

THE WORLD'S LAWS CONCERNING VOLUNTARY STERILIZATION FOR FAMILY PLANNING PURPOSES

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The question of voluntary sterilization for purposes of family planning has developed quickly into an issue of world-wide significance. In most countries it has far out-stripped the slow legislative process. The purpose of this article is to present the current legal situation in many countries of the world and to indicate the confusion which has arisen as a result of the above developments. It will also explore the provisions of the most recently developed laws.

Until very recently, it seldom occurred to anyone that a medical procedure for sterilization which would not adversely affect normal sex relationships was either possible or desirable. Sterilization was generally considered in connection with other purposes, either therapeutic (to protect the physical or mental health of a woman), or eugenic (to prevent physically or mentally inadequate progeny). In criminal law it was dealt with as violent physical assault equivalent to castration. While a change has occurred in some countries, most still deal only with these aspects.

The world population problem only became pressing after World War II. It developed suddenly before a safe, effective, inexpensive and generally acceptable contraceptive could be invented and marketed effectively. Meanwhile, male and female sterilization techniques have developed with surprising rapidity. These techniques are relatively safe, quick, inexpensive, and acceptable to many people since they do not interfere with normal sexual activity. These operations are already becoming popular both in the developing countries as well as in developed countries.

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Public opinion appears to be evolving towards acceptance in many countries. Tens of thousands of operations are being performed every year throughout the world. Sterilization is supported by official policy in some nations, with the government even subsidizing the costs.

These swift developments in turn call for a prompt reappraisal of existing laws, which either do not deal with the matter at all, or worse, deal with it in a highly inappropriate manner. The inappropriateness is best illustrated by the fact that the only laws ostensibly applicable in most countries are the criminal laws on assault and heavy bodily injury. These statutes equate the work of a skilled physician on a willing patient under clinical conditions with the most brutal kind of mugging. As a result of the nature of these draconic penal provisions, they are not often applied in practice. Only a microscopic number of cases have been found where prosecution has been instituted, and only two of these have resulted in conviction. In short, either there is a deep discrepancy between law and practice, or a legal vacuum has been created. The situation is further complicated by the fact that in many countries the old laws find strong support. The idea of sterilization still arouses strong moral, religious, and emotional reactions. Such phenomena as the atrocious Nazi experience in this field add to this atmosphere.

In dealing with this situation, various legal questions arise. The most frequent of these is the question of human rights and the effect of consent in jurisdictions where sterilization is treated as assault.¹ As to human rights, the issues now raised are wholly different from the older human rights issues raised by compulsory sterilization. The United Nations has declared that the right to determine the number and spacing of children in a responsible manner is a basic human right.² The related assertion is that a woman or a man has the right to control her or his own body. The human rights issue concerning the equality of women is also involved because, with sterilization, the husband can be expected to take as much responsibility as the wife in the family planning process.

1. The writers use the word "jurisdiction" in a sense less common outside the United States, to cover with one term all types of legislative areas. This might be one unitary country, or a territorial unit of a federalized country (states, provinces, Laedner, Kantone).

2. See U.N. International Conference on Human Rights, *Human Rights Aspects of Family Planning*, in Act of the International Conference on Human Rights, at 3, 14 (1968). See also U.N. Doc. A/CONF. 32/41 (1968).

Under present conditions the question of whether consent by the person requesting sterilization constitutes a defense in a criminal action for assault is the key problem in many jurisdictions. Although it might normally be assumed to constitute a defense in theory, that is not always the case in actuality.

In this paper several objectives will be sought. First, a brief survey of the legal regulations governing voluntary sterilization which exist at the present time in various countries will be undertaken. Secondly, the paper will discuss and evaluate characteristic contemporary legislation, taking into consideration: (1) modern attitudes toward sex and family planning; (2) the danger of excessive population growth in many countries; and (3) the question of enforceability and effectiveness. Finally, it will draw conclusions and make recommendations as to the factors to be considered in connection with future legislation.³

I. JURISDICTIONS WITH SPECIFICALLY APPLICABLE LAWS

A. Jurisdictions Which Specifically Authorize Voluntary Sterilization

During the past decade and a half, in what can be seen as a modern legislative approach to the issue, some jurisdictions have enacted statutes which specifically authorize voluntary sterilization, subject to certain limitations. Another group of jurisdictions have laws specifically dealing with sterilization which somewhat restrict the access of a mature person to voluntary sterilization.

Virginia, in 1962, was the first jurisdiction to enact legislation of the non-restrictive type. Virginia's law expressly authorizes "vasectomy, or salpingectomy, or other surgical sexual sterilization procedure"⁴ under the following conditions: (1) that they are carried out by a licensed physician or surgeon; (2) that a written authorization is obtained from his or her spouse; (3) that a medical explanation is given to the patient as to the meaning and consequences of the operation; (4) that the patient is at least 21 years old; and (5) that there is a lapse of 30 days between the request and the operation.⁵

3. There has been no attempt in this article to deal with therapeutic or eugenic sterilization or with the question of liability for civil damage for assault, negligence or malpractice.

4. VA. CODE ANN. §§ 32-423 to -427 (1972).

5. *Id.*

A number of vasectomy clinics in the United States impose their own criteria in practice, such as age, parity, marital status, or signed consent of spouse.⁶ The legality of these criteria is sometimes questionable. In New York, a woman who was refused a sterilization by a private hospital on the basis of such criteria sued for the refusal. Although the hospital eventually performed the operation, she recovered damages in an out-of-court settlement.⁷

In England, the National Health Service Amendment Act of October 26, 1972, introduced a broadly framed type of regulation which provides:

[V]oluntary vasectomy services may be provided by local health authorities in England and Wales on the same basis as the contraception services A local health authority in England or Wales may, with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for the giving of advice on voluntary vasectomy, the medical examination of persons seeking advice on voluntary vasectomy for the purpose of determining what advice to give and for treatment of voluntary vasectomy.⁸

Since the statute imposes no limitations or directions, the development of legal vasectomy in England depends upon the decision of the Secretary of State and of the local health authorities.

The most important trend in modern legislation on the European continent was started by the Alternative Draft (*Alternativentwurf*) of the Criminal Code, introduced in 1966 by a group of German legal scholars as a counter-draft against the draft criminal code proposed by the government of West Germany.⁹ According to the *Alternativentwurf*, sterilization would not be "unlawful" if performed by a physician on a person older than twenty-five years with his consent, and after the patient had been alerted by a medical consultation as to the consequences. As the explana-

6. Association for Voluntary Sterilization News, Feb., 1974, at 1.

7. Stein v. North Westchester Hospital, Civil No. 70-1974 (S.D.N.Y. 1974).

8. The National Health Service (Family Planning) Amendment Act 1972, ch. 72, §§ 1, 2A. The British law may be significant for the additional reason that it is apparently one of the first laws to provide for the subsidization of the operation under such conditions as the local health authority may consider reasonable. See *id.*, § 2B. What the future trends may be in this connection, including the question of health insurance coverage, is an interesting question.

9. Alternativ-Entwurf eines Strafgesetzbuches, Besonderer Teil, Straftaten gegen die Person, Erster-Halbband (1970).

tory comment of the counter-draft says, the legislative intent of such a regulation would be:

[T]o protect young and immature persons from the irreparable consequences of decisions, which they may later regret, at the same time, however, to leave open to mature and judicious people the free shaping of their personal circumstances¹⁰

On this basis, the *Bundestag* adopted in the spring of 1974 an amendment to the Criminal Code which, although it follows the substantive provisions of the *Alternativentwurf*, nevertheless retains the traditional German concept that a voluntary sterilization which does not comply with the new provisions shall be treated as the crime of intentional grave bodily injury. Under this law, persons under twenty-five years of age may be sterilized only where special circumstances exist such as in the instance of a woman who already has four children.

The proposal of the West German scholars immediately influenced the legislatures of other countries. With various modifications, the model of the *Alternativentwurf* was enacted in Denmark in 1973, and in Austria in 1974. The new Danish law entitles any person who is at least twenty-five years of age and is domiciled in Denmark to sterilization on request.¹¹ Younger persons may be allowed to be sterilized if a special committee unanimously agrees that special conditions exist. Sterilization may only be performed by a physician in a certain kind of hospital, after the patient has been informed of the nature, consequences, and risks involved in the operation. If a hospital or hospital department refuses to perform the sterilization, the applicant shall be referred to another hospital or department in which the operation can be performed.

The new criminal code of Austria, adopted in January 1974, provides:

Sterilization, if performed by a physician with the consent of the sterilized person, is not unlawful [*rechtswidrig*] where either this person has already reached the age of 25 years, or where the operation is not against good morals on the strength of other grounds.¹²

10. *Id.*, at 53.

11. Law of June 13, 1973, (No. 318) On Sterilization and Castration, [1973] Lovtidende A 923 (Den.).

12. PENAL CODE § 90, para. 2 (1974) (Bundesgesetzblatt No. 60, 1974) (Aus.) (effective Jan. 1, 1975). Further, section 90, paragraph 1, states in general

The non-restrictive limitations found in the laws discussed above require: (1) the full and mature consent of the patient, assured by age limits, medical explanation, and lapse of time; (2) safeguards of the spouse's interest; and (3) safeguards as to adequate medical treatment. Limitations of this kind do not seriously restrict the right of couples to family planning, provided the age requirement is not too high.

Countries with specific laws dealing with voluntary sterilization in a more restrictive manner include Czechoslovakia,¹³ Finland,¹⁴ Honduras,¹⁵ Iceland,¹⁶ Japan,¹⁷ Norway,¹⁸ Panama,¹⁹ Singapore,²⁰ Sweden²¹ and Thailand.²² Legal limitations frequently appear either in the country's basic sterilization legislation or in implementing regulations.²³ For example, in Eastern Germany, under directives issued by the Minister of Health, voluntary sterilization of women may be performed if all methods of reversible contraception are ineffective, and the operation is necessary to avoid serious danger to life and health.²⁴

Several additional types of restriction can be found in these countries.

that inflicting corporal injury is not unlawful if done with consent of the injured person and is "in itself not against good morals." *Id.*, § 90, para. 1.

13. Law of March 17, 1966, (No. 20) § 27, [1966] *Sbírka Zákonů* 74 (Czech.). Implementing regulations were issued by the Czech Ministry of Health on Dec. 17, 1971, [1972] *Věstník ministerstva zdravotnictví* (Nos. 1, 2), and by the Slovak Ministry of Health on April 14, 1972 [1972] *Vestník ministerstva zdravotnictva* (Nos. 6, 7).

14. Law of April 24, 1970, (No. 283) On Sterilization, [1970] *Finlands Foerfattningssamling* 587 (Fin.).

15. Decree No. 94 of June 25, 1964, § 110, [1964] *La Gaceta* (Nos. 18.320, 18.321, July 13, 14, 1964) (Hond.).

16. Law of Jan. 13, 1938, (No. 16), [1938] *Stjórnartíðind* 24 (Iceland).

17. Law of July 13, 1948, (No. 156) On Eugenic Protection, 16 *INT'L DIGEST HEALTH LEGIS.* 690 (1965) (Japan).

18. Law of June 1, 1934, (No. 2) Concerning Sterilization, [1934] *Norsk Loutidende* 203 (Nor.).

19. Law of May 13, 1941, (No. 48) Allowing Sterilization, [1941] *Gaceta Oficial* (No. 8.515, May 19, 1941) (Pan.).

20. Law of March 20, 1970, (No. 26) On Voluntary Sterilization, Statutes of the Republic of Singapore, ch. 170 (1970), *as amended*, Law of May 2, 1972.

21. Law of May 23, 1941, (No. 282), Concerning Sterilization, [1941] *Svensk foerfattningssamling* (Swed.), *as amended*, Law of March 26, 1964, (No. 173), [1964] *Svensk Foerfattningssamling*.

22. *PENAL CODE* §§ 297, 298 (Thailand).

23. *See, e.g.*, the Czechoslovakian legislative technique with a short statutory provision implemented by two extensive ministerial regulations, *supra* note 13.

24. *See* Appendix note 28, *infra*.

1. *Sex of the patient*: The 1941 statute of Panama limits contraceptive sterilization to women only.²⁵ In view of the fact that the previous law had allowed voluntary sterilizations for persons of both sexes, the present law seems to be clearly restrictive in intent, if not actually discriminatory. Similar provisions are found in the laws of other Latin American and African countries.²⁶

2. *Minimum number of children required*: The applicant must have a certain number of children in some countries before voluntary sterilization is allowed. Japan requires "several."²⁷ Five living children are required in Panama.²⁸ Four (three, if the woman concerned is over thirty-five years of age) were required by the Czechoslovak 1966 regulation.²⁹ Policy guidelines issued by the Government of India and the Indian states require a minimum of three living children.³⁰

3. *Social and economic difficulties*: The fact that some laws allow sterilization if a family has a large number of children appears to be based on the assumption that large families will have financial difficulties. Under the laws of a number of nations, a socially and economically difficult situation is provided as a criterion for allowing sterilization. Thus, a section of the old Danish law of 1967 concerning sterilization and castration provided:

Sterilization may be authorized . . . when the conditions under which the applicant and his family live make it desirable to prevent the birth of further children. Account shall be taken, in reaching the decision, of the condition of the family from the point of view of health, housing, and income, and the number of children in the home, and also of the possibility that further children will result in an appreciable deterioration of the situation by harmfully affecting the state of health of the woman, markedly increasing her workload³¹

25. Law of May 13, 1941, (No. 48) Allowing Sterilization, [1941] *Gaceta Oficial* (No. 8.515 of May 19, 1941) (Pan.).

26. See Appendix, *infra*.

27. Law of July 13, 1948, (No. 156) On Eugenic Protection, 16 INT'L DIGEST HEALTH LEGIS. 690 (1965) (Japan).

28. Law of May 13, 1941, (No. 48) Allowing Sterilization, [1941] *Gaceta Oficial* (No. 8.515 of May 19, 1941) (Pan.).

29. Law of March 17, 1966, (No. 20) § 27, [1966] *Sbírka Zákonů* 74 (Czech.).

30. S. Singh, *India*, ch. 4 of L. LEE & A. LARSON, *POPULATION AND LAW*, at 112 (1971).

31. Law of June 3, 1967, (No. 234) Concerning Sterilization and Castration, [1967] *Lovtidende A* 837 (Den.).

The Swedish law of 1941 provides that sterilization is contingent upon the existence of compelling social considerations. This includes situations where "because of mental derangement or an asocial way of life the subject is found obviously unable to assume responsibility for the proper upbringing of children."³² This concept indicates the predominantly eugenic character of the Swedish law.

4. *Authorization of sterilization by an official authority or board:* This is a frequent prerequisite for the sterilization operation, but it does not occur in the most modern laws.³³ The old Danish law even required a unanimous decision of the authorizing committee.³⁴ The Georgia law requires the physician to consult with another physician.³⁵ In Honduras, sterilization must be "decided by three competent physicians."³⁶ When an official body is constituted to decide if a person can or cannot be sterilized, its procedure and decisions are regular administrative matters. However, the statutes often lack provisions as to the extent of discretion given to the administrative board and the extent to which a citizen has either a right to sterilization, or a right to review or appeal.

5. *Right of a hospital or doctors to refuse to perform the operation on grounds of conscience:* Denmark and some jurisdictions in the United States give the hospital or its personnel the right to refuse to perform the operation on grounds of conscience.³⁷ If the refusing facility is the only one available in the area, a considerable burden is placed on the requesting person. In the event one institution refuses to perform the operation, Danish law requires the refusing institution to refer the party to another facility which will conduct the operation.

32. Law of May 23, 1941, (No. 282) Concerning Sterilization, [1941] Svensk foerfattningssamling (Swed.), as amended Law of March 26, 1964, (No. 173) [1964] Svensk foerfattningssamling.

33. See, e.g., VA. CODE ANN. §§ 32-423-427 (1972); The National Health Service (Family Planning) Amendment Act 1972, ch. 72.

34. Law of June 3, 1967, (No. 234) Concerning Sterilization and Castration, [1967] Lovtidende A 837 (Den.).

35. GA. CODE ANN. § 84-932 (1970).

36. Decree No. 94 of June 25, 1964, § 110, [1964] La Gaceta (Nos. 18.320, 18.321, July 13, 14, 1964) (Hond.).

37. Compare GA. CODE ANN. § 84-935.2 (1970), with *Hathaway v. Worcester City Hospital*, 475 F.2d 701 (1st Cir. 1973) (held public hospital receiving public funds was declared obligated to perform the operation). See also, Law of June 13, 1973, (No. 318) on Sterilization and Castration, [1973] Lovtidende A 923 (Den.).

Some of the above five types of restrictive limitation may be combined in some instances with one or more of the non-restrictive limitations previously discussed, including age limits, consent of a person who "although not legally married, possesses marital status" with the applicant, or safeguards of adequate medical treatment.³⁸ Some countries require that the operation be carried out in a hospital managed or supervised by an official authority.³⁹

The Georgia law is a good example of a combination of non-restrictive and restrictive provisions.⁴⁰ In 1966, a law was adopted which allowed sterilization for married people only. The law was amended in 1970 so as to make it available for both married and unmarried people. The following conditions were imposed: (1) the operation must be performed by a physician, but only after *mandatory* consultation with another physician; (2) the patient must be twenty-one years old or married; (3) the request must be submitted in writing; (4) a medical explanation of the consequences must be provided; (5) consent of the spouse is required; and (6) the hospital and its employees individually may not be required to provide treatment if they object on moral or religious grounds. The North Carolina law is similar, except for the last condition.⁴¹

B. Countries with Provisions Which Specifically Prohibit Voluntary Sterilization

Symptomatically, some dictatorial regimes enacted provisions punishing not only the person performing sterilization, but also the patient. However surprising the idea of punishing the person sterilized appears to be in the contemporary trend of thinking, it is logical where the government is thinking in terms of a duty of citizens to procreate.

In the later period of the Hitler era, a provision was enacted in Germany under which the physician performing the sterilization operation, as well as the patient himself, were punishable. This provision, deleted in 1946,⁴² was characterized by the Federal Supreme Court of Germany in a 1964 decision as follows:

38. See Law of July 13, 1948, (No. 156) On Eugenic Protection, 16 INT'L DIGEST HEALTH LEGIS. 690 (1965) (Japan).

39. See Law of March 17, 1966, (No. 20) § 27, [1966] Sbirka Zákonů 74 (Czech.).

40. GA. CODE ANN., §§ 84-931 to -936 (1970).

41. N.C. GEN. STAT. §§ 90-271 to -275 (1965).

42. Law of March 9, 1943, § 226(b), To Protect Marriage, Family, and Maternity [1943] RGBl. I 140 (Ger.).

The laws relating to sterilization, enacted during the time of national socialism . . . were in accord with its ideology under which the procreation of those human beings who were worthless in its opinion, was to be prevented and the procreation of those, who in its opinion were valuable, was to be encouraged by all means available.⁴³

The Italian Penal Code clearly provides for the punishment of the person performing the operation. It states:

Whoever performs acts on persons of either sex, with their consent, intended to render them incapable of procreating, will be punished by imprisonment from six months to two years and with a fine from eight to forty thousand lire.⁴⁴

This punishment also applies to the person sterilized under Turkish law. The Turkish Criminal Code provides:

Whoever, by his acts, causes a man or woman to become sterile, and any person giving consent to the performance of such acts on himself, shall be punished by imprisonment for six months to two years and by a heavy fine of 100 to 500 lire.⁴⁵

By decision of the Council of Ministers, Turkish regulations were issued allowing sterilization on preventive medical grounds and eugenic sterilization on grounds of serious hereditary disease.⁴⁶ There is no provision for sterilization on family planning grounds.

In South Vietnam, a law dealing with the protection of morality was adopted. It provides for the following:

It is forbidden to conduct propaganda for, or to encourage . . . the unnatural prevention of pregnancy . . . except where the doctor decides otherwise on the basis of clear evidence that the life of the woman will be endangered by delivery.

If found in violation of this article, the main defendant and his accomplices will be subject to a fine from 10,000 to 1,000,000 piastres, or to a confinement of from 1 month to 5 years, or both of these two penalties. As to the crime of pregnancy prevention only one of these penalties is applied.⁴⁷

43. Judgment of Oct. 27, 1964, 20 BGHSt.81 (Bundesgerichtshof, W. Ger.).

44. C. PEN. art. 552 (Italy).

45. CRIMINAL CODE § 471 (1926) (Law No. 765 of March 1, 1926) (Tur.).

46. Decision No. 6/8.305 of June 12, 1967 (Council of Ministers) 19 INT'L DIGEST HEALTH LEGIS. 426 (1968).

47. Law of May 22, 1962, (No. 12) § 8, On Protection of Morality (S. Vietnam).

Similarly Burma also forbids voluntary sterilization for family planning purposes.⁴⁸

A few other jurisdictions punish only the person performing the sterilization. The Penal Code of Nicaragua provides:

The following shall be punishable for grave bodily injury: 1) whoever, without causing death, maliciously (*maliciosamente*) castrates or renders the reproductive organs (*organes generadores*) of another person useless, without his consent; 2) whoever commits the same offense against an adult person with his consent.⁴⁹

In the United States there were only a few state laws prohibiting contraceptive sterilization. This seems surprising in view of the abundant anti-contraceptive laws which survived from the nineteenth century. The states which tried to outlaw voluntary sterilization were Kansas,⁵⁰ Utah,⁵¹ and Connecticut.⁵² However, the Kansas law was repealed effective June 1965, and the law of Connecticut was superseded by a new criminal code, effective October 1971, from which all restrictions on voluntary sterilization have been removed.⁵³ In May, 1972, the Utah Supreme Court held that the state's sterilization statute covering compulsory sterilization of certain inmates of state hospitals and prisons does not restrict the right of individuals to voluntary sterilization.⁵⁴ There are no federal laws prohibiting voluntary sterilization in the United States.

II. JURISDICTIONS WHERE VOLUNTARY STERILIZATION IS COVERED UNDER CRIMINAL LAW PROVISIONS ON INTENTIONAL GRAVE BODILY INJURY

In the great majority of jurisdictions, the only laws which

48. PENAL CODE § 312a-d (Burma), inserted by the PENAL CODE ACT of 1963.

49. CODIGO PENAL § 360, para. 2 (M. Escobar, 1950) (Nicar.). Section 361 provides a less severe punishment for the offense where there is consent. *Id.*, § 361. See also CRIMINAL CODE § 416 (Spain), and Law No. 40.651 of June 21, 1956, art. 81, for Regulation of Physicians, [1956-I] *Legislacao Portuguesa* 937 (Portugal).

50. KAN. STAT. ANN. § 76-155 (1969) (indicates that the section was repealed in 1965).

51. UTAH CODE ANN. § 64-10-12 (1968).

52. CONN. GEN. STAT. ANN. § 53-32 (1960). See also Bravenec, *Voluntary Sterilization as a Crime: Applicability of Assault and Battery and of Mayhem*, 6 J. FAMILY L. 94 (1966).

53. 53 CONN. GEN. STAT. ANN. § 32 (Cum. Annual Pocket Part 1974).

54. *Parker v. Rampton*, 28 Utah 2d 36, 497 P.2d 848 (1972).

might be applied to cover voluntary sterilization for family planning purposes are the sections of criminal law dealing with intentional infliction of grave bodily injury. The key issue in such a case is the relevancy of the fact that the "victim" requests the operation.

In common law jurisdictions the crime in question appears under terms such as "inflicting grievous bodily harm", "assault", or "mayhem". Terms such as "intentional infliction of grave corporal injury" are used in most Civil Law countries. *Coups et blessures volontaires*⁵⁵ is the expression formerly used in French law.

The standard statutory form, especially on the European continent and in Latin America, usually follows a pattern. First, there is a preliminary general definition of the crime of intentional infliction of a bodily injury. The next provision provides a severe penalty for a grave bodily injury and usually includes a listing of very serious injuries to corporal integrity or health. Among them can be found language covering loss of reproductive ability, either in general terms such as "permanent impairment of an organ" or "loss by an organ of its function" or, more specifically, "loss of ability to procreate." Less often, codes may use only very general definitions such as "heavy bodily injury," "lasting infirmity" or "grievous injury to health." Penalties imposed by law are very severe, usually several years of imprisonment.

The provisions of the Colombian Penal Code are illustrative of this legislative technique. It provides:

Anyone who, without intent to kill, causes an injury to the body or the health of another or a physical disturbance, shall suffer the punishments specified in the following articles.

. . .

If the injury causes facial disfiguration, curable physical deformity or transitory psychical disturbance, the punishment will be imprisonment for six months to five years and a fine of one hundred to two thousand pesos.

If the disfiguration or deformity be permanent, the punishment shall be imprisonment for one to six years and a fine of one hundred to four thousand pesos.

If the injury causes transitory functional impairment of an organ or limb, the punishment shall be penal servitude for two to five years and a fine of two hundred to four thousand pesos. If the functional impairment be permanent, the

55. This term refers to wounds and injuries intentionally inflicted.

punishment shall be penal servitude for two to six years and a fine of two hundred to five thousand pesos.⁵⁶

Similarly, the Penal Code of the Russian Federal Socialist Republic of October 27, 1960 states:

Intentional infliction of bodily injury dangerous to life or resulting in loss of sight, or of hearing, or of any organ, or in loss by an organ of its function, or in mental illness or in any other impairment of health, joined with persistent loss of at least one third of the capacity to work, or when it results in an interruption of pregnancy or permanent disfigurement of the face, shall be punished by deprivation of freedom for a term not exceeding eight years.

The same actions, if they cause the victim's death, or assume the character of torment or torture or are committed by an especially dangerous recidivist, shall be punished by deprivation of freedom for a term of five to twelve years.⁵⁷

On the scale of violent crimes ranged in order of their social dangerousness and condemnation, criminal infliction of sterility is usually close to the top in severity. The Soviet provision, which is similar to that of many other countries, even covers without differentiation of penalty both castration, which typically means violent and malicious castration, and sterilization. These provisions subject sterilization, considered as one of the most serious crimes of brutal violence, to such heavy punishment that they appear to have been aimed at cases of "malicious" sterilization carried out against the will of the victim.

The present worldwide legal problem, therefore, may be phrased in this manner: do these criminal provisions also cover cases of voluntary sterilizations, such as operations carried out under professional precautions and at the request of mature persons who consider such to be for their own benefit? In other words, does the consent of the sterilized person change the situation from brutal, violent attack to a surgical service? Does consent constitute a defense in the terminology of Common Law countries?

A. Countries Where Consent is Not a Defense

A few countries expressly legislate on the issue of consent

56. PENAL CODE §§ 371, 373, 374 (Law No. 95 of April 24, 1936) (Colombia) 14 AM. SERIES FOREIGN PENAL CODE 107 (1967) (Colombia).

57. R.F.S.F.R. Oct. 27, 1960 UGOLOVNYI KODEKS (Criminal Code) § 108 (Soviet Union). For an English translation, see H. Berman & J. Spindler, SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES (1966).

on the part of the victim to heavy bodily injury, and provide that consent is not a defense. Some Latin American codes contain specific provisions imposing lighter punishment for bodily injury, if committed with the consent of the injured person. Hence, the consent is not exculpatory; it is merely an extenuating circumstance. Such provisions can be found in Guatemala⁵⁸ and Nicaragua.⁵⁹

Despite the provisions cited, under which even voluntary sterilization operations have to be regarded as criminal acts, the actual situation in these and other Latin American countries is subject to some doubt. Although voluntary sterilizations are performed in some countries, prosecution of operating physicians seems to be virtually nonexistent. In fact, for the past few years, a public vasectomy program has been carried out with the support of a charitable fund and has been very well received.⁶⁰

B. Countries Where Consent is a Defense

Contrary to the legal situation above, the criminal laws and codes of other countries provide that the consent of the "victim" exculpates the person inflicting the injury.⁶¹ As a rule, however, this provision applies only with some limitations.

Consent, in a broad sense, is acknowledged by the provision of the Uruguayan Penal Code of July 1, 1934, under the heading of "Consent to Injuries":

Causing bodily injury with the consent of the injured [*paciente*] is not punishable, except where the object is to elude

58. See Appendix, *infra*.

59. CODIGO PENAL § 317 (Decree No. 2164 of 1936) (B. Ramiro, V. Valdez, 1968) (Guat.); CODIGO PENAL § 360, para. 2 (M. Escobar, 1950) (Nicar.).

60. New York Times, June 27, 1972, at 6, col. 1. *Accord*, M. Gomez & V. Bermudez, *Costa Rica*, [1974] COUNTRY PROFILES 8 (April, 1974). The Colombian vasectomy program was carried out by the Colombian family planning association (Asociacion Pro-Bienestar de la Familia Colombiana) with financial help from Pathfinder Fund of Boston, and subsequently from the Association for Voluntary Sterilization.

61. Generally, the concept assumes that the criminal responsibility of the "doer" can be excluded only by a consent given by someone authorized to dispose of the interest concerned. Here it should be pointed out that this approach finds its statutory expression in the South Korean Penal Code:

Conduct which infringes a legal interest with the consent of someone who is authorized to dispose of such interest shall not be punishable, except as otherwise provided by law.

CRIMINAL CODE art. 24 (U.N. Command, 1956) (S. Korea).

compliance with the law, or to inflict damage to a third person.⁶²

The German Penal Code of 1871, as amended, and still in force, enacted in what is now the West German Penal Code, provides, "Whoever inflicts corporal injury with the consent of the injured person, acts illegally [*rechtswidrig*] only where his act violates good morals [*gute Sitten*]." ⁶³ Similar provisions are contained in the penal codes of Ethiopia.⁶⁴

In the countries influenced by the Common Law two types of statutory provision have developed with regard to the relevancy of consent in criminal cases involving surgical operations. Legal systems similar to the Indian Penal Code,⁶⁵ such as Pakistan,⁶⁶ Sri Lanka,⁶⁷ Malaysia,⁶⁸ and Singapore,⁶⁹ include provisions like that of the Indian Code, which are designed to meet the needs of the medical profession. The Indian Penal Code states:

Nothing which is not intended to cause death, is an offense by reason of any harm it may cause or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.⁷⁰

The key words are, of course, "for whose benefit it is done."⁷¹ It has been traditionally stressed that the benefit contemplated in this section does not include a pecuniary benefit. What this means, as applied to voluntary sterilization, is apparently receiving different interpretations.

62. CODIGO PENAL § 44 (U. Carballa, 1968) (Uru.). In dealing with this question in the next sections, a distinction must be made between sterilizations consented to in good faith for family planning purposes, and cases where a bodily injury is consented to in bad faith, for such purposes as evading military duty or supporting claims for social security.

63. Law of May 26, 1933, § 226(a), [1933] RGBL I 295 (Ger.).

64. PENAL CODE § 542, para. 1(c) (Negarit Gazeta, No. 158, 1957) (Ethiopia).

65. INDIAN PENAL CODE § 320, 325 (Central Law Agency, 1963). *See id.* § 88, regarding consent of the injured.

66. PENAL CODE § 320, 325 (The Law of Crimes 1970) (Pakistan) (Act 45 of Oct. 6, 1860). *See id.* § 88, regarding consent of the injured.

67. *See* W. Weerasooria, Manuscript for the Law and Population Project, Colombo, Sri Lanka (unpublished manuscript on file with the authors).

68. PENAL CODE § 88 (1860) (Malaysia).

69. Law of March 20, 1970, (No. 26) On Voluntary Sterilization, Statutes of the Republic of Singapore, ch. 170 (1970), *as amended*, Law of May 2, 1972.

70. INDIAN PENAL CODE § 88 (Central Law Agency, 1963). The term "good faith," according to Section 52 of the Indian Penal Code, includes due care and attention. *Id.* § 52.

71. *Id.*, § 88.

In India, despite this law, millions of sterilizations have been performed without any prosecution of a doctor being reported. The interpretation in practice seems to be that consent is relevant. In Sri Lanka, sterilization as a method of family planning has become a part of the government's program and the large tea estates have established incentive schemes to encourage it. At the same time, there are no specific legal provisions on sterilization as such. Since the criminal code provision is that of India, the physician concerned might be criminally liable if the "benefit" were to be considered "pecuniary". Yet a correspondent from Colombo writes that "it is inconceivable that doctors performing sterilization operations are in any real danger of being prosecuted, particularly after consent to the operation has been obtained."⁷² In India and Sri Lanka at least, it appears that the human right of family planning may include the right to select the means of family planning and thus to decide what constitutes "benefit."

However, the Vice Chancellor of the University of Malaya, interpreting the Malaysian law⁷³ which is also identical to the Indian, expressed doubt that consent would be a defense, unless the purpose of the operation was therapeutic. He states, "It is doubtful if contraceptive or socio-economic sterilization would be covered, especially as mere pecuniary benefit is not benefit within the meaning of the statute."⁷⁴

Another type of development is shown in the penal codes of several African countries such as Ghana, Nigeria, Tanzania, and Zambia. These statutes contain specific provisions on surgical operations, under which the intended benefit to the patient appears to exclude criminal responsibility for the surgeon. The Criminal Code of Nigeria, which is typical, states:

[P]erforming with good faith and with reasonable care and skill a surgical operation upon any person for his benefit, if the performance of the operation is reasonable, having regard to the patient's state and to all the circumstances of the case.⁷⁵

72. W. Weerasooria, Manuscript for the Law and Population Project, Colombo, Sri Lanka (unpublished manuscript on file with the authors).

73. PENAL CODE § 88 (1860) (Malaysia).

74. Letter from Professor Ahmad Ibrahim, Kuala Lumpur, Nov. 2, 1972. See L. Green, *Sterilization and the Law*, 5 MALAYA L. REV. 105 (1963), which expressed doubts on the legality of family planning sterilization under English law as well as under the Indian Penal Code models.

75. CRIMINAL CODE § 297 (Nigeria). See L. Brett & I. McLean, *THE CRIMINAL LAW AND PROCEDURE OF LAGOS, EASTERN NIGERIA AND WESTERN NIGERIA*, para. 1815 (1963). See also PENAL CODE § 230 (off. ed., 1945) (Tanzania); PENAL CODE ch. 6, § 210 (1965) (Zambia), which reads "perform-

Uncertainty exists regarding how these provisions may be interpreted in connection with voluntary sterilization. Perhaps the issue will revolve around whether or not the operation is a medical treatment of the kind which the statutes were enacted to protect rather than focusing on the interpretation of the word, "benefit". The question may therefore become: is voluntary sterilization, performed for family planning rather than therapeutic purposes, a medical treatment? This contention has occasionally been denied, both by medical and legal authorities—sometimes without due regard for the realities of life and for the right of individual couples to decide on their own parenthood. To perform voluntary sterilization, it is said, is to pursue ends "alien to the mission of medicine." Elements of paternalism, both legal and medical, may here come into conflict with the family planning principles accepted on the United Nations level.

Mexico should also be mentioned as a country where, in the Federal District, consent is covered by a provision which states that all persons over the age of minority have the right "freely to dispose of their bodies and possessions, subject to such limitations as the law may establish."⁷⁶ Since there is no provision in the Criminal Law which specifically prohibits sterilization, and since the Constitution of Mexico states that criminal laws are to be interpreted strictly,⁷⁷ it appears that voluntary sterilization is not illegal.⁷⁸

C. *Countries Without Provisions Regarding the Relevancy of Consent*

In the large majority of countries, criminal codes or laws con-

ing in good faith . . . [a] surgical operation upon any person . . . for his benefit." See also CRIMINAL CODE § 42c (Act 29 of 1960) (Ghana), which reads, "[Performing the operation] in good faith, for the purpose or in the course of medical or surgical treatment." Professor K. Bentsi-Enchill, Faculty of Law, Legon, Ghana, writes in a communication of Sept. 1, 1972: "The effect of Sec. 42 of the Code . . . is to make legal what otherwise would be a crime. Consent is therefore the fundamental feature which makes voluntary, as distinct from compulsory, sterilization legal under the Code."

76. C. Civ. Dist. y Terr. Fed., art. 24 (Andrade, 1952) (Mex.).

77. Constitución, tit. I, ch. 1, art. 14, para. 3 (Feb. 5, 1917) (Mexico). The Constitution says: "The penalty must be decreed in a law in every respect applicable to the crime in question." An English translation can be found in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Blaustein & G. Flanz ed. 1973).

78. Letter from Lic. Gerardo Cornejo M., Executive Director of Fundación para Estudios de la Población in Mexico, September 13, 1972.

tain no provisions on the effect of consent or on its relevancy or irrelevancy to the issue of criminal responsibility. Thus the question is a matter of doctrinal interpretation in the countries of continental Europe and Latin America. It should be a matter of case law in the Common Law countries, but judicial decisions are very rarely found on point.

In Civil Law countries, such as France, Belgium, and some countries formerly under French law, the weight of legal theory supports the principles that consent of the "victim" to "grave bodily injury," such as the sterilization operation, does not exculpate the surgeon. This was the basis for decision in the 1937 French case of the *Bordeaux sterilisateurs*.⁷⁹ Involved was a group who advocated and practiced voluntary sterilization for ideological reasons. Both French courts which faced the issue declared the consent of the sterilized people to be irrelevant to the criminal responsibility of the accused. Although the accused were not authorized physicians, that fact was irrelevant to the analysis upon which the decision was founded. The decision was based on the French doctrine that the patients could not authorize anyone to violate, against their own persons, the rules governing the public order.

Austrian authorities declared prior to the 1974 criminal code that non-therapeutic sterilization is a crime in spite of consent. The reasoning behind this assertion appears to be that the result of the operation diminishes the individual's capacity for achievement (*Leistungsfähigkeit*), and thus consent cannot set aside the material unlawfulness (*Rechtswidrigkeit*).⁸⁰

A reported case exists where the Austrian Supreme Court had ruled that voluntary vasectomy or vasoligature constitutes a crime of grave bodily injury.⁸¹ The logic followed was essentially that first, sterilization is not a healing medical treatment; and secondly, no one has the right to dispose of the intactness of his body on grounds of a family planning motive, as it is not an interest recognized by law. However, the sterilization was considered to be in a less serious class of grave bodily injury since medical experts testified that both vasoligature and vasectomy were re-

79. *Bordeaux Sterilisateurs*, [1938] S. Jur.L. 193 (Cass. crim.).

80. See F. Nowakowski, *DAS OESTERREICHISCHE STRAFRECHT IN SEINEN GRUNDZUEGEN*, at 137 (1955) (Aus.).

81. Judgment of May 8, 1934, [1934] *Entscheidungen des Obersten Gerichtshofes in Strafsachen* 110 (Aus.).

versible. Otherwise the act would have been punishable by imprisonment for five to ten years.

On the other hand, in Switzerland, a neighboring country whose legal system is somewhat similar to that of Austria, voluntary sterilization is practiced under the traditionally sympathetic attitude of physicians. Although under the official view of the Federal Department of Justice only therapeutic sterilization is allowed,⁸² some leading authorities on Swiss doctrine declare that consent excludes criminal responsibility, as it abolishes the *Rechtswidrigkeit*.⁸³ The concept of *Rechtswidrigkeit*, roughly translated as "material unlawfulness," has developed mainly in German criminal law. The prerequisite of *Rechtswidrigkeit* is that, to be criminal, an act must contradict not only a specific criminal law provision, but also the social object protected by that law. It would appear that as world opinion on family planning liberalizes, a growing number of authorities may be willing to deny the *Rechtswidrigkeit* of a contraceptive sterilization.

The situation still prevalent in the Civil Law area appears to be, according to legal theory and to some of those in official legal circles, that consent does not negate the criminal responsibility of the surgeon who performs sterilization for family planning purposes. But these expressions virtually never take cognizance of actual practice, of the impact of the growing acceptance of voluntary sterilization as a method of family planning, or of international declarations on this subject. In striking contrast to this theory, contraceptive sterilizations are increasingly being performed without prosecution in many countries. Moreover, there is strong reason to assume that, in some countries, contraceptive sterilizations are frequently performed in collusion between the physician and the patient, under the guise of therapeutic operations.⁸⁴

82. S. Woher, *Die Freiwillige operative Unfruchtbarmachung als Methode der Empfaengnisverhuetung in strafrechtlicher Sicht*, 1969, at 113 (unpublished dissertation, University of Saarland).

83. See, e.g., H. Pfenninger, *Ist freiwillige Sterilisation strafbar?* 82 SCHWEIZERISCHE ZEITSCHRIFT FUER STRAFRECHT, REVUE PENALE SUISSE 136, for a review of existing literature.

84. For an example of this discrepancy, see letter from Dr. G. Erenius, Law Faculty, University of Stockholm, of November 14, 1972, which reads:

According to Swedish law a surgeon performing a sterilization with full consent of the patient but not following the requisites of the Sterilization Act of 1941 is guilty of assault according to the Penal Code Ch. 3 Sec. 5, provided that his surgery does not fall among the cases of medical necessity. If he, by one reason or another, is not guilty of assault there is a possibility to punish him . . . according to Sec. 8 of the Sterilization Act The consent of the patient is no bar to conviction. In re-

The discrepancy between official interpretation of the law and its practice in some Civil Law countries becomes more marked when the principle of legality, as opposed to opportunity, governs. Under this principle a state prosecutor has no discretion whether to prosecute or not. Once he has a reasonable basis to believe that a crime has been committed and that he can prove it, he must file a prosecution.

With the exception of the years of the Hitler and Mussolini regimes in Germany, only three reported cases of criminal prosecution for sterilizations performed on request of the patient are known to the authors: the above mentioned Austrian case in 1934,⁸⁵ a French case in 1937,⁸⁶ and the famous West German case of Dr. Dohrn of 1964.⁸⁷

In Common Law countries, legal opinion seems to be less conservative than in some countries of continental Europe, although the state of the Common Law on voluntary sterilization is no less confused as there is a lack of clarifying judicial precedents in the United Kingdom and Canada. A few years before the Vasectomy Act of 1972 was enacted, the prevailing legal opinion in Great Britain seemed to be that full consent of the patient legalized sterilization, presuming that the purpose of the operation was legal. Sections 18 and 20 of the Offenses Against the Persons Act of 1861 imposed punishment for maiming or caus-

ality, however, . . . there is only a marginal chance for a prosecutor to obtain a conviction. The defendant almost always successfully claims medical necessity.

See also letter from Professor Jose Sulbrandt, Facultad Latinoamericana de Ciencias Sociales, Santiago, Chile, of November 22, 1972, who says:

[S]terilizations . . . effected for economic and social reasons would be punished under Chilean penal law [C]onsent does not constitute justification and therefore does not exclude from penal responsibility.

He further indicates that decree no. 226 of May 15, 1931 on the SANITARY CODE specifically forbids sterilization of females. However, no prosecutions are known from this country. According to a professor of gynecology at the Medical School of the University of Chile, although most physicians perform these operations on medical grounds, a number of private practitioners do contraceptive operations without prosecution. See also letter from Mrs. S. Hanifa, Faculty of Law, University of Indonesia, Djakarta, who says:

[T]here are clinics which provide voluntary tubal ligation and vasectomy and are usually performed on medical grounds with the written consent of the spouse.

85. Judgment of May 8, 1934, [1934] Entscheidungen des Obersten Gerichtshofes in Strafsachen 110 (Aus.). See text accompanying note 81, *supra*.

86. Bordeaux Sterilisateurs, [1938] S. Jur. I. 193 (Cass. crim.). See text accompanying note 79, *supra*.

87. Judgment of Oct. 27, 1964, 20 BGHSt 81 (Bundesgerichtshofs, W. Ger.). See text accompanying note 106, *infra*.

ing grievous bodily harm and for unlawfully and maliciously causing wounds. In 1967 the Secretary of the English Medical Defense Union, on the basis of previous reports from both English and Scottish counsel, felt justified in issuing a much quoted statement:

In view of this opinion we now have no hesitation in advising members of the medical profession in Britain that sterilization carried out merely on the grounds of personal convenience, in other words as a convenient method of birth control, is a legitimate legal undertaking.⁸⁸

As for Canada, the state of general confusion is well explained in K.G. Gray's book, *Law and the Practice of Medicine*.⁸⁹ The author concludes the section concerning criminal liability as follows:

Where a parent requests sterilization on the sole ground that he is not financially able to support additional children, the surgeon may not operate, even though the parent's contention may be true It should be stated again however, that this opinion rests upon no reported decision. It is quite conceivable that the courts may decide that a sterilization operation for eugenic or economic reasons is lawful if the parent consents⁹⁰

It may be added that in Canada, where Alberta and British Columbia have Sexual Sterilization Acts, Section 228 of the federal Criminal Code states that whoever causes bodily harm with intent to wound, maim or disfigure any person may be imprisoned for fourteen years.⁹¹

In Australia, the number of voluntary sterilizations is believed to be increasing. The matter is now considered one of "ethics or conscience" on the part of the physician performing the operation.⁹² In Jamaica, where thousands of sterilizations are

88. S. MYERS, *THE HUMAN BODY AND THE LAW: A MEDICO-LEGAL STUDY*, at 16 (1970). Due to the total lack of any British case dealing with the criminal law aspect of voluntary sterilization, *dictum* in *Bravery v. Bravery* [1954] 3 All E.R. 59 (C.A.), has often been mentioned, where the view was expressed that a sterilization operation, even if done by consent, was unlawful unless done for a good medical reason. However, this was a typical obiter dictum in a divorce case, and by a dissenting judge.

89. K. Gray, *LAW AND THE PRACTICE OF MEDICINE* (rev. ed. 1955).

90. *Id.*, at 45.

91. *THE CRIMINAL CODE* ch. 51, § 228 (Tremefear, 1971) (Can.).

92. Letter from H. Finlay, Associate Professor, Faculty of Law, Monash University, Clayton, Victoria, of June 6, 1972. See also C. Howard, *AUSTRALIAN*

performed each year, the Offenses Against the Persons Act 1861, reads:

Whosoever shall unlawfully and maliciously, by any means whatsoever, wound, or cause any grievous bodily harm to any person . . . with intent in any of the cases aforesaid, to maim, disfigure, or disable any person . . . shall be guilty of felony, and . . . liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for a term not exceeding two years, with or without hard labour.⁹³

Surprisingly, the criminal law aspect of voluntary sterilization does not seem to have been raised directly in any reported case in the United States, but the legal confusion which existed in different states seems to have been substantially resolved during the last two decades. This results from certain decisions which illuminate the problem indirectly. E.L. Sagall reports:

In 1952, the attorney general of Wisconsin warned: "The consequences to a physician from the performance of an operation of this kind, should the courts hold it illegal, could be serious" However, in 1968, when faced with this issue again, the Wisconsin attorney general ruled that a physician who performs a non-therapeutic salpingectomy or vasectomy with the consent of the patient was not committing any crime under the state law⁹⁴

A similar change in attitude has occurred in California. In 1950, the California attorney general issued an advisory opinion stating that consensual vasectomy was against public policy and may constitute the crime of mayhem. This opinion, however, was overruled in 1969 by the appellate court in *Jessin v. County of Shasta*.⁹⁵ Although the case involved civil litigation, the court found that there was no legal reason why a voluntary sterilization,

CRIMINAL LAW (2d ed., 1970). Australian criminal law is state, not federal. According to the NEWSBULLETIN of the Queensland Branch of the Australian Medical Association, there has been no judicial determination as to whether a provision which occurs in most state laws makes the sterilization operation illegal. NEWSBULLETIN, Oct. 1973, at 3, col. 3.

93. Law of 1861, § 16, Concerning Offences Against the Person [1953] Laws of Jamaica, (Jamaica). See also R. Rosen, *Law and Population Growth in Jamaica*, in LAW AND POPULATION MONOGRAPH SERIES, No. 10, at 23 (1973).

94. E. Sagall, *Surgical Sexual Sterilization*, TRIAL, July, Aug., 1972, at 57. (Adapted from MEDICAL COUNTERPOINT, March, April, 1972).

95. *Jessin v. County of Shasta*, 274 Cal. App. 2d 737, 79 Cal. Rptr. 359 (1969).

given competent consent, should not be performed, and that vasectomy does not constitute mayhem.

In 1973, the Individual Rights and Responsibilities Section of the American Bar Association reported that voluntary contraceptive sterilization is now legal in all fifty states.⁹⁶ However, as a practical matter, it was not always available due to the existence of extra-legal and financial limitations.⁹⁷ The Association's House of Delegates urged states to eliminate current laws which restrict access to contraceptive procedures, including those restricting access to voluntary contraceptive sterilization.⁹⁸ According to the Association for Voluntary Sterilization, sterilization of both sexes has been taking place at the rate of about one million per year over the past three years.

In the socialist states of Eastern Europe it can be seen from the provisions of the penal codes that the legislative techniques of dealing with the intentional infliction of grave corporal injury do not differ fundamentally from those of other countries in Eastern and Western Europe.⁹⁹ However, there is a basic concept in socialist criminal law, common to all the Eastern countries, that the "material condition of social dangerousness" is a prerequisite to criminal responsibility. Under this concept, consent may possibly play a decisive role in cases of this kind.

Under the "material condition of social dangerousness" concept, to be a crime, an act must constitute more than a negligible danger to society. It must: (1) fulfill all the elements of the legal definition of a particular crime; and (2) represent a material social danger, taking into account all the circumstances. Only when both components are present can a person be prosecuted for, or found guilty of, a crime. Lacking the second requisite, the act in question does not constitute a crime, although it may still be an offense under administrative law, or a disciplinary offense.

This peculiar feature may be shown from two penal code provisions. The R.S.F.S.R. Penal Code provides:

Although an act or an omission to act formally contains the

96. ABA INDIVIDUAL RIGHTS AND RESPONSIBILITIES SECTION, Rep. No. 101 (1973).

97. *Id.*

98. Report of the Annual Meeting of the ABA HOUSE OF DELEGATES (1973).

99. See text accompanying note 57, *supra*.

indicia of an act covered by the Special Part of the present code, it shall not be a crime, if by reason of its insignificance it does not represent a social danger.¹⁰⁰

In the same manner the Czechoslovak Penal Code of 1961 provides: "An act of which the degree of social dangerousness is slight, is not a crime, even if it otherwise fulfills all the elements of a crime."¹⁰¹ Under this concept, different circumstances in otherwise similar acts can substantially change the degree of social dangerousness. Thus, intentional deprivation of a person of the capacity to procreate would generally be estimated to be a heinous crime against this person. By contrast, if the operation is performed at the request of the patient in a professional manner, the character of the act may be so changed as to lose its criminal nature. On the other hand, in the instance of the sterilization of a young person without consent of her or his spouse, the social dangerousness of a grave bodily harm may still be great.

An evaluation of this concept as it affects the sterilization problem under Polish law may be useful. It seems that sterilization performed upon a healthy, consenting patient with the sole purpose of preventing unwanted procreation is illegal and punishable under the Polish Penal Code.¹⁰² In individual cases, criminal prosecution may be dropped on the ground that an insignificant degree of social dangerousness exists. Such decisions can be adopted only on a case by case basis according to the proper application of the Polish Penal Code.¹⁰³

In summary, various criminal statutes of the world which punish intentional infliction of grave bodily injury, even if not applied in practice in this area, may still operate as deterrents to voluntary sterilization. As discussed herein, issues such as the effect of the patient's consent vary considerably from country to country.¹⁰⁴

100. R.S.F.S.R. Oct. 27, 1960, UGOLOVNYI KODEKS (Criminal Code). For an English translation, see H. Berman & J. Spindler, *SOVIET CRIMINAL LAW AND PROCEDURE: THE R.S.F.S.R. CODES* (1966).

101. PENAL CODE § 3, para. 2 (1961), [1961] Sbíрка Zákonů No. 140 (Czech.).

102. PENAL CODE art. 155, para. 1 W.S. Kenney (1973) (Law No. 94 of April 19, 1969) (Pol.).

103. Letter from Professor Stanislaw Pomorski, Rutgers (Camden) School of Law.

104. For a complete survey regarding all foreign statutes which are relevant to voluntary sterilization see the Appendix, *infra*.

III. JURISDICTIONS WHERE, IN THE ABSENCE OF APPLICABLE LEGAL PROVISIONS, VOLUNTARY STERILIZATION IS PRESUMABLY PERMITTED

There are a few countries where no law specifically prohibits or authorizes voluntary sterilization and where even the criminal law seems to contain no provision against it, since the provisions on grave bodily injury in these countries are not broad enough to cover sterilization. Therefore, the maxim *nullum crimen sine lege* would prohibit the widening of statutory definitions of a crime by analogy in order to make consented sterilization a criminal offense.

Thus, the Penal Code of Iran of 1928 deals with bodily injury in language which does not cover sterilization:

He who intentionally inflicts an injury or blow to another which causes cutting, breaking, damaging, or disfunctioning of a limb, or ends in permanent sickness or loss of one of the senses, shall be subject to 2-10 years of solitary confinement¹⁰⁵

In West Germany, a decision of the Federal Supreme Court on October 27, 1964, declared, "There no longer exists any criminal law provision in Germany under which voluntary sterilization would be punishable."¹⁰⁶ Although the *legal reasoning* which led the Court to this conclusion has been criticized, and though judicial decisions in Civil Law countries do not have the force of law, this judgment has been allowed to stand since 1964. No physician has since been punished for performing voluntary sterilization in West Germany, where the practice is not exceptional. In jurisdictions of this kind, contraceptive sterilization with the consent of the patient must be considered as legal.¹⁰⁷

105. IRANISCHES STRAFGESETZBUCH § 172 (*Rechtsvergleichende Untersuchungen zur gesamten Strafrechtswissenschaft, Drittes Heft*, at 191, 1935) (Iran). Translation is by Dr. Parviz Saney, Attorney at Law and Legal Counsellor in Tehran, whose letter states, "There are no laws in Iran which would affect voluntary sterilization directly or indirectly. . . [The penal code] provisions do not cover sterilization. . . . Voluntary sterilization does not squarely fit any of the acts defined. . . ."

Recently, as reported by the Iranian newspaper Ettelaat, two fathers of large families in Iran received golden coins as awards from a family planning institution acts for having undergone voluntary sterilizations. Ettelaat, Aug. 26, 1972, at 1.

106. Judgment of Oct. 27, 1964, 20 BGHSt 81 (Bundesgerichtshof, W. Ger.). It would have been punishable until amendments to the German Penal Code adopted during the Hitler era were repealed following the Second World War.

107. For an explanatory statement of the Federal Government of West Germany with regard to the Draft of a Fifth Law to Reform the Criminal Law of

IV. RELIGIOUS LAW

The effect of religious law varies by country. In some cases, it may be enforced by the courts. In others, it may influence the judges in their interpretation of the secular law. In other countries, it may have no effect whatsoever. However, because it will probably have some effect in some countries, it is worthy of note.

Islamic authorities are not in agreement as to whether or not Islamic religious law permits voluntary sterilization. At the Conference on Islamic Attitudes Toward Planned Parenthood sponsored by the International Planned Parenthood Federation (I.P.P.F.) at Rabat, Morocco in 1971, a well-known Iranian expert stated that he knew of nothing in Islamic literature against sterilization.¹⁰⁸ However, the trend was to adopt the findings of the Islamic Research Academy in Cairo, which were in opposition to voluntary sterilization. Vice Chancellor Ahmad Ibrahim of the University of Malaya states that "official Muslim opinion in Malaysia is that sterilization is against the principles of Islam."¹⁰⁹ Magdi El-Kammash, writing in *Population and Law*, says:

[T]he Islamic religion forbids permanent sterilization
[P]ermanent sterilization is absolutely forbidden . . . except
in case of hereditary disease or malformities that may be
transmitted to the offspring.¹¹⁰

The author also states:

Islamic religion forbids sterilization except in justified cases such as physical deformity, psychological or mental illness and incurable or hereditary diseases. The Islamic jurisprudence, Shariah, requires sterilization in such cases¹¹¹

On the other hand, Dr. Rafi Ullah, Vice Principal, Government College, Gujar Khan, Pakistan, argued at the Rabat Conference that sterilization is not to be equated with castration, and

May 15, 1972, see Deutscher Bundestag, 6 Wahlperiode, Drucksache VI/3434, at 38.

108. Information from Dr. Isam Nazer, Medical and Administrative Director, IPPF Middle East and North Africa Divisional Regional Office, Beirut, who was one of the principal organizers of the Conference. The proceedings were not available in English when this article was written.

109. Prof. A. Ibrahim, *Voluntary Sterilization in Malaysia* (unpublished manuscript on file with the Law and Population Programme, Fletcher School of Law and Diplomacy, Tufts University).

110. M. El-Kammash, *Islamic Countries*, ch. 12 of L. LEE & A. LARSON, *POPULATION AND LAW*, at 314 (1971); M. El-Kammash & G. El-Kammash, *The United Arab Republic*, ch. 14, *id.*

111. *Id.*, at 370.

there is no Islamic law prohibiting it.¹¹² In Tunisia, President Bourghiba declared in a 1973 speech that under modern medical conditions, sterilization is not contrary to Moslem law, and urged that use be made of the sterilization method.¹¹³ It appears, moreover, from the discussions that if reversibility can be assured, there would very likely be no objection on the part of the large majority of Moslem scholars.

It appears unlikely that the Islamic law would have a direct effect in the regular courts of a country like Lebanon which has secular legislation on grave bodily injury consistent with the stricter Islamic view. Lebanon's code imposes a high penalty on one who renders an organ of another person functionless.¹¹⁴ In Malaysia, where the statute may possibly authorize consent as a defense,¹¹⁵ the finding of the court might be nevertheless against the legality of the operation, while the same statute in Sri Lanka, a non-Moslem country, is interpreted in the opposite manner.

On the other hand, in a country like Saudi Arabia, where Islamic religious law is applied, the Hanbali School of Islamic Law recognizes consent as a defense in bodily injury actions.¹¹⁶ Thus it is likely that, in the absence of administrative regulations forbidding sterilization operations, consent of the patient would bar the application of those Islamic Law penalties otherwise imposed for bodily injuries. In Indonesia, the operation is usually justified on medical grounds.¹¹⁷

Regarding the Canon Law of the Roman Catholic Church, nothing now in the Code of Canon Law specifically prohibits contraceptive sterilization, but there is a body of official ecclesiastical documents, including the 1968 *Humanae Vitae* encyclical, which reflect a policy contrary to the practice.¹¹⁸ No secular jurisdiction is known which applies Canon Law or Roman Catholic doctrine directly in its secular court decisions, but it is possible

112. Bahishti, *Islamic Attitudes Toward Abortion and Sterilization*, 7 BIRTH-RIGHT 49 (1972).

113. Traditional speech of the President on the eve of the "Mouled" religious holiday. Action (newspaper), April 15, 16, 1973, at 1.

114. PENAL CODE § 557 (1943) (Lebanon).

115. PENAL CODE § 88 (1860) (Malaysia). See also text accompanying note 68, *supra*.

116. Letter from A. Nafisa, Lic. en Droit, Cairo University.

117. Letter from Mrs. S. Hanifa, Faculty of Law, University of Indonesia, Jakarta, of October 17, 1972.

118. Statement by Dr. Andre Hillegers, Director of Center of Study on Bio-Ethics, Georgetown University, to authors, Nov., 1972.

that some judges in Catholic countries which have no specific provisions on sterilization may be influenced by this body of doctrine in interpreting the general law. However, no particular case of this kind has been found.

Under Jewish religious law, sterilization in any surgical form is explicitly forbidden.¹¹⁹ The Rabbis in Talmudic literature trace the prohibition against impairing the reproductive organs to Leviticus 22:24.¹²⁰ In Israel, religious law only applies to questions of personal status, defined in article 51 of the Palestine Orders-in-Council as covering marriage, divorce, and alimony.¹²¹ The list does not include matters such as sterilization, since they would presumably fall under the criminal law handled by the secular courts. There appears to be nothing in the secular law on the matter.¹²² However, sterilization might easily be a factor in cases involving marriage and divorce. These cases are handled in the religious courts and thus religious law might be applied.¹²³

V. CONCLUSION AND COMMENT

In the course of the last decade voluntary sterilization has become an established and widely accepted method of family planning in a number of countries. As previously discussed, several governments have legalized contraceptive sterilization by explicit statute, while others sponsor programs of voluntary sterilization.¹²⁴ In fact, millions of sterilizations for contraceptive purposes are taking place every year.

This swift development has completely overtaken the law in this field, and there is a gap of exceptional dimensions between current legislative enactments and actual practices. With the exception of a few jurisdictions, laws specifically covering voluntary sterilization are either non-existent or outdated. If the subject is covered at all, it is usually only indirectly handled under criminal laws which are so ambiguous as to make the legal situation obscure.¹²⁵ This uncertainty in the law has given rise to some un-

119. Statement by Rabbi Fox of the Massachusetts Council of Rabbis to authors, Nov., 1972.

120. *Id.*

121. B. Marks, *Population and the Law in Israel* (to be published as part of the Law and Population Monograph Series).

122. *Id.*

123. See note 119, *supra*.

124. See discussion in text accompanying notes 4-41, *supra*.

125. When the authors started work on this subject, the Law and Population Programme of the Fletcher School of Law and Diplomacy requested information

easiness among the medical profession. This uncertainty exists despite the fact that prosecutions almost never take place in the light of the obvious obsolescence of the legal prohibition. Thus, voluntary sterilization is at least tolerated in most countries.

A change is therefore necessary. At the International Planned Parenthood Federation Seminar on Voluntary Sterilization and Post Conceptive Regulation for South East Asia and Oceania, at Bangkok in January-February, 1974, the Thai Minister of Public Health said:

With a few exceptions, . . . our countries' laws concerning voluntary sterilization . . . are lagging sadly behind people's actual practice. This lag is dangerous and expensive, both in terms of fostering public discontent for outmoded laws and, by extension, for law itself; and in terms of delaying the attainment of our goals of improved family health and accelerated national development.¹²⁶

The mere amendment of the criminal law so as clearly to exclude voluntary sterilization is not sufficient despite the maxim *nullum crimen sine lege* since it would still leave a number of important questions unsettled. A wholly new "sterilization law" covering these problems is needed in most countries.

Modern legal regulation of the contraceptive sterilization issue should, under no circumstances, maintain the outdated concept that voluntary sterilization may be treated as the intentional infliction of grave bodily injury. As previously discussed, the equation of a requested, beneficial, surgical operation to a serious case of mugging is absurd. Hence, the rule is completely ignored both in daily life and in criminal practice.¹²⁷

from correspondents throughout the world. Replies typically indicated the obscurity of the laws governing voluntary sterilization.

126. Address by the Thai Minister of Public Health, I.P.P.F. Seminar on Voluntary Sterilization and Post-Conceptive Regulation for South East Asia and Oceania, Bangkok, Thailand, Jan., 1974.

127. Another difficulty with using the criminal law arises from the fact that some specific sterilization laws may include a penal clause containing special penalties for an unauthorized sterilization or for operations performed in an unauthorized way. These penalties are considerably milder than the heavy ones imposed by penal codes for the intentional infliction of heavy bodily injury. The question arises as to the relationship between these two penal provisions. Does the milder provision punishing infringement of rules specifically governing voluntary sterilization operations exclude the application of general provisions of the penal codes?

Since both provisions are in the penal law area, the specific provision should normally exclude the general one (*lex specialis derogat generali*). However, the

Maintaining the present legal situation must be considered as legislative hypocrisy. There is also dishonesty in the concept that consent to voluntary sterilization is irrelevant. It would be difficult to characterize the situation better than Lord Devlin did several years ago:

Sterilization, if done without consent upon a normal person, would be a criminal assault of a most wicked kind; if done with consent, it is another matter . . . [and] should not be treated as criminal if it is done . . . with the consent of the other party and for a purpose which is not otherwise criminal [I]f it is thought that sterilization, although done by consent, should be prohibited except for grave medical reasons, then it should be made a crime in itself and the law should not try to catch it as a form of assault.¹²⁸

It would be out of the question for any modern legislation to proclaim voluntary sterilization a crime in itself. The old approach to this operation as if it were a moral taboo has clearly been overcome in most countries.¹²⁹ To regulate voluntary sterilization through a section of the penal code is no more justified than to regulate the performance of plastic surgery or dentistry in the penal code. Issues of quite different dimensions, outside of the area of criminal law, are now relevant and important. Therefore, the modern voluntary sterilization law should not be a part of the criminal law but rather a part of the medical law. Thus the authors find the approach taken by the recent Danish and Virginia laws to be most appropriate.¹³⁰

A law on voluntary sterilization as a method of family planning should be divorced not only from questions of eugenic sterilization but also from therapeutic sterilization. Some of the laws presently in force are oriented towards eugenic or therapeutic problems and omit family planning aspects. As a result, family planning sterilization may frequently be carried out under the sub-

wording of the penal clauses in some of the sterilization statutes may leave some doubt. Thus, Sec. 16 of the old 1967 Danish statute provides: "Any person who illegally carries out sterilization or castration shall be punished by a fine, without prejudice to any more severe penalty to which he may be subject under other legislation." Law of June 3, 1967, (No. 234) Concerning Sterilization and Castration, [1967] Lovtidende A 837 (Den.).

128. P. DEVLIN, *SAMPLES OF LAWMAKING*, at 94 (1962).

129. For a cross-section of the opinions on the moral issue of contraceptive sterilization in the legal writing of recent years, see E. HANACK, *DIE STRAFRECHTLICHE ZULAESSIGKEIT KUNSTLICHER UNFRUCHTBARMACHUNGEN* (1959).

130. See text accompanying notes 4 and 11, *supra*.

terfuge of eugenic or therapeutic operations.¹³¹

A contemporary legislative approach to the regulation of voluntary sterilization must necessarily be affected by the principles which have recently been laid down by broad international consensus. These principles cast considerable light on some ethical and legal questions surrounding contraceptive sterilization.¹³² Among these principles, is the recognition of family planning as a basic human right. In 1968, the Proclamation of the United Nations Conference on Human Rights at Tehran and the U.N. General Assembly Declaration on Social Progress and Development in 1969 proclaimed the right of couples to decide freely and responsibly on the number and spacing of their children.¹³³ Further, these bodies called on governments to provide families not only with the knowledge, but also with the means necessary to enable them to exercise the right.¹³⁴

This development would appear to have two important consequences as far as voluntary sterilization is concerned. The right

131. The issue arises as to whether medical considerations should be regulated by law. The question as to whether and when a surgeon should perform a sterilization operation on a woman for the protection of her life or health, is basically the same as the question as to whether and when he should, on medical grounds, amputate a leg or an arm. It is an issue of *lex artis*, an area where legal regulation is unsuitable, if not improper. Since any legislation at all on the therapeutic aspects of sterilization is probably inappropriate, this field should clearly be kept separate from legislation on contraceptive sterilization. A legislative arrangement which attempts to cover several distinct problems, such as exists in some Scandinavian countries, may result in contraceptive sterilization taking place on false grounds. Both patient and physician may in effect be in collusion to circumvent a law which is contrary to reality.

This seems to be the situation in Japan. Statistics of 1965 show that during that year in Japan, 26,334 out of 26,509 voluntary sterilizations were carried out for alleged reasons of protection of mother's life or mother's health. See MURAMATSU, *SOME FACTS ABOUT FAMILY PLANNING IN JAPAN* (1955).

132. The slow progress in changing the situation in the international and especially United Nations area has been described in R. SYMONDS AND M. CARDER, *THE UNITED NATIONS AND THE POPULATION QUESTION (1954-1970)* (1973); and D. PARTAN, *POPULATION IN THE U.N. SYSTEM: DEVELOPING THE LEGAL CAPACITY AND PROGRAMS OF U.N. AGENCIES* (1973).

133. See text accompanying note 2, *supra*. For the U.N. Declaration on Social Progress, see G.A. Res. 2542, art. 22; 24 U.N. GAOR, Supp. 30, at 49; U.N. Doc. No. A/7630 (1969).

134. In 1968, the Teheran Proclamation was adopted with no dissenting vote. The Social Progress Declaration was adopted with only one dissenting vote. For the human rights aspect of family planning and for the development of the issue on the international law level, see J. Halderman, *Programs of the United Nations and Associated Organizations*, ch. 15 of LEE & LARSON, *POPULATION AND LAW* (1971); L. Lee, *Law, Human Rights and Population: A Strategy for Action*, 12 J. INT'L L. 309 (1972).

to family planning is now recognized as one of the basic human rights, and should include the right to the necessary means to put the decision regarding the birth of children into effect. Where contraceptives are not sufficient or fully effective, it would be logical to conclude that voluntary sterilization is covered by the human rights concept.¹³⁵ Hence, any contemporary legal regulation should not be inconsistent with the idea that voluntary sterilization is a right. This appears to have been recognized by most of the countries which have modernized their sterilization laws in recent years. The concept that voluntary contraceptive sterilization may be a basic human right has gained support in the United States from the Supreme Court's recently developed right of privacy in matters of sex and the family,¹³⁶ and from the growing acceptance of the concept that an individual has the right to control and dispose of his or her own body.¹³⁷

In view of this general world trend, it is no longer possible to claim that voluntary contraceptive sterilization is in itself immoral, unnatural, or against public order, or that it is an act which should be condemned or punished by law. Thus some laws, such as the criminal codes of Italy and Spain and the Medical Code of Portugal, are now subject to question.¹³⁸ Moreover, if the law is not clear and there is a question of interpretation on the basis of accepted rules of law, any interpretation which implies that voluntary sterilization as such is against good morals has now become more difficult to justify. This point may be of great importance, for example, in the interpretation of the new Austrian penal code.¹³⁹

A modern law on sterilization, recognizing the right of the individual to make the ultimate decision is nevertheless justified in imposing certain reasonable and non-restrictive safeguards. These are indispensable because of the irreversibility of the operation.

First, provisions should be included to ensure a mature, fully informed decision by the patient. These might include a mini-

135. The Working Party of Demographic Experts on Fertility of the Population and Vocational Training Division, Council of Europe stated on Dec. 5, 1973, that "sterilization was felt to be as much a human right as contraception." Council of Europe Doc. Concl. GT/Dem/Fecondité (73) 1 final, para. 18, at 6.

136. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

137. See text accompanying note 76, *supra*.

138. See notes 43 and 49, *supra*, and text accompanying.

139. See note 12, *supra*, and text accompanying.

imum age limit with certain exceptions authorized and a lapse of time requirement between the application and the operation. A full medical explanation of the consequences of the operation, specifically underlining its irreversibility, is a self evident prerequisite under medical law.

There may also be provisions on medical conditions, provided these are not made so onerous as to constitute an effective impediment to the operation. Any such requirement should not be applied solely in sterilization cases, if it is not required for other operations of similar gravity.

Consent of the spouse should also be a prerequisite to the sterilization. This restriction is more controversial. The Geneva Conference on Voluntary Sterilization in 1973 disapproved of this limitation, but conceded that sterilization without consent of a spouse might be grounds for divorce.¹⁴⁰ Others consider such consent essential in contraceptive cases (but not in eugenic or therapeutic cases), since the right to decide on having or not having children belongs equally to both spouses.¹⁴¹ The issue seems to need some further discussion before some amount of consensus is obtained.

Another necessity would be the establishment of appropriate sanctions for violations of various provisions of the law. Experience warns that such sanctions should be proportionate to the character of the provision violated. Logically, a sterilization without informed consent must be dealt with as a serious crime. Other violations of the law, such as sterilization shortly before the legally prescribed age, or without the required consent of the spouse, or performance of the operation by an inadequately trained person might be treated less severely, such as through administrative or disciplinary sanctions. All experience seems to show that any attempt to impose excessive legal punishment will result in non-application of the law.

A modern law on sterilization should not impose inappropriate conditions of an unduly restrictive nature. These would include provisions based on the concept that the individual has a duty to bear or beget children. Such a restriction is seen in the

140. SCHIMA, LUBELL, DAVIS & CONNELL, *ADVANCES IN VOLUNTARY STERILIZATION, PROCEEDINGS OF THE SECOND INTERNATIONAL CONFERENCE*, at 276 (1974).

141. The U.N. declarations previously granted the right of responsible parenthood to couples and parents, not to individuals. See note 2, *supra*. However, this was extended by the World Population Conference at Bucharest (Aug., 1974).

common provision that a sterilization should not be performed unless the patient has had a relatively large number of children.¹⁴²

Similarly, the requirement that a sterilization must be authorized or approved by a medical board should be omitted. The application of such a requirement in the case of mature persons clearly violates the concept of sterilization as a basic human right.

The requirement that the operating surgeon must consult with another physician seems inappropriate where the considerations are other than medical. This requirement overlooks the fact that the decision should normally be made by the patient, usually on non-medical grounds. Where the medical aspect is the only topic of a consultation, there is no more reason why the law should prescribe a mandatory medical consultation for a sterilization operation than for any other operation. The requirement seems paternalistic and unjustified.

Finally, a provision that the hospital or its personnel have the right to refuse to perform the sterilization on "grounds of conscience" appears justified only if joined to a provision that the patient is to be referred to a medical facility where he would be able to obtain the treatment requested. Otherwise, situations may arise where a legally recognized right may in fact be denied because of a general negative attitude on the part of the medical profession, or even of professional organizations.

The changes herein proposed, if enacted into law, would (1) ensure to individuals the basic human right to control their own procreation without adversely affecting their normal sexual activity, (2) bring archaic legislation of the world in line with current mores and medical advancements of our time, and (3) provide a practical basis for future population policy.

ADDENDUM

This paper, in an earlier form, was presented to the Second International Conference on Voluntary Sterilization at Geneva in February, 1973. It was considered by the Legal Workshop of the Conference. After a number of sessions, the Committee recommended to the Conference a report, excerpts from which read as follows:

142. See Report of the Symposium on Population and Human Rights, U.N. Doc. No. E/CONF. 60/CBP/4 (1974), at 14.

In view of the fact that it was clear that the laws of most countries clearly need amendment in this field, the bulk of the Committee's deliberations was addressed to the formulation of provisions for a model voluntary sterilization law, which should not be a part of the criminal law.

Virtually all participants agreed on the following statement:

PREAMBLE

In 1968, the Proclamation of Teheran was adopted by the International Conference on Human Rights. Paragraph 16 provides that:

"[P]arents have a basic human right to determine freely and responsibly the number and the spacing of their children."

. . .

The following provisions of law are recommended to effectuate those principles and provide for freedom of choice in the matter of voluntary infertility.

I. Generally applicable

Every individual of either sex has the right to obtain a procedure that will establish voluntary permanent infertility, and the government has an obligation to make available appropriate services, subject to the following:

- 1) The individual is over the age of legal consent and furnishes evidence of his or her voluntary consent;
- 2) The individual is fully informed by an appropriate person of the immediate, the possible and the probable long-term consequences of the procedure, and informed of the various methods of family planning. When appropriate the individual shall also be encouraged to carefully consider over an interval of time the consequences of the different courses of action available.
- 3) If an individual is a member of a particular ethnic, religious or philosophical group, he or she shall be offered the option of receiving such information (as set out in 2 above) jointly from the person giving the information and a representative of the group concerned, unless the person giving the information belongs to that group.

. . .

III. Performance by individuals

Nothing in these provisions of law shall compel any

individual to participate in a voluntary infertility procedure, but any individual declining to participate shall have the obligation to inform the requesting individual, of another person or facility which offers such procedures. However, every government-supported facility shall be obliged to make such procedures available.

IV. *No effect on marriage and divorce laws*

Nothing in these provisions of law shall be interpreted to modify the laws on marriage and divorce which shall apply to the question of the consent of the spouse.

V. *No liability for non-negligent voluntary infertility procedure*

No physician or other person or health facility shall be held civilly or criminally liable for proceedings in accordance with the foregoing provisions.*

Since the time of the Geneva Conference, a number of countries have liberalized their laws and others have undertaken studies to reconsider them.**

* This text is taken from SCHIMA, LUBELL, DAVIS & CONNELL, *ADVANCES IN VOLUNTARY STERILIZATION, PROCEEDINGS OF THE SECOND INTERNATIONAL CONFERENCE*, at 726 (1974).

** *Id.*, at 273. For citations to new and current laws see Appendix, *infra*.

	A NO PROVISIONS ON VOLUNTARY STERILIZATION (therefore permitted)				B SPECIFIC PROVISIONS ON CONTRACEPTIVE VOLUNTARY STERILIZATION				C CRIMINAL LAW PROVISIONS ON GRAVE CORPORAL INJURY APPLICABLE TO VOLUNTARY CONTRACEPTIVE STERILIZATION				D MOSLEM RELIGIOUS LAW (applicable directly as law)
	Legal (with non-restrictive limitations)	Legal (with restrictive limitations)	Illegal	Specific Provisions in Criminal Law	Citations to Penal Codes, etc.	Relevant	Relevant with Conditions	Irrelevant					
CENTRAL AFRICAN REPUBLIC					§§ 309, 310								
CEYLON—see SRI LANKA					art. 397								
CHILE			prohibited for women		§§ 371, 373, 374	?							
COLOMBIA					arts. 123, 129								
COSTA RICA		?			§§ 89, 222								
CZECHOSLOVAKIA		X											
DENMARK		X		X									
DOMINICAN REPUBLIC					art. 309								
ECUADOR					\$ 443								
EIRE					\$ 18								
ETHIOPIA					\$ 538								
FINLAND		X											if lack of social dangerousness
													if not against "good morals"

FRANCE ²⁷									X
EAST GERMANY ²⁸									
WEST GERMANY ²⁹									

arts. 309, 310

§ 116
§§ 224, 225,
226a

contra-
ceptive
propa-
ganda
for-
bidden
X

if lack of social
dangerousness
if not against
"good morals"

16. PENAL CODE §§ 309, 310 (Cent. Afr. Rep.).
 17. CODIGO PENAL art. 397, para. 1 (off. ed., 1874) (Chile). See also Decree No. 226 of May 15, 1931, § 226, on Sanitary Code (Chile).
 18. PENAL CODE §§ 371, 373, 374 (Law No. 95 of April 24, 1936) (Colom.) 14 AM. SERIES FOREIGN PENAL CODE (1967).
 19. See CODIGO PENAL arts. 123, 129 (A. Vincenzi 1965) (Costa Rica). Article 123 lists sterilization as a grave bodily injury; article 129 makes consent a defense.
 20. Law of March 17, 1966, (No. 20) § 27 [1966] Sbírka Zákonů (Czech.). Implementing regulations were issued by the Czech Ministry of Health on Dec. 17, 1971, [1972] Věstník ministerstva zdravotnictví (Nos. 1, 2), and by the Slovak Ministry of Health on April 14, 1972 [1972] Věstník ministerstva zdravotnictva (Nos. 6, 7).
 21. Law of June 13, 1973, (No. 318) On Sterilization and Castration, [1973] Lovtidende A 923 (Den.).
 22. CODIGO PENAL art. 309 (A.A. Coiscou 1972) (Dom. Rep.).
 23. CODIGO PENAL § 443 (Registro Oficial 1953) (Ecuador).
 24. Offenses Against the Person Act of 1861 § 18 (Eire). This is the old English provision. It is generally understood not to prohibit voluntary sterilization.
 25. PENAL CODE § 538(b) (Negarit Gazette, No. 158, 1957) (Ethiopia).
 26. Law of April 24, 1970, No. 283, on Sterilization; Regulation of Sterilizations No. 360 of May 29, 1970, 19 INT'L DIGEST HEALTH LEGIS. 746 (1968) (Fin.).
 27. C. PEN. arts. 309, 310 (71e ed. Petits Codes Dalloz 1973) (France); Law of Dec. 28, 1967 § 5, No. 67-1176. See decision of French Supreme Court, Crim. 1 July 1937, Gaz. Pal. 28 Sept. 1937, S. 1938-1-193, note Tortat.
 28. STAFGESETZBUCH [StGB] § 116 (1968) (E. Ger.).
 29. Law of May 26, 1933, §§ 224, 225, 226(a), [1933] RGBl. I 295 (Ger.).

	B SPECIFIC PROVISIONS ON CONTRACEPTIVE VOLUNTARY STERILIZATION				C CRIMINAL LAW PROVISIONS ON GRAVE CORPORAL INJURY APPLICABLE TO VOLUNTARY CONTRACEPTIVE STERILIZATION			D MOSLEM RELI- GIOUS LAW (appli- cable directly as law)		
	A NO PRO- VISIONS ON VOLUN- TARY STERIL- IZATION (there- for per- mitted)	Legal (with non- restrictive limita- tions)	Legal (with restrictive limita- tions)	Illegal	Specific Provisions in Criminal Law	Citations to Penal Codes, etc.	Relevant		Relevant with Conditions	Irrelevant
GHANA ³⁰						§ 69				
GREAT BRITAIN ³¹ (UK except SCOTLAND)	X					§§ 1, 2A		surgical treat- ment—in good faith—not improper		X
GREECE ³²					X	§§ 308, 310(2)		if not for a criminal purpose		X
GUATEMALA ³³					X	§ 310				
HAITI ³⁴						art. 254				
HONDURAS ³⁵			X			§ 110				
HUNGARY ³⁶						§ 257		if lack of social dangerousness		
ICELAND ³⁷			X							
INDIA ³⁸						§§ 320, 325, 88		if for benefit and in good faith		
INDONESIA ³⁹										
IRAN ⁴⁰	X									X

	§ 238	art. 552	art. 309, 310	§ 16	punish- able despite consent	Jewish law ap- plicable indirectly
ISRAEL ⁴¹		X				
ITALY ⁴²		X				
IVORY COAST ⁴³						
JAMAICA ⁴⁴						X

30. CRIMINAL CODE § 69 (Ghana) (Act No. 29 of 1960).

31. The National Health Service (Family Planning) Amendment Act, 1972, ch. 72, §§ 1, 2A.

32. PENAL CODE §§ 308, 310(2), 18 AM. SERIES FOREIGN PENAL CODES, 1973 (Greece) (Law No. 1.492 of Aug. 17, 1950). That the act does not violate good morals is relevant only in cases of simple, as opposed to grave, injury *id.*, § 308, para. 2.

33. CODIGO PENAL § 310 (Guat.).

34. CODE PENAL art. 254 *et seq.* (H.R. Wood 1922) (Haiti).

35. Decree No. 94 of June 25, 1964, § 110 [1964] La Gaceta (Nos. 18.320, 18.321, July 13, 14, 1964) (Hond.).

36. BÜNTETO TÖRVÉNYKÖNYV (Penal Code) § 257 (M. Miklós 1972) (Hung.). For the prerequisites to social danger, see *id.*, § 2.

37. Law of Jan. 13, 1938, Concerning Eugenic and Preventive Sterilization, [1938] Stjórnartíðindi 24. (Iceland).

38. INDIAN PENAL CODE §§ 320, 325 (Central Law Agency 1963). For Indian policy regarding consent of the injured, see *id.*, § 88.

39. See Damian & Hornick, *Indonesia's Formal Legal System: An Introduction*, 20 AM. J. COMP. L. 493, at 517 (1972). See also the communication by S. Hanifa, note 84 of text, *supra*. Moslem religious courts do not seem to have jurisdiction over sterilization matters which are practiced on therapeutic grounds.

40. IRANISCHE STRAFGESETZBUCH § 172. See text accompanying note 105 of text, *supra*.

41. CRIMINAL CODE § 238 (Ordinance No. 74 of 1936) (Israel).

42. PENAL CODE art. 552 (off. ed. 1931) (Italy). Anyone who consents to sterilization is also punishable, *id.*, para. 2. See *id.*, art. 553, prohibiting contraceptive propaganda, which has been declared unconstitutional by ruling of the Supreme Court.

43. C. PEN. arts. 309, 310 (71e ed. Petits Codes Dalloz 1973) (France). According to article 72 of the Ivory Coast Constitution, the French Penal Code remained in force as of January 1, 1970. IVORY COAST CONST. art. 72.

44. Law of 1861 § 16, Offences Against the Person (Jamaica).

	A NO PROVISIONS ON VOLUNTARY STERILIZATION (therefore permitted)				B SPECIFIC PROVISIONS ON CONTRACEPTIVE VOLUNTARY STERILIZATION				C CRIMINAL LAW PROVISIONS ON GRAVE CORPORAL INJURY APPLICABLE TO VOLUNTARY CONTRACEPTIVE STERILIZATION CONSENT				D MOSLEM RELIGIOUS LAW (applicable directly as law)
	Legal (with non-restrictive limitations)	Legal (with restrictive limitations)	Illegal	Specific Provisions in Criminal Law	Citations to Penal Codes, etc.	Relevant	Relevant with Conditions	Irrelevant					
JAPAN ⁴⁵		X			\$ 179								
JORDAN ⁴⁶					\$ 121								
NORTH KOREA ⁴⁷					art. 257				if lack of social dangerousness if person authorized to dispose of a protected interest				
SOUTH KOREA ⁴⁸													
LEBANON ⁴⁹					\$ 557							?	
LIBERIA ⁵⁰					\$ 242							X	
LUXEMBURG ⁵¹					\$\$ 398, 400							X	
MALAGASY REPUBLIC ⁵²					\$\$ 309, 310								
MALAWI ⁵³					\$ 235				if surgical operation in good faith				
MALAYSIA ⁵⁴					\$ 320							?	
MALTA ⁵⁵					\$\$ 230, 232								

MEXICO ⁵⁶	?			
MOROCCO ⁶⁷				
NEPAL ⁵⁸				if for benefit in good faith
NETHERLANDS ⁵⁹				
NEW ZEALAND ⁶⁰				
NICARAGUA ⁶¹		X		
NIGER ⁶²				X

45. Law of July 13, 1948, (No. 156), on Eugenic Protection, 16 INT'L DIGEST HEALTH LEGIS. 690-699 (1965) (Japan).
46. OTTOMAN PENAL CODE § 179, as amended, Law of 1936 (No. 74) (Jordan). The authors had no access to the Jordanian Penal Code of 1959, which replaced the code of 1951.
47. CRIMINAL CODE art. 121 (136 Foreign Pamphlets, No. 10, 1958) (North Korea). For a prerequisites of social danger, see *id.*, art. 7.
48. CRIMINAL CODE art. 257 (U.N. Command 1956) (South Korea). See *id.*, art. 24, relating to consent.
49. PENAL CODE § 557 (1943) (Lebanon).
50. PENAL CODE § 242 (M.R. Konvitz 1956) (Liberia).
51. CODE PENAL §§ 398, 400 (I.C.L. Hammes 1952) (Luxemburg).
52. CODE PENAL §§ 309, 310 (240 Journal Officiel 1962) (Malagasy).
53. PENAL CODE § 235 (II Laws of Malawi 1969) (Malawi). See also *id.*, § 243, relating to consent.
54. PENAL CODE § 88 (1860) (Malaysia).
55. KODICI KRIMINALI (Criminal Code) §§ 230(a)(ii), 232 (1 Laws of Malta 1942) (Malta).
56. C. PEN. DIST. y Terr. Fed. art. 292 (Porrúa 1974). See notes 76-78 of text *supra*, and text accompanying.
57. CODIGO PENAL art. 402 (H. Carteret 1952) CODE PENAL (Serv.) 179 (Morocco).
58. PENAL CODE §§ 320, 325 (1860). See also *id.*, § 88, concerning consent.
59. CODE PENAL DES PAYS-BAS arts. 302, 303 (W.J. Wintgens 1883) (Neth.) (Law No. 35 of March 3, 1881).
60. CRIMES ACT § 188 (R.E. Owen 1961) (New Zealand).
61. CODIGO PENAL §§ 360, paras. 1, 2, 361 (Nicar.). Under these sections, consent is attenuating only.
62. CODE PENAL arts. 231, 232 (1961) (Niger.).

A NO. PROVISIONS ON VOLUNTARY STERILIZATION (therefore permitted)	B SPECIFIC PROVISIONS ON CONTRACEPTIVE VOLUNTARY STERILIZATION				C CRIMINAL LAW PROVISIONS ON GRAVE CORPORAL INJURY APPLICABLE TO VOLUNTARY CONTRACEPTIVE STERILIZATION C O N S E N T				D MOSLEM RELIGIOUS LAW (applicable directly as law)
	Legal (with non-restrictive limitations)	Legal (with restrictive limitations)	Illegal	Specific Provisions in Criminal Law	Citations to Penal Codes, etc.	Relevant	Relevant with Conditions	Irrelevant	
NORTHERN NIGERIA ⁶³					§ 241/d		if for benefit in good faith		
LAGOS, E. NIGERIA, W. NIGERIA ⁶⁴			X		§§ 297, 332		if reasonable operation, for benefit		
NORWAY ⁶⁵					§§ 320, 325, 88		if for benefit in good faith		
PAKISTAN ⁶⁶									
PANAMA ⁶⁷			X						
PARAGUAY ⁶⁸									
PERU ⁶⁹					art. 341 § 165	X			
PHILIPPINES ⁷⁰		X			art. 262 art. 155			if lack of social dangerousness	X
POLAND ⁷¹									
PORTUGAL ⁷²									
PUERTO RICO ⁷³	X				§ 366				
ROMANIA ⁷⁴					§ 182		if lack of social dangerousness		

EL SALVADOR⁷⁵
 SAUDI ARABIA⁷⁶
 SINGAPORE⁷⁷
 SOUTH AFRICA⁷⁸
 SPAIN⁷⁹

?	X	?	?
§ 368			
§ 420			

63. NORTHERN NIGERIAN PENAL CODE § 241 (A. Gledhill 1963, at 447) (No. Nigeria).
 64. CRIMINAL CODE §§ 297, 332 (D. Kingdon 1959) (Lagos, E. Nigeria, W. Nigeria).
 65. Law of June 1, 1934, (No. 2) Concerning Sterilization, [1934] Norsk Loutidende 203 (Nor.).
 66. PENAL CODE §§ 320, 325 (The Law of Crimes 1970) (Pakistan) (Act XLV of October 6, 1860). Concerning consent of the injured, see *id.*, § 88.
 67. Law of May 13, 1941, (No. 48) Allowing Sterilization, [1941] Gaceta oficial (No. 8.515, May 19, 1941) (Pan.).
 68. CODIGO PENAL art. 341 (edicion oficial 1941) (Paraguay).
 69. PENAL CODE § 165, para. 2 (Peru) (Law No. 4.868 of 1927).
 70. PENAL CODE art. 262 (1946) (Philippines). This section has been specifically interpreted by the Secretary of Justice not to forbid tubal ligation or vasectomy with consent. It was also held consistent with national policy.
 71. PENAL CODE art. 155, para. 2 (W.S. Kenney 1973) (Poland) (Law No. 94 of April 19, 1969).
 72. PORTUGUESISCHE STRAFGESETZBUCH art. 366 (F. Zarder 1903) (Portugal). Consent is irrelevant, according to a communication of the Attorney General. S. Woher, *Die Freiwillige operative Unfrucht barmachung als Methode der Emptaengnisverhuetung in strafrechtlicher Sicht*, 1969, at 107 (unpublished dissertation at the University of Saarland).
 73. No criminal statute in Puerto Rico covers sterilization.
 74. CODUL PENAL (Penal Code) art. 182 (1968) (Rom.) (Law No. 30 of June 21, 1968). For prerequisite to social dangerousness see *id.*, art. 17.
 75. CODIGO PENAL art. 368 (J. Trigueros 1893) (El. Sal.).
 76. See text accompanying note 105-107 of text, *supra*.
 77. Law of March 20, 1970, (No. 26) On Voluntary Sterilization, Statutes of the Republic of Singapore, ch. 170 (1970), as amended, Law of May 2, 1972.
 78. See S. Strauss, *Bodily Injury and the Defence of Consent*, 81 SOUTH AFRICAN LAW JOURNAL 179, 189 *et seq.* (1964).
 79. PENAL CODE § 420 (1963) (Spain) (Decree No. 691 of March 28, 1963).

	A NO PROVISIONS ON CONTRACEPTIVE VOLUNTARY STERILIZATION				B SPECIFIC PROVISIONS ON CONTRACEPTIVE VOLUNTARY STERILIZATION				C CRIMINAL LAW PROVISIONS ON GRAVE CORPORAL INJURY APPLICABLE TO VOLUNTARY CONTRACEPTIVE STERILIZATION				D MOSLEM RELIGIOUS LAW (applicable directly as law)
	Legal (with non-restrictive limitations)	Legal (with restrictive limitations)	Illegal	Specific Provisions in Criminal Law	Citations to Penal Codes, etc.	Relevant	Relevant with Conditions	Irrelevant	Relevant	Relevant with Conditions	Irrelevant		
SRI LANKA ⁸⁰	some states				§§ 311, 316, 81								
SWEDEN ⁸¹		X			ch. 3, § 5								
SWITZERLAND ⁸²					art. 122								
TANZANIA ⁸³					§§ 222, 230, 232								
THAILAND ⁸⁴		X			§ 297, 298								
TUNISIA ⁸⁵		X			arts. 218, 219								
TURKEY ⁸⁶			X		§ 471								X
U.A.R. ⁸⁷													
U.S.A. ⁸⁸	some states	some states		some states	State legislation								
U.S.S.R. ⁸⁹ (RSFSR)					§ 108								
URUGUAY ⁹⁰					§§ 317, 318								
VENEZUELA ⁹¹					art. 416								
SOUTH VIETNAM ⁹²			X										

80. See W. Weerasooria, Manuscript for the Law and Population Project, Colombo, Sri Lanka (unpublished manuscript on file with the authors).

81. Law of May 23, 1941, (No. 282) Concerning Sterilization, [1941] Svensk foerfattningssamling (Swed.), as amended, Law of March 26, 1964, (No. 173) [1964] Svensk foerfattningssamling (Swed.).

82. SCHWEIZERISCHES STRAFGESETZBUCH [StGB] art. 122 (Zurich Schulthess & Co. Ag. 1952) (Switz.).

83. PENAL CODE § 222 (Tanzania).

84. PENAL CODE §§ 297, 298 (Thailand). See discussion of the regulation of the Ministry of Public Health of 1962, in W. Fawcett, *Thailand*, ch. 3 of LEE & LARSON, *POPULATION AND LAW*, at 80 (1971).

85. CODE PENAL arts. 218, 219 (M.T. Es-Snoussi 1964) (Tunisia) (Decree of July 9, 1913). On April 15, 1973, President Bourguiba, in his traditional speech on the eve of the religious *Mouled* Holiday, declared that either member of a couple, under both Moslem and Tunisian law, may legally undergo a sterilization operation which, for a man, is not comparable to castration. He urged that this be done (after a sufficient number of children had been born) "for the good of the country".

86. Decision No. 6/8.305 of June 12, 1967 (Council of Ministers) 19 INT'L DIGEST HEALTH LEGIS. 426 (1968) (Tur.); CRIMINAL CODE § 471 (1926) (Turkey) (Law No. 765 of March 1, 1926). Consent to the sterilization is also punishable.

87. See M. El-Kammash & G. El-Kammash, *The United Arab Republic*, ch. 14 of LEE & LARSON, *POPULATION AND LAW*, at 369. In view of strong government policy for family planning, it may not be certain that cases would be prosecuted.

88. Regulation of voluntary sterilization (including criminal law provisions) is a matter of state, not federal, law. It is legal in all fifty states, see text accompanying notes 51-54 of text, *supra*. Seven states have statutes which attempt to deal specifically with this type of sterilization (Georgia, Massachusetts, North Carolina, Oregon, Pennsylvania, Utah, and Virginia). Georgia, North Carolina and Virginia provide specific procedures which must be followed before a sterilization operation will be given in a hospital. See notes 4, 40, 41 of text, *supra*. Oregon and Utah have laws making the procedure legal. Georgia allows any hospital to refuse the operation. See note 40 of text, *supra*. See also 47 TEMP. L.Q. 403, at 408 (1974). As to the right of a public hospital to refuse to perform sterilization operations, see *Hathaway v. Worcester City Hospital*, 475 F.2d 701 (1st Cir. 1973). The issue of the right of private hospitals to refuse to perform the operation is unsettled. The question is also raised whether a refusing hospital must refer an applicant to a nearby facility which is prepared to perform the operation.

89. R.F.S.F.R. Oct. 27, 1960 UGOLOVNIY KODEKS (Criminal Code) § 108. For an English translation, see H. Berman & J. Spindler, *SOVIET CRIMINAL LAW AND PROCEDURE: THE RSFSR CODES (1966)* (Soviet Union).

90. CODIGO PENAL §§ 317, 318 (U. Carballa 1968) (Uru.).

91. CODIGO PENAL art. 416 (2 M. Arcaya 1968) (Venez.).

92. Law of May 22, 1962, (No. 12), § 8, Protection of Morality (So. Vietnam).

A NO PROVISIONS ON VOLUNTARY STERILIZATION (therefore permitted)	B SPECIFIC PROVISIONS ON CONTRACEPTIVE VOLUNTARY STERILIZATION			C CRIMINAL LAW PROVISIONS ON GRAVE CORPORAL INJURY APPLICABLE TO VOLUNTARY CONTRACEPTIVE STERILIZATION C O N S E N T			D MOSLEM RELIGIOUS LAW (applicable directly as law)
	<i>Legal</i> (with non-restrictive limitations)	<i>Legal</i> (with restrictive limitations)	<i>Illegal</i>	<i>Specific Provisions in Criminal Law</i>	<i>Relevant</i>	<i>Relevant with Conditions</i>	<i>Irrelevant</i>
YUGOSLAVIA ⁹³					<i>Citations to Penal Codes, etc.</i> § 141	if lack of social dangerousness	
ZAIRE ⁹⁴					bk. II, § 1	if for benefit in good faith	
ZAMBIA ⁹⁵					§§ 202, 205, 210, 212		

93. CRIMINAL CODE art. 140, 20 Foreign Pamphlets (No. 22) (1951) (Yugoslavia) (Law No. 13/ 1951). For prerequisite of social dangerousness, see *id.*, art 4.

94. PENAL CODE bk. II, § 1 (Bull. Off. 1896, at 4) (Zaire).

95. PENAL CODE ch. 6, §§ 202, 205, 210, 212 (1965) (Zambia).