Constitutional law

THE MEDICAL TERMINATION OF PREGNANCY ACT 1983 (BARBADOS)

As in many other countries, prosecution for illegally induced abortion is extremely uncommon, practically unknown, in Barbados. The difficulty in law enforcement lies in the very nature of the crime. Everyone involved in the act is interested in suppressing knowledge from the police, and there is no injured party or victim in the ordinary sense of the word to register a complaint. When a woman has been unlawfully operated upon, she may, out of allegiance towards the abortionist, refuse to disclose the information. In effect, the law is flouted with impunity because the rules are inconsistent with the way in which many human beings actually behave. This breeds disrespect for the law.

For this reason, it was found desirable that abortion laws should be brought into sensible conformity with society's attitudes and practices. A number of countries that formerly had restrictive laws have liberalised their statutes, while some others have made permissive rules within a broad range of indications. Barbados has changed the law by the Medical Termination of Pregnancy Act 1983 ("MTPA"). It was the first country among the English-speaking Caribbean islands to do so.[1]

A. *Termination of Pregnancy*

In accordance with section 3 of the MTPA, the treatment for the termination of pregnancy is lawful if administered in conformity with certain conditions stipulated by the Act. The Act deals with four categories of termination of pregnancy: (1) pregnancy of 12 weeks' duration or less;[2] (2) pregnancy of between 12 and 20 weeks' duration; (3) pregnancy of over 20 weeks' duration; and (4) immediate necessity to terminate the pregnancy.

1. *Pregnancy of 12 weeks' duration or less*

It is now widely recognised that the prolongation of a pregnancy increases the risks arising out of its termination; hence the earliest treatment is the safest.[3] The law provides that the treatment for the termination of a pregnancy of not

1. The Act came into force on 10 May 1983. By the Criminal Code Amendment Bill 1983, Bermuda is amending the Criminal Code (No.13 of 1907) so as to include in it provisions "which permit a medical practitioner to terminate a pregnancy which in the opinion of a majority of the members of the Therapeutic Abortions Committee should be terminated": (1984) 10 Commonwealth Law Bulletin 57.

2. By s.7 of the MTPA, the duration of pregnancy is determined (a) by calculating from the first day of the last normal menstruation of the pregnant woman ending on the last day of the relevant week; and (b) by clinical examination.

3. "It has been pointed out that . . . there may be fewer risks in an early abortion. If an abortion is performed within the first three months of pregnancy, the risk to life is generally negligible and the risk to health small. After the twelfth week, an abortion becomes difficult to carry out in one session with safety and privacy": A. J. C. Hoggett, "The Abortion Act 1967" [1968] Crim.L.R. 247–248.

more than 12 weeks' duration may be administered by a medical practitioner if he is of the opinion, formed in good faith,

> (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman or grave injury to her physical or mental health; or
> (b) that there is substantial risk that if the child were born, it would suffer such physical or mental abnormalities as to be seriously handicapped.[4]

For the purposes of (a), the risk of injury to health should be grave but need not be permanent or immediate. What constitutes a "grave injury" to the health would appear incapable of exact definition. Perhaps, as Viscount Kilmuir stated in *D.P.P.* v. *Smith*,[5] the words should be given their ordinary and natural meaning. The problem may no longer arise once the question is determined by a medical practitioner in good faith and in accordance with the other provisions of the Act.

How is it determined whether a medical practitioner has acted in good faith? The traditional method in medical practice of demonstrating good faith is to obtain a second medical opinion.[6] A second supporting opinion would enhance the reputation of approval procedures and, "more therapeutically, bring more information and critical judgment to bear on the circumstances".[7] In contrast with this practice, which is followed in several other countries, the Barbados MTPA is satisfied if the opinion is formed simply by "a medical practitioner". This provision, however, does not make much difference in relation to law enforcement because the medical evidence, notwithstanding the weight it carries, is not conclusive of innocence or guilt. "The question of good faith", on the other hand, "is essentially for the jury to determine on the totality of the evidence."[8]

In determining whether the continuance of a pregnancy would involve a risk of injury to the health of the pregnant woman, the medical practitioner must take into account her social and economic environment, whether actual or foreseeable.[9] The section taken as a whole would mean that all socio-economic environmental factors should be considered. In a narrow sense, what is to be determined is whether bearing a child or another child is likely of itself to cause ill-health to the mother. In a wider sense, as a United Kingdom report suggests, the birth of an additional child to a woman who lives in conditions of poverty or

4. S.4(1), MTPA 1983.

5. [1961] A.C. 290, 334. Viscount Kilmuir was speaking of the meaning of "grievous bodily harm" in s.18 of the Offences against the Person Act 1861.

6. See Rebecca J. Cook and Bernard M. Dickens, "A Survey of Abortion Laws in Commonwealth Countries", in *Three Studies of Abortion Laws in the Commonwealth* (published by the Commonwealth Secretariat), p.30.

7. *Ibid.* The authors go on to say that "advanced laws have institutionalised this by incorporating requirements of documented concurring opinions or of committee majority approval".

8. Scarman LJ, in *R.* v. *Smith* [1974] 1 All E.R. 381, went on to say: "A medical view put forward in evidence by one or more doctors as to the good faith of another doctor's opinion is no substitute for the verdict of the jury. An opinion may be absurd professionally and yet be formed in good faith; conversely an opinion may be one which a doctor could have entertained and yet in the particular circumstances of a case may be found either to have been formed in bad faith or not to have been formed at all."

9. S.4(3), MTPA 1983.

bad housing may cause deterioration in her situation resulting in injury to her health.[10]

The environmental criteria are somewhat vague; they are susceptible of various interpretations and are open to criticism. First, the competence of doctors is predominantly on medical matters rather than on social problems.[11] Second, the term "environment" may entail an examination of various factors such as the woman's housing condition, income, place of employment, place of residence, availability of external help, etc.[12] Further, the environmental situation need not remain the same for ever. It may change rapidly; for example, "the doctor may enter a house of squalor, filth and dirt where the husband is a chronic drunkard. In three months' time, the individual may see the light, sign the pledge and become a teetotaller."[13]

Injury to mental health may be established due either to therapeutic indication or to juridical indication. In the former case, a medical practitioner is competent to determine the fact. In the latter case, the written statement of a pregnant woman stating that she reasonably believes that her pregnancy was caused by an act of rape or incest is sufficient to constitute the element of grave injury to mental health.[14] This is a provision for which abortion law reformers throughout the world had been campaigning during the last few decades.[15] In this context Professor Glanville Williams has been quoted as saying: "It is hard to see how anyone can support a law that compels a girl to nourish within her body seed violently planted there by a sexual maniac."[16]

2. Pregnancy of between 12 and 20 weeks' duration

By section 5, treatment for the termination of a pregnancy of more than 12 and not more than 20 weeks' duration may be administered if two medical practitioners are of the opinion that the matters specified in paragraph (a) or (b) of section 4(1) are present.[17]

3. Pregnancy of over 20 weeks' duration

In cases involving a still more advanced stage of pregnancy, three medical practitioners should be satisfied that the treatment to terminate the pregnancy is immediately necessary

(a) to save the life of the pregnant woman; or

10. *Report of the Committee on the Working of the Abortion Act* (Chairman: Mrs Justice Lane) (1974), Cmnd.5579, Vol.I, p.70.

11. Medical defence societies have "made it clear that an adequate evaluation of a woman's social and psychological situation can rarely be made by a few minutes' interview in a busy and often rather public gynaecological outpatient department and even the general practitioner's reports may need supplementing by social workers' reports, based on home visits if necessary": D. A. Pond, *Abortion: Changing Views and Practice* (1971), p.126.

12. See Hoggett, *op. cit. supra* n.3, at pp.250–251.

13. As quoted from the House of Commons Debate, Vol.749, col.943.

14. S.4(2), MTPA 1983.

15. See Madeleine Simms, "Abortion Law Reform: How the Controversy Changed" [1970] Crim.L.R. 571.

16. As quoted from *The Sanctity of Life and the Criminal Law* (1958).

17. See *supra* n.4.

(b) to prevent grave permanent injury to the physical or mental health of the woman/her unborn child.[18]

4. Immediate necessity to terminate pregnancy

Section 11 of the MTPA deals with emergencies. These are situations where the termination of the pregnancy is immediately necessary to save the life of the pregnant woman or to prevent grave permanent injury to her physical or mental health. In those circumstances, a single medical practitioner may administer the treatment. The opinion of two or more doctors as envisaged in sections 5 and 6 of the Act need not be sought. Further, neither the restrictions on the place of treatment nor any requirement of written consent on the part of the woman (considered below) apply.

B. Consent

Unless it is an emergency as discussed in the previous paragraph, a medical practitioner closely following general medical and surgical procedures may require the written consent of the woman before administering treatment for the termination of a pregnancy.[19] If the woman is under the age of 16 or is of unsound mind at any age, the consent of her parent or guardian is required.[20]

The question of the biological father's consent to a termination of pregnancy has been subject to judicial scrutiny in the United Kingdom and by the European Commission on Human Rights. In *Paton* v. *Trustees of the British Pregnancy Advisory Service*,[21] the English High Court considered an application from the husband seeking an injunction to restrain his wife's termination of pregnancy since he contended that he must have a say in the destiny of the child he had begotten. In that case, the judge, Sir George Baker, President of the Family Division, said that the English Act gave "no right to a father to be consulted in respect of the termination of a pregnancy".[22] He further noted that the regulations made under the Act did not permit disclosure of information "except in specified instances, of which disclosure to the spouse is not one".[23]

The husband appealed to the European Commission on Human Rights claiming that English law violated Article 8, paragraph 1 (right to respect for private and family life), of the European Convention on Human Rights. The Commission recalled that

> the pregnancy of the applicant's wife was terminated in accordance with her wish and in order to avert the risk of injury to her physical and mental health.[24]

As such, the Commission found that "this decision, in so far as it interfered in itself with the applicant's right to respect for his family life, was justified under

18. S.6, MTPA 1983.

19. S.8(1).

20. S.8(2). "Person of unsound mind" has the meaning assigned to it by s.2 of the Mental Health Act 1952 (Chap.46, *Laws of Barbados* 1978) under s.8(3) of the MTPA 1983.

21. [1978] 3 All E.R. 987.

22. *Idem*, p.991.

23. *Idem*, p.992.

24. *Paton* v. *United Kingdom* (1981) 3 E.H.R.R. 416.

paragraph 2 of Article 8 as being necessary for the protection of the rights of another person".[25]

As to the husband's right to consultation, the Commission did not

> find that the husband's and potential father's right to respect for his private and family life can be interpreted so widely as to embrace such procedural rights as claimed by the applicant, i.e. a right to be consulted or a right to make applications, about an abortion which his wife intends to have performed on her.[26]

C. *Place of Treatment*

The treatment for the termination of a pregnancy has to be administered in a hospital approved by the minister, with following exceptions: (1) when the pregnancy is of less than 12 weeks' duration;[27] and (2) when in an emergency the termination "is immediately necessary to save the life of the pregnant woman or to prevent grave permanent injury to her physical or mental health".[28] The restriction of the place of treatment to approved hospitals is to ensure that patients receive the best medical care.

D. *Conscientious Objection*

In any democratic society, due to deep-rooted religious beliefs or otherwise, there may exist conscientious objections to termination of pregnancy *per se*. Thus, in order to accommodate the interests of that group of persons, section 10 of the Barbados MTPA provides a conscience clause by which "no person is under any legal duty to participate in any treatment for the termination of a pregnancy to which he has a conscientious objection". The clause does not enumerate the categories of participants or the extent of participation, but it appears that it may well cover surgeons, general physicians and nurses in the treatment process.

In legal proceedings, the burden of proving the conscientious objection lies on the person making the claim.[29] It may, however, be noted that the conscience clause cannot be invoked in an emergency where the termination of pregnancy is immediately necessary to save the life of the pregnant woman or to prevent grave permanent injury to her physical or mental health.[30]

E. *Counselling Services*

In accordance with section 12 of the MTPA, the minister is competent to make regulations with respect to the counselling services, residence requirements, keeping records and information disclosure. The regulations require a medical practitioner who carries out the treatment for the termination of pregnancy to be familiar with counselling functions with particular reference to family life, education and child-birth. Before carrying out the treatment he must

25. *Ibid.*
26. *Idem*, p.417.
27. S.9, MTPA 1983.
28. S.11.
29. S.10(2). The burden of proof may be discharged by the person testifying on oath or affirmation to the fact of his conscientious objection (para.3).
30. S.10(4).

(a) counsel the woman requesting the termination of her pregnancy; or
(b) ensure that the woman has been counselled by a person authorised by the minister.[31]

The counselling services provided would include (a) advice on courses of action available as alternatives to the termination of the pregnancy; (b) operative procedures and the possible immediate and long-term effects of the termination of the pregnancy; (c) advice on methods of contraception and the availability of family planning services; (d) advice to deal with the social and psychological consequences of the termination of the pregnancy; and (e) advice to the woman who decides to continue her pregnancy on the availability of adoption, fostering and other services.[32]

F. *Information Disclosure*

A medical practitioner who carries out the treatment for the termination of a pregnancy is required to keep a record of the treatment and forward the record to the chief medical officer.[33] Information thus given shall not be disclosed except

(a) by the chief medical officer in the performance of his functions;
(b) to a member of the police force for the purpose of instituting criminal proceedings;
(c) for the purpose of carrying out scientific research; and
(d) to a medical practitioner, or other person, with the consent in writing of the woman whose pregnancy was terminated.[34]

G. *Conclusion*

It is the general opinion that clandestine termination of pregnancies had been frequent in Barbados. As elsewhere, reliable statistical data are non-existent. However, it was estimated that in Barbados, with a total population of 250,000, an estimated 4,000 abortions were performed annually.[35]

For over 100 years, Barbados had been following the legal provisions contained in the English Offences Against the Person Act 1861 with regard to abortion. The Medical Termination of Pregnancy Act 1983, liberalising the abortion law, is thus a fundamental change of direction.

It is too early to evaluate the impact of the new law. But one thing is certain. Legalisation of the termination of pregnancy under stated conditions does not necessarily mean promotion of the number of induced abortions. It can but bring abortion to clinical attention so that it may lead to a reduction of cases of sepsis and haemorrhage caused by unqualified, illegal backstreet abortionists, sometimes referred to rather euphemistically as "freelance social workers". Experience in different parts of the world indicates that the treatment for termi-

31. The Medical Termination of Pregnancy Regulations 1983, reg.4(1).
32. Reg.4(3).
33. Reg.2.
34. Reg.3.
35. See Yunus Haniff, "Legislation on Abortion Urged", *Advocate News*, 6 May 1975, p.1.

nation of pregnancy under proper medical care in skilled hands can be a simple and safe procedure.

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BOOK REVIEWS

The Vienna Convention on the Law of Treaties. By IAN SINCLAIR. 2nd ed. [Manchester: Manchester University Press. 1984. x + 268 pp. £29.50]

THIS is a welcome and much expanded second edition of Sir Ian Sinclair's short commentary on the Vienna Convention on the Law of Treaties, first published in 1973. Since then the Convention has entered into force, and a sufficient period has elapsed for its impact and significance to emerge more clearly in the practice of States and the judgments of international tribunals. The author has used this opportunity to the full, and the book's most valuable feature is the inclusion of a lot of up-to-date source material. Treaty aspects of arbitration awards in the *Young Loans* case, the *Anglo-French Continental Shelf* case and the *US-France Air Services Award* are fully discussed, and the advisory opinion of the ICJ in the *WHO* case and its judgments in the *Icelandic Fisheries*, *Aegean Sea* and *Nuclear Tests* cases are also considered.

In place of the previous five chapters, there are now eight. Reservations and interpretation are given fuller treatment in separate chapters, commensurate with the case law which these parts of the Convention have generated, and the book concludes with a completely new chapter assessing the significance of the Convention. These are probably now the most interesting sections of the book and they show the benefit of the extensive re-writing involved. The author is particularly critical of the European Court of Human Rights' purposive approach to questions of interpretation, especially in the *Golder* case, saying of the latter that "it pays scant respect to the principle of 'ordinary meaning' of terms 'in their context' ". One has the feeling that the arguments in favour of the Court's general approach are not well canvassed here, but the coverage of this and other recent case law does bring out well the fluidity of the Vienna Convention's articles on interpretation. The conclusion is that these articles do represent a general expression of customary law and mark a major advance in resolving doctrinal disputes.

Elsewhere too the author's conclusions on the operation of the Convention are optimistic. The provisions on invalidity and *ius cogens*, so strongly contested at the Vienna Conference, have not upset the delicate balance between the security of treaty relations and the recognition of newly emerging concepts. *Ius cogens* has had some influence on the subsequent work of the ILC, but little on State practice, and the author plainly remains deeply sceptical about its content, rejecting as "far-fetched" the inclusion of principles of permanent sovereignty over resources and self-determination.

The real value of the Convention, as the author argues in his conclusion, lies not in its status as a treaty, but as a restatement and consolidation of existing or emergent principles. As such it has had a "dynamic and continuing influence" on the development of customary law, regularly cited by tribunals and relied on by foreign ministries. The author has been singularly well-placed to observe that influence and, if one might perhaps have wished for more extensive reference to