state institutions. A good example, although in this case mental abnormality is not an essential prerequisite, of such legislation exists in Oregon—Sterilisation is compulsory and mandatory at the instance of the State Board of Eugenics in the case of "all persons who are feeble minded, insane, epileptic, habitual criminals, incurable syphilitics, moral degenerates or sexual perverts; any person con-

victed of the crime of rape, incest, sodomy, the delinquency of a minor by sexual act or act of sexual perversion, the crime against nature . . ."

Sometimes, the attempt has been made to widen the scope of such punitive sterilisation far beyond the range of sexual crimes. Thus, in Oklahoma a 1935 statute provided for the sterilisation of those who had been convicted of two or more felonies involving moral turpitude. It was expressly made to apply to larceny, including larceny by fraud, but not to embezzlement. In *Skinner* v. *Oklahoma*[19] the Supreme Court had to consider the challenge to this statute lodged on behalf of an individual who had been convicted of stealing chickens in 1926, and of robbery with firearms in 1929 and 1934. He was in jail when the statute came into force in 1935, and in 1936 proceedings were launched for his sterilisation. The judgment was delivered by Justice Douglas, and appears to have been written against the background of what was becoming known of the conditions in Nazi Europe:

> "This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring .... The power to sterilise, if exercised, may have subtle, far-reaching and devasting effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom it touches.[20] Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty .... Strict scrutiny of the classification which a State makes in a sterilisation law is essential, lest unwittingly or otherwise, invidious discriminations are made as against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."

In the instant case, the majority were of opinion that to punish the man who had twice been convicted of larceny by sterilisation, while not treating in the same fashion one who had become a professional embezzler constituted "invidious discrimination in violation of the constitutional guaranty of just and equal laws." Chief Justice Stone and Justice Jackson agreed that the statute was unconstitutional, but both were concerned that legislative sterilisation was being used for social reasons without paying the slightest attention to the 'inheritability' of this type of criminal propensity.

As distinct from the punitive sterilisation carried out at the discretion of State officials, there is therapeutic sterilisation conducted at the desire of the patient. In so far as the United States is concerned, some of the State sterilisation legislative measures expressly declare that "nothing in this act shall be construed so as to prevent the medical or surgical treatment for sound therapeutic reasons of any person in this state, by a physician or surgeon licensed by this state, which treatment may incidentally involve the nullification or destruction of the reproductive functions."[21]

Closely akin to this legislation is that of, for example, Connecticut.[22] This recognises the great risks that are open when sterilisation operations are permitted. It does not take much imagination to envisage a situation in which an unscrupulous mother, or other guardian, of an infant heiress suborns a similarly unscrupulous medical practitioner to perform an unnecessary salpingectomy in order to evade the provisions in a will. Such an operation is obviously unlawful with the mother and doctor liable to prosecution.[23] Connecticut has made express provision for this, stipulating that, except as authorised under the Act, "any person who shall perform, encourage, assist in or otherwise promote the performance of either of the operations described in (this legislation), for the purpose of destroying the power to procreate in the human species, or any person who shall knowingly permit either of such operations to be performed upon such person, unless the same shall be a medical necessity, shall be fined . . . or imprisoned . . ."

While consent is required to render such operations lawful, and the doctor will be protected if the patient voluntarily requests the operation, it does not follow that legal implications will not in event arise. For example, the patient may be married and if he or she arranges for the operation without the consent of the marriage partner a matrimonial offence may be committed.[24] Consideration of this problem, however, is best postponed until after certain other medical implications have been examined.

In 1934 a Minnesota court came to the conclusion that it was not contrary to public policy for an individual to submit to therapeutic sterilisation on behalf of a third person. The problem in *Christensen* v. *Thornby*[25] arose from the fact that it was considered dangerous for the wife to have a further confinement and the husband therefore agreed to submit to vasectomy, being assured by the surgeon that he would thereby be rendered sterile. In fact, the wife became pregnant and survived the birth. The doc-

tor was sued for breach of contract and the expenses involved in the confinement. The judge found for the doctor, pointing out that, "instead of losing his wife, the plaintiff had been blessed with the fatherhood of another child."

More difficult from the doctor's point of view is the situation which arises when, in the course of an abdominal operation, he discovers that sterilisation of his patient is medically advisable or that hysterectomy is inevitable. In 1949 a Canadian doctor discovered, while performing a Caesarian operation, that tumours were present on the uterine wall and, having told the husband that sterilisation might be necessary, he tied off the woman's Fallopian tubes. Although the consent certificate signed by the husband had referred to a "Caesarian operation and any further surgical procedure found necessary by the attending physician", when she came out of hospital the woman sued the doctor. In the view of the judge, "the point is whether an emergency existed, whether it was *necessary* that the operation be done, not whether it was then more *convenient* to perform it." Since he did not regard sterilisation as immediately necessary to perserve the woman's health, he awarded her $3,000 damages[26]—presumably, the patient should have been sewn up and, after she regained consciousness, informed by the surgeon that a further operation was necessary.

Three years later, a Californian surgeon was faced with a similar problem. During an operation he discovered that his patient's Fallopian tubes were infected and, on his own initiative, removed the diseased portions, rendering the woman sterile. In *Danielson* v. *Roche* judgment for the doctor was upheld on appeal.[27]

In the case of doctors practising in places like Singapore, which owe their legal traditions rather to the United Kingdom than the United States, the local courts are more likely to follow the practice of a British rather than an American court. It is perhaps relevant to point out in this connection that in England the medical defence unions decline to indemnify surgeons for performing sterilisation operations.[28]

Closely akin to therapeutic sterilisation, and of prime significance sociologically, is eugenic sterilisation. The major criticism of eugenic sterilisation is that in the hands of a fanatical regime eugenics and race purity can become the ideology under which abominable crimes are committed. Reference has already been made to Adolf Eichmann, but it is significant to note that in the first year of operation of the Nazi sterilisation statute of 1933, no less than 56,244 sterilisations were ordered,[29] and it was envisaged that the Hereditary Health Courts (*Erbgesundheitsgerichte*) would order some 400,000 persons to be sterilised. This figure, which had nothing to do with the anti-Jewish programme, was made up as follows: feeble-minded, 200,000; schizophrenics, 80,000; epileptics, 60,000; manic-depressive insane, 20,000; physically deformed, 20,000; deaf-mutes, 18,000; chronic alcoholics, 10,000; victims of St. Vitus's dance, 6,000; and blind, 4,000.[30]

As has been seen in connection with punitive sterilisation, eugenic sterilisation is provided for by legislation in most of the American states. The first statute was enacted in Indiana in 1907, and by 1915 fifteen states had legislation permitting eugenic sterilisation. This number had increased to thirty-two by 1935, but was down to twenty-eight in 1961. The majority of the known sterilisations in the United States, and certainly those performed in accordance with the statutes, are compulsory, and in the fifty years from 1907 to the end of 1957 60,166 persons had been sterilised. Of these, 31,038 were mental deficients, 26,922 were suffering from mental illness, and the remaining 2,206 were epileptics, criminals and the like. Of the total, 19,998 were performed in California. Since the Second World War there has been a gradual decline in the number of compulsory sterilisations.[31] In so far as these sterilisations have been of mental deficients or of persons thought likely to commit sexual offences, and invariably of persons who have been institutionalised, it might well be questioned whether, particularly in view of the fact that ordinary sterilisation does not normally affect sexual potency, institutionalisation rather than sterilisation is not the correct treatment. If mental abnormality warrants institutionalisation, the same condition will continue after the sterilisation has been performed. If this is so, institutionalisation should continue, when there is no need for sterilisation.

At one time it was considered that compulsory sterilisation of the mentally unfit was contrary to the Constitution of the United States. However, the constitutionality of such legislation was upheld by Oliver Wendell Holmes, one of the greatest common lawyers of all time. In *Buck* v. *Bell* he delivered the opinion of the Supreme Court upholding the validity of a Virginian statute which had been invoked to deal with a feeble-minded inmate of an institution, who was born of a feeble-minded mother and had herself given birth to a feeble-minded ille-

gitimate child. In words that have become memorable, Holmes summed up the position thus:

> "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Three generations of imbeciles are enough.*"[32]

It is difficult not to sympathise with the last few words of Holmes's comment, but the implications of the statement that "society can prevent those who are manifestly unfit from continuing their kind" are, in the light of Hitler's activities, terrifying. Nor does it matter much that so enlightened a law-reformer as Dr. Glanville Williams has expressed support for legalised sterilisation, pointing out that "there is a striking contrast between human fecklessness in our own reproduction and the careful scientific improvement of other forms of life under man's control. No rose-grower, pigeon-fancier or cattle-breeder would behave as men do in their own breeding habits."[33] The prospect of State stud-farms, assisted by such medical advances as sperm, eye and kidney banks makes the imagination boggle.

Legislation authorising eugenic sterilisation also exists in certain parts of Canada, in Denmark, Switzerland, the Federal Republic of Germany, Norway, Sweden, Finland, Mexico, and Japan, where there were over 38,000 operations in 1938 alone. The question arises whether eugenic sterilisation may, from the point of view of the doctor, be defended on similar grounds as therapeutic sterilisation. In the case of eugenic sterilisation it cannot be argued that it is the health of the patient that is involved. What is at stake is the alleged health of the unborn generation and the interest of society in its fitness. Generally speaking, save in such matters as succession to property[34] or for damages in respect of a deceased parent under the Fatal Accidents Act, 1846[35], unborn embryos do not possess legal interests. For one thing, there is no guarantee that the unborn will ever be born alive. It has been held, for example, by an Irish court that there is no cause of action in a child who alleges that it is deformed as a result of injuries suffered in a railway accident while *en ventre sa mère*.[36] On the other hand, a Canadian court has awarded a child damages in tort in respect of a deformity held to have been caused by a negligent pre-natal injury to the mother.[37] In the same way, a woman will not be awarded damages in respect of an embryo that she has lost as a result of an accident. In view of Dr. William's approach, it is perhaps not irrelevant to mention that a similar attitude is taken by the law in respect of the loss of cattle. Thus, if cattle die because, for example, their pasture has been poisoned by industrial fumes, damages will not be recoverable in respect of the first prizes they did not win or the calves they did not produce. At the next agricultural show there might well have been a better prize steer, while a cow might drop her calf prematurely. Similarly, damages will not be awarded for timber that does not reproduce itself, allegedly because of the same industrial fumes.[38]

In the field of criminal law, there is some recognition of the unborn child as a person. By the Infant Life Preservation Act, 1929[39], to inflict a pre-natal injury upon a child capable of being born alive, preventing it from being so born may amount to child destruction, and a similar injury causing its death after being born alive might amount to murder or manslaughter.[40] To incite someone to murder a child when born, if the inciting has taken place before birth, has been held to amount to soliciting to murder a "person".[41]

There is one other legal point with regard to voluntary sterilisation that is important from the doctor's point of view. It has been held in the United States that, while it is lawful to perform a therapeutic sterilisation, a contract for such an operation is contrary to public policy, so that a doctor who has agreed to operate and does so inefficiently cannot be sued for breach of contract.[42] Presumably, if such a contract has been made, then if either the doctor or the patient changes his mind no suit for breach of contract would lie. It is also questionable, since the contract is unlawful, whether a doctor who has operated could sue his patient for his fee. It should be borne in mind in this connection that the "Brock Report" was of opinion that the eugenic sterilisation of normal persons was illegal.[43]

Before leaving the question of eugenic sterilisation, perhaps a word should be said of the position in the absence of permissive legislation. While, as has been noted, the Brock Committee did not consider this lawful in the case of normal persons, it recommended that legislation should be enacted permitting voluntary sterilisation. There has, however, been no English judicial decision relating to the validity of voluntary eugenic sterilisation as such. Lord Denning has, in an *obiter dictum*, given expres-

sion to the view that sterilisation to prevent the transmission of an hereditary disease would be lawful[44]. In the same way, the Baltimore City Circuit Court has upheld the lawfulness of a eugenic sterilisation decree issued on the petition of a husband, relatives and the Incompetent Committee in the absence of any legislation relating to sterilisation[45]. This decision is interesting since it is stated in Wharton's *Criminal Law* that "consent cannot cure such operations on women as prevent them from having children."[46]

Under the impact of the "population explosion", perhaps the most important problem relating to sterilisation is that raised by operations performed for contraceptive or socio-economic purposes. Generally speaking, in the common law countries legislation tends to be absent, and the matter has become confounded by references to the common law offence of mayhem.

According to Coke, "the life and members of every subject are under the safeguard and protection of the king," and he refers to a case at Leicester in 1604 in which "a young, strong and lustie rogue, to make himself impotent, thereby to have the more colour to begge or be relieved without putting himself to any labour, caused his companion to strike off his left hand"[47]—both were convicted of mayhem. In those days, it was thought that castration would diminish bodily vigour and thereby render a man less capable of fulfilling his military duties, so that castration was explicitly held to be a maim and a felony[48]—a view that is confirmed by statute in some parts of the United States today,[49] as well as in the Singapore Penal Code.[49a] The classical view is well expressed by Blackstone,[50] who considered it "an atrocious breach of the king's peace, and an offence tending to deprive him of the aid and assistance of his subjects. For mayhem is properly defined to be the violently depriving another of the use of such of his members, as may render him the less able in fighting, either to defend himself, or to annoy his adversary. And therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts, the loss of which in all animals abates their courage, are held to be mayhems. But the cutting off his ear, or nose, or the like, are not held to be mayhems at common law; because they do not weaken but only disfigure him." It would thus appear that Blackstone provides a common law ground on which a cosmetic plastic operation might be defended. This does not, however, seem to be the case under modern French law, for "there is some doubt whether the cause is licit where a patient runs a bodily risk for aesthetic reasons actuated merely by a sense of *coquetterie*."[51]

Today, the general view is that sterilisation and castration do not interfere with a man's fighting potential, and this is likely to become more true the more the methods of warfare reduce the individual's participation to that of pressing a button. It may be relevant here to refer to the crisis of conscience that was recently presented, in the course of discussion, to a medical practitioner in Singapore. A married man with a child asked the doctor to sterilise him, and was met by the response that, in the absence of good medical or contraceptive reasons, a need for psychiatric treatment was indicated. When it was explained that the man was worried by the risk of nuclear war and of children being born deformed because of the effects of gamma rays, or into a world polluted by radioactive fallout, the doctor indicated that, in such circumstances, he might be prepared to perform a sterilisation operation. In view of the strength with which one may hold pacifist views or conscientious objection to war, it may well be that the time has come to review the common law approach to mayhem. Perhaps with this in mind, another proposition was put before the medical practitioner in order to ascertain his reactions. He was asked whether he would be prepared to amputate the applicant's right arm[52] and indicated that in his view such a request merited immediate incarceration in a mental institution. The case of the pacifist was then put to him, and it was suggested that in view of the ideological divisions that now split the world there might be no place for a conscientious objector should a major war break out. In view of this, the only way in which one might be able to give effect to one's conscience might be by such incapacitation as would render the objector completely useless from the war point of view. Nevertheless the doctor maintained his objections to such an operation, wisely, since this would amount to "grievous hurt" under section 320 of the Singapore Penal Code.[52a] It is true that the example is far-fetched, but, theoretically, if it is justifiable for a doctor to perform a sterilisation operation in order to assist in preventing children from being brought into a nuclear world, it ought to be equally justifiable—and perhaps even ethical from the medical point of view—to assist a person who does not wish to take part in a war of which he does not approve.

The problem just posed raises in a very real fashion the whole issue of consent to mutila-

tion and operations in general. Thus, according to Lloyd's view of French law, while a "surgical operation which is reasonable and necessary having regard to the patient's condition would be perfectly lawful, . . . a submission to vivisection for reward would be illicit as incompatible with human dignity." On the other hand, in English law an "agreement to perform a dangerous experiment in physiology might be lawful, at any rate unless the degree of danger is very great."[53] According to the *Shorter Oxford English Dictionary* "vivisection (is) the action of cutting or dissecting some part of a living organism"—a definition which would include both sterilisation and castration.

The term "illegal operation" is habitually employed to indicate an abortion which has been performed without any clear and present medical need. The fact that it has been performed upon a consenting woman does not render the operation legal and the consent is no defence to either the doctor or the woman. Similarly, if a masochist consents to an unlawful caning, then, either because of the risk of bodily harm or because of the potential public character of the place in which it has been carried out, the caning remains an indecent and unlawful assault. In *R.* v. *Donovan*[54] the Court said that the test of legality was whether the blows were likely or intended to do bodily harm, which was defined to include any hurt or injury calculated to interfere with the health or comfort of the victim: "If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime." The result seems to be, as Glanville Williams points out, that "a person cannot effectively consent to any blow, or presumably to any incision or puncture, that is likely to diminish his comfort."[55] Here we come face to face with the fact that while one may participate in a competitive boxing match fought with regulation weight gloves, though the risk of permanent physical harm or even death is obvious, it is unlawful to take part in a prize fight since bare-knuckle fighting is likely to endanger life and health and the match to constitute a disorderly exhibition[56]—a description which may be equally applied to many recent championship matches.

Apart from any problem relating to criminal liability in respect of a possibly illegal sterilisation operation, problems will obviously arise in the field of divorce, particularly if the unsterilised spouse contends that sterile intercourse involves sufficient cruelty to ground an action for dissolution of marriage. It must be remembered of course that natural sterility in one or both spouses cannot afford grounds for dissolution. A different rule would mean that a woman beyond the age of child-bearing could never enter into a valid marriage.

Before considering cruelty and sterilisation, it is useful to see what the attitude of the courts has been to other forms of non-reproductive intercourse. In *Cowen* v. *Cowen*[57] the Court of Appeal had held that where throughout a marriage one partner had refused to have intercourse except with a contraceptive or by way of coitus interruptus, there was no consummation and the marriage could be annulled. The Court quoted the comment of Dr. Lushington in *D-e* v. *A-g*[58] where the wife had no uterus and only a short vagina that "sexual intercourse in the proper meaning of the term is ordinary and complete intercourse; it does not mean partial and imperfect intercourse", and continued: "we are of opinion that sexual intercourse cannot be said to be complete when a husband deliberately discontinues the act of intercourse before it has reached its natural termination or when he artificially prevents that natural termination . . . To hold otherwise would be to affirm that a marriage is consummated by an act so performed that one of the principal ends,[59] if not the principal end, of marriage is intentionally frustrated." On the basis of this reasoning, it should be possible to hold that if a person contracted a marriage knowing that he or she was sterile, then that marriage, despite intercourse, could not be considered to be consummated due to the frustration, knowingly, of one of its principal ends. In *L.* v. *L.*,[60] however, Horridge J. expressly said that "mere incapacity to conceive was no ground for a decree of nullity of marriage."

A very different view of the use of contraceptive was taken by the House of Lords only a year after the *Cowen* decision. In *Baxter* v. *Baxter*[61] a wife had refused to permit intercourse without the use of a condom, but it was held there was a vera copula, since there was a complete conjunction of bodies, and that the marriage had been consummated. In the course of his judgment Lord Jowitt L.C. declared that "it is indisputable that the institution of marriage generally is not necessary for the procreation of children, nor does it appear to be a principal end of marriage as understood in Christendom."

Although a marriage in which intercourse is regularly conducted with the assistance of contraceptives is not regarded as null, it does not

mean that a spouse who objects to the persistent use of such methods is without a matrimonial remedy. *Baxter* v. *Baxter* indicated that if a spouse agrees to employ such methods, because to refuse would mean the absence of intercourse, he may still possess his ordinary remedies,[62] and in *Ward* v. *Ward*[63] a husband whose wife refused to permit intercourse without contraceptives obtained a divorce for cruelty as he had become very distressed and nervous. Similarly, when the wife persists in using a diaphragm, knowing that her husband finds this repulsive, the husband will be able to get a divorce on the same ground.[64] A similar result will ensue if, the marriage having been consummated, either spouse persistently refuses to have intercourse and the health of the partner is or is likely to be affected.[65]

It is not only persistent use of mechanical methods of contraception that has been held sufficient to warrant a divorce for cruelty. In *Knott* v. *Knott*[66] a wife petitioned for dissolution alleging that the constant indulgence in coitus interruptus by her husband, contrary to her desire, was affecting her health and therefore amounted to cruelty. Medical evidence supported her contention, and in granting a decree Sachs J. stated: "for a man deliberately and without good reason permanently to deny a wife who has a normally developed maternal instinct a fair opportunity of having even a single child is of itself cruelty when injury to her health results and when the husband adopts a course which preserves to himself a measure of sexual enjoyment."

The problem of sexual enjoyment without procreation has also been considered by the English courts, at least from the point of view of nullity, in cases concerning deficient sexual organs. *B.* v. *B.*[67] concerned a female hermaphrodite whose male organs had been removed surgically. She had no vagina and at the time of the marriage the husband was aware that she could have no children, but was apparently unaware that intercourse was impossible. After marriage, the wife underwent an operation for the provision of an artificial vagina, but since complete penetration was still impossible, the husband left and sued for nullity. The Divorce Commissioner held that since this was a mere connection between the parties not amounting to a vera copula, there was no consummation. By way of *obiter* he expressed the view that there could never be consummation with an artificial vagina.

This *dictum* of Commissioner Grazebrook was expressly disapproved by the Court of Appeal in 1962 in *S.* v. *S.*[68] The wife in this case had no uterus and a short vagina and before marriage had told her fiancé, who already was aware that coitus with her might be difficult, that she could not bear children. The marriage took place in 1955, and in 1958 the husband suggested that the wife take medical advice. By now she had a vagina about an inch long, which the gynaecologist attributed to the husband's attempts at intercourse. The doctor suggested that improvement would result from further intercourse, assisted by a dilator, and pointed out that an artificial vagina could be created by surgery. The wife expressed willingness, but before the operation could be performed the husband left her and the question was shelved. The husband sued for nullity for non-consummation, although medical evidence confirmed that, while there was a clear impediment to normal intercourse, the woman was not a virgin. The Court accepted that the marriage had never been consummated, since "it was not possible for the husband, owing to the abnormality of the wife's sexual organs, to achieve full penetration, or anything like full penetration . . . (But) before relief can be granted it must be shown that the wife's incapacity is incurable . . . . It is admitted that absence of a uterus, and the consequent inability to conceive, is of no significance, and that the fact that the cavity to be created would be a mere cul-de-sac leading nowhere would not of itself be conclusive." Nevertheless, it was contended on behalf of the husband that, even if full penetration could be achieved, intercourse by way of an artificial vagina would not constitute a vera copula, although this would not be the case if it were a question of enlarging what was originally an inadequate vagina. As regards the contention that no vagina existed, the Court was of opinion that this was not actually proved, as the doctors tended to refer to vaginal inspection and the absence of a "normal vagina". Willmer L. J. pointed out that the fact that a doctor was of opinion that consummation was possible by way of an artificial vagina, did not mean that this was conclusive from the point of view of the law,[69] and he found "it difficult to see why the enlargement of a vestigial vagina should be regarded as producing something different in kind from a vagina artificially created from nothing. The operation involved in either case is substantially the same. . . . .In either case the resulting passage has substantially the same characteristics, at any rate for so much of its length as is artificially created. In either case there is no more than a cul-de-sac, and there can be no possibility of a child being conceived. It is admitted, however, that

inability to conceive a child is no ground for saying that the marriage cannot be consummated. It is also admitted that the degree of sexual satisfaction that may be obtained by either or both of the parties makes no difference.... In either case full penetration can be achieved, and there is thus complete union between the two bodies. Counsel for the wife conceded (no doubt rightly) that an artificial cavity created in some other part of the wife's body, into which the husband's organ could be inserted, would not be appropriate. But there is no question of that in the operation suggested. What would be created would be a vagina, albeit an artificial one, and it would be located precisely where a natural vagina would be. In such circumstances, I do not see why intercourse by means of such a vagina should not be regarded as amounting to a "vera copula".... (Unlike the position in *Baxter* v. *Baxter*) in the case of intercourse by means of an artificial vagina, the husband's organ would at least be united, in physical union, with the appropriate part of the wife's body.... If it is to be held that a wife with an artificial vagina is incapable in all circumstances of consummating her marriage, it can only be on the basis that such a woman is incapable of taking part in true sexual intercourse. If that were right, the strangest results would follow. It would involve, for instance, that such a woman might be to a considerable extent beyond the protection of the criminal law, for it would seem to follow that she would be incapable in law of being the victim of a rape.[70] What is perhaps even more startling would be that a woman with an artificial vagina would be incapable in law of committing adultery. Consequently, the wife of a man engaging in intercourse with such a woman would be left wholly without remedy. I should regard such a result as bordering on the fantastic...."

In this case it was indicated that had the husband been fully aware of his wife's disability before the marriage and had despite this contracted marriage, then he would have been considered to have approbated her condition. All the members of the Court of Appeal were at one in dismissing the husband's plea, although it was only Willmer L. J. who expressed disapproval of the dictum in *B.* v. *B.* It is perhaps to be regretted that leave to take the issue to the House of Lords was refused. Having held that the husband could not get a decree of nullity and that there was a valid marriage, the decision means that it is open to the wife to bring an action for divorce on the ground of desertion. There is one other problem arising from this case. It would be interesting to know whether the husband, had he not left his wife, might have been able to bring an action for divorce, paraphrasing Sachs J. in *Knott* v. *Knott,* pleading that "permanently to deny a husband who has a normally developed paternal instinct a fair opportunity of having even a single child is of itself cruelty when injury to his health results and when the wife adopts a course which preserves to herself a measure of sexual enjoyment."

If the law with regard to abstinence, mechanical contraception and artificial genitalia is as indicated above, a similar situation may be expected to prevail in the case of permanent sterilisation, particularly if voluntarily undergone and without the consent of the other spouse. Apart from the matrimonial problems involved, if the Brock Committee were correct in its view that voluntary sterilisation is illegal, it would mean that if a doctor were to perform such an operation with his patient's consent and the patient died, then that doctor would face a charge of manslaughter or perhaps even murder. In his summing-up to the jury *R.* v. *Lumley,*[71] arising out of death in consequency of abortion, Avory J. said: "If the evidence satisfies you beyond reasonable doubt that the prisoner did, in fact, use ... means, for the purpose and with the intention of procuring abortion, and that death resulted from that act, then you must ask yourselves ...: When he did the act, did he contemplate, or must he as a reasonable man have contemplated, that death was likely to result, or must he as a reasonable man have contemplated that grievous bodily harm was likely to result? If, in your opinion, he must as a reasonable man have contemplated either of those consequences, then your duty is to find him guilty of murder. If you are of the opinion ... that he had not at the time in contemplation, and would not as a reasonable man have contemplated, that either death or grievous bodily harm would result, but thought that by his own skill as a medical man he could perform this operation without any risk of either death or grievous bodily harm,[72] then you would be justified in convicting him of manslaughter."

When considering the impact of sterilisation upon marriage, it is necessary to consider the situation when the operation is performed before and after the marriage has been contracted. In *Twiner* v. *Avery*[73] a court in America held that concealment of a pre-marital sterilisation from the prospective spouse was good ground for the annulment of the marriage. Another American court later held that for a party to a marriage to undergo sterilisation without informing the spouse and obtaining his or her

consent might constitute good grounds for divorce on the basis of desertion.[74]

Similar problems have come before the English courts. In *L.* v. *L.* (1922)[75] the wife had undergone, prior to marriage, an ovarian operation involving sterility, a fact of which she was aware. The husband knew of the operation, but maintained that he was unaware of the wife's inability to bear children, and although intercourse had taken place he brought an action for nullity alleging non-consummation. The claim was dismissed on the ground that consummation was not the same as conception, and "mere incapacity to conceive was no ground for a decree of nullity of marriage." Twenty-five years later, in *J.* v. *J.*[76] the court had to consider a case in which the operation had been performed, with the knowledge of the other party, before marriage and in which the marriage had subsisted eleven years. The man had promised his fiancée not to become sterilised, but six weeks before the date of marriage he had the operation. The woman felt that it was by then too late to break off the marriage, and normal coitus with emission by the husband took place. The wife did not know that she might have grounds for nullity, and when she brought her action it was held that the delay was excused by her ignorance of her rights[77] and as there was no insincerity on her part. In view of this it was held that knowledge of impotence was not an absolute bar, and that the husband, "in having the operation, rendered himself incapable of effecting consummation by reason of a structural defect which he had himself brought about in his organs of generation."[78]

The English *cause célèbre* in relation to sterilisation, and the one that is of most importance for the medical profession, is undoubtedly *Bravery* v. *Bravery*.[79] The marriage took place in 1934 and a child was born in 1936. Two years later the husband had himself sterilised. Intercourse continued until the wife left in 1951. The wife sued for divorce alleging cruelty, and it was held that she knew of the operation, apparently never made any strong objection, and really left because of his bad temper and not the sterilisation. The decree was refused, and this refusal was confirmed by the Court of Appeal, with Denning L. J. dissenting. In the course of their joint judgment, Evershed M. R. and Hodson L. J.[80] commented that "as between husband and wife for a man to submit himself to such a process without good medical reason ... 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. It is also not difficult to imagine that if a husband submitted to such an operation without the wife's consent, and if the latter desired to have children, the hurt would be progressive to the nerves and health of the wife.... We feel bound to dissociate ourselves from the more general observations of Denning L. J.... in which he expressed his view (as we understand it) that the performance on a man of an operation for sterilisation, in the absence of some 'just cause or excuse' ... is an unlawful assault, an act criminal per se, to which consent provides no answer or defence. The court must, no doubt, take notice of any relevant illegality which appears in the course of any proceeding before it; but in the present case both the general question, whether an operation for sterilisation is prima facie illegal, and the more particular question whether the operation here performed was a criminal assault, are alike irrelevant to the issue to be determined.... We are not prepared to hold in the present case that such operations must be regarded as injurious to the public interest.... In our view, in the circumstances of the present case, it is neither the duty nor the function of this court to do more than draw attention to the obviously grave potentialities of such an operation for the parties to the marriage...."

It is important to bear in mind that although the majority of judges upheld the marriage, they did so on its particular facts, finding the allegations of cruelty not proved. They did not hold sterilisation operations by consent were legal, since they were of opinion that the matter was not in issue. Denning L. J., in the course of his dissent, made a number of remarks that are of significance from the point of view of the medical practitioner.[81] In his view the fact that the wife did not go to the surgeon and protest at the husband's proposal to be operated upon was irrelevant: "It was not for her to approach the surgeon, but for the surgeon to approach her.... There was no just cause for this operation at all (—it appeared from the evidence that the husband did it to spite the wife for showing too much affection to the child of the marriage—). If the husband had undergone it without telling his wife about it beforehand, no one could doubt that it would be cruelty.... When this husband was sterilised, the effect of it was not over and done with at once, like a blow with the fist or like an act of adultery. This operation had an effect which continued, day in and day out, year in and year out, throughout the marriage. No act of sexual intercourse could result in a child. The effect on the wife's health might not be immediate. It might

have a delayed effect.... An analogy is, I think, to be found from the criminal law about surgical operations. An ordinary surgical operation, which is done for the sake of a man's health, with his consent, is, of course, perfectly lawful because there is just cause for it. If, however, there is no just cause or excuse for an operation, it is unlawful even though the man consents to it.... (The learned Lord Justice referred to the Leicester case reported by Coke.) ... Another instance is an operation for abortion, which is 'unlawful' within the statute unless it is necessary to prevent serious injury to health. Likewise with a sterilisation operation. When it is done with the man's consent for a just cause, it is quite lawful, as, for instance, when it is done to prevent the transmission of an hereditary disease; but when it is done without just cause or excuse, it is unlawful, even though the man consents to it. Take a case where a sterilisation operation is done so as to enable a man to have the pleasure of sexual intercourse without shouldering the responsibilities attaching to it. 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 whom he marry, to say nothing of the way it opens to licentiousness; and, unlike contraceptives, it allows no room for a change of mind on either side. It is illegal even though the man consents to it.... If a husband undergoes an operation for sterilisation without just cause or excuse, he strikes at the very root of the marriage relationship. The divorce courts should not countenance such an operation for sterilisation any more than the criminal courts. It is severe cruelty. Even assuming that the wife, when young and inexperienced, consented to it, she ought not to be bound by it when in later years she suffers in health on account of it, especially when she was not warned that it might affect her health. ..."

It is clear from these statements that Denning L. J. (now Lord Denning, Master of the Rolls) recognises that there may be a "just cause or excuse" which would render a sterilisation operation lawful. He would, apparently, recognise that sterilisation for therapeutic or eugenic purposes done with consent, although it is not clear whether he regards the consent of the other spouse as essential, would be a lawful operation. It is equally clear that, in his view, sterilisation for contraceptive or socio-economic purposes is unlawful, and remains so whether consent is given or not. The comment with regard to "licentiousness" is not really of major significance. If it were, then, to be consistent, Lord Denning would be compelled to attack the use of contraceptives, whereas earlier in the judgment he indicated that the same effect could legitimately have been achieved by the husband by their use.

Before leaving the *Bravery* case, mention should be made of the fact that, despite Lord Denning's comments, vasectomy can, as was pointed out in the case, be reversed. Further, although this case as well as *J.* v. *J.* dealt with sterilisation of the man, and the judges made their comments in reference to the husband, what they said is equally true of female sterilisation and of the wife. On the other hand, since, at the time the common law developed, women did no military service, it may be doubted whether sterilisation of the female would amount to common law mayhem.[82]

In view of the differences expressed in the opinions of the members of the Court of Appeal, it is perhaps not surprising that the 1955 volume of *British Surgical Practice* states that the decision in *Bravery* v. *Bravery* supports the legality of voluntary sterilisation operations,[83] while the 1956 edition of the *British Encyclopaedia of Medical Practice* is of opinion that the decision reinforces the doubts as to the legality of such operations.[84] In fact, it is stated in Sir Eardley Holland's *Obstetrics*[85] that the operation is legal only when undertaken to preserve the life of the patient or to avert serious injury to physical or mental health.

If one is to assume that Lord Denning's approach to the law is correct, one is thrown back upon the position that any operation is legal only when there is just cause, which leads Minty to suggest that "a medical practitioner, having received his training largely at the public expense and by being put on the medical register thus being put in a favoured position to be able to handle dangerous drugs, etc., should not use his privileges and skill for anything but a purely therapeutic purpose. He therefore should not concern himself with the making of money by carrying out face lifting operations and other cosmetic activities. A surgeon who charges high fees by persuading elderly ladies to have their faces lifted or their noses straightened may be said to be battening upon the foibles and silliness of these women instead of practising legitimately the profession for which he was trained and given special privileges.... (On the other hand,) it often happens that when the victim of a road accident is claiming damages, among the items of special damage is a sum to cover the cost of a plastic surgery operation to remove the scars due to the victim's face having been badly cut by the glass from

the windscreen shattered in the accident[86,87]. In other words, we are back at considering when an operation is medically necessary.

Reference has already been made to the case of *R.* v. *Bourne*. Perhaps what is necessary at the present moment and from the point of view of meeting the threat of the population explosion is for some doctor possessing Bourne's courage and determination to take steps similar to those taken by his illustrious predecessor. Perhaps somewhere there is an unknown Bourne prepared to inform the police that he is about to perform an operation, concerning the legality of which there may be doubts, and that he intends, despite these doubts, to proceed, confident in the knowledge that if a prosecution is mounted an acquittal will follow.

There are, of course, some countries in which sterilisation with the consent of the patient is perfectly legal. Thus a Swedish statute of 1941 recognises a woman's right to have herself sterilised for eugenic, social, medical, and medico-social reasons.[88] To a certain extent, this statute forecasts the definition of health in the Constitution of the World Health Organisation. It provides the justification for a doctor, whether the physical—or mental—health of his patient demands such an operation or not, to perform a sterilisation operation on any grounds that he and his patient consider just. To a great extent, this is as it should be. Generally speaking, all operations should be the concern of the patient and his or her medical adviser, although the lawyer must be aware of the risks of abuse that are inherent in the situation.[89]

To talk of sterilisation in the context of the patient's health tends, as does the Swedish statute, to confine the operations to women only. This would be contrary to the human rights provisions of the Charter of the United Nations and the underlying basis of the Universal Declaration of Human Rights, both of which are concerned with the eradication of discriminatory treatment not merely on the ground of race, but on the ground of sex as well. If one keeps in mind the World Health Organisation concept of health as a state of complete physical, mental and social well-being, it should be possible to extend such rights as those in the Swedish statute to men. Regardless of what the position may be in Sweden, in the United Kingdom, and those countries whose law stems from English law, it is commonly said that in statutes, unless the opposite is clearly intended, "man always embraces woman."[90]

In so far as the position in Singapore is concerned, this is almost certainly the same as in the United Kingdom. It is true that during 1962 home visitors sent out by the Family Planning Association ascertained that 78 patients who had ceased attending clinics, did so because they had been sterilised.[91] There is, however, no Singapore Ordinance authorising such operations, and if Lord Denning's view of the position is correct most of them will have been unlawful. The fact that the Government of Singapore officially supports the work of the local Family Planning Association[92] and made a grant of M$100,000 to its funds in 1962[93] does not mean that unlawful operations are therefore made lawful. A declaration of Government policy, however sympathetic to contraceptive methods of every kind, is insufficient, for Government statements do not amend the law. Despite these statements, it would be open to the State Advocate General to institute proceedings against the practitioner concerned for having performed an illegal operation, or against the patient for having submitted to one. Whatever might be the form or content of any government statement, in the absence of clear statutory permission the position remains as it is at common law. That is to say, there is some doubt as to the legality of sterilisation operations in the absence of "lawful cause or excuse", whatever that may mean, although the *Bourne* case indicates that matters may not be so bad as Lord Denning has implied.

While the position at common law is such as to leave doubts as to the legality of sterilisation operations, it is possible[94] that under the Singapore Penal Code[95] the position may be different. Thus, by section 87, "nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death, or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm." There can be no doubt that a doctor performing a sterilisation operation does not intend to cause death or grievous hurt. However, by section 320 of the Code it is expressly stipulated that "grievous hurt" includes "Firstly — emasculation; ... Fifthly — destruction or permanent impairing of the powers of any member or joint ..."

"Emasculation" has not been judicially defined, and according to the Oxford Dictionary it means "the action of depriving of virility; the state of impotence;" while in Ratanlal's

*Law of Crimes*[96] it states that the term means "the depriving a person of masculine vigour, castration. Injury to the scrotum would render a man impotent." Lest it be contended that this seems to confine the act to male persons, it should be pointed out that under section 8 "the pronoun 'he' and its derivatives are used of any person, whether male or female", and presumably this is equally true of the commentary. Further, in 1860 and 1872 it is feasible that sterilisation as we now know it was not envisaged, and therefore it becomes necessary to define the terms that have been used sufficiently widely to apply to modern practice too. As regards the term "member", while this prima facie is used to indicate the limbs, it is in law frequently employed to indicate the male sexual organ.

The combined effect of sections 87 and 320 is that an operation performed for other than purely medical reasons, in the narrow meaning of the term, with the intention of "emasculating" the patient, or destroying or permanently injuring the powers of any of his or her members, is an illegal operation since it constitutes "grievous hurt". As is the case with other illegal operations, consent does not constitute a defence, as is clear from section 87 itself. Ratanlal's comment in this connection is that "where an act is in itself unlawful, consent can never be an available defence."[97]

Section 88 of the Penal Code is also relevant to any argument aiming to suggest that sterilisation is legal, particularly if it is asserted that this does not constitute "grievous hurt" within the terms of section 320. By section 88, "nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person *for whose benefit it is done in good faith, and who has given a consent,* whether express or implied, to suffer that harm, or to take the risk of that harm."[98] This would imply that even an act constituting "grievous hurt" does not amount to an offence if done with the consent of the patient and for his benefit. There can be no question that if the reason for the sterilisation operation is therapeutic it would be protected by this section. Eugenic sterilisation, however, is for the benefit of the community at large and not for that of the patient and would not be so covered. Contraceptive or socio-economic sterilisation would also not be covered, especially as "mere pecuniary benefit is not benefit within the meaning of this section."[99]

It would still appear, therefore, that in most of the cases in which sterilisation is now performed, no protection is afforded by the Penal Code. The Singapore medical practitioner is thus probably in the same position as his colleague in the United Kingdom, and a decision as to the legality of the operation can only be certain if and when a medical practitioner has been prosecuted.

In order to clarify the position and remove any doubts the medical practitioner may have in his mind when called upon to perform a socio-economic or contraceptive sterilisation operation, there is no doubt that legislation clearly declaring such operations to be legal is desirable. In India statutory provision for voluntary sterilisation exists, but from the point of view of family planning propaganda it is perhaps unfortunate that a payment is made to the male submitting to vasectomy. It is true that the payment takes the form of compensation for wages lost while attending the medical centre, but it carries the impression of compensation for deprival of a specific function. In fact, the Indian Tea Association goes even further. The birth rate of the Association's Assam Branch is so high that its family planning programme is to reduce it by half. In an attempt to encourage sterilisation on the estates the Tea Association has agreed to pay a sterilisation bonus to volunteers in its employ.[100]

The whole purpose of education for family planning, whether by way of mechanical contraception or surgical sterilisation, should be directed to convincing the public that the action taken or suggested is for the benefit of the person concerned. Statutory draftsmen should be required to bear this in mind, while those promoting the legislation should remember that anything that looks like compensation, whatever the guise under which it is introduced, suggests that rather than doing a service to the patient, he is being deprived of something which requires compensation, and, in the view of French law, is "incompatible with human dignity."[101]

## REFERENCES


1. A.J. Peaslee, *International Governmental Organisations*, Vol. 2, p. 1881, 2nd Revised Edition, 1961. Martinus Nijhoff. The Hague: Netherlands.
2. (1939) 1 K.B. 687.
3. 19 and 20 Geo. 5, c.34, s.1.
4. 24 and 25 Vict. c.100, s.58.
5. United Nations, *Year Book on Human Rights for 1948*, p. 466. United Nations. New York: U.S.A.
6. Art. 16, 1. See also *Skinner* v. *Oklahoma* (1942) 316 U.S. 535 *per* Justice Douglas, at p. 536.
7. Art. 5.

8. *Year Book on Human Rights for 1948*, p. 484.
9. Art. 2 (d).
10. *Att.-Gen.* v. *Adolf, son of Adolf Karl Eichmann* (1961) Crim. Case 40/61, Crim. App. 356/61.
11. Indictment, 4th Count (a), (c)(3) (see S. Rosenne, *6,000,000 Accusers: Israel's Case against Eichmann*, p. 17, 1961. Jerusalem Post. Jerusalem: Israel).
12. A mass murderer who killed and mutilated a number of prostitutes in London's 'East End' at the end of the nineteenth century.
13. See, e.g., N. St. John-Stevas, *Life, Death and the Law*, p. 227, 1961. Eyre & Spottiswoode. London: U.K.
14. Supplemental Nights, Vol. 1, p. 70 Burton Club Edition. 1887.
15. *Christensen* v. *Thornby* (1934) 93 A.L.R. 570.
16. J.B. McWhinnie, *Denmark—A New Look at Crime*, p. 6, 1961. Institute for the Study and Treatment of Delinquency. London: U.K.
17. United Nations, *International Review of Criminal Policy*, No. 12, p. 13, 1957. United Nations. New York: U.S.A.
18. St. John-Stevas, *op. cit.*, App. VIII-X.
19. (1942) 316 U.S. 535, at 536, 541.
20. In fact, male vasectomy can be reversed. At the Singapore conference, Dr. G. Phadke of Bombay reported on 18 cases in which the vas had been rejoined after vasectomy. In 15 of these, the semen showed sperms, and 9 of the 15 impregnated their wives.
21. Arizona, Mississippi, New Hampshire, *etc.*, see St. John-Stevas, *op. cit.*, pp. 296, 302, 304.
22. *Ibid.*, p. 297; Kansas, p. 300; Utah, p. 307.
23. For reference to such occurrences in the United States, see L.M. Minty, "Unlawful Wounding; Will Consent Make It Legal?", *Medico-Legal Journal*, vol. 24, p. 54, at pp. 61-62. 1956. Heffer. Cambridge: U.K.
24. *Keyling* v. *Keyling* (1942) 23 Atl. 800.
25. 93 A.L.R. 570.
26. *Murray* v. *McMurchy* (1949) 2 D.L.R. 442, 445 (italics in original).
27. (1952) 241 Pac. 2d 1028.
28. St. John-Stevas, *op. cit.*, p. 164, n.1.
29. *Eugenics Review*, 29:9, 1937/8. London: U.K. (cited *ibid.*, p. 161).
30. F.L. Schuman, *Hitler and the Nazi Dictatorship*, p. 382, 1936. Robert Hale. London; U.K.
31. St. John-Stevas, *op. cit.*, p. 174. For a state-by-state breakdown of the figures, see App. V, p. 291.
32. (1927) 274 U.S. 200,208 (italics added).
33. *The Sanctity of Life and the Criminal Law*, p. 82, 1958. Faber & Faber. London: U.K.
34. Sir Percy Winfield, "The Unborn Child", *Cambridge Law Journal*, vol. 8, p. 76 at p. 77, 1942. Stevens. London: U.K.
35. *The George and Richard* (1871) L.R. 3 Ad. & Ecc. 466.
36. *Walker* v. *Great Northern Rly. of Ireland* (1890) 28 L.R. Ir. 69.
37. *Montreal Tramways Co.* v. *Leveille* (1933) 4 D.L.R. 337.
38. *Trail Smelter Arbitration* (1938/41) United Nations, *Reports of International Arbitral Awards*, Vol. 3, p. 1905, at p. 1929. United Nations. New York: U.S.A. (L.C. Green, *International Law Through The Cases*, p. 777, 2nd Edition, 1959. Stevens. London: U.K.).
39. 19 and 20 Geo. 5, c.34, s.1.
40. *R.* v. *Senior* (1832) 1 Moo. C.C. 346.
41. *R.* v. *Shepherd* (1919) 2 K.B. 125.
42. *Christensen* v. *Thornby* (1934) 93 A.L.R. 570.
43. Report of Departmental Committee on Sterilisation, 1934. Cmd. 4485. H.M. Stationery Office. London: U.K.
44. *Bravery* v. *Bravery* (1954) 3 All E.R. 59, at 67.
45. *Ex parte Eaton* (1954) cited St. John-Stevas, *op. cit.*, p. 163, n.2.
46. 12th Edition, s. 182, 1932. Lawyers' Co-op Publ. Co. Rochester: U.S.A.
47. *Coke on Littleton*, ss. 127a, 127b. 1628. Society of Stationers. London: U.K.
48. Hawkins, *Pleas of the Crown*, p. 107, 1739. Nutt. London: U.K.
49. *Wharton's Criminal Law*, Vol. 1, p. 733, Anderson Edition, 1957. Lawyers' Co-op. Publ. Co. Rochester: U.S.A.

49a. S. 320, see below.

50. *Commentaries*, Bk. 4, Ch. 15, I, 1768. Clarendon Press. London: U.K.
51. D. Lloyd, *Public Policy*, p. 29, 1953. Athlone Press. London: U.K.
52. For a similar request by Byron with regard to his club-foot, see Minty, *loc. cit.*, p. 58.

52a. It may be of interest to mention a case that came before the Burmese courts: A claimed to be proof against edged instruments and invited B to test his claim. B thereupon cut A on the arm inflicting a wound as a result of which A bled to death. It was held that A's consent was given under a misconception of fact, but that in the circumstances B could not be supposed to be aware of his mistake. B had no intention of causing death or grievous hurt and was therefore entitled to the benefit of section 87, *Shwe Kin* (1915) AIR (LB) 101 (for a discussion of ss. 87 and 320 of the Penal Code see below).

53. Lloyd, *op. cit.*, p. 29.
54. (1934) 2 K.B. 498 *per* Swift J. at 507.
55. *Op. cit.*, n.33 above, p. 103.
56. *R.* v. *Coney* (1892) 8 Q.B.D. 534 *per* Stephen J. at 539. In *R.* v. *Hargrave* (1831) 5 C & P 170 it was held that all present at and sanctioning a prize fight where one of the contestants is killed are equally guilty of manslaughter.
57. (1946) P. 36, 40.
58. (1845) 1 Rob. Ecc. 279, 298.
59. The Book of Common Prayer lists the causes for which matrimony is ordered: "first, the procreation of children . . ." See also *G.* v. *M.* (1885) 10 A.C. 171: "The procreation of children being the main object of marriage, the contract contains by implication, as an essential term, the capacity for consummation", *per* Lord Fitzgerald at 204.

60. (1922) 38 T.L.R. 697, 698.
61. (1948) A.C. 274, 286.
62. At p. 282.
63. (1958) 1 W.L.R. 693.
64. *Forbes* v. *Forbes* (1956) P. 16.
65. *Lawrance* v. *Lawrance* (1950) P. 84.
66. (1955) P. 249, 256. See Also *Cacket* v. *Cacket* (1950) P. 253.
67. (1955) P. 42, 46, 47.
68. (1962) 3 All E.R. 55, 58, 59.
69. At pp. 62, 63.
70. It is quite clear, however, that if there is any vestige of a vaginal opening, she may be the victim of rape, for only the slightest penetration of the body is necessary, see *R.* v. *Lines* (1844) 1 C & K 393: the question is "whether, at any time, any part of the virile member of the prisoner was within the labia of the pudendum of the prosecutrix: for, if it was (no matter how little), that will be sufficient to constitute a penetration."
71. (1911) 22 Cox C.C. 635.
72. It may well be questioned whether there is, in fact, any operation, legal or illegal, "without any risk of either death or grievous bodily harm." Minty, *loc. cit.* p. 59, says of salpingectomy: "It is about as serious as a simple appendicectomy, but there can be no absolute guarantee against complications and fatal results."
73. (1921) 113 Atl. 710. Similar decisions have been rendered in other states, see *Aufort* v. *Aufort* 49 P. 2d 620, *Vileta* v. *Vileta* 128 P. 2d 376, *Stegianko* v. *Stegianko* 295 N.W. 252, and *Osborne* v. *Osborne* 191 A. 783.
74. *Keyling* v. *Keyling* (1942) 23 Atl. 2d 800.
75. 38 T.L.R. 697.
76. (1947) P. 158.
77. In *C.* v. *C.*, *The Times* (London), Oct. 30, 1961, a delay of 28 years was not considered too long.
78. Per Somervell L.J. at p. 161.
79. (1954) 3 All E.R. 59.
80. At pp. 61, 63, 64.
81. At pp. 65, 66, 67.
82. Minty, *loc. cit.*, p. 59.
83. *Surgical Progress*, p. 155. Butterworths. London: U.K.
84. *Medical Progress*, p. 112. Butterworths. London: U.K.
85. *Per* Stallworthy, p. 361. 1955. Heinemann. London: U.K.
86. *Lampert* v. *Eastern National Omnibus Co. Ltd.* (1954) 2 All E.R. 719.
87. Minty, *loc. cit.*, p. 60.
88. Williams, *op. cit.*, p. 80.
89. Minty, *loc. cit.*, p. 62.
90. Interpretation Act. 1889 (52 & 53 Vict. c. 63) s.1, Singapore Penal Code S.8.
91. Singapore Family Planning Association, *13th Annual Report 1962*, p. 25.
92. See Foreword to Report by Prime Minister, *ibid.*, p. 3.
93. *Ibid.*, p. 41.
94. I am grateful to Mr. David Marshall for having drawn my attention to this possibility.
95. 1872. *The Laws of the Colony of Singapore*, 1955 ed., Ch. 119 (re-enacting the Indian Penal Code 1860). Government Printer: Singapore.
96. 20th edition, p. 838, 1961. Bombay Law Reporter (Pte) Ltd. Bombay: India.
97. *Op. cit.*, p. 180.
98. Italics added.
99. Ratanlal, *op. cit.*, p. 182, citing Stephen, *Digest of Criminal Law*, Art. 226.
100. *News of Population and British Control* (London), No. 108, Oct. 1962.
101. See text to n.53 above.