# THE CRIME ABORTION

## A COMPARATIVE LEGAL STUDY

by

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# CHAPTER ONE

# ROMAN LAW

# *ROMAN LAW*

From D.25.4.1 it appears that initially there was no punishment for abortion - here the unborn foetus was not considered *portio mulieris* i.e. part of the wife. Only after there had plainly been " a separate part from the wife ", was the born child considered portio mulieris.

The husband then had a right to his child and could compel his wife to deliver the child into his custody by interdict or by the *actio exhibendum*. Abortion itself however appeared to be no crime.
Later, however, in texts like D.48.19.38.5, abortion was created a crime whether deliberately or accidently caused by the administering of a " love potion or other draught ". [1] An abortion caused by the giving of a potion or draught was punishable, if the person was of lowly rank, by being sentenced to work in a mine, or if of higher rank, to banishment to an island or loss of property.[2]

Abortion seemed a crime not so much against the foetus itself as living thing, but more a patrimonial crime against the foetus. Punishment was to punish the crime of " defrauding the foetus " out of its rights as heir for instance.

In D.48.19.39, a wife who caused or attempted to cause an abortion on herself in order to rid herself of a competing heir ( where the child was conceived, but not born before her husband's death ), was held guilty of a crime serious enough to invoke capital punishment. In the same text however, she was held guilty of a lesser crime where she caused an abortion on herself to rid herself of the child of her husband with whom she was already " living in enmity ".[3]

Further evidence that initially protection was not of the foetus as living thing, but of the patrimonial interests of the foetus is seen in D.35.11.9 where abortion was considered a crime where a woman caused herself to abort as a result of having been

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1) "*Qui abortionis aut amatorium poculum dant*"
2) *Voet*, Commentarias ad Pandectas *XLVII.II.3*
3) *Percival Game*, The Selective Voet *XLVII - Title II - Sec.3*

" bribed to inflict violence on her inward parts by substitutes, or by those who hope for sucession in intestacy and others like them who have an interest in no posthumous child being born ".[4)]

However, there does seem at a later stage to be an appreciation of the foetus itself as being a living object or being worthy of protection. D.38.8.1.8 provides for recognition of the *nasciturus* as already born if, had it actually already been born, it would have been the next in line for an inheritance - thus it would oust others who were already born. There is however the qualification that the nasciturus must already be *living* and it must also not be a monster.

It must be kept in mind that the Romans, during their earlier existence practised infanticide as means of controling their numbers - also illegitimate children were removed in this manner, while pregnant women who did not want their figures destroyed by childbirth, practised abortion openly. Thus with this terrible power of the *lex vitae necisque*, it would seem that abortion was at the most only a slight misdemeanour.

It is of interest that in Greece, at a more or less contemporary period, both Plato [5)] and Aristotle approved of abortion for economic reasons as well as a protection against illegitimate children, and in order to preserve a woman's figure. Aristotle even suggested that a mother should be compelled to commit abortion after she had borne an allotted number of children.[6)]

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4) *Percival Game, op. cit. XLVII - Title II - Sec. 3.*
5) *Politics, VII.16 also Plato, Republic V ex. Glanville Williams.*
6) *Glanville Williams,* Sanctity of Life and the Criminal Law *p. 141*

# CHAPTER TWO

## C A N O N  L A W

2.1 Traducianism and Generationism

2.2 Creationism

2.3 Roman Catholic Viewpoint

# *C A N O N  L A W*

## 2.1 Traducianism and Generationism

According to these theories, the human spiritual soul is transmitted to the offspring by the parents, the soul being coeval with impregnation.[1)]

## 2.2 Creationism

This theory held that the soul was in every instance the creation of God, and only after the creation of the body did He breathe life into it. ( Genesis ii, 7 )

These opposing theories led to the Creationists asserting that the soul did not enter the embryo until some time after conception, while the Generationists thought that the soul was created simultaneously with the embryo at the time of impregnation. In determining the time when the soul entered the embryo, the Creationists were influenced by the views of the classical writers. Augustine for instance, drew a distinction between *embryo inanimatus* and *embryo animatus*. The abortion of an inanimatus was punishable by a fine only ( being merely an act preventing a life from coming into being ) while the aborting of an animatus was murder, punishable by death. When the point of changing from inanimatus to animatus was exactly, Augustine felt no human power could tell.

Gratian, in his " Decretum " (circa 1140) announced that abortion is not murder if the soul has not been infused into the foetus. He, however, also remained silent on when this took place. The Glossators in their commentaries, assumed this to be the fortieth day for the male foetus and eightieth day for the female foetus.[2)]

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1) *Glanville Williams, op. cit. p.141*

2) *Huser, J.* The Crime of Abortion in Common Law *ex. Glanville Williams.*

Thomas Aquinas held that life is shown principally by two actions, knowledge and movement. Thus it was easy to imagine that the animus entered the body of the unborn infant when it turned or moved in the womb. This can possibly be seen as the start of the British Common Law theory that life does not start at a fixed time after conception, but at the moment of *quickening*, which usually takes place about mid term. Killing after quickening was murder, while abortion before quickening was no crime at all.

2.3 Roman Catholic Viewpoint

The Roman Catholic viewpoint has always been that it is murder to kill the foetus. A fairly neat summary, representative of both ancient and contemporary Roman Catholic opinion is found in the following observation of Pope Pius XII : ' Every human being, even the child in its mother's womb holds his title to life directly from God; and not from his parents or from any human society or authority. Therefore no man, no " indication " - medical, eugenic, social, economic or moral - can show or give a valid legal right to dispose of an innocent human life directly and deliberately, that is to dispose of it with a view to its destruction, whether this is regarded as the end, or as the means to an end which may not in itself be in any way unlawful.' [3)]

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3) *Dickens, J.M.* Abortion and the Law *p. 152*

# CHAPTER THREE

## R O M A N  D U T C H  L A W

3.1 The Old Writers

3.2 Summary

# *ROMAN-DUTCH LAW*

## 3.1 The Old Writers

In the Roman-Dutch law we find that abortion was on occasion looked upon as murder, while at other times it was seen as a separate offence. Some confusion also arises from the comparison or equation of abortion with child murder. However, a certain pattern seems to make itself evident in the definitions of the older writers. Chiefly they describe the crime of abortion as ' the unlawful intentional aborting of the foetus of a pregnant woman '.[1] This, however, according to Huber [2] if the foetus was a living foetus, could also be considered murder or at least child murder.

The chief requirement was that the foetus should be aborted - the person causing the abortion ( the woman herself or an abortionist ) being the perpetrator of the crime.

If the abortion was in order to save the life of the woman, it was considered justified, but only if the abortion was carried out by someone else other than the woman herself.[3]

It is interesting to note that abortion, although considered a crime on its own, was often also seen as being the result of some other crime such as wizardry or poisoning. Damhouder [4] discussed abortion as a shootoff of murder-by-poison so that a person giving a poison draught to a woman, which caused her to abort, could be charged with the murder of the child.

If, however, the child was not alive when the abortion took place, then the punishment was not as harsh and rested at the

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1) *De Wet and Swanepoel, p. 213*
2) *Huber, J. 6.13.39 ex De Wet and Swanepoel*
3) *Matthaeus 47.5.1.5 ex De Wet and Swanepoel*
4) *Joost Damhouder,* Crimineel en de ordonnantie op die crimineel justitie *p. 134*

discretion of the judge.[5] (Banishment was suggested by Damhouder as being fitting punishment) [6]

If the abortionist, knowing that the child was already dead, administered a medicine or draught which caused the woman to abort, then this was considered as being praiseworthy and not punishable. [7]

If the abortion was caused by wizardry, then that person was considered to be a wizard as well as a murderer. [8]

If a woman received money from an interested heir in order that she cause herself to abort a child who might have ousted that heir, then she was punishable by banishment, there being no distinction as to whether or not it was alive when she aborted. [9]

In addition, any money she had so received was forfeited because of the inhumanity of the whole thing.[10] This could also have been seen as assasination of the child.[11] Damhouder also raised the question of when it should be considered that the child was *alive*. According to his reports, some people were of the opinion that the child was alive 30 or at the most 35 days after being conceived. Others thought 40 and even as many as 80 days after conception was a better period.[12] His final admission was that only doctors and scientists could really determine what the period was. Interesting too was the fact that the *unsuccessful* attempt at abortion was punishable by banishment or other extra-ordinary punishment.

Johannes Voet did not do much more than report and comment on

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5 & 6) *" ... bannen oft anderzins ter arbitraige en discretie van den jughe " Damhouder, op.cit.*

7) *" ... die is te prijsen ende prijsweerdich ende gheenzins 't inculperen " Damhouder, op.cit.*

8) *" ... Foxtier oft Toorenaar " Damhouder op.cit.*

9) *De Wet and Swanepoel, op.cit. p. 213*

10) *"Onmensche-Lijcheyt ende D'onbetaamheyt" Damhouder, op.cit*

11) *"Assasinium" Damhouder, op.cit.*

12) *Damhouder, op.cit. p.134*

the Roman practices. According to him, abortion was effected by " denying food to the embryo by cutting a vein, or by drugs or draughts, or violence inflicted on the inward parts ".[13] Voet considered abortion as a capital crime if a *living* child was aborted. If the foetus was not yet living, the crime was of a lesser degree of seriousness. An abortion to save the life of the mother was legal and fully sanctioned as " charity begins at home ". The mother's life was *certain* but that of the foetus was *uncertain*.

Carpzovius [14] reports that the opinion of the majority of jurists was that a distinction should be drawn between *partus animatus* and a *partus inanimatus*; procuring abortion of the partus animatus was punishable in the same way as murder, but where the partus was inanimatus, a lesser punishment was imposed.[15]

Matthaeus [16] felt that the only justification for abortion was the risk of the *life* of the mother. He weighed up the importance of the life of the mother against the life of the child and decided that " age demands respect " and that it is fitting for children to die for their parents sake rather than vice versa.

Moorman[17] also came to the conclusion that the termination of a pregnancy was illegal and justified only to save the life of the mother - the reason being that if the mother's life were threatened, it would be better to take care of the mother's life, which was certain, than to worry about the life of a child, which was uncertain. Usually, at any rate, the life of the child was dependant upon the life of the mother.

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13) *Percival Game, op. cit. XLVII - Title II, Sec. 3*

14) *Carpzovius, B (1644)* Practica Nova Imperialis Saxonica Rerum Criminalium II. 2

15) *cf. S.A. Strauss* S.A. Medical Journal *July 1968, p. 711*

16 & 17) *S.A. Strauss,* S.A. Medical Journal *July 1968, p. 711*

## SUMMARY

From the aforegoing, it is evident that the Roman-Dutch authorities were unanimous that abortion was a serious offence and that the abortion of a *partus animatus* ( besielde vrucht ) was a decidedly more serious offence than the abortion of a *partus inanimatus* ( onbesielde vrucht ).

Abortion however, was not absolutely forbidden or prohibited and there was justification for an abortion where the *life* of the *mother* was endangered.

It is interesting to note at this point that, as there has never been any legislation on the subject of abortion in South Africa, the above reflects the basis of our Common Law in South Africa ( see later in Chapter 7 ).

# CHAPTER FOUR

## B R I T I S H  L A W

Introduction

4.1 EARLY PRE-1803 Law

4.2 LAW FROM 1803-1967

- i) Summary

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- i) The course of events leading up to the adoption of the 1967 Abortion Act
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  - A) G.P.'s or Consultants
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# *B R I T I S H  L A W*

This chapter on the British Law with regard to abortion, deals fairly comprehensively with the history and development of the law in this system, as, although we in South Africa are not bound to British rulings or decisions, we are, and have often been, greatly influenced by developments in that country. Interesting interpretation of badly-drafted statutory law and certain key-decisions on important points of law can be of great importance to us where problems of the same nature arise.

Also, the various interesting arguments offered during debate on the newly-instituted Abortion Law 1967, as well as the contents itself of this new Act, can be of inestimiable importance to us in South Africa, where the time, it appears, is ripe for a reform and clarification of the law.

For convenience sake the British Law on abortion is divided into the following categories, viz., Early pre-1803 law, law from 1803 - 1967 and present day law.

## 4.1 EARLY PRE-1803 LAW

As mentioned on p. 3 ( supra ), Thomas Aquinas' speculation that life is shown principally by two actions, viz: *knowledge* and *movement* very possibly gave rise to the early British Common Law theory revolving about the *quickening* of the foetus.[1)] The movement of the foetus was seen as the entering of the *animus* into the foetus - the movement of the foetus being equated with *life*. Once the foetus had moved in the womb or quickened it was considered as being alive.[2)] Thus the determination of whether or not the foetus

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1) *Glanville Williams, p. 143*

2) *' Life, ' said Blackstone ' begins in contemplation of law as soon as the infant is able to stir in the mother's womb ' ( Blackstone* Commentaries *1.129, as quoted by G. Williams p. 144 )*
*' For if a woman is quick with childe and by a potion or otherwise killeth in her womb, or if any one beat her, whereby the child dieth in her body and she is delivered of a dead childe; this though not murder, was homicide or manslaughter ' ( Dickens, B.M.* Abortion and the Law *p. 21 )*

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*( PRE-1803 )*

was *alive* was not by the standard of a fixed number of days after conception ( as in the Roman, Roman-Dutch and Canon Law ) but by the standard of whether or not the foetus had quickened.[3)]

With this apparently sound medico-theological doctrine as foundation, Bracton [4)] held that killing the foetus after quickening was murder Coke [5)] however, on the other hand denied this, saying such a killing was a great misprision.[6)]

Abortion before the time of the so called quickening of the foetus was not a crime at all. And so it remained until 1803, when it was put on a statutory footing.[7)]

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3) *Glanville Williams p. 144*

4) *Folio 120 b as quoted by Glanville Williams p. 144*

5) Coke's Institutes *III 50 as quoted by Glanville Williams p. 144*

6) *' If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her whereby the childe dieth in her body and she is delivered of a dead childe, this is a great misprision. '*
*Dickens, B.M. p. 20.*

*MISPRISION :-* *Henious misdemeanour ( Blackstone ) also misprisions are generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon ( Coke )*

7) *Dickens, B.M. op. cit. pp. 23, 24*

*The Act, which was then enacted, Lord Ellenborough's Act, received Royal assent on June, 24th, 1803. ( per Dickens, B.M. p. 23 ), the relevant sections reading as follows:-*

*' Certain henious offences, committed with intent to destroy the lives of his Majesty's Subjects by poison, or with intent to procure the miscarriage of women ... have been of late so frequently committed; but no adequate means have been hitherto provided for the Prevention and Punishment of such offences. ' and then further it provides ' That if any person or persons shall wilfully, maliciously, and unlawfully administer to or cause to be taken by any of his Majesty's Subjects, any deadly poison or other noxious and destructive substance or thing with intent thereby to cause and procure the miscarriage of any woman then being quick with child ..... then and in every such case the person or persons so offending, the counsellors, aiders and abettors, knowing and privy to such offence, shall be and are hereby declared to be felons, and shall suffer death. '*

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*( PRE-1803)*

Now abortion before quickening also became a crime, although not so severly punishable as abortion after quickening.[8)]

This Act was naturally of great consequence as the onus of the prosecution of proving that the foetus had quickened was effectively removed - also because nearly all women who procure their own abortions do so prior to quickening in the early months of pregnancy and so, where they were formerly immune to prosecution, they were now considered offenders. ( cf. " any persons " in the Act )

4.2 LAW FROM 1803 - 1967

The Offences against the Person Act, 1861, firmly established the crime of abortion as a crime in Britain,[9)] a maximum punishment or imprisonment for life [10)] being the sanction

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8) *Dickens, B.M. op.cit. p. 24*

*Section 2 of the Act provides:*

*" And whereas it may sometimes happen that poison or some other noxious and destructive substance or thing may be given, or other means used, with intent to procure miscarriage or abortion where the woman may not be quick with child at the time, or it may not be proved that the woman was quick with child, be it therefore further enacted, that if any person or persons .... shall wilfully and maliciously administer to, or caused to be administered to, or taken by any woman, any medicines, drug or other substance or thing whatsoever, or shall use or employ, or cause or procure to be used or employed, any instrument or other means whatsoever with intent thereby to cause or procure the miscarriage of any woman not being or not being proved to be quick with child at the time of administering such thing or using such means, that this shall be felonious, and punishable with fine, imprisonment, whipping or transportation for up to fourteen years.*

9) *Apparently after 1803, but prior to 1861, the law was only loosely enforced ( ex Glanville Williams ). Prior to this Act, the Offences against the Person Act 1837 removed the differentiation made between charges before and after quickening. The death penalty as maximum punishment was also removed. Dickens, B.M. p. 27*

10) *Sect. 58*

for abortion attempted before or after quickening. The reason for the severity of the maximum punishment can be seen from the fact that the law on abortion had a religious origin ( supra p. 6 ). However, it is strange that if abortion was considered as murder, the maximum punishment ( if only to remain consequent ) was not the same as for murder. [11)]

The Offences against the Person Act, 1861, covered the following contingencies:

i) Where the pregnant woman procured or attempted to procure her own miscarriage and ....

ii) Where anyone else unlawfully used or attempted to use any means with intent to bring about the miscarriage of a woman ( whether the woman was pregnant or not, and whether the attempt was successful or not ).

Of great importance is the fact that the crime was not the actual procuring of the miscarriage, but in fact that it was *attempted* ( whether successful or not ). Thus it would appear that a woman was guilty of no crime if she attempted to abort herself, but was not pregnant. However, if she was in fact pregnant, the same attempt ( whether successful or not ) was punishable. If someone else, however, attempted an abortion on her the fact that she was pregnant or not, became irrelevant. [12)] Also irrelevant was whether the attempt was successful or not, and apparently, whether the foetus was alive or not. [13)]

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11) *cf. The views of Glanville Williams, op.cit. p. 144*

12) *Section 58 provides:*

*' every woman being with child who, with intent to procure her own miscarriage shall unlawfully administer to herself any poison or other noxious thing or shall unlawfully use any instrument or other means whatsoever with the like intent AND whosoever with the intent ot procure the miscarriage of any woman " whether she be or not be with child " shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing or shall unlawfully use any instrument or other means whatsoever with the like intent shall be guilty of felony. ' Dickens B.M. p. 29*

13) *Dickens, B.M. p. 29*

## *B R I T I S H  L A W*
## *( 1803-1967 )*

The Infant Life ( Preservation ) Act, 1929, did not improve matters when it introduced the offence of Child Destruction which created an offence very closely allied to the crime of abortion - Section 1 (1) provided as follows:

' any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes the child to die before it has an existence independent of its mother, shall be guilty of a felony, to wit of child destruction. '

Thus the offences of abortion and child destruction overlapped in that abortion also covered the case of destroying the life of a viable child before independent existence while child destruction must certainly have classed as abortion. In fact Sections 2 (2) and 2 (3) of the 1929 Act makes provision on a charge under the 1861 Act for returning a verdict of guilty " to the alternative charge of child destruction " and vice versa.[14)]

Practice has shown that prosecution of the woman for aborting or attempting to abort herself was rare. Even where the woman had consented to someone else performing the abortion, the abortionist was invariably the person prosecuted, and the woman herself merely called as a witness.[15)] As far as punishment is concerned, the courts never imposed anything near the maximum.[16)]

With regard to a charge under the 1929 Act, the fact that Sect. 1 (2) provided that ' for the purposes of this Act, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be *prima facie* proof that she was at that time pregnant of a child

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14) *Dickens, B.M. op.cit. 31*
15) *See the reports of Glanville Williams op.cit. 145*
16) *Glanville Williams, op.cit. p. 145*

capable of being born alive, ' limited prosecution to those cases where abortion was carried out at a very late stage and where there was reliable evidence that the child was viable. As it was in most cases very difficult to prove when a child was viable, prosecution in terms of the 1861 Act were more successful and more frequent.

The 1861 Act ( and the preceding ones of 1803, 1828 and 1837 ) all point in one way or another to the act bringing about the abortion being an *unlawful* act. This would thus imply that under certain circumstances abortion must have been *lawful*.

The authority for establishing when abortion was lawful and when it was unlawful was with the now famous case of R. v. Bourne in 1939. [17]

Mr. Aleck Bourne, a leading consultant obstetrician, operated to terminate a sevenweek pregnancy of a fourteen year old girl who had been raped by four soldiers. The case was quite obviously a test case as Mr. Bourne, immediately upon completion of the operation, informed the Attorney General thereof and invited him to take action against him.[18] The presiding judge, MacNaghten J., in summing up the case, referred to a proviso recommended by the Criminal Law Commissioners in 1846, when they suggested that the following words should be introduced to the legislation existing at that time. ' Provided that no act ... shall be punishable when such act is done in good faith with the *intention of saving the life* of the mother whose miscarriage is intended to be procured. ' This was not included in either the 1929 Act or the 1861 Act. The judge felt that this proviso was to be read into the 1861 Act although not actually contained

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17) *1939 (1) K.B. 687, also 1938 (3) A.E.R. 615*
18) *There is however, also a somewhat less heroic report to the effect that he at one stage wanted to back out of the whole affair.*

therein. The judge decided that therapeutic [19] abortion could be carried out in order to " save the life of the mother ".

His liberal interpretation of when an abortion would be to save the life of the mother was based on his rejection of a distinction between a danger to the life and a danger to the health of the mother. MacNaghten J.:- ' since life depends upon health, and it may be that health is so gravely impaired that death results '.[20]

The Bourne case thus established that :-

a) a therapeutic abortion to save the life of the mother was lawful and

b) a therapeutic abortion carried out with the intention to preserve[21] the life of the mother was lawful.

The *health* of the mother was extended to include both her *physical* and *mental* health.[22] However, the mere fact that a pregnancy was caused by rape, did not make a termination thereof lawful - the prospective experience of giving birth to the child of a rapist must have been likely to have a harmful mental effect on the woman. A further precedent set in the Bourne case was that the abortion must have been carried out " in good faith and in consultation with specialists ". It appeared therefore, that a legal operation could only be carried out following consultation with specialists ( either in physiology or psychology ).[23]

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19) *Therapeutic, in the strict sense of the word means ' for reasons of health, healing, curative or medical '.*

20) *Dickens, B.M. op.cit. p. 43*

21) *It must be noted that a distinction is drawn between 'save' and 'preserve', the thought being that the 'preserving' of the mother's life refers to her health, while 'saving' refers specifically to her life.*

22) *Dickens, B.M. op.cit. p. 43*

23) *Dickens, B.M. op.cit. p. 44. Compare the opinion of Paul Ferris,* The Nameless *pp. 93-95. See also p. 125 and further re.* Psychiatrist for Sale.

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*( 1803-1967 )*

Suicide[24)]

Where a woman threatened to commit suicide if her doctor refused to perform a legal operation, the doctor was faced with a dilemma:- Either it was an attempt at blackmail or the woman was in earnest. With the opinion of a psychiatrist that the woman was serious, an operation could be carried out legally.[25)]

A similar, yet critically different problem was where a woman threatened that she would have an illegal backstreet abortion carried out if her doctor would not help her. The majority opinion was that this was no justification - the doctor merely had a duty, both legal and moral, to try to prevent breaches of the law and all that he was required to do was to warn the woman of the illegality and dangers of such an action on her part.[26)]

Although there was always strong support[27)] for allowing legal abortion in cases where the child was likely to be born seriously handicapped or deformed ( such as where its mother had suffered Rubella during pregnancy ), this was not formally permitted by the common law.

Dickens reports:- ' medical men were most unlikely to be prosecuted for ending a pregnancy in these circumstances, this, however, not because of the law, but despite it '.[28)] This problem seems to have been overcome by " twisting " the law, or perhaps rather the patient. If she were likely to suffer in health, either physically ( unlikely ) or mentally ( easily concocted ), then the operation was justifiable - a psychiatrist's opinion was all she required.[29)]

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24) *See Paul Ferris op.cit. pp. 130-131*
25) *Dickens, B.M. op.cit. p. 49*
26) *Paul Ferris op.cit. p. 130*
27) *Lord Denning,* Medical Journal 1956, *2, 821*
28) *on p. 50*
29) *cf. Paul Ferris op.cit. p. 131*

# *B R I T I S H  L A W*
## *( 1803-1967 )*

## SUMMARY

Legislation and interpretation thereof in Britain during the period after 1803 and up to the passing of the new abortion legislation in 1967, may be summarised as follows:-

Abortion was allowed:

i) Where the abortion was to " save the life " of the mother ( would include threatened suicide in certain circumstances )

ii) Where the abortion was carried out with the " intention to preserve " the life of the mother ( would include rape, and incest under certain circumstances, also includes possible abnormality or deformity of the child if this threatened the life or health of the mother ).

Broadly speaking thus, on the grounds of a threat to (i) the life of the mother, or (ii) the health of the mother. Abortion was not allowed merely because there was a possibility of an abnormal or deformed child being born, and where this had no direct effect on the mother's life or health. A threat to commit suicide was no justification to perform the operation unless the strong possibility existed that the woman would in fact commit suicide. A threat to have a backstreet abortion performed unless the doctor operated, was also no justification.

*B R I T I S H  L A W*
*( Present day )*

## 4.3 PRESENT DAY LAW

### i) The course of events leading up to the adoption of the 1967 Abortion Act.

#### A. R. v. Bourne and the Inter Departmental Committee 1937

The general problem that the British people encountered prior to R. v. Bourne in 1938, was that abortion was expressly forbidden by the 1861 Act and, apparently, could never be justified. In order to have the matter clarified, already in 1934 the organisation of Woman's Co-operative Guilds, passed a resolution calling upon the Government " to revise the abortion laws of 1861, thereby making abortion a legal operation that can be carried out under the same conditions as any other operation."[1)]

Thereafter in 1935, the National Council of Women advocated the appointment of a Committee " to inquire into the incidence of abortion and as to the law dealing with criminal abortion ". In 1936 the British Medical Association got more to the point saying " the wording of the Act (1861) may be thought to imply that abortion may be lawful as well as unlawful, but in the law as it stands no specific authority is given for terminating pregnancy "[2)]

The result of this agitation for reform was that in 1937 an Inter-Departmental Committee on Abortion was created, but before the Committee could give its reports, the case of R. v. Bourne was decided in 1938 and the grounds on which a medical practitioner could lawfully perform a therapeutic abortion, became clear. This, although establishing law by case-law precedent, did not completely satisfy the Committee which finally suggested

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1) *Dickens, B.M. p. 121*
2) *Dickens, B.M. p. 121*

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that " the law should be amended to make it unmistakably clear that a medical practitioner is acting legally, when in good faith he procures the abortion of a pregnant woman in circumstances which satisfy him that continuance of the pregnancy is likely to endanger her life or seriously impair her health.[3] No statutory change was however enacted.

B. Attempts at Statutory revision

a) Joseph Reeves' Bill 1952

This Bill drafted by Dr. Glanville Williams attempted to have the position of the medical practitioner established by statute, but the Bill was only read for a second time, before debate on it stood adjourned.[4]

b) Lord Amultrees' Bill of 1954

Slightly more ambitious than the 1952 one, this Bill sought to declare the existing law and permit abortion also on eugenic indications. It also spoke of an abortion

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3) *para 201 of the Report.*

4) *The Bill, which had the approval of the B.M.A. was drafted as :* The Abortion Act, 1952, *and read as follows:*

*" For the removal of a doubt there shall be added the following proviso to Section 58 of the Offences against the Person Act 1861 - Provided that*

*a) no person shall be found guilty of an offence under this section unless it is proved that the act charged was not done in good faith for the purpose of preserving the life of the mother;*

*b) no registered medical practitioner who acts with the concurring opinion of a second registered medical practitioner shall be found guilty of an offence under this section unless it is proved that the act charged was not done in good faith for the purpose of preventing injury to the mother in body or health. "*

being lawful if procured with the intention of " preventing serious injury to the mother's physical or mental health ". The Bill, however, did not progress beyond the First Reading.

c) Kenneth Robinson 1961

In 1961 an attempt was made to " put into statutory form what is now the common law ". Mr. Robinson's attempt, although receiving some considerable discussion by Parliament, was rejected.[5)]

d) Mrs. Reneẽ Short 1965

Unfortunate timing of an almost identical Bill to that of 1961, resulted in Mrs. Short's Bill not receiving a second reading.

e) Lord Silkin's Bill - Nov. 1965

The Bill proposed by Lord Silken may be considered as the spearhead to the Bill which was finally to become the Abortion Act 1967.

Lord Silkin's Bill introduced for the first time a " Social Clause " which provided that it would be lawful for a registered medical practitioner to terminate a pregnancy in good faith:- " in the belief that the health of the patient or the social conditions in which she is living ( including the social conditions of her existing children ) make her unsuitable to assume the legal and moral responsibility for caring for a child or another child as the

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5) *This act was drafted as the* Medical Termination of Pregnancy Act 19 ... *This act attempted to have it made lawful for a registered practitioner to terminate a pregnancy in good faith for a) Preserving the life of the patient, b) if there was risk to the patients physical and mental health, c) if the child could possibly be born abnormal or deformed, d) if the patient was pregnant as the result of a criminal offence. The concurring opinion in good faith of two medical practitioners was also required.*

case may be ".[6] Lord Silkin explained that this clause was intended to provide relief for the middle aged woman finding herself pregnant, or the mother of five or six children who felt that she could not cope with another.[7]

In the debates which followed, there was fairly strong opposition to the social clause as it was framed on the grounds that is was susceptible to abuse. However, Lord Silkin himself never for one moment hesitated to point out that there was room for amendment and thus it was that with the undertaking to consult with the other members in order to prepare the draft of a new and more widely agreed Bill, that the Bill was withdrawn and a decision ( in a division of the House of Lords ) taken to read it for a Second Time.

ii) The Abortion Act 1967

The principal provisions of the Abortion Act 1967, which came into force on April 27, 1968, are as follows:

*MEDICAL TERMINATION OF PREGNANCY*

*1.- (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith -*

*a) that the continuance of the pregnancy would involve the risk of the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or*

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6) *Sect. 1 (c)*
7) *Hansard, House of Lords Debates, Vol 27, Col. 1240*

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b) *that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.*

*(2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as mentioned in paragraph (a) of subsection (1) of this section, account may be taken of the pregnant woman's actual or reasonably forseeable environment.*

*(3) Except as provided by subsection (4) of this section, any treatment for the termination of pregnancy must be carried out in a hospital vested in the Minister of Health or the Secretary of State under the National Health Service Acts, or in a place for the time being approved for the purposes of the section by the said Minister or the Secretary of State.*

*(4) Subsection (3) of this section, and so much of subsection (1) as relates to the opinion of two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.*

*Notification*

*2.-(1) The Minister of Health ... shall by statutory instrument make regulations to provide -*

a) *for requiring any such opinion as is referred to in section 1 of this Act to be certified by the practitioners or practitioner concerned in such form and at such time as may be prescribed by the regulations, and for requiring the preservation and disposal of certificates made for the purposes of the regulations;*

b) *for requiring any registered medical practitioner who terminates a pregnancy to give notice of the termination, and such other information relating to the termination as may so be prescribed;*

c) *for prohibiting the disclosure, except to such persons or for such purposes as may be so prescribed, of notices given or information furnished pursuant to the regulations.*

*(2) The information furnished in pursuance of regulations made by virtue of paragraph (b) of subsection (1) of this section shall be notified solely to the Chief Medical Officers of the Ministry of Health ...*

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*Conscientious Objection to participation in treatment*

*4.-(1) Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection:*

*Provided that in any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely upon it.*

*(2) Nothing in subsection (1) of this section shall affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman.*

*Supplementary provisions*

*5.-(1) Nothing in this Act shall affect the provisions of the Infant Life (Preservation) Act 1929 (protecting the life of the viable foetus).*

*(2) For the purposes of the law relating to abortion, anything done with intent to procure the miscarriage of a woman is unlawfully done unless authorised by section 1 of this Act.*

A. G.P.'s or Consultants

The Act requires that two registered medical practitioners must be of the opinion that the abortion falls within the terms of the Act. A third practitioner, who need not have any knowledge of the patient, and who need not have any specialist status may then carry out the operation. However, as the operation must be carried out in a National Health Nursing Home or other approved institution it will most probably be a specialist who carries out the operation.

B. " Social " Clause

Most probably the most important and revolutionary alteration of the former legislation, this clause permits abortion on the grounds of *risk of injury to the physical or mental health of any existing children ( or child ) of the family* (family in a sociological and not legal sense). Although this would seem to be placing the burden of a non-medical, sociological decision on the practitioner, it is not objectionable as a responsible family doctor knows well the social condition of his patient and is well equipped to make such a decision. Any decision a

doctor takes with respect to his patient, is usually with the social conditions surrounding the patient also in mind.

This clause has been severly criticised by the British Medical Association which is of the opinion that to carry out an abortion " because little Willy might be jealous of the new baby ", is objectionable and unethical.[8)]

The B.M.A. was of the opinion that the social clause was not necessary to deal with Lord Silkin's " middle aged woman finding herself pregnant or the mother of five or six children who felt that she could not cope with another ". (see p. 17 supra) It would apparently be sufficient to examine the situation with the health of the mother in mind.[9)] Opposing opinion was that termination under the social clause would in practice most likely not be regarded as " infamous conduct in a professional sense ".[10)]

The opposition of the medical practitioners to this social clause would seem somewhat surprising as it certainly has a very loose and blanketing protection in the case of prosecution.

The result of this opposition would possibly be that the unmarried pregnant teenager and the forty-year-old middle class mother who are neither physically or mentally at risk, may find their position little

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8) British Medical Journal Supplement, July 6, 1968, *p. 25 :- " The B.M.A. Council welcomed the recent Bill, but took exception to the clause which permitted termination on the grounds that the health of the other children in the family might be affected ".*

9) *Derek Stevenson, Secretary to the B.M.A.,* The Times, April 29, 1968. *" Faced with such a situation (i.e. where the woman already has five or six children) it is difficult to see how a doctor, taking into account the mother's total environment, as he is entitled to do (cf. Sect. 2 of the Act), could come to any other conclusion than that it would be in the interests of the health of the mother to terminate the pregnancy "*

10) *Alec Samuels,* Medicine, Science and the Law, Jan. 1969.

changed to what it was before the Act.[11] ' The availability of abortion will be governed by medical ethics rather than by legal requirements '[12]

So where there is a high standard of moral ethics, such as with medical practitioners, there is only a relatively small risk of this clause being abused.

C. Weighing of Risks

When a decision to terminate a pregnancy is taken, the risk, if the pregnancy were terminated must be weighed against the risk of the life or injury to the physical or mental health of the woman ( or any of her children ) if the pregnancy were not terminated, and then the lesser risk must be taken.[13]

D. Risk of Abnormality ( Sect 1 (1) (b). )

The following are normally considered as likely to result in some form of abnormality in the unborn child.

i) Maternal Rubella (German measels) in early stages of pregnancy.
ii) Blood group incompatibility of parents.
iii) A cytoxic drug tragedy like thalidomide.
iv) Haemophilia in both parents.
v) Mongolism.[14]
vi) Veneral disease of either parents at the time of conception or at any time thereafter.
vii) Hereditary abnormality such as blindness or deafness.

If the practitioner were to satisfy himself that any one of the above conditions were present, and that

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11) *Alec Samuels, op.cit. p. 6 cf.*
12) *Hoggett, 1968*
13) *Sect. 1 (1) (a) of the Act.*
14) *Alec Samuels, p. 6*

some form of abnormality was likely to result, he would be perfectly justified in carrying out the operation.

The opponents of such eugenic[15] provisions are wont to raise the cruel and inhumane acts of Nazi Germany as an argument against the practice of preventing the birth of an abnormal or handicapped child, but as Glanville Williams says, ' to allow the breeding of defectives is a horrible evil, far worse than any that may be found in abortion '. [16] The provision seems to have been accepted generally by the public [17] as a whole, and is apparently also ethically acceptable to the medical practitioners.

E. SEXUAL OFFENCES

In contrast to the earlier proposals[18] this Act makes no specific provision for the victim of a sexual offence, a girl under sixteen, or the victim of rape. An *automatic* right to abortion on these grounds is thus not created and must be justified ( usually without any problem ) on the general grounds of injury to the physical or mental health of the woman. In this way the problem of false accusation to obtain a ground by right is removed. The problem of proving an allegation is also removed.

F. Duty, Conscience Clause and Prosecution ( Sect. 4 )

The case of R. v. Bourne, which regulated the law prior to this Act, contained the very specific instruction of MacNaghten, J. that the doctor had a " duty to perform " an operation with a view to saving the life of the woman. However, Sect. 4 (1) makes it quite clear

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15) *Eugenic : " of the production of fine offspring "* Oxford Pocket Dictionary.

16) Sanctity of Life *p. 212*

17) *1965 National Opinion Poll in Britain showed that more than 50% of the people interviewed, were prepared to allow abortion on Eugenic grounds.*

18) *Kenneth Robinson's Bill 1961 - Sect 1 (d) ; Mrs. Renee Short's Bill 1965 - Sect 1 (d) ; Lord Silkin's Bill (Original Draft)1965*

" no person shall be under any duty " to participate in any abortion permitted by the Act. This is, however, subject to the qualification of Sect. 4 (2) which reinstates the duty to " participate in treatment which is necessary to save the life or prevent grave permanent injury to the physical or mental health of a pregnant woman ". ( This is at any rate, the duty of a doctor or nurse ) Thus the person with conscientious objection ( possibly Catholic ) is not compelled to participate in something abhorrent to him, and may refer the woman to someone who has no objection to do the operation. He cannot be prosecuted for refusing to operate ( unless an emergency situation required him to do so ).

G. Private Nursing Homes

The introduction of a control of the institutions at which abortions could be carried out is a very effective method of keeping abortion " in trim ". The fact that legal abortion can be carried out only at the National Health Service Hospital and certain other "registered" Nursing Homes,[19] plus the requirement that notification must be given to the Chief Medical Officers of Health[20] has resulted in the Minister being able to have control on the situation by investigating why the number of abortions are particularly high at any particular institution. The possibility that he may withdraw his approval also exists and will keep medical practitioners on their toes in order that they may not be shown up as being too keen to perform abortions.

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19) *Sect. 1 (3)*
20) *Sect. (2)*

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H. Professional Confidentiality

The great value of the procedure of this Act is that it allows the pregnant woman to discuss her problem with the ordinary " house doctor ", who will keep all her confessions and explanations in strict confidence. Unlike the Tribunals or Medical Boards of the Scandinavian Countries, the woman does not stand the risk that official note is taken of her pregnancy and if she is refused an abortion, she cannot go elsewhere other than to a criminal abortionist ( the more risky because her condition has been officially noted ).[21] The British Act merely requires the " opinion " in good faith of *two* registered medical practitioners. If she does not receive the blessing of her own doctor, there is nothing to stop her from going to another, more sympathetic one ( although this is naturally not the objective of the Act ).

The notification that an abortion has been performed is required merely for record and statistical purposes, not to keep track on who has had an abortion performed on her. In fact, this information is kept strictly secret, only being available in criminal cases for prosecution of a doctor who acted illegally, of for *bona fide* research purposes. The consent of the patient will naturally enough also allow the information to be examined.

Very important statistics with regard to abortion, specifically in respect of incidence of death, morbidity and the general epidemiology can be obtained from the records of these statutorily required notifications.

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21) *The fact that a woman has to appear before an official inquisitorial "Board" in Denmark, is given as a reason why the number of criminal abortions has not decreased in this country, even though legal termination is fairly easily obtained - the women are unwilling to make the whole affair "public".*

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I. What have we learned so far?

From an interesting article by Alec Samuels in Medicine, Science and the Law[22] it has become apparent that General Practitioners are referring more pregnant patients to gynaecologists. Lots of foreign pregnant girls are going to Britain for abortions.[23] As far as trends and statistics are concerned, it appears that the ratio between[24] married and unmarried patients is almost equal. Most patients are in the 20 - 34 year range. The most common ground, especially with the unmarried, is risk of injury to the physical or mental health of the patient. The social clause is not used much in order to justify an abortion, and if it is used as a ground, it is largely confined to married women ( achieving Lord Silkin's intention as supra ) and then usually in conjuction with some other ground.

Recent figures [25] have shown that the number of legal abortions in Britain has increased tremendously: in 1967, 9,700 legal abortions were performed; while in 1969 the figure was 54,000. More than half of these operations were performed in National Health Hospitals. The total number of notifications of abortion since the imposition of the Abortion Act 1967 in April 1968 had reached 76,413 by the end of 1969. The rate is thus more than 1,000 abortions per week.

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22) *January, 1969, Vol. 9, p. 3 on p. 9*

23) *See* Life, March 16, 1970 *" Abortion comes out of the Shadows " for the story of an American girl who went to Britain for an abortion. Interesting is to note that the grounds for the abortion were very superficially investigated, if at all:- p. 12 " we were handed some forms to sign which said we agreed to have the operation. We signed them and gave back letters from our doctors back home ".*

24) Life, March 16, 1970 *says " most women who seek abortions are married, more than half are over 21 "*

25) *Report in* Cape Argus *dated 28.1.1970.*

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Thus although still in its infancy and in the process of being tried out, the New Abortion Act of 1967 seems to have been a remarkable success to date, although perhaps with an increase in the number of legal abortion ( as expected ). However, there has been no wholesale misuse or abuse of the provisions of the Act and as a result of the relaxed measures there has hopefully been a decrease in the number of criminal abortions.

It is only fair, however, to point out here that there has been some strong criticism against this new " liberal " law, most of it coming from those people who are concerned that Britain has become the " abortion capital of the Western World ",[26] and also from the medical practitioners[27] who are faced with an ever increasing number of distasteful operations which they have to perform.

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26) *cf. numerous reports in the local press, e.g.* Die Beeld, *11.8.68 headline - " Londen is die plek vir meisies in die moeilikheid "*

27) *Personal discussion with a South African Gynaecologist revealed that he had encountered several complaints from his British counterparts, that they were " acutely alarmed by the ever-increasing number of operations they had to perform ".*

# CHAPTER FIVE

## A B O R T I O N  I N  T H E  U.S.A.

5.1 Present situation in most states

i) What is considered as abortion?

ii) Where can there be legal abortion?

A) No Provision made

B) Where termination is to save the life of the mother

C) Eugenic Considerations

a) Drugs
b) Rubella
c) Radiation
d) Genetic Incompatibility
e) Psychiatric & Socio-Economic Indications
f) Abortion & Criminal Offences

5.2 Latest Developments in the U.S.A.

# *A B O R T I O N  I N  T H E  U.S.A.*

## 5.1 PRESENT SITUATION IN MOST STATES

### i) What is considered as abortion?

The following is a definition by the American writer B.J. Ficarra, which fairly accurately reflects what the crime of abortion comprises: ' An abortion as generally understood, is a crime existing in the administration of a drug or the use of any instrument or means upon a pregnant woman for the purposes of incurring a miscarriage or the expulsion of the foetus without legal justification. '

Abortion is a statutory crime throughout the U.S.A. Some statutes apply only where the woman is pregnant, in others the attempt itself ( even though the woman is not pregnant ) is punishable.[1] Prior to the latest reform, New York state law was similar to previous British law and a woman who committed an abortion on herself was punishable.[2] A consenting mother is some states[3] is held to be an accomplice, while in others not.[4] Custom, as in England, is not to prosecute her.[5] An interesting phenomenon is that, contrary to the usual rule of evidence, the consenting mother accomplice's evidence need not be corroborated.[6] The phenomenon of *quickening* is also known and in the states of Mississippi and Carolina, for instance, no crime of abortion can be committed prior to quickening.[7] In certain circum-

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1) *California, Colorado and previously New York.*
2) *New York Penal Law s.s. 81, 1052 ( punishment - imprisonment for not less than 1 year and not more than 4 years.*
3) *Alabama.*
4) *Connecticut, Massachusetts, Oregon, Minneapolis, California and Oklahoma.*
5) *Glanville Williams, p. 148 Also " generally speaking, the woman is considered as the victim and not the perpetrator of the crime " Law Review, University of California, Vol. 195 p. 48.*
6) *Connecticut, Massachusetts, Oregon.*
7) *State v. Steadman, 51 S.E. (2d) 91 (S.C. 1948)*

stances, the mere prescribing of a drug which could bring about an illegal abortion is sufficient to subject the physician to criminal prosecution.[8)]

Some states expressly require that the abortion should cause the death of the child or foetus, before a prosecution will be successful, and the courts in general so not find a person guilty for the removal of a dead foetus.[9)]

ii) Where can there be a legal abortion?

A. No provision made

In certain states[10)] no statutory provision is made for an abortion to be carried out legally under any circumstances. However, reference to the word *unlawful* in the statutes, implies that abortion must be *lawful* in certain circumstances. Glanville Williams[11)] says that in accordance with the principles of R. v. Bourne, these states read into the law that a termination is lawful and justifiable if it is carried out where it is necessary to save the life of the mother.

B. Where the termination is to save the life of the mother

The statutes of most states refer to the *preserving* or *saving* of the mother's life.[12)] The preserving or saving the *life* of the mother, receives a broader interpretation to cover also the *physical health* and even the *mental health* of the mother.[13)]

The life of the woman does not have to be in imminent danger, but need merely be threatened. The recognised grounds on which *therapeutic*[14)] abortions may be carried out, include cardiovascular disease, gastrointestinal

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8) *In Massachusetts.*
9) *Ficarra, B.J.* Surgical and Allied Malpractices *p. 401 item 15*
10) *Notably Florida, Louisiana, Massachusetts, New Jersey Pennsylvania*
11) *On. p. 155*
12) *Glanville Williams, p. 154*
13) *Glanville Williams, p. 155 with reference to R.v.Bourne and State v. Rudman.*
14) *Note that the word therapeutic is used to denote a "lifesaving" or "healing" operation. The truth of the matter is that therapeutic somewhat softens the rather harsh and "ugly" connotation given to the word abortion when used without the adj.*

disease, renal disease and certain neurological[15] diseases of the mother.[16] Also pulmonary diseases such as tuberculosis, diabetes, cancer and diseases like Rheumatoid arthritis are also grounds where they are of such a nature as threaten the life of the woman if she were to fall pregnant.

C. Eugenic Considerations

No state statutorily permits abortion because of an expected abnormality of the foetus,[17] but, by twisting the true state of affairs, certain purely eugenic abortions are carried out under the guise that the thought to the mother that she may have an abnormal child could seriously affect her health, and therefore consequently endanger her life.

a) Drugs

The thalidomide tragedy forced pregnant American women to seek abortion outside the U.S.A.. Only those who were able to wrangle Psychiatrist's recommendations that not to have an abortion would affect their health, were able to have legal abortions carried out in their own country.

b) Rubella

When the woman has suffered from German measels ( Rubella ) during early pregnancy, the chances are extremely high that she will have an abnormal child. Abortion in these circumstances, is not allowed unless the health of the woman is likely to be affected.

c) Radiation

Subjection to therapeutic, diagnostic or accidental radiation during the early months of pregnancy, can result in severe malformation and even death of the

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15) *Such as paralysis, epilepsy, etc.*

16) *Essay of Kenneth R. Niswander M.D. in* Abortion and the Law *edited by David T. Smith. See p.p. 41-51*

17) *Niswander, p. 45*

foetus.[18] Again no relief is available unless the malformed child is projected as being a danger to the life of the woman. Fears and neuroses, connected with the thought of having to give birth to an abnormal child are then considered as threats to the life or health of the mother ..... and the termination is justified!

d) Genetic incompatibility

Where blood or gene incompatibility may result in a deformed or abnormal child being born, where there is the risk of a congenital defect like blindness, or deafness being transmitted, or where there is the risk of maniacal tendencies being passed on, there is still no relief unless the health of the mother is threatened.

e) Psychiatric and Socio-Economic indications

More and more abortions are being allowed for psychiatric reasons, the official reason being given that if the pregnancy were allowed to continue, this would so affect the mind of the woman that this would threaten her health.[19]

Social and economic conditions result in abortions being carried out on a woman who is living under such extreme conditions of poverty, that an additional child would make life almost unbearable. Similarly, abortions are also carried out where either of the parents of the unborn child are socially inadequate to care properly for the child ( for instance drug addicts, alcoholics, mentally defectives ). Postulations

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18) *Parlee,* Radiation Hazards in Obstetrics and Gynaecology *as quoted by Niswander.*

19) *Genuine suicide tendencies are however present in some cases and the psychiatric indication is then truly a justifiable ground for performing an abortion.*

have been made that these are in fact the grounds on which most abortions are carried out. No legal relief is provided for abortion on these grounds, so that these abortions are almost invariably illegal

f) Abortion and Criminal Offences

Abortion is not *per se* legally justified on the ethical ground that the woman's pregnancy is the result of a rape or of incest or statutory sexual offence ( i.e. intercourse with a girl under sixteen[20] ). However, in practice no problem usually exists in obtaining an abortion in these circumstances, as the effect of rape or other sexual offence on the woman, is sufficient to obtain her a life-risk rating, whereupon the operation may be legally carried out " to save her life or her physical or mental health ".[21]

From all the aforegoing it would appear then that the present situation in most of the U.S.A. is very similar to the legal position in Britain, prior to the passing of the 1967 Abortion Act.

5.2 LATEST DEVELOPMENTS IN THE U.S.A.

At the writing of this thesis, the abortion laws in at least 3 of the states of the U.S.A. had been newly reformed. Unfortunately, no authoritative literature was available on the latest reforms, and the information which I have been able to assimilate is merely what has been reported in the local press.

According to a report in *The Rand Daily Mail* on April 13th, 1970, the state of Hawaii has recently had legislation enacted which requires merely " that the woman and her

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20) *Glanville Williams, p. 160*

21) *See more comprehensive discussion on this point in Chapter 7, under heading " MY SUGGESTIONS "*

doctor agree that the pregnancy be terminated and that the abortion should be carried out in an accredited hospital ". In order to prevent abuse of this new law by foreigners, there is a 90 day residence provision which requires that the patient be resident in the state for 90 days prior to an operation being performed. Should there be an operation carried out on a woman who has not been resident there for the required period, I cannot see that a prosecution will be of a serious nature, as in the crime of abortion, the unlawful removal of the contents of the womb itself is the essence of the crime - the mere breaking of a statutory residence provision is of very little significance.

The same report referred to above, carries news of a very similar Bill to the one in Hawaii, lying ready and merely awaiting the signature of the governor of Maryland to make it law. This Bill does not even have a residence provision.

*The Friend* of 14th April, 1970, carries the following report:

*ABORTION LAW*

*'MOST LIBERAL'*

*ALBANY (New York) -*

*Governor Nelson Rockefeller has signed into law a Bill giving New York State the most liberal abortion reform law in the United States and one of the most liberal in the world.*

*Under the new law, an abortion is strictly a matter between a woman and her doctor up to the 24th week of pregnancy. After that, an abortion will be permitted only if necessary to save the woman's life. - Sapa-Reuter*

It appears that, following on the reform of the law on abortion in Britain, these states of the U.S.A. have gone " one bigger-'n-better " and provided " abortion on request ".

Whether this is a far as the agitators for reform hoped to have things go, is uncertain. What the effect of this legislation will be, will only be provided by the future, and present predictions would merely be speculation.

# CHAPTER SIX

## D A N I S H  A B O R T I O N  L A W S

6.1 ABORTION LAW (1937)

i) Medical

ii) Ethical

iii) Eugenic

# *DANISH ABORTION LAWS*

From an interesting article by Mögens Ingersler, Professor of Obstetrics and Gynaecology, at the University of Aarhus, Denmark[1], the existing position with regard to abortion in Denmark may be summarized as follows:

Firstly, world attitude on therapeutic abortion may be divided into 5 broad categories, viz:

i) No formal indication for abortion
ii) Abortion on medical (disease) grounds only
iii) Abortion on medical indications supported by socio-economic grounds
iv) Abortion on socio-economic indications - occasionally supported by medical grounds
v) Abortion on demand

Scandinavia, and thus Denmark, falls into the categories under (iii) and (iv), ( c.f. position at present in Britain today ).

The formal grounds indicated are incorporated in the First Danish Abortion Law (1937).

## 6.1 ABORTION LAW (1937)

Briefly, the indications:

i) Medical: When necessary to prevent the serious risk of the *life or health* of the pregnant woman

ii) Ethical: certain criminal conditions ( in particular sexual offences )

iii) Eugenic: obvious risk due to severe hereditary trait

Requirements

a) Certificate from two registered doctors, one preferably the family doctor.
b) Treatment in public hospitals only
c) Notification to Ministry of Health
d) All cases other than strictly medical to be referred to the Mother's Aid Institution.

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1) Medicine, Science and Law, 1967

A risk to the *life or health* of the mother includes physical and *mental* health. Other serious risks, when abortion may be carried out, are chronic malnutrition due to misery and distress; exhaustion from a series of childbirths; depression; attempted suicide or other desperate actions.[2)]

As if these grounds were not already sufficient, the 1956 Abortion Act added still further provisions.

i) Medical

In evaluating the risk for life and health, attention should be paid to all relevant conditions, the patient's total environment and present or impending physical or mental illness. ( c.f. Present British Act )

ii) Eugenic

When hereditary trait, damage to the foetus in utero, or illness during pregnancy, indicate an obvious risk that the newborn will suffer from mental disease, mental inferiority, epilepsia, serious or incurable abnormality or physical disease, then a therapeutic abortion may legally be carried out.

What is interesting to note, is that all non-medical, therapeutic abortions are first referred to the Mother's Aid Institution, which is comprised of a board consisting of a psychiatrist, gynaecological surgeon and a social welfare worker.

This board decides whether all relevant conditions produce sufficient grounds for a therapeutic abortion. This decision has to be unanimous.

As a result of the relaxing of requirements, the number of therapeutic abortions has increased.[3)]

What is even more perturbing, is that the number of illegal abortions has also increased.[4)] Possibly the situation

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2) *Circular from Ministry of Health to clarify 1937 Act*
3) *From 500 to 5,000 from 1940 to 1951*
4) *From 5,000 to 13,000 from 1940 to 1951 (estimated)*

as it has been and is at present in Denmark, is an indication of what to expect now in Britain after the latest legislation.

However, the problems and difficulties experienced by the Scandinavian countries in the evolution of this semi-liberal abortion policy of theirs, is of inestimable value to the development of reformed and modern legal systems in other countries.[5)]

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5) *c.f. The value to Britain in deciding on what reforms to make, ( British legislators decided pro social or economic clause, anti Board or Institution to examine patient - also only in approved hospitals, notification of termination to authorities ).*

# CHAPTER SEVEN

## A B O R T I O N  I N  S O U T H  A F R I C A

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- vii) What is the Public Opinion with regard to abortion?

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7.7 CONCLUSION

## 7.1 THE COMMON LAW

Abortion as such, has never been the subject of a statute in South Africa. The result of this, is that the entire position is regulated by Common Law on the subject.

As pointed out in Chapter 3 supra, the basis of our Common Law on the subject of abortion, is contained in the writings of the Dutch jurists.

At least Matthaeus, Johannes Voet and Moorman unambiguously indicated that abortion was an offence, but was justifiable in order to *save the life of the mother*. (See 3.2. p.7 supra) On the authority of these last-mentioned writers, and the less explicit writings of Huber, Damhouder and also Carpzovuis, it may fairly safely be concluded that our Common Law in South Africa, is that abortion is an offence, but that it is justifiable in order to *save the life of the mother*.

## 7.2 CONTEMPORARY INTERPRETATION

### i) Elements

In order to discuss in more detail the law on abortion as it is in South Africa today, I should like to refer to the definition of the crime of abortion in order to examine its elements more closely.

Gardiner and Lansdown's [1] definition is as follows:

> *" The crime of procuring abortion is committed by ANY PERSON who, with the object of defeating the ordinary course of gestation, WILFULLY applies to a PREGNANT woman any means by which the untimely expulsion of the foetus is effected. "*

De Wet and Swanepoel[2] define abortion as such:

> *" die WEDEREGTELIKE, OPSETLIKE veroorsaking van die AFDRYWING van 'n VRUG in 'n SWANGER vrou. "*

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1) *Vol. II, 6th Edition, p. 1598*
2) *p. 220*

Gordon, Turner and Price:

*" The Common Law crime of procuring abortion is committed by ANY PERSON who WILFULLY and UNLAWFULLY with the intention of prematurely terminating pregnancy does any act which causes a PREGNANT woman to MISCARRY. "*

These definitions and, as will be seen later, the general opinion of our courts, show that our common law crime of abortion is essentially different from what legislation and interpretation by the courts in Britain held the crime of abortion to be there.[3]

In Britain, there was no differentiation between abortion and attempted abortion, and it was not even essential for a woman to be pregnant for a conviction under Sect. 58 of the Offences against the Person Act.[4] In South Africa, two absolute essentials of the crime of abortion are that firstly, the woman must have been *pregnant*, and secondly, that the foetus must have been *alive* - if one of these two elements is lacking, there can only be an *attempt* at procuring an abortion (intra).

A. Foetus

As indicated above, the foetus must have been alive[5] at the time of the abortion being induced. Had the foetus already been dead, the most that the abortionist could be found guilty of is " attempted abortion ".[6]

Our law makes no specific provision for determining when a foetus is alive, and the only legislation which

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3) *Prior to the Abortion Act of 1967*

4) *See discussion on the elements of the felony abortion on p. 12 (supra)*

5) *See R. v. Davies and Another 1956 (3) S.A. 52 (A) Per Schreiner, J.A.: " for the completed common law crime of procuring abortion, the foetus must have been alive at the time of the act. " Also R. v. O 1963(i) S.R. p. 43. Per Young, J: " it must have been alive at the time of procuring the abortion. " Also R. v. Madongo 1966(i) p. 75. In the indictment, specific mention is made of procuring the miscarriage of a woman pregnant with "Living child".*

6) *R. v. Davies and Another (supra)*

may be of interest, is sect. 113 of the General Law Amendment Act 46 of 1935. Here, for purposes of the crime concealment of birth, a foetus was considered not to be a child " unless it has reached a stage of development sufficient to have rendered its existence apart from its mother, a reasonable probability ".[7]

A child is not a " viable " child, and its birth does consequently not have to be reported if it is less than six months old, after date of conception.[8]

However, this does not have any real relevance on when the foetus may be considered as being alive. The former English Practice of differentiating between a foetus which had *quickened*, and one which had not, has not influenced us in South Africa, and the rather vague and largely differing opinions of the Roman Dutch writers on when the " soul " enters the foetus, also leaves us unsatisfied. I could find no reported decision on this point, and it would seem that reference to a foetus as being alive is merely to differentiate it from one that is dead inside the mother. The question is not when did the foetus *become* alive, but was it in fact *ever* alive? The life of the foetus thus starting at the time of conception, ( beginning of biological life )[9] and not depending upon quickening or entering of the soul or other such like occurence.

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7) *See also R. v. Matthews 1943 C.P.D. p. 8*
8) *Sect. 49 of the same Act.*
9) *cf. Hymie Gordon - paper delivered at a Symposium on Therapeutic Abortion, reported in July, 1968 Medical Journal, p. 729*

B. Pregnancy

The other elements, viz. that the woman must have been pregnant before the crime of abortion can be carried out on her, is in fact a duplication of the element that the foetus must be alive, as it is impossible for the foetus to be alive at all if the woman is not pregnant. So. although it has become fixed practice to consider the two as separate elements,[10] it would in fact be sufficient to consider abortion merely as the unlawful, intentional causing of the death of a *live* foetus in its mother.[11]

ii) When is termination lawful?

Since we have now established that the crime of procuring abortion is the *unlawful*, intentional causing of the death of a live foetus in its mother, it is left to us to clarify when the termination will be *lawful*.

As shown above, our Roman Dutch authorities considered abortion as lawful when carried out to " save the life of the mother ". This then, strictly speaking, is the only actual legal ground on which pregnancy may be terminated in South Africa at present. The threat to the life of the mother is the justification. This would seem to be the justification ground, either emergency or self-defence, but this is not completely satisfactory, in that all the elements are not present.[12]

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10) *R. v. Madongo, 1966(i) p. 75 In the indictment :- " pregnant with living child "*

11) *I say "in its mother", as it would seem unlikely that a test-tube baby could be technically aborted.*

12) *Possibly no unlawful attack by the foetus - S.A. Strauss, Med. Jnl. p. 713. c.f. Also Strauss* - S.A. Geneeskundige Reg *p. 254, where he says " emergency is the fundamental justification ground ". See also Gardiner & Lansdown p. 1598 De Wet & Swanepoel, p. 80 - "By vrugafdrywing is opoffering van 'n potensiele lewe geregverdig om die lewe van die moeder te red". But also see p. 73 re: The Mignonette, where 3 adults killed and ate a young boy in order to save themselves from starvation on a lifeboat - " dit is ook geen noodweer-geval nie, maar die opoffering van een, wat nie wederregtelik gehandel het nie, om die lewens van die ander drie te red " Is the foetus acting unlawfully? - is it not similar to the young boy on the lifeboat?*

Although a strict interpretation of the common law will allow only therapeutic or medical abortion where there is imminent danger to the life of the mother, most indications are that there will be a wider interpretation of this threat to the *life* of the mother to include, as in the Bourne case, a threat also to the physical and mental health of the mother, should this point ever be raised in our courts.[13] However, the point is by no means a clear one and there is in fact no real basis for arguing that the interpretation will be broad, [14] other than perhaps the fact that the law is a living force, which, where there is uncertainty as the result of the absence of an express provision, will take into consideration *überpositive* criteria, and will give heed to juristic notions prevailing in a particular culture. [15] That the " juristic notions " prevailing in South Africa at the present moment, include inter alia, a wider interpretation of the law than the strict threat to the life of the mother, is evident from the numerous cries for reform of the law. The actual practice of medical practitioners in South Africa, indicates that their interpretation of a threat to life includes a threat to health. ( intra ) p. 46

An interesting argument in favour of broadening the justification argument of emergency action in self defence, to cover also the threat to the health of the woman, is that put forward by Prof. Strauss :- he refers to the recent

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13) *Prof. Strauss in his paper delivered at the Symposium on Therapeutic Abortion in Hermanus in April, 1968 .. " it is my conviction that enlightened public opinion would support such a decision " ( i.e. threat to health being a justification )*

14) *Gordon, Turner and Price* - Medical Jurisprudence *are of the opinion that our Courts will not interpret a threat to the mother's life as including a threat to her health. So also de Wet & Swanepoel. Gardiner and Lansdown are non-committal on this point.*

15) *The ideas of Prof. Strauss in the paper quoted supra on p. 712 of the South African Medical Journal.*

landmark decision of our Appeal Court[16] in which it was decided that a shopkeeper was entitled in extreme circumstances to kill a thief where this was the only way to protect the goods in his shop. He argues further, then that if the killing of a human being is legally justifiable, where not only the bare physical existence of the person is at stake, but also his economic existence, then as a corollary, if abortion is justifiable where the very existence ( life ) of the mother is at stake, then it should be no less justifiable where her meaningful existence ( health ) is at stake.[17]

Finally, a certain safeguard exists with regard to prosecutions for illegal abortions as, when a practitioner has performed an abortion, which he has carried out on his patient in good faith with the patient's interests at heart and the blessing of another doctor's second opinion, then, although on the face of it, it may appear to be an illegal termination, the enlightened Attorneys General are not inclined to pursue a prosecution.[18]

To summarize thus, an abortion in South Africa is lawful, strictly speaking, only to save the life of the mother, but a respectable practitioner may safely carry out an therapeutic ( medical ) abortion also where there is a risk or threat to the health ( physical and mental ) of his patient. Logically then, the next question must be - what is considered as a risk to the life and/or health of the patient?

## 7.3 THE VARIOUS GROUNDS FOR THERAPEUTIC ABORTION

For convenience's sake, I have divided the various grounds for for therapeutic abortion into three major groups, viz: risk

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16) *Ex Parte die Minister van Justisie : in re. Staat v. v. Wyk 1967(i) S.A. 488(A)*

17) *S.A. Medical Journal, July 1968, p. 713*

18) *Strauss, S.A., South African Medical Journal p. 713 Also Simonz, South African Medical Journal p. 715*

to the life or health of the mother, humanitarian considerations and eugenic considerations.

i) Risk to the life or health of the mother

Risk to the life or health of the mother, if a pregnancy is allowed to continue, occurs either where the mother has some or other disease or complaint, prior to becoming pregnant, or where she contracts the disease after having fallen pregnant This disease may be of a more serious nature, threatening her very life, or it may be less severe, threatening only her health and her life indirectly thus.

A. Severe maternal disease

J.N. de Villiers,[19] in his paper delivered at the Symposium on Therapeutic Abortion at Hermanus, during April, 1968, supplies some very interesting information from statistics compiled from 4 hospitals in South Africa According to these statistics, 71.8% of abortions carried out on strictly medical grounds,[20] where there is risk to the life or health of the mother, are carried out on the indication of *severe* maternal disease.

The indicated diseases in their order of importance are the following:

| | |
|---|---|
| Toxaemia and hypertension | 54 cases |
| Malignant disease | 13 cases |
| Cardial disease | 12 cases |
| Renal (Kidney ) disease | 9 cases |
| Placenta praevia | 1 case |
| Total | 89 (71.8%) |

There seems to be no hesitation that these diseases could all be fatal to the mother and the termination of preg-

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19) *South African Medical Journal 1968 p.p. 718-721*

20) *Figures are for, in one hospital 1963-67, and in the other 3 from 1966-67.*

nancy is therefore strictly to preserve the life of the mother.[21)]

B. Less severe maternal disease

According to the same statistics referred to above, 13.7% of strictly medical abortions are carried out on the indication of less severe maternal disease.

These are:

| | |
|---|---|
| Psychiatric disease | 11 cases |
| Epilepsy | 4 cases |
| Bronchiectasis and Asthma | 2 cases |
| Total | 17 (13.7%) |

This class of indication refers mainly to a threat to the *health* of the mother and includes a threat to both her physical and mental health.

As is obvious from the above, abortions are carried out on these grounds, but are they strictly legal? Here it would appear that merely the health of the woman and not her life is threatened.

Referring to the individual classes of less severe maternal disease, it is interesting to note that psychiatric disease is the largest class. One of the most interesting psychiatric indications on which an abortion may be performed is a threat from the mother-to-be that she will commit suicide unless an abortion is performed. This may be an empty threat, and the doctor may realize this, but at the same time he will usually also realize that if the pregnancy is carried through, it would be detrimental to the mother's health ( mentally ), not

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21) *However, de Villiers ... " I submit that approved therapeutic abortions are in actual fact done more for medical reasons of health than to save the life of the mother " p. 719 South African Medical Journal, July 1968.*

only during pregnancy, but also afterwards.[22]

C.G.A Simonz,[23] in his paper delivered at the Symposium, also points out that a threat to commit suicide is a very real one, and should be given sympathetic consideration.[24] A person who is seriously considering suicide, must be greatly disturbed and should surely be classified as being at least mentally sick. Naturally enough, the problem of differentiating between the genuine threat and the faked threat, will raise its head, but an experienced psychiatrist should have no difficulty in deciding which threats to ignore and which threats to take seriously. The practice in South Africa today, is that a doctor, receiving a threat to commit suicide from a patient, will refer the patient to a psychiatrist, and on his opinion that the threat is a genuine one, an abortion will be carried out.[25]

Another psychiatric indication would be severe depression. Simonz disagrees with other authority quoted by himself[26] and points out that a termination is indicated under certain circumstances of severe depression.[27]

Other possible psychiatric grounds mentioned by Simonz, include Schizophrenia,[28] Puerperal Psychosis[29] and threats of having an illegal abortion carried out.

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22) *cf. de Villiers p. 719, S.A. Medical Journal, July, 1968*
23) *p. 716 of the S.A. Medical Journal, July, 1968*
24) *Interesting to note is that there is only 1 actual suicide out of every 33 threats*
25) *Personal discussion with a gynaecologist*
26) *Viz. Anderson*
27) *p. 716, S.A. Medical Journal, July, 1968*
28) *Severe damage to the personality of the schizophreniac may result if e.g. a former pregnancy precipitated the Schizophrenia. Simonz, p. 716*
29) *That is, fear of childbirth - this fear occurs in only 0.14% of the population. Suggested that guiding principle should be probability of the illness producing chronic psychiatric invalidity.*

However, the fact still remains that this point on the law in South Africa is not clear and no practitioner carrying out an operation on any of these psychiatric indications can ever be free from the possible risk of a prosecution and consequent professional ruin.

ii) Humanitarian Indications

Often inextricably linked with psychiatric indications, humanitarian indications for the termination of pregnancy would, for instance, be on the grounds of a pregnancy caused by rape, or a criminal sexual offence, incest or the like.

The statistics quoted above, do not indicate any abortions carried out for any one of the reasons just mentioned, but it is not difficult to imagine that compassion for the plight of the victim of a rape or other sexual offence would spur on a practitioner to carry out a termination of the pregnancy under such circumstances.

The situation presented itself in Britain with the now famous Bourne case, and the decision which followed the prosecution of Bourne, more or less substantiated the law on abortion ( as far as it was unwritten ) in Britain. However, this case is of not effect in South Africa, and we are consequently still between Scylla and Charybdis with regard to this point. Indications are that the Attorneys General[30] will not prosecute under these circumstances. This is nevertheless, a most unsatisfactory state of affairs as, although an Attorney-General is in most cases a very learned and reasonable man, it places the whole matter in the hands and discretion of only a single man. This could result in non-uniform practice of law, varying from Attorney-General to Attorney-General, depending in most cases, on the personal convictions of each.

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30) *Simonz, p. 717, S.A. Medical Journal, July, 1968.*

The point can of course be circumvented if the approach is that the psychological effect of the rape or other sexual offence will be of such an extreme nature as to warrant termination on the medical grounds of a threat to the physical or mental health of the mother. This bending of the law should not be necessary, and legislation is required to clarify the situation.

iii) Eugenic considerations

Where for one or other reason, the pregnancy is terminated in order to prevent the birth of an abnormal child, ( physically, mentally or genetically abnormal ) we find eugenic considerations.

A. Maternal Rubella

If the mother, at any time during the early weeks of pregnancy, comes into contact with a case of German measels, she stands a strong chance of giving birth to a deformed child [31] De Villiers[32] says that this should be a ground for therapeutic abortion, on the basis that it is wrong to condemn a woman ( sometimes to a 75% chance ) to have an abnormal child, whereas she may very soon after termination of the pregnancy, begin a new and absolutely normal pregnancy. Estimations on the cost of treating rubella syndrom baby, have been made at R 7,650 during the first 6 months of its life, while long range care and special education would reach R 76,500.[33] However, on the other side of the argument, Hymie Gordon[34] pleads for the right of *all* babies to be born, and says that termination is not warranted as improving medical knowledge is making the care of abnormal children more effective, and at any rate, it is the duty of mankind to care for the abnormal people in his society.

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31) *Figures ranging from 85% chance to 9.7% chance, are given*
32) *p. 720, S.A. Medical Journal, July, 1968*
33) *p. 720, S.A. Medical Journal, July, 1968*
34) *p. 720, S.A. Medical Journal, July, 1968*

The statistics referred to earlier, show that of all the abortions carried out in South Africa, 12.1% are on Eugenic indications.

The following is a table of the eugenic indications and their relative incidence.

| | |
|---|---|
| Rubella | 9 cases |
| Diagnostic X-ray | 5 cases |
| Severe rhesus disease | 1 case |
| Total | 15 (12.1%) |

It would appear thus, that not withstanding whether the termination is strictly legal or not, it is nevertheless carried out.

B. Radiation

As shown above, abortions have also been carried out when the mother has been subjected to some form of radiation during early pregnancy. This may have been as the result of therapeutic or diagnostic X-ray, or by purely accidental subjection to any form of radiation. Radiation can cause serious abnormality of the foetus. Once again, de Villiers recommends abortion in order to prevent the birth of an abnormal or deformed child.

C. Rhesus disease

Where there is blood group incompatibility between parents, seriously defective children may be born and the same arguments as above hold here.

D. Cytoxic drugs (Thalidomide)

The recent dilemma that the world faced with the thalidomide tragedy, did apparently not affect South Africa as the drug was not used by South African women. Had there been an occasion for a doctor in South Africa to decide whether or not to terminate a pregnancy under

similar circumstances, he would have been forced to go beyond the law, to justify his action He could not say he was terminating the pregnancy for fear of bringing an abnormal child into the world, but would have to fabricate a risk to the mother s life or health. Surely this is not a satisfactory state of affairs, and should be altered!

E. Other

Besides the occasions mentioned above, also other factors may cause abnormality - certain basic genetic defects of either or both of the parents. Mongolism is a defect, as are hereditary blindness, deafness or other hereditary diseases. All these factors must be subject to the same argument, and we must decide in South Africa, whether or not we will sanction abortion in order to prevent abnormal, deformed and defective creatures from coming into the world, where they are most likely to be condemned to a life of seclusion, exclusion or derision.

iv) Social Indications

Absolutely no social indications are any grounds for abortion in South Africa today

7.4 REFORM OF EXISTING LAW

As a result of the uncertainty with regard to exactly what the law of abortion is in South Africa today, there have been numerous appeals that the law be, if not reformed, then at least clarified.

Most agitation for reform has been of a conservative nature, the particular representatives usually advocating abortion on therapeutic or medical grounds where :-

i) the life of the mother is threatened[35)]

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35) *Existing law*

ii) the physical[36] and mental[37] health of the woman is threatened

iii) under certain humanitarian[38] conditions viz. where a very young girl has been raped ( even more so when the rapist was of another race )

Various movements[39] are at present agitating for a reform and clarification of the existing law. Besides the Symposium on Therapeutic Abortion, held by the South African Society of Obstetricians and Gynaecologists at Hermanus in April, 1968, the National Council of Women ( 60,000 members ) has organised various discussion groups on the subject. A Symposium on Abortion was also held at the Witwatersrand University[40] and the view expounded that abortion should be legalised on social, economic and humanitarian grounds, as well as on the existing grounds.[41]

A request for the Government to set up a Commission of Enquiry into therapeutic abortion has been made[42] and a Departmental Investigation is at present under way.[43]

With all this agitation for reform and discussions going on, it would appear that the time is now ripe for a full scale public investigation to be made into the problems surrounding abortion.

Only then will all the arguments in favour of, and all the arguments against certain aspects be raised and thrashed out. We need possibly a draft Bill on Abortion, which the public may examine, criticise and comment on. Its members, armed with all the pros and cons, may finally settle the matter in Parliament.

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36) *Generally accepted law*

37) *In favour, Strauss, de Villiers, Simons. Doubtful, Gordon Gardiner and Lansdown. Interesting to note is that in an editorial in the S.A Med. Jnl. 1949, p.223, an appeal was made that abortion be allowed if there was the risk that a continued pregnancy would affect the mental health of the patient.*

38) *In favour, Strauss, de Villiers, Simons, S.A. Med. Jnl. Editorial 1949. Non committal, Hymie Gordon. Interesting is that the latest Parliamentary request for reconsideration by Dr. Radford and Mrs. Helen Suzman (reported Hansard 17/5 cols. 5714-5715 and 5721-5722) Both are in favour of allowing abortion on all three above grounds.*

39) *See* Personality *dd. 6/11/1969 pp. 55-59*

40) *On 6th June, 1968*

41) *See* The Rand Daily Mail *dd. 7/6/1969 on p. 7*

42) *In Parliament by Dr. Radford & Mrs. Suzman and the N.C.W.*

43) *See* Personality,*6/11/1969 p. 55*

## 7.5 OWN VIEW

In this section, I give my own view on abortion and its problems. My method has been to pose the problem which confronted me, to raise briefly the arguments for and against a particular view, and then to give my own point of view on the subject. Finally, I also give the results of a survey of public and legal opinion on abortion.

i) Is a foetus a human being?

In my opinion, this is the most important decision to make, because, depending on what the decision is, certain absolute consequences must follow. If, for instance, the foetus is to be considered as a human being, then it can only be justifiably killed or aborted on the same grounds as a human being can justifiably be killed. If the foetus is not considered a human being, then other considerations arise.

A human being may be deliberately killed by other human beings ( excluding statutory provisions ) only on the grounds of action in self-defence. A man acting in self-defence, must be acting in an emergency, and in order to save his life [44] If one considers a foetus as a human being, then the only justification for killing it, is in self-defence, that is, in defence of the *life* of the mother.

However, to qualify fully as an action in self-defence, the action must, inter alia, be against an *immediately threatening* and *unlawful* attack - immediately the question is raised: " is the innocent foetus, merely growing naturally inside its mother ( and through no fault of its own ) guilty of an unlawful attack? " - if the attack is indeed unlawful, is it immediately threatening? - if not, when *is* it immediately threatening? - and *when* exactly must the abortion be carried out?

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44) *Ex Parte die Minister van Justisie : in re Staat vs. v. Wyk 1967(i) S.A. 488(A) makes an action in self-defence in protection of a person's goods ( in this case the person's very livelihood ) justifiable.*

From the above, it will become clear that is not even certain that the action taken against the foetus completely qualifies as an action in self-defence.

If one considers a foetus a human being, then the only justification for its abortion is an action in self-defence, thus only to save the *life* of the mother. However, if one does not consider the action taken as being the equivalent of an action in self-defence, then abortion may not be carried out on any grounds whatsoever. This is the view of the Roman Catholic Church, which considers a foetus to be a human being right from the moment of conception, and considers the life of the foetus and the life of the mother as being absolutely equal in all respects, there being no justification in sacrificing the life of the foetus for the life of the mother.

My personal conviction is that the foetus is not a human being and is in fact not considered as a human being by the greater part of Western civilization ( this may be consciously or sub-consciously ). I base my decision on various observations. Firstly, I look to an interesting observation of Prof. Glanville Williams, where he points out that in spite of their firm belief in the absolute equality of the foetus and a human being, the Catholics nevertheless, do not afford a spontaneously aborted foetus of less than six months, the same lengthy funeral service that a deceased human being would ordinarily receive. There is also no interment in consecrated ground, or lamentation of the death of a human being. This I feel, is at least a subconscious admission that even the Catholics are not absolutely certain that a foetus is a human being.

I further support my contention by quoting the following words of the Bishop of Exeter, representing the Protestant standpoint:- ' it is possible to say that the foetus is not a member of the human race in the ordinary sense of the word. '

Jewish opinion is that the killing of the unborn is not considered as murder.[45] The deduction therefore is that the unborn child is not considered as a human being.

By virtue of the fact that British Courts were empowered with the right to impose the death sentence for abortion, but never did ( in fact most sentences were of the order of 2-3 years ), I conclude that the Courts too, do not consider abortion as being the equivalent of murder. If the killing of the foetus is not considered murder, then the foetus, by implication cannot be considered as a human being.

My personal discussion with several people at random, including, inter alia, a magistrate and a sociologist, revealed that most people, when asked whether they thought a foetus was a human being or not, initially said they thought a foetus was a human being, but after a little discussion on the subject, had second thoughts as to whether they were right.

If a person, after considering the above, feels that a foetus is nevertheless a human being, then that person has two alternatives, viz.: either abortion must not be allowed at all ( because one life is not more important than another ), or abortion may be carried out to save the *life* of the mother ( here the person must be able to see the act of abortion as being an act of self-defence ).

As I stated before, I am of the opinion that a foetus is not a human being and consequently I do not feel that it is murder to abort a foetus. My other views, which now follow are, naturally enough, expounded on this basis.

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45) *Rabbi Dr. Immanuel Jakobovits - essay in* Abortion and the Law *p. 124*

ii) Should abortion be permitted where there is a threat to the health of the mother?

Where the threat to the health of the mother is a substantial threat, and is likely to cause her to suffer unduly, then I feel an abortion is justified. Factors which might affect her health would be similar to those which might, if severe enough, threaten her very life.

iii) Should abortion be permitted on humanitarian grounds?

If, for instance, a girl has been raped, or she is pregnant as a result of incest, or where she is still very young. Here I feel that all the world's sympathy might, in certain circumstances, not be sufficient.

Certain antagonists to the permitting of abortion on humanitarian grounds, might argue that a child which is the result of a rape, for instance, may be born an absolutely perfect physical specimen. Opponents of allowing abortion in cases of incest, might say that people guilty of incest are to be punished and they should not be able to be *assisted* in their crime by the law. People might say that a very young girl who has fallen pregnant, must at any rate be rather promiscuous and deserves her fate.

I feel that one must assist these people, one must be human and consider the implications :- a child conceived by rape, was most definitely not conceived in love, in all probability its father is some sort of defective or degenerate, or he is of a different race to the child's mother. Think of the hardships and embarrassment of the mother, think of the future of the unwanted child!

Where the unborn child is the result of incest, the same arguments as for eugenic considerations hold ( see later ).

A very young girl may not have been completely aware of what was happening; she might not have realised the consequences; she might have been taken advantage of by some or other unscrupulous male. - These people need to be assisted, and I feel that their uncertain position under the present law is inneed not only of clarification, but also substantial alterations. ( see own suggestions later )

iv) Should abortion be permitted on eugenic grounds?

Where the child stands a risk of being born abnormal ( whether physically or mentally ), then I feel two factors must be taken into consideration, viz what will be the effect on the mother, if she gives birth to an abnormal child, and what are the chances of the abnormal child living a useful and happy life?

Here the antagonists are wont to raise the arguement of the unsavoury Nazi Regime, with its eugenic search for a super race. Others point out that certain geniuses would not have been born had eugenic abortion been permissible at the time ( cf. Beethoven was born of an alcoholic, syphilitic father and a mother suffering from T.B. ). Still others say that it is man's duty to accept this fate and use his ingenuity and knowledge to help the abnormal.[46)]

Still I feel that it is not fair to bring an abnormal child into the world - that child is not likely to live a happy or useful life in a world where better human specimens are continually competing against one another. Also, a mother, or the parents of an abnormal child, and even the state, may suffer great distress, expense or hardship caring for this child. ( see supra on p. 50 )

If a mother can start a new and absolutely normal pregnancy, after termination of the previous one ( as for instance where the first pregnancy was threatened by rubella ) or where the mother feels that she cannot cope with an abnormal child, and where the indications are that the child will in fact be born abnormal, then I can see no objection to the termination of her pregnancy.

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46) *Hymie Gordon - S.A. Medical Journal, July, 1968.*

v) Should abortion be permitted on socio-economic grounds?

Where a child stands the likelihood of being born into extremely bad social conditions, where the family is already doing no more than merely subsisting, where the parents are drug addicts or alcoholics, then I feel that it is often decidedly in the interests of the unborn child, that it never be born at all. This is also in the interests of all humanity, because these children are more likely than not, to become similar misfits and burdens on humanity. The extremely poor family may not be in a position to even feed the child properly, but possibly at some later date, they might be in different circumstances, and the birth of a child would then be a different ( and probably welcome ) proposition.

A child born under adverse social or economic conditions, is usually unwanted and may create powerful feelings of resentment and hatred in its parents - it is better off not being born, and so is mankind in general!

This ground is more likely to raise opposition than any of the preceding ones, as opponents will say that the social and economic position of people is due to their own doing. Is this not perhaps an even more important reason why these people should be helped in their ignorance? - their ignorance got them where they are, cannot outside intelligence prevent them, or assist them from going futher downhill?

These people have been helped by allowing them birth control methods, to control their numbers, why can they not be allowed abortion as a form of *post facto* extension of birth control? [47)]

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47) *A recent Swedish invention has now made it possible for a woman to " bring on a period " and flush away a foetus for up to 10 days after conception. This " Abortion Pill " makes it possible ( that is, if it is released to the world ) for a woman to cause herself to abort without experiencing any more discomfort than a normal period. See* **Personality**, *April 1970 p. 81*

vi) Should abortion be permitted on demand?

Abortion on demand is something which has been practised with success in certain Soviet countries ( Russia and China ), and in Japan, but no Western nation has, as yet, had any experience of what would happen if this were to be allowed.[48]

vii) What is the Public Opinion with regard to abortion?

In order to test public opinion with regard to abortion, a questionaire ( see copy herein ) was circularized amongst a fairly broad cross-section of the public. People questioned included clerks, typists, doctors and professional men. The majority however, was represented by university students of the University of the Orange Free State, employees of attorney's firms in Bloemfontein, and employees at the Magistrates' Courts, Masters' Office and Deeds Office in Bloemfontein.

A total number of 389 questionaires were completed, and of these, 35 were completed by advocates, attorneys, magistrates and law lecturers, their opinions being singled out as being representative of not public opinion, but legal opinion.

The results of the survey are shown graphically. The most interesting to note, is that of the public vote, 91% desired some sort of change or addition to the existing law, while the corresponding figure was 97% of the legal vote. 11% of the public voted in favour of abortion on demand, while 17% of legal men wanted abortion on demand. The other figures appear from the graphs. In both the public and the legal vote, a majority was in favour of adding humanitarian and eugenic grounds to the present grounds for abortion in South Africa, while at the same time, a majority was in favour of excluding socio-economic grounds to the existing grounds. (SEE OVERLEAF FOR SAMPLE SURVEY FORM AND GRAPH)

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48) *Recent developments in the U.S.A. should soon remedy this!*

# THE PROBLEM OF ABORTION AND THE LAW

Termination of pregnancy ( abortion ) in South Africa today is allowed on the following grounds:

1) Where the continued pregnancy threatens the LIFE of the MOTHER

2) Where the continued pregnancy threatens the HEALTH of the MOTHER

i.e. only on MEDICAL grounds, with the LIFE and HEALTH of the MOTHER as the only considerations.

However, in certain other countries of the world, abortion is allowed, in addition to the above, also on the following grounds:

3) Where the mother is pregnant as the result of a rape or other sexual offence, i.e. on HUMANITARIAN grounds ( position in Britain )

4) Where the CHILD stands a substantial risk of being born abnormal, deformed or defective ( as a result for instance of the mother having suffered an attack of German Measels at the early stages of pregnancy or having taken the drug thalidomide ).

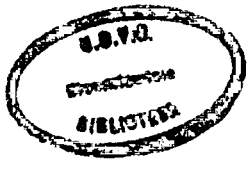
These are called EUGENIC grounds ( position in Britain )

5) Where the social or economic surroundings that the CHILD will be born into are very poor, i.e. SOCIO-ECONOMIC grounds ( position in Britain & Sweden )

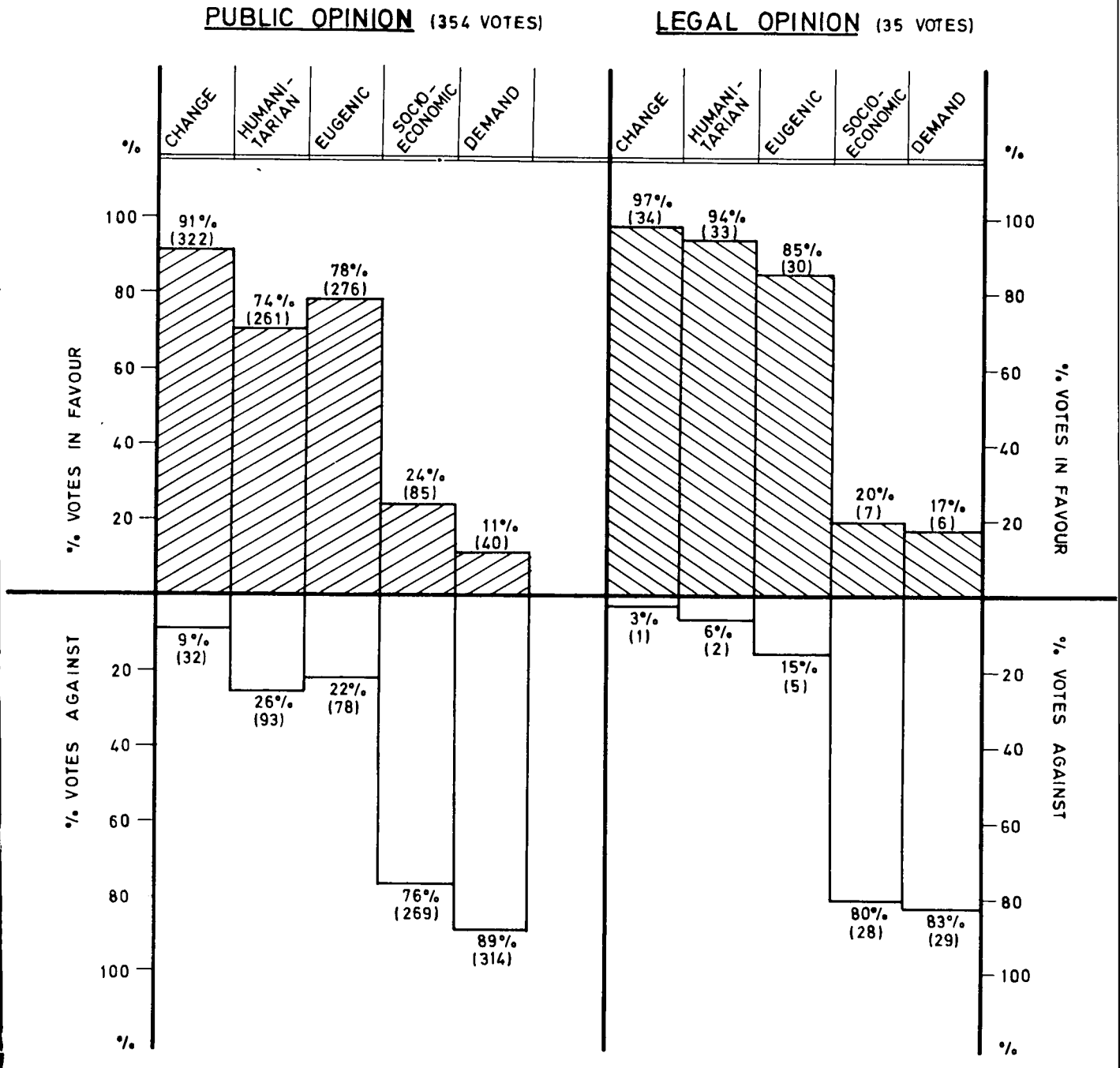
6) Where the MOTHER requests that the pregnancy be terminated, i.e. merely ON DEMAND ( position in New York, Russia, Hawaii and Japan )

Now, if you had four votes and had to vote for additional grounds in South Africa's present law, how would you vote? Referring to the grounds shown above, make either a tick ( ✓ ) if you think that this ground should be added to the existing grounds, or a cross ( X ) if you feel it should not be added.

| | | |
|---|---|---|
| Existing Law | [✓] | 1) Mother's life threatened |
| | [✓] | 2) Mother's health threatened |
| | [ ] | 3) On Humanitarian grounds |
| | [ ] | 4) On Eugenic grounds |
| | [ ] | 5) On Socio-Economic grounds |
| | [ ] | 6) On Demand |



# SURVEY OF OPINION ON ABORTION



## 7.6 MY SUGGESTIONS

Having given my own views on the problems connected with abortion, I now offer the following suggestions with regard to possible legislation:- From the somewhat lengthy treatment that the present British system has received in this thesis, the reader will realise that I have a particular predilection for the principles of this system. In accordance with the British Abortion Act 1967, I feel that abortion in South Africa should be allowed under the following circumstances:

i) Where there is a substantial risk to the life or health (physical or mental) of the mother

ii) When there is a substantial risk that the child, if the pregnancy is allowed to continue, will be born abnormal or defective

iii) Where the social and/or economic conditions of the mother are such that the birth of a child will cause an unjustified lowering of the standard of living of its mother or other immediate family

These 3 circumstances may be grouped broadly into Medical Indications, Eugenic Indications and Social Indications respectively. It will be noted that ( like in the British Act ) I have made no specific provision for victims of rape, statutory sexual offences, incest or the like, but in genuine cases, I cannot forsee any problem in justifying an abortion for medical reasons or eugenic reasons. If, for instance, a young girl is pregnant as the result of a criminal offence ( under sixteen ) she will qualify under (i) above, in that there is either *physical* risk to her health ( her body is perhaps too small to carry the pregnancy to term ) or *mental* risk to her health ( she may not be able to face the consequences of giving birth to a baby, or she may be in a mental state due to being virtually raped by the offender ). Where, on the other hand, the girl or woman is pregnant as a result of incest, where either the mother or the father-to-be is a

mentally defective, these cases would easily classify under (ii), i.e. there is a substantial risk that the child will be born abnormal ( mentally, physically or genetically ). In a genuine case of rape, the woman, having conceived in hatred, loathing and fear, will inevitably qualify on the ground of risk to her mental health.

The reason that I prefer to leave out any specific or automatic right in these cases, is to obviate the problem connected with the proof of an allegation of rape or other sexual offence. The doctor cannot diagnose rape, and by the time a decision could be made on the truth of an allegation ( not by a doctor[49] but by a court of law ) it might be too late to carry out the abortion safely.[50]

One further problem, which I have not yet touched on, is that of control on abortions carried out on the three grounds I have advocated. In order to seek out the genuine cases and eliminate abuse of the system, I suggest that, as in Britain, the concurring opinion that the termination be effected, of <u>two</u> medical practitioners, be a prerequisite.

In order that a control be established and the liability for a wrong decision be enforced, the opinions should be in writing and lodged, together with a notification of the termination, with some or other central medical body.

This will tend to eliminate or reduce abuse, as doctors will be held liable for " padded " or insincere opinions. Termination should be effected only by registered Gynaecologists

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49) *Otherwise a doctor might find himself in the impossible position of having to pronounce upon an alleged crime, a task for which he has no qualification, experience or inclination - per Alec Samuels* Medicine, Science and Law *1967, p. 14*

50) *An interesting statement is that made by Mr. Roy Jenkins during discussion of the Bill in the British Parliament:*

*" The fundamental problem here really is that - if I may so express it - the processes of human gestation are much quicker than those of the British legal system. "*

( preferably by one of the doctors on whose opinion the operation is to be carried out ) and only at national or provincial hospitals ( in order to eliminate private nursing homes becoming specialised, uncontrolled centres for abortion.

In regard to my above suggestions, I would like to point out that, although no one should attempt to ignore or override the religious beliefs of a nation, the people who make the laws for that nation, must at the same time remember that religious interpretations change and differ, and religious beliefs clash and are sometimes altogether non-existant. The law makers must make a law which provides too for those, who have not got conscientious objections to abortion on certain ( or possibly even any ) grounds. Those people who want to make use of the relaxed law, will then do so, and those who have certain conscientious objections, may let their moral standards guide them.

## 7.7 CONCLUSION

I come then after this discussion of the law of Abortion in South Africa, and after comparing it with the laws of the other countries so discussed in this thesis, to the conclusion that our law is in dire need of clarification and reform.

The reforms that should be brought about refer mainly to Eugenic and Social Indications for the termination of pregnancy. If we are to look elsewhere for guidance in drafting legislation, then we should look to Britain and her experiences in the recent reform of the law in that country, which finally gave birth[51] to a thorough and reasonable piece of expert legislation in the form of the Abortion Act 1967.

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51) *No play on words, and no offence meant here!*

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