THE LAW, SEX AND THE POPULATION EXPLOSION

> Man with all his wisdom toils for heirs he knows not who *(Nevison* v. *Taylor* (1824) 8 N.L.J. 43, 46, *per* Kirkpatrick C.J.)
>
> Sex — The sum of the peculiarities of structure that distinguish a male from a female organism (Webster, *Dictionary*)

In 1962 the International Planned Parenthood Federation held a conference on family planning in Singapore at which the writer was invited to speak on legal problems concerning sterilisation. This address formed the basis of a paper which appeared in the Malaya Law Review [1] and stimulated the writer's interest in a field that has had increasing appeal for him, beyond that which might be expected in an international lawyer even in the light of current discussions on the international implications of the population explosion and internationally inspired control programmes. Within the last ten or fifteen years in particular, concern with ecology, the exhaustion of natural resources and the like has resulted in international as well as local concern in so far as population and its rate of increase are concerned. This interest has affected writers, both lay and learned,[2] and on an official level reached its culmination with United Nations sponsored World Population Conferences held in Belgrade in 1965 and Bucharest in 1974. The sociological aspects of the matter range from migration[3] and the movement and direction of populations to population control, with some countries seeking to achieve zero-growth. In some cases state-enforced policies have been advocated and proposals in India have been among the most far-reaching, but for the main part such policies are not looked upon with favour, for they soon revive memories of Nazism and the shadow of genocide. In fact, the Genocide Convention[4] includes in its definition of this crime:

> ... (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) imposing measures intended to prevent births within the group..

Before international interest became so marked, population control was considered a matter essentially private to the individuals concerned, although governments did not hesitate to introduce legislative controls and sometimes complete bans on the modes that might be applied to achieve this end. In some Catholic countries, for example, any form of contraceptive practice was officially banned and the sale, supply or advertisement of contraceptive devices was illegal. It was

[1] (1963) 5 Mal. L.R. 105.
[2] See, e.g., Lee, *Population and Law* (1971), the first vol. in Duke University's Law and Population series.
[3] Plender, *International Migration Law* (1972), vol. 2 of the Duke series.
[4] 1948, 78 U.N.T.S. 277, Art. 2.

not until the end of 1973 that the Irish Supreme Court confirmed the woman's constitutional right to import contraceptives,[5] although their sale in Eire remained illegal. Even in the United States it was only as recently as 1965 that the Supreme Court struck down as unconstitutional a Connecticut statute making the imparting of contraceptive information criminal,[6] while before the Canadian Criminal Code was amended in 1968[7] their advertisement or public sale was banned. On a more general level, most municipal systems made abortion a criminal offence, although the decisions of the United States Supreme Court in *Roe* v. *Wade* and *Doe* v. *Bolton*,[8] which upheld the right of the woman to seek, and of her doctor to perform an abortion within a named period, while totally ignoring any 'right' of the putative potential father, introduced a series of amending statutes in a variety of countries, though rarely recognizing the woman's right to an abortion on demand.

It has always been contended that the purpose of such legislation is not contraceptive, but sociological in the interests of the mother or to avoid defective births. But such legislation, accompanied by allegations that, despite safeguards or prescribed restrictions, it is being abused, to allow abortion on demand, has resulted in a backlash leading to proposals for further 'reform' which would in fact reintroduce limits on the right to abortion,[9] This reaction has even expressed itself in electoral programmes, as in Italy in 1976, and in suggestions by United States potential presidential candidates that if elected they would introduce a constitutional amendment to forbid abortion in any circumstances. Moreover, the opposition of the Catholic Church has been such that even when the Italian government by exceptional decree permitted the abortion of pregnant women whose foetuses may have been adversely affected by the poison gas released by the Saveso chemical works explosion, the Vatican condemned the measure and called for foster parents to come forward to adopt any deformed infants that might be born. In the Federal Republic of Germany the Federal Constitutional Court held in 1975 that the Abortion Act infringed s. 2(2) of the Constitution providing that "everyone has the right to life and to physical inviolability". The Court considered the embryo's right to life to be inherent, and:

> since the right of life of the unborn child and the right of the mother to free personal development *(auf frei Entfaltung ihrer Personalichkeit),* including a right to secure freedom from childbearing by abortion, cannot be secured simultaneously, the Constitution Articles are absolute and require a decision giving priority to the right of the unborn child, over the self-determination of the mother *(sugunsten des Vorrangs des Lebenschutzes fur die Liebesfrucht vor dem Selbstbestimmungsrecht der Schwangeren).*[10]

On the other hand, when the French *Conseil Constitutionnel* was faced also in 1975 with a statute containing almost the same language as that in the German Abortion Act it held that this act was incompatible with the constitutional guarantee of the right to life.[11]

5 *The Times* (London), 12 Dec. 1973.
6 *Griswold* v. *Connecticut* (1965) 381 U.S. 479.
7 S.C. 1968-69, c. 41, s. 13.
8 (1973) 410 U.S. 113, 179, resp.
9 See, e.g., U.K. Abortion (Amendment) Bill, 1975.
10 1 Human Rights Rev. (1976) 7.
11 *Ibid*., 8.

Apart from abortion and mechanical aids to contraception, there remains sterilisation, in which surgical aid is invoked by a man or woman in order to interrupt reproductive capacity, although in some cases further surgery can effect a repair.[12] For a variety of reasons, many countries have in the past forbidden or discouraged resort to sterilisation, often because of the fear of abuse — one often meets allegations that doctors in hospitals catering to the needs of underprivileged groups frequently perform unnecessary hysterectomies, without always informing the woman of the nature of the treatment which is being provided. Today, however, most of the legislative restrictions have been raised, and population experts, frequently with governmental backing, advocate sterilisation as the most effective method of population control. In some cases, however, unfortunate personal complications have arisen when parties who have been sterilised regret the finality of the operation since they desire further children, perhaps because their economic status has changed or because the sterilised party has formed a relationship with a new partner.

While a number of the medico-legal and social questions relating to sterilisation may have been resolved by reason of the change in social environment, many of the original issues, especially those of a sociological character, remain relevant in other connections. This is particularly so in relation to recent genetic engineering efforts[13] affecting, for example, sex changes — thus Jan Morris,[14] formerly a man and now a woman, has disclosed that his children now address him as an aunt. Similarly, as a result of changes in life-style, attempts have been made to regularize uni-sexual marriages with consequent serious juridical problems.[15] Moreover, in a different field, operations involving the implant of a new heart raise interminable controversy as to the moment of death, while proposals to recognize a right to recover for pre-natal injury focuses attention on the right not to be born.[16]

In a sense, sterilisation is, of course, nothing but a surgical operation like any other and, on occasion, has to be performed for straightforward medical reasons. This, however, is not the case when a person wishes to undergo sterilisation for ideological reasons, or

[12] At the Singapore Conference Dr. G. Phadke of Bombay reported on 18 cases in which the male vas had been rejoined: in 15 the semen showed sperm, and 9 of these impregnated their wives. In July 1976 a team of doctors at Louvain's Catholic University announced that they had perfected an operation which could produce temporary sterilisation in the female (*The Times* (London), 8 Sept, 1976).

[13] E.g., Taylor, *The Biological Time Bomb* (1968); Hilton & Harris, *Ethical Issues in Human Genetics* (1970); Stringer, *Ethics and Judgment in Surgery and Medicine* (1970); Newell & Simon, *Human Problem Solving* (1972); Fletcher, *Ethics of Genetic Control*: *Ending Reproductive Roulette* (1974); Friedmann, 'Interference with Human Life: Some Jurisprudential Reflections' (1970), 70 Col. Law Rev. 1058: Humber and Almeder, *Biomedical Ethics and the Law* (1976).

[14] *Conundrum* (1974); see, also *Corbett* v. *Corbett* [1970] 2 W.L.R. 1306 (fn. 64, p. 114), and the case of Dr. Renee Richards see fn. 69, p. 116.

[15] See, e.g., Manitoba decision in *North and Vogel* v. *Matheson* (1974 — reported as *re North et al & Matheson* (1974) 52 D.L.R. (3d) 280).

[16] See, e.g., Edwards, 'The Problem of Compensation for Antenatal Injuries', (1973) 246 *Nature* 54. See also, U.K., Report on Injuries to Unborn Children, Cmnd. 5709 (1975).

because his wife is physically incapable of further confinement, or when it is contended that the potential patient should be sterilised in the interest of her future welfare. But in this connection reference must be made to the definition of health to be found in the Preamble to the Constitution of the World Health Organization,[17] which has significance for both the doctor and the lawyer:

> Health is a state of 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.

It is probably difficult to contend that this definition is not wide enough to cover both the individual who wishes to achieve mental peace for either egotistic reasons or out of consideration for the welfare of society, as well as the one who seeks the operation to save his partner from further childbearing risks.

The problem of what constitutes health confronted lawyers and doctors long before the establishment of the World Health Organization. It was brought to the forefront of public and professional consideration by the case of *R.* v. *Bourne*,[18] the decision in which has constituted a landmark in the development of the law. The charge arose from an operation for abortion and not sterilisation, and 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 United Kingdom Infant Life Preservation Act, 1929[19] and the Offences against the Person Act, 1861,[20] which then governed the situation, an induced miscarriage was 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 knowledge, 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 thereupon 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.[21]

17 1948, 14 U.N.T.S. 185.
18 [1939] 1 K.B. 687, 693-4, *per* Macnaghten J.
19 19 & 20 Geo. 5, c. 34, s. 1.
20 24 & 25 Vict. c. 100, s. 58.
21 See, e.g., *Murray* v. *McMurchy* (1965) 381 U.S. 479.

The Constitution of the World Health Organization 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 operation 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 psychosomatic 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" — but does it also extend to the criminal on the run, whose 'mental and social well-being' may well depend on a cosmetic operation that completely alters his facial characteristics?

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,[22] whereby the General Assembly of the United Nations went on record that everyone, regardless of race, culture, language or religion, has the *right* to found a family[23] although the Soviet Union, which abstained on the vote, has prevented Soviet women from joining their foreign husbands abroad, while Australia, which voted for it, refused to allow Japanese wives to join their Australian husbands in Australia, and the United States, which was a prime mover in drafting the Declaration, in some of its states treated marriages across the colour line as criminal.[24] The right raises the problem of consent, particularly as the Declaration also provides that no one shall be subjected to cruel, inhuman or degrading punishment,[25] and this itself touches a specific aspect of the legal nature of sterilisation. These provisions have now been given full legal validity with the entry into force of the International Covenant on Civil and Political Rights, 1966,[26] by Article 6 of which "every human being has the inherent right to life [, which] right shall be protected by law [and] no one shall be arbitrarily deprived of his life." Article 7, which bans cruel, degrading and inhuman treatment or punishment, specifically states "no one shall be subjected without his free consent to medical or scientific experimentation", which may well cause difficulties in those cases where it is suggested that sterilisation *might* perhaps serve a societal purpose by minimising the sexual or aggressive urge of an offender.

Finally, as already mentioned, there is the Genocide Convention, also a binding treaty. Broadly, it is directed against organised crime the purpose of which is to deny the character of a group *qua* group,

[22] Res. 317A (III).
[23] Art. 16(1). See *Skinner* v. *Oklahoma* (1942) 316 U.S. 535, 536, *per* Douglas J., and *Re D (A Minor)* [1976] 2 W.L.R. 279, *per* Heilbron J.
[24] See, e.g., Green, 'Human Rights and the Colour Problem' (1950) 5 *Curr. Legal Prob.* 236, 245.
[26] Art. 5.
[26] Res. 2200 (XXI).

and includes the imposition of measures intended to prevent births within the group. The significance of this type of activity as an international crime was made clear in the trial of Adolf Eichmann.[27] Although Eichmann was not charged with genocide *per se,* he was accused 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.

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.[28] In so far as heterosexual misconduct is concerned, it must be borne in mind that, despite popular misconceptions to the contrary, 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*,[29] 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 stated that male sterilisation "frequently improves the health and vigour of the patient." [30]

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.[31] It would appear from this that the principle of consent is preserved, just as it seems to have been preserved in other medical experimental schemes conducted in United States prisons and elsewhere, and portrayed so effectively in a film like Kubrick's *Clockwork Orange.* 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 Nor-

27 *Eichmann* v. *Att. Gen., Israel* (1962) 36 Int'l Law Rep. 5, 277.
28 See, e.g., St. John-Stevas, *Life, Death and the Law* (1961) 227.
29 1 *Supplemental Nights* (Burton Club ed., 1887), 70.
30 *Christensen* v. *Thornby* (1934) 93 A.L.R. 570, 572, *per* Loring J.
31 McWhinnie, *Denmark — A New Look at Crime* (1961), 6.

wegian 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.[32] There have been instances in Canada recently where a convicted sexual offender has sought to secure a reduction in sentence by volunteering to submit to sterilisation. In one instance, the judge himself hinted at this possibility which met with public disapproval and a refusal by the medical profession to operate in such circumstances.

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.[33] Twenty-eight of the states possessed such legislation, and in only Minnesota and Vermont was 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 is that of 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 convicted of the crime of rape, incest, sodomy, the delinquency of a minor by sexual act or act of sexual perversion [—and this would seemingly include oral sex —], the crime against nature....

Somewhat similar legislation formerly existed in Alberta, Canada, under the Sexual Sterilization Act,[34] permitting sterilization, sometimes without the patient's consent, of psychotics, mental defectives, epileptics, sexual recidivists, and the like. This was, however, repealed in 1972[35] as being contrary to the Alberta Bill of Rights.[36]

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 embezzlement. In *Skinner v. Oklahoma*[37] the Supreme Court had to consider the challenge to this statute lodged on behalf of an individual who had been convicted of stealing chickens

[32] 12 Int'l Rev. of Crim. Policy (1957) 13; for evidence of Nazi practices, see Nuremberg Proceedings, vol. 10, 21, vol. 20, 238.
[33] St. John-Stevas, *op. cit.*, App. VIII-X.
[34] R.S.A. 1970, c. 341.
[35] 1972, c. 87.
[36] 1972, c. 1.
[37] (1942) 316 U.S. 536, 541, 546.

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 deprived 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 devastating 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.[38] Any experiment which the State conducts is to his irreparable injury.[39] 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. In fact, the latter almost went so far as to condemn any compulsory eugenic sterilisations as unconstitutional:

> I think the present plan to sterilize the individual in pursuit of a eugenic plan to eliminate from the race characteristics that are only vaguely identified and which in our present state of knowledge are uncertain as to transmissibility presents other constitutional questions of gravity.... There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of dignity and personality and natural powers of a minority.

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,[40]

and in 1974 it was announced by the Department of Health, Education and Welfare that sterilizations would in future be considered as family planning services, so that the Department would pay ninety percent of the cost for poor persons[41] — although the same would not apply

[38] See, however, fn. 12 above.

[39] This seems to be confirmed by the Tuskegee Jail V.D. experiment in which some prisoners were denied treatment. In 1974 an out-of-court settlement was announced (*Globe and Mail* (Toronto), 16 Dec. 1974).

[40] St. lohn-Stevas, *op. cit*., *296* (Arizona), 302 (Mississippi), 304 (New Hampshire).

[41] *Globe and Mail, 9* Dec. 1974.

to abortions, even though legal. The new law proposed for Sweden[42] provides for free sterilisation on demand for anyone over 25.

When sterilisation is lawful, there is an inevitable risk of abuse and legislation will often embody safeguards. 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.[43] Connecticut[44] 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 any 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.[45] 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*[46] 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 doctor 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." A somewhat similar case occurred in Auckland, New Zealand, in 1974. The claim failed, it being held that the doctor had performed the operation in accordance with medical knowledge available at the time —1969 — there having apparently been a natural regeneration of the vas.[47] In *Colt* v. *Ringrose*[48] Lieberman J. dismissed an action for a failed sterilisation performed by a method expressly rejected by the local professional authorities on the ground of consent. He commented, however, that if he were wrong on consent he would have awarded $1 damages, since "the woman has a child she loves."

42 Bull. of Legal Developments [1974] No. 19, 3.

43 For reference to such occurrence in the U.S., see Minty, 'Unlawful Wounding: Will Consent Make It Legal?' (1956), 24 Medico-Legal J. 54, 61-2.

44 St. John-Stevas, *op. cit*., 297; see, also, 300 (Kansas), 307 (Utah).

45 *Keyling* v. *Keyding* (1942) 23 Atl. 800.

46 (1934) 93 A.L.R. 570, 572.

47 *Globe and Mail, 6* Nov. 1974.

48 *Edmonton Journal,* 7 Oct. 1976.

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 preserve the woman's health, he awarded her $3,000 damages[49]—presumably, the patient should have been sewn up and, after she regained consciousness, informed by the surgeon that a further operation was necessary, and a new consent secured. 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.[50] In England the medical defence unions decline to indemnify surgeons for performing sterilisation operations.[51]

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. 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,[52] 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 dance, 6,000; and blind, 4.000.[53]

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, was down to twenty-eight in 1961, but now seems to be generally allowed. The majority of the known sterilisations in the United States, and certainly those performed in accordance with the statutes, were 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,

49 *Murray* v. *McMurchy* [1949] 2 D.L.R. 442, 445 (italics in original).
50 (1952) 241 P. 2d 1028.
51 St. John-Stevas, *op. cit.*, 146, fn. 1.
52 29 Eugenics Rev. (1937/8), c. *ibid.* 161.
53 Schuman, *Hitler and the Nazi Dictatorship* (1935) 382.

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.[54] On the other hand, in the last ten years or so there has been a vast increase in the number of voluntary sterilisations throughout the world, by young and old alike, for a variety of reasons, contraceptive, ecological, fear of war, ideological, but rarely eugenic.

In so far as the compulsory sterilisations were of mental defectives or of persons thought likely to commit sexual offences, and invariably of persons who had been institutionalized, 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*[55] 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 illegitimate 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.*

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, and it is possible that the sentiments expressed by Justice Douglas in *Skinner* v. *Oklahoma*[56] are more likely to be followed today, even though the statute in that case was invalidated merely on the ground of its arbitrary classification.

It is perhaps apt to refer here to the English case of *Re D (A Minor)*.[57] It was proposed, at the request of the mother and with the approval of the family pediatrician, to sterilize an infant female of 11 suffering from Sotos Syndrome, and showing mental backwardness and behavioural problems, but advanced physical development. It was maintained that the patient was likely to be sexually precocious,

64 St. John-Stevas, *op. cit*., 174; for a state-by-state breakdown, see App. V, 291.
65 (1927) 274 U.S. 200, 208 (italics added).
66 See fn. 37 above.
67 [1976] 2 W.L.R. 279 — the extracts here used are from the report in *The Times,* 18 Sept. 1975 (italics added).

amenable to undue sexual influence and likely to produce an abnormal child which she would almost certainly be unable to care for. At the instance of an educational psychologist attached to the local authority wardship proceedings were commenced in the Family Court. Mrs. Justice Heilbron held:

> that in a case of a child of 11 years, where her mental and physical condition had already improved [—although the medical evidence was not consistent on this —] and where her future prospects were as yet unpredictable, where while as yet unable to understand and appreciate the implications of the operation she was likely in later years to be able to make her own choice, where the frustration and resentment of realizing, as she would one day, what had happened, could be devastating an operation of the present nature was contra-indicated. The operation was not in D's best interests.

Moreover, the learned judge stated:

> The operation involved the *deprivation of a basic human right namely, the right of a woman to reproduce,* and therefore, *if performed on a woman for non-therapeutic reasons and without her consent, would be a violation of such right.*

In its editorial comment on this decision the *London Times*[58] praised the judge as "wise and compassionate", although its remarks on the issue at large show some measure of confusion:

> It is right of course that where a sterilisation operation may be indicated for therapeutic reasons, the sole decision whether or not to perform it should lie with doctors and specialists. A purely clinical judgment is required.... Serious, irreversible, operations on minors for non-therapeutic reasons call for a different approach.... A procedure ought to be introduced which would ensure that they are performed as rarely as possible, only on the strongest evidence and after consultation between all the people having responsibility for the child.... One example might be where the young girl was herself severely and permanently subnormal, and there was a *proven high probability* that any child she might bear would be very seriously deformed or mentally incapacitated.... In any case *sterilization should not be considered for purely eugenic reasons.* There must also be persuasive evidence as to the present and future conditions of the potential mother. Nor should an operation be suggested where it is possible for one or other form of contraception to be used with any real chance of success. There is also, of course, the possibility of terminating a pregnancy [— how many times? —], but this might well be harmful to the mental state of the girl.... Mrs. Justice Heilbron's sensitive approach... should reassure those who feel that a court of law is not the best place to raise delicate issues of this kind.

The latter's comments, especially regarding the inalienable right of the woman to give birth, raises the inevitable question whether a similar decision would have been rendered by a male judge.

The absolute rejection of eugenic sterilisation by the *Times* makes one wonder whether there is not more than a little substance in the support expressed for legalized sterilization by Dr. Glanville Williams, who points 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.[59]

[58] 18 Sept. 1975 (italics added).
[59] *The Sanctity of Life and the Criminal Law* (1958) 82.

However, the prospect of State stud-farms, assisted by such medical advances as sperm, eye and kidney banks makes the imagination boggle, especially in view of the great advances which have been made with transplants, including the use of replacements from animals — which may eventually cause the conservationists to rise up in anger![60]

In so far as eugenic sterilisation is concerned the question arises whether such 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,[61] including a crown or a title, or for damages in respect of a deceased parent, unborn embryos have not generally speaking been regarded as possessing 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 mere*.[62] On the other hand, a Canadian court had 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,[63] while in the United States damages have been awarded for the death of a viable foetus, defined as a legal 'person'.[64] although normally a woman will not be awarded damages in respect of an embryo that she has lost as a result of an accident. On the other hand, reference should be made to a decision by the Duval County Circuit Court, Florida, in which it was held that, despite the views of the United States Supreme Court regarding abortion, an unborn foetus has a right to support payments. A woman had filed a paternity suit against one Shinall, which she agreed to drop on payment by him of $500 and a signed statement acknowledging paternity. When the child was born the mother sought support payments which Shinall contested on the basis of the agreed release. It was held, however, that the release was not binding since it was against Florida legislation protecting the rights of the unborn.[65]

In view of Dr. Williams' approach, it is perhaps not irrelevant to mention that a similar attitude to life *in futuro* 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

[60] See Friedmann, *loc. cit.*, n. 13 above, 1073, n. 50.
[61] Winfield, 'The Unborn Child', (1942) 8 Camb. Law J. 76, 77.
[62] *Walker* v. *Great Northern Rly. of Ireland* (1890) 28 L.R.Ir. 69.
[63] *Montreal Tramways Co.* v. *Leveille* [1933] 4 D.L.R. 337.
[64] *Hall* v. *Murphy* (1960) 113 SE 2d 790, 793; *Fowler* v. *Woodward* (1964) 138 SE 2d 42, 44.
[65] *Edmonton Journal,* 10 Dec. 1975.

timber that does not reproduce itself, allegedly because of industrial fumes.[66]

In recent years there has been an increasing tendency, particularly in the common law countries,[67] to press for recognition of the rights of the unborn child in the widest possible sense. Thus, much of the campaign against abortion on demand has been conducted on the basis that the embryo is a life in being entitled to legal protection, and that this right to protection is on a higher level than the woman's right to decide not to have a child. In the field of tort, the argument to a great extent has gone on the basis of pre-natal injury resulting from, for example, traffic accidents. It has, however, been suggested that recognition of such a right has far greater implications. Difficulty will obviously arise in determining where to draw the line to distinguish between those causes of injury which give rise to an action and those which do not, and how far the liability will extend. The most notorious instance of this kind is the series of actions that have been brought in a number of countries as a result of the tragedies arising from the use of thalidomide by their mothers. An early instance of this kind is to be seen in *Sinkler* v. *Kneale*[68] when an American judge awarded damages for 'imbecile mongolism' held to have arisen from the use of teratogenic agents during the first month of pregnancy, although it has been stated[69] that "the chance of a succession of simultaneous chromosomal changes in the cells of a one-month old fetus can almost certainly be totally excluded." The writer of this comment has, however, raised some interesting issues that could arise if antenatal rights were fully recognized. He enquires, for example, whether a child could bring a claim against its mother as a result of deformities traceable to the mother's smoking during pregnancy; whether an action could be brought by a deaf child whose mother had suffered German measles and not had an abortion; whether a claim would lie against one or both parents if the child were born syphilitic; whether it would lie if the parents were unmarried and the child were born into a society that discriminates against bastards;[70] and, even, if such a claim could be brought in the event of a miscegenous relationship with the child being born a half-caste into a society that rejects or discriminates against such a racial mixture. It may be thought that many of these suggestions are too far-fetched to warrant serious consideration. It should be remembered, however, that should the principle of the child having a right to sue for antenatal injury be conceded, then such matters as these might become very real, unless the legislation in question was very strictly worded — and even more strictly interpreted and applied when actual cases present themselves before the courts. In fact, these difficulties are only emphasised by the proposals embodied in the 1975 report of the English Law Reform Commission,[71] which discriminates as between the potential liability of the father and of the mother.[72]

[66] See, e.g., *Trail Smelter Arb.* (1938/41) 3 U.N. Rep. Int'l Arb. Awards 1905, 1929.
[67] See, e.g., British Law Reform Comm., Working Paper No. 47 (1973) and Cmnd. 5709 (1975).
[68] (1960) 401 Pa. 267.
[69] Edwards, *loc. cit*., n, 16 above, 54.
[70] Such a claim was rejected by an Illinois court in *Zepeda* v. *Zepeda* (1963) 190 NE 2d 849.
[71] Cmnd. 5709 (1975).
[72] See comments by Pearce Wright, Science Editor, *The Times,* 12 Sept. 1975.

In the field of criminal law, there is often some recognition of the unborn child as a person, so that to inflict a prenatal 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.[73] To incite someone to murder a child when born, if the inciting has taken place before birth, has even been held to amount to soliciting to murder a "person".[74]

Perhaps it is worth commenting here on the problem of breach of contract. As has already been mentioned, it was held in Minnesota in 1934[75] that a contract to perform or submit to a eugenic or contraceptive sterilisation was not contrary to public policy, but that in the case in issue the patient could not recover damages for breach of contract in respect of an ineffective sterilisation as a result of which his wife bore him another child. Had the wife died — for it was on account of her weak health that the husband submitted to the operation — a different verdict might have been reached. On the other hand, as recently as 1974 a New Zealand court denied damages for breach of contract on the basis that the operation, though unsuccessful, had been performed in accordance with proper surgical practice.[76]

Problems may arise in the absence of permissive legislation. The 1934 Report of the British Departmental Committee on Sterilisation[77] considered sterilisation of normal persons to be unlawful, and recommended enactment of permissive legislation. While there has been no eugenic sterilisation as such, in an *obiter dictum* Lord Denning has expressed the view that sterilisation to prevent the transmission of an hereditary disease would be lawful.[78] 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.[79] 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,"[80] and it should, of course, be compared with the English case of *Re D*.[81]

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,

[73] *R.* v. *Senior* (1832) 1 Moo C. C. 346. See also, Hong Kong trial of accused charged with stabbing a pregnant woman, inflicting injuries upon her unborn child from which it died after birth; the accused was acquitted of murder, but found guilty of manslaughter, *Straits Times* (Singapore), 6 Jun. 1963. Similarly, a man who fired into the abdomen of a pregnant woman killing her foetus was acquitted of murder in Tennessee, *The Times,* 17 May 1974.

[74] *R.* v. *Shepherd* [1919] 2 K.B. 125.

[75] *Christensen* v. *Thornby* (1934) 93 A.L.R. 570.

[76] See fn. 47 above. But see n. 48 for a Canadian case in which the procedure was not in accordance with local practice.

[77] (1934) Cmd. 4485 (The Brock Report).

[78] *Bravery* v. *Bravery* [1954] 3 All E.R. 59, 67.

[79] *Ex p. Eaton* (1954 — c, St. John-Stevas, *op. cit*., 163, n. 2).

[80] 12th ed., s. 182.

[81] Fn. 57 above.

and the matter has become confounded by references to the common law offence of mayhem, although sterilisation has now become popular with both married and unmarried persons, and there appears to be no fear or threat of prosecution.

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" [82] — 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, defined in the *Oxford English Dictionary* as removal of the testicles, was explicitly held to be a maim and a felony.[83] Blackstone[84] described it as:

> 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*.[85]

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. In fact, in *Christensen* v. *Thornby*[86] the Supreme Court of Minnesota expressly stated that sterilisation "does not render the patient impotent or unable 'to fight for the king' as was the case in mayhem or maiming." It may be relevant here to refer to the crisis of conscience that was presented in the course of discussion, to a medical practitioner in Singapore in 1962. 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

[82] *Coke on Littleton* (1628) 127a, 127b.
[83] Hawkins, *Pleas of the Crown* (1739) 107.
[84] 4 *Commentaries* (1768), ch. 15, 1 (italics added).
[85] Lloyd, *Public Policy* (1953) 29.
[86] *Loc. cit*., fn. 75 above, 572, *per* Loring J.

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[87] 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 s. 320 of the Singapore Penal Code, and would probably be unlawful under any system of criminal law.[88] 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. Some support may be found for this suggestion in s. 87 of the Code:

> nothing which is intended to cause death, or grievous hurt [—and if artificial limbs can enable the person affected to live a full life other than serving in the armed forces, it may be possible to argue there is no '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 the 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.[89]

There can be no doubt that a doctor performing a sterilisation does not intend to cause death or grievous hurt, although this may ensue from any operation. However, by s. 320 it is expressly stated 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 impotency;' while in Ratanlal's *Law of Crimes*[90] — the Singapore Penal Code is based on that of India, of which Ratanlal is probably the leading commentary — 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 a male, it should be pointed out that by s. 8 'the pronoun 'he' and its derivatives are used of

[87] See Minty, *loc. cit.*, 58, for a similar request by Byron with regard to his club-foot.

[88] See, however, Burmese case of *Shwe Kin* [1915] A.I.R. (L.B.) 101—A claimed to be proof against edged instruments and invited B to test his claim; B cut A's arm inflicting a wound from which A bled to death.

[89] See, however, *R.* v. *Donovan* [1934] 2 K.B. 298, consent no defence to an indecent assault (caning) likely to cause grievous hurt.

[90] (1966) 864.

any person, whether male or female,' and presumably this is equally true of the commentary. Further, in 1860 when the Indian Penal Code was promulgated and 1872 when it was adopted in Singapore 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 practices 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 seems to be 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".[90a] 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."[91]

Section 88 of the Penal Code is also relevant to any argument aiming to suggest that sterilisation in the absence of statute 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 suggest that harm, or to take the risk of that harm.[92]

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 protected, especially "as mere pecuniary benefit is not benefit within the meaning of this section."[93] This would of course raise numerous problems in, for example, India where for a time it appeared as if a person subjecting himself to sterilisation was being paid, as distinct from receiving compensation for lost wages, while payment was also being made to 'social workers' who persuaded persons to become sterilised.[94]

[90a] [Parts of the discussion on sterilizatioa are reproduced from the author's article, "Sterilization and the Law" (1963) 5 Mal. L.R. 105.

With respect to the discussion as to whether sterilization constitutes "grievous hurt" under the Penal Code, it should be noted that the law in Singapore has since been clarified by s. 9 of the Voluntary Sterilization Act 1974 (No. 25 of 1974) which reads "For the avoidance of doubt it is hereby declared that any treatment of sexual sterilization by a registered medical practitioner shall not constitute 'grievous hurt' under sections 87 and 320 of the Penal Code". For the definition of "treatment for sexual sterilization", see ss. 2 & 3 of the Act. — Ed.]

[91] *Ibid*., 192; see also, 183 *et. seq.*

[92] Italics added.

[93] *Ibid*., 194 citing Stephen, *Digest of Criminal Law,* Art. 226.

[94] See, e.g., plan of Assam branch of Indian Tea Assoc., *News of Population and Birth Control* (London), No. 108, Oct. 1962.

The position under the Penal Code has now become somewhat historical[94a] since Singapore has enacted legislation permitting sterilisation, while India runs a government scheme in its support, and has recently intimated that legislation would be enacted denying public loans, housing and jobs to couples with more than two children, while West Bengal was threatening compulsory sterilization for couples with three children, and Maharashtra talked of imprisoning parents of more than two children who refused sterilisation.[95]

The problem just considered raises the whole issue of consent to mutilation 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."[96] 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 operations" is habitually employed to indicate an abortion which has been performed without any clear and present medical need or in accordance with statutory provisions. 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, unless it falls within the terms of the local law which now, increasingly, permits abortion for socio-economic reasons if these are likely to endanger health, while in the United States the Supreme Court has virtually permitted abortion on demand during the first three months of pregnancy.[97] 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*[98] 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."[99] Here we come face to face with the fact that while one may participate

[94a] See fn. 90a, *infra.*

[95] *The Times, 25* Feb. 1976. In Oct. 1976 the civil service conduct rules were amended limiting civil servants to 3 children, and providing that after Sept. 1977 no civil servant will be permitted to add a fourth child, *ibid.*, 8 Oct. 1976. This policy apparently contributed to the defeat of Mrs. Ghandi's government.

[97] See fn. 8 above.

[96] Lloyd, *op. cit.*, 29.

[98] [1934] 2 K.B. 498, 507, *per* Swift J. see, however, Leigh, "Sado-Masochism, Consent, and the Reform of the Criminal Law," 39 Mod. Rev. (1976) 130.

[99] *Op. cit.*, 103.

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 constitutes a disorderly exhibition — a description which may be equally applied to many recent soccer and ice hockey matches, amateur and professional, national and international. In so far as masochism is concerned, the rather more lax approach now taken to sexual deviance, even permitting public advertisements, might suggest a more lenient approach than that adopted in *Donovan.*

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. The starting point for any such discussion is Dr. Lushington's judgment in *D-e.* v. *A-g* in 1815[1] in which the wife had no uterus and only a short vagina. A number of unsuccessful attempts at coitus had been made and eventually the husband sought a declaration of nullity:

> Mere incapability of conception is not a sufficient ground whereon to found a decree of nullity. The only question is whether the lady is or is not capable of sexual intercourse.... In order to constitute the marriage bond... there must be the power, present or to come, of sexual intercourse. Without that power, neither of two principal ends of matrimony can be attained, namely a lawful indulgence of the passions to prevent licentiousness, and the procreation of children according to the evident design of Divine Providence[2].... Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse, it does not mean partial and imperfect intercourse;... if *so* impossible as scarcely to be natural,... legally speaking, it is no intercourse at all.... Certainly it would not lead to the prevention of adulterous intercourse, one of the greatest evils to be avoided .... If there be a reasonable probability that the lady can be made capable of *vera copula* [by medical or surgical means] — of the natural sort of coitus, though without power of conception, I cannot pronounce the marriage void .... In the case first supposed, the husband must submit to the misfortune of a barren wife, as much when the case is visible and capable of being ascertained, as when it rests in undiscoverable and unascertained causes. There is no justifiable motive for intercourse with other women in the one case, more than in the other. But when the coitus itself is absolutely impossible, and I must call it unnatural, there is not a natural indulgence of natural desire; almost of necessity disgust is generated, and the probable consequences of the connexions with men of ordinary self-control become almost certain [*sic*]. I am of opinion that no man ought to be reduced to this state of quasi-unnatural connexion, and consequent temptation, and, therefore, I should hold the marriage void. The condition of the lady is greatly to be pitied, but on no principle of justice can her calamity be thrown upon another.

[1] 1 Rob. Ecc. 279, 299 (Italics in original).
[2] The *Book of Common Prayer* lists the causes for which matrimony is ordered: 'first, the procreation of children ...'

It is difficult to tell from this judgment whether Dr. Lushington was more concerned about the procreation of children — 'the principal end of marriage' — or the prevention of adultery. Later judges seem to have been more specific about the procreation aspect of the problem.[3]

Almost 150 years later, when surgeons had effected various methods of remedying natural deficiencies, including the creation of artificial passages, the English courts were again faced with the problem of a woman lacking a natural vagina. *B.* v. *B.*[4] 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* was expressly disapproved by the Court of Appeal in *S.* v. *S.*[5] The wife here had no uterus and a short vagina, and before marriage had told her fiance, who was already aware that coitus with her might be difficult, that she could not bear children. Three years after the marriage, the husband suggested that the wife take medical advice. By now she had a vagina about an inch long, which the gynecologist attributed to the husband's attempts at coitus. The doctor pointed out that an artificial vagina could be surgically created, and the wife expressed willingness. Before the operation could take place the husband left and sued for nullity for non-consummation, although medical evidence confirmed that, while there was an 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 the fact that the cavity to be created would be a mere cul-de-sac leading nowhere would not of itself be conclusive.

It was, however, 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

[3] See, e.g., G. v. G. (1871) L.R. 2 P. & D. 287, 291: "if the organs of the woman were so formed structurally as to render intercourse impossible, the marriage would be void. It is apparent enough that without intercourse the ends of marriage, the procreation of children, and the pleasures and enjoyment of matrimony cannot be attained", *per* Lord Penzance; *G.* v. *M.* (1885) 10 A.C. 171, 204: "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 — but consummation is no guarantee of conception and procreation.

[4] [1955] P. 42, 46, 47 *per* Commissioner Grazebrook.

[5] [1962] 3 All E.R. 55, 58, 59 (*sub. nom. S.Y.* v. *S.Y.* [1963] P. 37).

be the case were it a question of enlarging what was originally an inadequate vagina. The Court was not convinced that there was no vagina, since the doctors referred 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,[6] 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 when a condom was used,] 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.[7] What is even more startling would be that a woman would be incapable in law of committing adultery.[8] Consequently, the wife of a man engaged in intercourse with such a woman would be left wholly without a 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, and 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 opens the way to the wife, should she so wish, to bring an action for divorce on the ground of desertion. In those countries where

[6] At 62, 63.

[7] See, however, *R.* v. *Lines* (1844) 1 C. & K. 393, in which it was held that the question in issue was "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", which would imply that an artificial vagina might suffice.

[8] See, however, *Dennis* v. *Dennis* [1955] 2 All E.R. 51, 56 — "there must at least be partial penetration for the act of adultery to be proved", *per* Hodson L.J.

divorce is obtainable by reason of marriage breakdown, it is possible that the husband too could secure a dissolution for this reason.

There has, of course, been no case of an action for nullity on the basis of non-consummation which has involved an artificial penis, although impotency has long been recognized as sufficient. In view of the fact that penetration of the labia is sufficient for rape[9] and also for adultery,[10] it might be considered that the same would be true for nullity, especially as in *Dennis* v. *Dennis,* Singleton L.J. said [11] that in his view there was "no distinction to be drawn between the words 'sexual intercourse' in the definition of 'adultery'... and 'carnal knowledge' in the criminal law. In regards to... a charge of rape, it must be shown there is some penetration" but, in the instant case, he accepted that the co-respondent was in fact impotent on the occasion cited. Hodson L.J. also conceded that, while something less than completion might suffice, 'there must at least be partial penetration for the act of adultery to be proved'[12] and he refused to accept that an attempt which might result in impregnation because of contact and ejaculation would suffice, even though in *Russell* v. *Russell*,[13] Lord Dunedin had said that, even in the absence of penetration 'fecundation *ab extra* is, I doubt not, adultery.' In view of the *Dennis* decision, it is somewhat surprising to read the decision in *W.* v. *W.*,[14] in which Brandon J. held himself to be bound by Dr. Lushington's view of 'ordinary and complete intercourse' in *D-e* v. *A-g* and granted a wife's plea for nullity:

> ... on occasion, the husband was able to penetrate the wife for a short time, but soon after he got inside her, his erection collapsed and he came out. In my view, penetration maintained for so short a time, resulting in no emission inside the wife or outside her, cannot without violation of language be described as ordinary and complete intercourse. I do not think there is any authority binding me to hold that, I do not see why I should not make a finding of fact in accordance with what seems to be the realities of the case. On these grounds, ... this marriage has not been consummated.

It would seem from his comments with regard to *ejaculatio ante portas* that, unlike Hodson L.J. who would not have regarded this without penetration as sufficient to constitute adultery, Brandon J. might have regarded such emission after inadequate penetration as sufficient for consummation. Before leaving this aspect of the subject, it might be worth mentioning that, despite the weight of modern technical comment by doctors, sexologists, marriage counsellors and the like, with regard to sexual activity short of intercourse, the English divorce court has not yet shown itself willing to accept anything less than sexual intercourse as sufficient to constitute adultery. In *Dennis* v. *Dennis* it was agreed that adultery might be inferred from the surrounding circumstances, but in *Sapsford* v. *Sapsford and Furtado*[15] Karminski J. applied the traditional tests:

> The wife masturbated the co-respondent. That, of course, is an act of sexual familiarity which on any view of marriage can hardly be

9 *R.* v. *Lines,* fn. 7 above.
10 *Dennis* v. *Dennis,* fn. 8 above,
11 *Ibid*., 55.
12 At 56.
13 [1924] A.C. 689, 721.
14 [1967] 3 All E.R. 178.
15 [1954] 2 All E.R. 373.

> thought to be consistent with the duties of a wife towards her husband, but... I have to decide whether or not the behaviour between the co-respondent and the wife amounted to adultery. On the other hand,... an act of adultery need not be such a complete act of intercourse as is required to consummate a marriage,... adultery need not be a *vera copula*.... There has to be intercourse in which both the man and the woman play... their normal role, and that mere masturbation by itself cannot come within the ambit of mutual intercourse,

although in the instant case, he was of opinion that even if there were not completely satisfactory coitus, there was sufficient penetration, apart from the act of masturbation, to constitute adultery. In view of the constant emphasis on the need for penetration of the female genitalia one is compelled to ask what the attitude of the judges would be if, instead of sexual intercourse, the defendant and the co-respondent had indulged in buggery, particularly in a case in which the defendant spouse had preferred this form of relationship and had been denied it by the marriage partner. It is hardly feasible that in such a case any judge would today maintain that there had been no adultery. However, with the trend to accept breakdown of marriage as sufficient to ground a divorce it is unlikely that problems of this kind will arise in future.

The above discussion suggests that, whatever might at one time be thought to be the principal end of marriage, the possibility of impregnation is no longer a *sine qua non* for adultery. But what if impregnation is frustrated as between husband and wife because of some action taken by one of the spouses, bearing in mind that "mere abstention by the husband from intercourse could not... amount to cruelty or give to the wife any remedy, even though it might injure her health,"[16] although in *Lawrance* v. *Lawrance*[17] it was held that if, the marriage having been consummated, either spouse persistently refused intercourse so that the partner's health is or is likely to be affected, a divorce might be obtained on account of cruelty. This interference with the possibility of conception may arise either because one of the parties has submitted to sterilisation or because intercourse always takes place with a contraceptive or is frustrated by way of *coitus interruptus.* In so far as contraceptive practices are concerned, it might be thought difficult to argue that the marriage had not been consummated. In *Cowen* v. *Cowen*,[18] however, the English Court of Appeal held that where throughout a marriage one partner had refused to have intercourse except with a contraceptive or by way of withdrawal, there was no consummation for, in the light of Dr. Lushington's test,[19] the Court was:

> 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, if not the principal end, of marriage is intentionally frustrated.

This statement suggests that if one of the partners to a marriage enters the marriage knowing that he is sterile and keeps this fact

[16] *Walsham* v. *Walsham* [1949] 1 All E.R. 774, 775, *per* Wallington J.
[17] [1950] P. 84.
[18] [1946] P. 36, 40.
[19] See fn. 1 above (p. 100).

from the other, then it should be possible to hold that the marriage, despite intercourse, could not be consummated due to the frustration, knowingly, of one of its principal ends. However, as Horridge J. pointed out in *L.* v. *L.*[20] "mere incapacity to conceive was no ground for a decree of nullity of marriage." But would it be possible for the other spouse to argue that the contract was frustrated by mistake on his part or fraud on the part of the sterile party?

It took only a year before there was a retreat from the reasoning in *Cowen,* for in *Baxter* v. *Baxter*[21] the House of Lords took the opposite view. Although the wife had refused to permit intercourse without the use of a condom, it was held that there was a *vera copula,* since there was a complete conjunction of bodies, and therefore the marriage was consummated. Lord Jowett 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" — does this mean that different standards might be applied if the parties to a marriage are atheists or non-Christians? Although a marriage in which intercourse regularly takes place with the aid of contraceptives is not regarded as null, it does not mean that a spouse objecting to the persistent use of such methods is without remedy. Obviously, any other grounds for divorce will still be available — and this is also true if the practice is agreed to.

For *coitus interruptus* or the use of contraceptives to be significant as a means to divorce, it is necessary for the objecting spouse to prove that his or her health has been adversely affected as a result of the practice in question. Perhaps the starting point for this discussion might be *Cackett* v. *Cackett*[22] since Hodson J.'s judgment still hankers after some of the traditional views. As the wife's parents were first cousins, the husband refused to have a child and, objecting to contraceptives, employed *coitus interruptus* and the wife's health suffered. The judge found that:

> penetration was effected and there was the possibility of conception.... Seed was emitted by the man in close proximity to the woman so that conception might have been effected.... It seems to me impossible to determine exactly where normal intercourse begins and ends. There could be no legal standard laid down which would define a matter of that kind.

Having refused a decree of nullity, he granted a divorce for cruelty.

There are two cases in this connection which may be compared, for not only are they the counterpart to each other, but they were heard within the same week. *Knott* v. *Knott*[23] was a case in which the husband insisted on *coitus interruptus,* and:

> ... in refusing to let his wife have children he was 'reckless' of the effect on his wife and his conduct was 'inexcusable'... For the 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

[20] (1922) 38 T.L.R. 697, 698.
[21] [1948] A.C. 274, 286.
[22] [1950] 1 All E.R. 677, 678, 680.
[23] [1955] 2 All E.R. 305, 309-10, *per* Sachs J.

> and when he adopts a course which preserves to himself a measure of sex enjoyment.... The refusal to allow the wife to have a child, and the conduct accompanying it,... is a deliberate act contrary to the laws of nature and one which any reasonable husband must realise is likely to affect his wife's health. Permanent and unreasonable starvation of the maternal instinct may... be of itself a cruel thing....[24] Even though both parties may obtain physical satisfaction, yet, so far as the woman is concerned, the permanent deprivation of having children [was sufficient, for her health was affected] in a more direct manner than any method of sex relationship which allows the wife to have all satisfaction short of satisfaction of the maternal instinct.... The course of conduct pursued by the husband ... in relation to sexual matters was cruel.

In *Forbes* v. *Forbes*[25] it was the wife who refused to have children and insisted on the use of contraceptives. At first the husband complied, but later the wife insisted on using a diaphragm, even though she knew it disgusted her husband and affected his mental health. In the judge's view:

> Quite apart from the exhortation in the solemnisation of matrimony that, first, Christian marriage was ordained for the procreation of children,... it is a natural instinct in most married men to propagate the species and to bear the responsibilities and to enjoy the comforts of their own children. If a wife deliberately and consistently refuses to satisfy this natural and legitimate craving, and the deprivation reduces the husband to despair, and affects his mental health,... she is guilty of cruelty.

Denning **L.J.** had suggested in *Fowler* v. *Fowler*[26] that the situation might be different if the wife's refusal was based on a fear of the consequences for herself and without any intention to injure her husband, but this was not confirmed in *P.* v. P.:[27]

> A spouse who was inhibited by a physical impediment known to the other spouse and who made every effort to cooperate could scarcely be said to be cruel, even though in the end it had a disastrous effect on the health of the other spouse.... [But] if... this wife was consistently depriving her husband of the amount of intercourse which she ought really to have been affording, and depriving him of the opportunity of becoming a father, which she knew that he wanted, and that these matters seriously affected his health,... then ... if the conduct becomes unendurable in the sense that... the husband should not be called on to endure it, the court can and should help him.

This discrepancy is explained by the fact that this decision was rendered after the House of Lords had decided *Gollins* v. *Gollins*[28] which was far more in accord with social needs than earlier decisions, in that it decided that matrimonial 'cruelty' was to be measured by the reality of the injury done to the other spouse and no longer depended on the 'guilty' party's intention to cause harm to his health. The importance of this was shown by *Sheldon* v. *Sheldon*[29] in which the husband, after normal intercourse with his wife for a number of years, refused to indulge any more and refused her the child she wished. Lord Denning stated:

> ... he has persistently, without the least excuse, refused her sexual intercourse for six years. It has broken down her health. I do not think

[24] *Cp. Re D.* fn. 57 above.
[25] [1955] 2 All E.R. 311, 314, *per* Commissioner Latey; see, also, *Ward* v. *Ward* [1958] 1 W.L.R. 693.
[26] [1952] 2 T.L.R. 143, 148.
[27] [1965] 2 All E.R. 456, 463, *per* Sterling J.
[28] [1964] A.C. 644.
[29] [1966] 2 All E.R. 257, 260-1, 264-5.

> she was called upon to endure it any longer.... No spouse would have any chance of obtaining a divorce on such a ground except after persistent refusal for a long period; and it would usually need to be corroborated by the evidence of a medical man who had seen both parties and could speak to the grave injury to health consequent thereon, for, as Salmon L.J. pointed out, impotence is not a ground for divorce, and if in the present case the evidence was equally consistent with impotence as with a wilful refusal of intercourse, the commissioner would have been right in refusing a decree.... [But] this evidence establishes wilful refusal.... When a man knows that his young wife is being made ill through sexual starvation, it is indeed cruel for him wilfully to refuse her sexual intercourse.

So far we have been concerned with the problem of wilful refusal to perform a 'full and complete' act of intercourse likely to cause impregnation. It may happen that, although complete intercourse in the sense of a *vera copula* takes place, impregnation is impossible on account of the voluntary sterilisation of either spouse. In view of the comments that have been made with regard to the natural desire for children and the suggestion that procreation is the principal end of marriage, it is necessary to look at some of the problems inherent in the event of voluntary sterilisation, for this is becoming much more common and it may well be that the sterilized person does not inform his potential spouse that a sterilization has been performed, or he may undergo such an operation after marriage without informing the spouse of his intention.

In those countries where, as it was suggested in the British Brock Report,[30] voluntary sterilization might be regarded as illegal, it would mean that any doctor performing such an operation was in fact committing a criminal act and if his patient were to die, then, regardless of the prior consent that may have been given, the doctor would face a charge of manslaughter and perhaps even of murder. But the possibility of such a charge now being brought is radically reduced, so long as the doctor has used all the precautions and skill to be expected of one performing such an operation.[31]

As has already been indicated, marriage is a contract and the parties to it have certain expectations. It is perhaps not surprising, therefore, that in a variety of American jurisdictions, for example, the concealment of pre-marital sterilisation has been held good ground for annulment.[32] In fact it may well be that this is one of the situations in which any legislative measure providing for sterilisation should stipulate that such suppression is a ground of nullity, thus removing any possible doubts. It might also go further and break into the traditional concept of confidentiality between doctor and patient. Sterilisation operations should, perhaps, be notifiable, so that a local authority might be required to maintain a list which could be consulted under safeguards at the request of a person about to enter marriage and seeking to confirm that his partner has not in fact undergone any such operation. Should a person enter marriage with one who

[30] *Op. cit.*, fn. 77.

[31] See, e.g., Minty, *loc. cit.*, 59, who says of salpingectomy, 'It is about as serious as a simple appendicectomy, but there can be no absolute guarantee against complications and fatal results.'

[32] *Twiner* v. *Avery* (1921) 113 Atl. 710; *Aufort* v. *Aufort* (1935) 39 P. 2d 620; *Vileta* v. *Vileta* (1942) 128 P. 2d 376; *Stegianko* v. *Stegianko* (1940) 295 NW 252; *Osborne* v. *Osborne* (1937) 191 A. 783.

has been sterilised and whose name is on such a list, then, on this ground at least, it should not be possible for a decree of nullity to be obtained. As to sterilisation after marriage, a similar list might be maintained so that spouses would have some means of ascertaining whether the partner to the marriage had since undergone such an operation. If this were in fact the case and the partner's consent had not been obtained, then the example of the court in *Keyling* v. *Keyling*[33] might be followed and a divorce granted for constructive desertion or, as is now more likely to be the case, for marital breakdown.

There has been a series of English cases involving similar problems. Thus, in *L.* v. *L.* (1922)[34] the wife had undergone, prior to marriage, on 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.*[35] 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 fiancee 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 of nullity, and when she brought her action it was held that the delay was excused by her ignorance of her rights[36] 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."

The English *cause celebre* in relation to sterilisation, and the one that is of most importance for the medical profession, is *Bravery* v. *Bravery*.[37] 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.[38] commented that:

> as between husband and wife for a man to submit himself to such a process without a good medical reason... would, no doubt, unless

[33] (1942) 23 Atl. 2d 800.
[34] *Loc. cit.*, fn. 20, p. 105.
[35] [1947] P. 158, 161, *per* Somervell L.J.
[36] In *C. v. C.* (1961), even a delay of 28 years by the husband was not considered too long (*The Times,* 30 Oct. 1961).
[37] [1954] 3 All E.R. 59.
[38] At 61, 63, 64.

> 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.I. ... 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.[39] 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 cruelty0. . . . 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.] [40]
>
> ... 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 attached to it. The operation then is plainly injurious to the public interest. It

[39] At 65, 66, 67.
[40] See fn. 82 above.

> is degrading to the man himself. It is injurious to his wife and to any woman whom he may 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 of excuse" which would render a sterilisation operation lawful. He would, apparently, recognise that sterilisation for therapeutic or eugenic purposes done with consent would be a lawful operation, although it is not clear whether he regards the consent of the other spouse as essential. 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.[41] 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 ever amount to common law mayhem.[42]

Divergencies of this kind among the judges inevitably cause difficulties. Thus, the 1955 volume of *British Surgical Practice* construed the decision as upholding the legality of voluntary sterilisation, while the 1956 *British Encyclopaedia of Medical Practice* stated it reinforced medical doubts as to the legality of such operations,[43] and the 1955 edition of Sir Eardley Holland's *Obstetrics* maintained that the operation was only legal if undertaken to preserve the life of the patient or to avert serious injury to physical or mental health.[44] Lord Denning's view means that an operation is legal only when there is a just cause, and this has led one commentator[45] 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

41 See fn. 12 above.
42 Minty, *loc. cit.*, 59.
43 At 155, 112, resp.
44 At 361.
45 Minty, *loc. cit.*, 62.

> 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.

In other words, we are back at considering when an operation is medically necessary.

In view of the population explosion and the strong pressures that now exist there is need in those countries where there is still some doubt as to the legality of voluntary sterilisation for some doctor possessing the courage of *Bourne*[46] to announce his intention to perform the operation, and rely upon the fact that there would probably be no prosecution, or no conviction if a trial ensued.[46a] Some countries have gone very far in recognizing the right to voluntary sterilisation. Long before the World Health Organization promulgated its definition of health, Swedish legislation acknowledged a woman's right to have herself sterilised for eugenic, social, medical, and medico-social reasons,[47] and in 1974 it was announced that Sweden intended providing free sterilisation for anyone over 25 seeking it. Such legislation, as well as the WHO definition, provides the justification for a doctor, whether the physical or mental health of the patient demands it, to perform a sterilisation operation on any grounds that he and his patient consider just. This is largely 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 inherent in the situation, while the doctor must apply to this, as to any other operation, the normal skill to be expected in medical treatment.

While there are some who seek to avoid the possibility of conception by having recourse to sterilisation, there are some women who feel so deprived at the lack of a child that they have recourse to artificial impregnation. In view of the attitude that courts have adopted towards the parental instinct, one might be excused for assuming that, at least if the other spouse consents, such activities would be encouraged. Perhaps the earliest case in this connection is *Orford* v. *Orjord*,[48] which arose in Canada and is probably a perfect example of the traditional approach to marriage and sexual activity. The judge believed offspring to be one of the main purposes of marriage, and he was of opinion that:

> had such a thing as 'artificial insemination' entered the mind of the [Mosaic] lawgiver, it would have been regarded with the utmost horror and detestation as an invasion of the most sacred of the marital rights of husband and wife, and have been the subject of the severest penalties.... Adultery... involves the possibility of introducing into

[46] See fn. 18 above.

[46a] In 1975 and 1976, a Quebec jury refused to convict Dr. Morgentaler of abortion. The Crown's insistence, on appealing this acquittal, led to amendment of Canadian law.

[47] Williams, *op. cit.*, n. 58, 80.

[48] (1921) 58 D.L.R. 251, 258, *per* Orde J.

> the family of the husband a false stream of blood.... The essence of the offence of adultery consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of these powers to the service or enjoyment of another person other than the husband or wife comes within the definition of 'adultery'.... What [the wife says] took place here was the introduction into her body by unusual means of the seed of a man other than her husband....

For these reasons, Orde J. held that artificial insemination by a donor was contrary to public policy and amounted to adultery. He even considered that A.I.D. without her consent would amount to rape. If this were so, and if it is the introduction of another man's seed into her body which constitutes the adultery, it would follow that the mere attempt to inseminate by way of a syringe should also constitute adultery. After all, the use of a contraceptive by a co-respondent does not mean that his intercourse with a wife does not amount to adultery, and what would be the position if the semen used had been taken — as is apparently medically feasible — from the vaginal passage of a woman with whom the donor had actual intercourse? Moreover, if A.I.D. constitutes adultery, if it has been carried out with the husband's consent it might be considered that there had been connivance and no matrimonial offence. Since there is a presumption that the child born in marriage is a child of the marriage,[49] although this can be rebutted by evidence of male impotency[50] or of non-access,[51] one might presume that if the husband has consented to the A.I.D. of his wife, the child should be legitimate and the husband considered its father. However, in 1954 a Chicago court held[52] that artificial insemination by a donor:

> with or without the consent of the husband is contrary to public policy and good morals, and constitutes adultery on the part of the father. A child so conceived is not a child born in wedlock and is therefore illegitimate. As such it is the child of the mother and the father has no right or interest in said child.

This decision should be compared to *Strnad* v. *Strnad*[53] in which a New York court held that where the husband consented it had the same effect as adoption, so that the child would be legitimate. However, in 1963 the New York Supreme Court held[54] the child to be illegitimate, although since the husband had consented he was liable to support it. As if to emphasise the type of confusion caused by the *Bravery* decision, the California District Court of Appeal shortly thereafter held that a husband who consented and held out the child thus born as his own would not be criminally liable for failing to support what was in fact somebody else's child.[55] The British courts have been no more consistent. In *L.* v. *L.*[56] the English

[49] *Russell* v. *Russell* [1921] A.C. 689.
[50] *R.* v. *Luffe* (1807) 3 East 193, 202.
[51] (Eng.) Matrimonial Causes Act, 1950, 14 Geo. 6, c. 25; see, also Quebec Civil Code, 1973 ed., Art. 220, which permits husband to renounce his wife's child in case of '*l'impossibilite physique de se rencontrer avec sa femme*'; see, also, *Re B. and B.* [1972] 26 D.L.R. (3d) 481.
[52] *Doornbos* v. *Doornbos* (1954) (unreported, c. (1955) 41 Am. Bar Assoc. J. 263).
[53] (1948) 78 NYS 2d 390.
[54] *Gursky* v. *Gursky* (1963) 242 NYS 2d 406, 409-10.
[55] *People* v. *Sorenson* (1967) 66 Cal. Reptr. 7, 13.
[56] [1949] P. 211.

Divorce Court granted a decree of nullity for non-consummation to a woman who had been artificially impregnated by her own husband. In Scotland, on the other hand, it was held[57] that a woman who, while separated from her husband, had conceived by artificial insemination from a donor had not committed adultery, because of the 'extraction of human relationship from the act of procreation'. The judge considered that to hold otherwise would mean that a mere injection without impregnation would suffice. In so far as New Zealand is concerned, since 1963 artificial insemination without the husband's consent is a ground for divorce.

In 1976 the Richmond Herald of Arms in England enquired whether a child held out to be legitimate by the husband but in fact produced by A.I.D. could succeed to a title. Perhaps the most learned letter in reply was that from Professor Colonel Draper.[58] He maintained that if a court was satisfied that conception resulted from A.I.D., there could be no doubt of the child's bastardy, and pointed out that from the religious point of view "A.I.D. might well place the donor, the doctor, the mother and the consenting husband in the queue of 'mortal sinners' outside the confessional." After all, as he reminded the Richmond Herald, in accordance with the Legitimacy Act, 1926[59] even legitimation by subsequent marriage debars the descent of titles of honour.

Artificial insemination, whether by a donor or a husband, involves certain problems for the doctor. In both cases he must ensure that every care is taken that the process is done hygienically and under proper supervision and conditions. When a donor is involved, perhaps ethics and morality demand that he be chosen in such a way that the offspring might have been born of the parties to the marriage. This is not to suggest that the doctor should seek out a 'twin' of the husband, but he should ensure that the donor is healthy; that the semen if stored has been stored properly and is unadulterated; that the donor had if not the same racial characteristics as the husband, at least the same pigmentation. If due to his carelessness things went wrong, the doctor might well be liable to the wife and possibly to the husband too; while if the suggestions made above with regard to the right of the embryo to a full life take effect, he might even be liable to the child as well.[60] This raises the question whether it is not time for legislatures to lay down the rules that are to apply when artificial insemination is resorted to, both for the protection of the parties, as well as for the medical practitioner.[61]

In recent years new problems have arisen affecting the marital relationship, some of which owe their origin to medical developments. As early as 1947 Mrs. Gardner, who found that she was uncontrollably sexually attracted to women and who frequently wore male clothing, talked with her husband of undergoing a sex-change operation. Before this could take place, however, he sought a divorce for cruelty on the basis of her lesbianism and succeeded,[62] while in

[57] *Maclennan* v. *Maclennan* [1958] S.C. 105, 113-4, *per* Lord Wheatley.
[58] *The Times* 27 Jul. 1976.
[59] 16 & 17 Geo. 5 *c.* 60.
[60] See Tallin, 'Artificial Insemination' (1956), 35 Can. Bar Rev. (Part I) 1, (Part II) 166, 175.
[61] See *ibid*., 183 *et seq*., for legislative suggestions.
[62] *Gardner* v. *Gardner* [1947] 1 All E.R. 630.

Spicer v. *Spicer*[63] a similar decree was granted, even though the female intervener had been dismissed from the suit, the wife having agreed that 'her admitted persistent friendship with the intervener had amounted to cruelty.' The implication of this decision is that any friendship which is unpalatable and causes pain to the other spouse could be held to amount to cruelty sufficient to ground a divorce. Once again, the concept of marriage breakdown would cover any situation of this kind.

The problems arising from a successful sex-change operation are perhaps best illustrated by the English case of *Corbett* v. *Corbett*.[64] The respondent had been registered as a male at birth in 1935 and had joined the Merchant Navy in 1951, when he was clearly male 'although possessed of a womanish appearance with little bodily and facial hair.' He had long desired to be a woman and underwent surgery in 1960, whereby any male genitalia he possessed were removed and an artificial passage created resembling a vagina. He than met the petitioner, who was a married man with children, but who himself often wore female clothes. The petitioner became interested in the respondent 'as a woman', and after obtaining a divorce went through a form of marriage with the defendant in Gibraltar. No sexual relations had taken place before the marriage and the parties were together for only fourteen days thereafter. Prior to the marriage, although the respondent had been unable to secure a new birth certificate, a female's national insurance card was issued and 'he' acquired a female name by deed poll. The petitioner sought a decree of nullity for non-consummation — which would have meant that the respondent was in fact a woman — or on the ground that since the ceremony was between two men it could not constitute a marriage. Medical evidence was to the effect that the respondent was a 'male homosexual transsexualist' or a 'castrated male' or 'intersex [to be] assigned to the female sex'. Ormrod J. tended to agree with the first opinion:

> The respondent has been shown to have **XY** chromosomes and therefore to be of male chromosomal sex; to have had testicles prior to the operation and therefore to be of male gonadal sex; to have had male external genitalia without any evidence of internal or external female sexual organs and, therefore, to be of male genital sex; and, psychologically, to be a transsexual .... The body in its post-operation condition looks more like a female than a male as a result of very skilful surgery .... [But] the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed either by the natural development of organs of the opposite sex, or by medical or surgical means. The... operation cannot affect the true sex....
>
> The fundamental purpose of law is the regulation of the relations between persons and between persons and the state or community... [L]egal relations can be classified into those in which the sex of the individuals concerned is either irrelevant, relevant or an essential determinant of the nature of the relationship. Over a very large area the law is indifferent to sex.... [T]here is nothing to prevent the parties to a contract of insurance or a pension scheme from agreeing that the person concerned should be treated as a man or as a woman, as the case may be. Similarly, the authorities, if they think fit, can agree with the individual that he shall be treated as a woman for national insurance purposes .... On the other hand, sex is clearly an essential

[63] [1954] 3 All E.R. 208.
[64] [1970] 2 W.L.R. 1306, 1322-3, 1324-5, 1326-7.

> determinant of the relationship called marriage, because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element . . . . [T]he characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex. There are some other relationships such as adultery, rape and gross indecency in which, by definition, the sex of the participants is an essential determinant....
>
> ... The question [is] what is meant by the word 'woman' in the context of a marriage, for I am not concerned to determine the 'legal sex' of the respondent at large. Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must... be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage... [T]he respondent is not a woman for the purposes of marriage but is a biological male and has been so since birth. It follows that the so-called marriage is void. ... [It has been submitted] that, because the respondent is treated by society for many purposes as a woman, it is illogical to refuse to treat her as a woman for the purpose of marriage. The illogicality would only arise if marriage were substantially similar in character to national insurance and other social situations, but the differences are obviously fundamental. These submissions, in effect, confuse sex with gender. Marriage is a relationship which depends on sex and not on gender.... I would, if necessary, be prepared to hold that the respondent was physically incapable of consummating a marriage because I do not think that sexual intercourse, using the completely artificial cavity constructed by [the operation] can possibly be described... as 'ordinary and complete intercourse' or as '*vera copula* — of the natural sort of coitus'.[65] in my judgment it is the reverse of ordinary, and in no sense natural. When such a cavity has been constructed in a male, the difference between sexual intercourse using it, and anal or intracrural intercourse is ... to be measured in centimetres. I am aware that this view is not in accordance with some of the observations... in *S.* v. *S.*[66] but... those parts of the judgment which refer to a wholly artificial vagina, go beyond what was necessary for the decision... and should be regarded as obiter. The respondent in that case was assumed to be a woman, with functioning ovaries, but with a congenital abnormality of the vagina. ... This is a very different situation from the one which confronts me. There are ... certain dangers in attempting to analyse too meticulously the essentials of normal sexual intercourse.... The mischief is that, by over-refining and over-defining the limits of 'normal', one may, in the end, produce a situation in which consummation may come to mean something altogether different from normal sexual intercourse....
>
> ... I hold that it has been established that the respondent is not, and was not a woman at the date of the ceremony of marriage, but was, at all times, a male. The marriage is, accordingly, void....

It may well be considered that it is high time the courts recognised the possibility that such a narrow medico-legal definition of 'sex', even for the purposes of marriage, is completely out of touch with modern social needs. After all, had the respondent in this case required medical treatment there is no doubt that this would have been given in the women's ward of a hospital, just as it cannot be doubted that the individual him/herself would have always used public conveniences set aside for women, and had an attempt been made to use those intended for males would probably have been arrested. Switzerland appears to have taken a far more socially-minded view

[65] See fn. 1 p. 100 above.
[66] See fn. 5 p. 101 above.

of this type of situation. In May 1974 the Swiss authorities recognized the civil status of a former male who had changed sex and "agreed to re-register the man as a woman provided that if she marries she informs her spouse beforehand about the operation."[67] The Swiss, therefore, accept that a valid marriage may be contracted between a man and a man who has become a woman, and presumably would give such a person the full protection of the criminal law, recognizing that as a woman she could be raped even by way of her artificial vagina. This is in direct contrast to the view of Judge Crush in Cincinnati who dismissed charges of rape and aggravated assault when it was discovered that the complainant was a man undergoing sex change operations. In the judge's view the plaintiff had not been raped, but was 'an obvious homosexual', whose credibility was nil.[68] While it may be true that the witness's credibility was nil, there is no real reason why a person with an artificial vagina, be that person medically female or male, cannot be the victim of rape. Perhaps, this is but one further ground for agreeing with those who argue that rape is merely another form of assault, and that it would be more in keeping with the victim's dignity and protect her from cruel and unnecessarily suggestive cross-examination if the sexual aspects of this crime were removed.

It is not only in legal relationships that cases of transsexualism have been important and controversial. In recent years disputes have arisen concerning sex tests for women competitors in international athletics meetings, including the Olympic Games, such tests being by way of chromosomal smears from the inside of the mouth. Matters came to a head in 1976 in the case of Dr. Renee Richards. As Dr. Richard Raskin this individual had played successfully in competitive tennis tournaments between men. After undergoing a sex-change operation and taking the name of Dr. Renee Richards she sought to enter women's tennis competitions in the United States. Most of the members of the Women's Tennis Association refused to play in any tournament in which Dr. Richards competed, and the United States Tennis Association announced that it would demand sex tests from competitors participating in the United States Open championships. Dr. Richards refused to submit to such a test and accepted an invitation to play in the women's singles in the forthcoming Australian Open.[69] Despite this, it can obviously be argued that in view of the decision in *Corbett* v. *Corbett* that sex depends on gonadal and chromosomal make-up, Dr. Richards is still physiologically a male and therefore the protests might be justified. On the other hand, if attention is paid to physical appearance and social acceptance, Dr. Richards is clearly female and entitled to compete with other females on equal terms, as the Australian invitation confirms.

Since society's attitude to homosexuality has changed and some homosexual couples have entered into more or less permanent bilateral arrangements; and since we have accepted for many purposes that legal consequences may flow even from an unmarried relationship between a man and a woman;[70] are changing our attitude towards

[67] *The Times,* 23 May 1974.
[68] *Globe and Mail, 21* Sept. 1974.
[69] *The Times,* 16, 19, 23 Aug. 1976.
[70] Thus, during the war, 'unmarried wives' of English soldiers received 'family' allowances.

illegitimacy; and no longer regard procreation as essential to a valid marriage and allow sterilisation, there appears to be no reason why we should not also recognize that a permanent relationship between two persons of the same sex can acquire legal recognition and protection. In 1974, using very similar reasoning to Ormrod J. in *Corbett* a Manitoban judge refused[71] to recognise a ceremony entered into by two men before a clergyman as creating a marriage. It may be that this was not a marriage in the traditional sense, for, after all, "[t]he truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables."[72] Nevertheless, it must not be forgotten that we have wandered far from tradition in both our sexual and our family relationships. It may be asking too much to expect a legislature or the mass of society to afford the word marriage to such a liaison. Perhaps, though, acceptance would be accorded if some other term were evolved to give legal cognizance to what may after all be an even more permanent relationship than is often created in a 'proper' marriage. Such a development would ensure for one thing that if the 'husband' or earning partner of the relationship were to die without leaving a will, the 'housewife' partner would be entitled to succeed to the matrimonial house and property sooner than the 'husband's' next of kin, who may as likely as not have refused to have anything to do with such 'husband' from the moment he entered into his 'marriage'. Moreover, there is perhaps another social reason for the recognition of such 'marriages' at the present time — they, at least, make no contribution to the population explosion.

Ormrod J. said that '[t]he fundamental purpose of law is the regulation of the relations between persons, and between persons and the State or community.' Too often, the law seems to lag behind what the public desires and too often the law becomes out of date and out of accord with social needs.[73] In so far as the personal lives of individuals are concerned, particularly in their most intimate relationships, it is high time that the law took note of its 'fundamental purpose' and made an effort to regulate 'the relations between persons, and between persons and the State' in a manner that preserved harmony in those relations, recognizing that the State, its institutions and the law are the servants of the people and that people are not the playthings of the law.

In 1929 Max Radin wrote:[74] "If [the judge] shuts his eyes and averts his face and cries out that he will not judge, he has already judged. He has declared it to be lawful by not declaring it unlawful." In this area, too often the truth is exactly opposite.

L. C. GREEN *

[71] *North and Vogel* v. *Matheson* (1974, see fn. 15 p. 83 above)—Philip, C.C.C.J., Manitoba, adopted Ormrod J.'s comments in *Corbett re* purpose of law, and sex and marriage.

[72] *Bollard* v. *U.S.* (1946) 329 U.S. 187, 193, *per* Douglas J.

[73] See, 'Law and Morality in a Changing Society', in Green, *Law and Society* (1975) 1, 51.

[74] 'Permanent Problems of the Law' (1929) 15 Cornell Law Q. 1, 15.

* LL.B., LL.D., University Professor, University of Alberta; Dean, Faculty of Law, University of Singapore, 1964-5.