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Reform of German Abortion Law

First Experiences

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*Albin Eser**

I. INTRODUCTION

Illegal abortion and legal termination of pregnancy are criminal law areas of universal concern. Even in the absence of formal reform plans, "latent" reform is often present, if only because strict prohibition is no longer sanctioned by the full force of the law or because existing exceptions have been expanded or used as a pretense for an absolute ban on prosecution.

In many countries, this discrepancy between law and reality has resulted in a type of factual "anomie" — a prospect which led the German legislature to revise abortion laws. In virtually no other country has the conflict between principle and realism been expressed with more intensity and polemics than in the Federal Republic of Germany.¹ The result was legislation that was both differentiated and complex. The new German Criminal Code provisions on abortion encompass eight lengthy sections, not to mention additional regulations in social security and labor law, as well as in implementing regulations in the states (*Länder*).²

II. HISTORICAL DEVELOPMENT

1. *From Roman Law to the German Criminal Code of 1871*

From the middle of the nineteenth century the German states considered abortion to be an independent crime distinguishable from the killing of born life.³ An example is the Prussian Criminal Code of 1851, from which the Criminal Code of 1871 (*Reichsstrafgesetzbuch*) was derived.⁴

In earlier times the unborn life was not protected for its own

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1. For an extensive survey of German public opinion in the early 1970s, see Baumann, *Das Abtreibungsverbot des § 218* (1971); Eser, "Schwangerschaftsabbruch in der strafrechtlichen Diskussion," 151 *Theologische Quartalschrift* 238 ff. (1971); Wilkens, § 218. *Dokumente und Meinungen zur Frage des Schwangerschaftsabbruchs* (1973).

2. Reprinted in Eser & Hirsch (eds.), *Sterilisation und Schwangerschaftsabbruch*, Anhang E, 266 (1980).

3. Berner, *Lehrbuch des Deutschen Strafrechts* 470 (6th ed. 1872).

4. On the development until the German *Reichsstrafgesetzbuch* of 1871, see Eser, "Zwischen 'Heiligkeit' und 'Qualität' des Lebens," in Gernhuber (ed.), *Tradi-*

sake, but only after having reached a certain level of development. In Roman law, for example, the *nasciturus* was regarded as a mere *portio mulieris* (part of the mother's body) which did not merit individual protection by the criminal law.⁵ As a result, abortion remained unpunishable until the time of the Roman Caesars. It was, however, regarded as an indecency, which could be punished by the *pater familias*, and which, as it became more pervasive among the upper class towards the end of the Republic, came also to be denigrated as a social evil.⁶ During this time the object of protection was less the individual life than the public interest of population policy. The issue of female emancipation was remote at the time; insofar as abortion affected individual interests, those of the father (who would suffer the loss of a legitimate heir⁷) were preeminent. Consequently, it is not surprising that only abortions by the wife of the procreator were punishable.

Even the Church did not regard abortion from the time of conception onwards as a killing of human life. Foetal life was regarded as equivalent to human life only when it was invested with a soul, which was usually put at the 40th day of pregnancy.⁸ Female foetuses, however, apparently seem to have needed more time, the rule being that animation occurred on the 80th or 90th day of pregnancy. Due to this doctrine of "animation", abandoned by the Church in 1869,⁹ both the *Constitution Criminals Carolina* of 1532 (effective in some parts of Germany until the mid-nineteenth century) and certain criminal codes of various German states punished abortion less severely in the first half of pregnancy than in the second. In fact, some states, such as Bavaria, for a time, did not punish the former at all.¹⁰

These historical examples should caution against invoking seemingly absolute or eternally valid principles. Nevertheless, an absolute prohibition against abortion—both for the pregnant woman and a willing doctor or any other third party—did coincide with the general understanding of the law in the second half of the nineteenth century and remained uncontested for some time.

2. Liberalization Efforts

At the beginning of the twentieth century increasing efforts were made to liberalize abortion law. These gained widespread at-

tion und Fortschritt im Recht. Festschrift zum 500-jährigen Bestehen der Tübinger Juristenfakultät 377, 400 s. (1977).

5. Ulpianus D. 25.4.1.1.; Papinianus D. 35.2.9.1.; see also Eser, *supra* n. 1 at 243.

6. Cf. Mommsen, *Römisches Strafrecht* 636 (1899); also the basic study of Spangenberg, "Über das Verbrechen der Abtreibung der Leibesfrucht," 2 *Archiv des Criminalrechts* 1-53, 173-193, espec. 20 (1818).

7. Marcianus D. 47.11.4.; cf. Spangenberg, *supra* n. 6 at 28.

8. Cf. Augustinus, *Decr. Grat.* c.8,9, C.329.2; *Decr. Grat. cap.* 20 X lib. 2 tit. 12.

9. Cf. Hinschius, 5 *System des katholischen Kirchenrechts* 798 n. 7 (1893).

10. Dähn, "Zur Geschichte des Abtreibungsverbots," in Baumann, *supra* n. 1 at 330, 333.

tention with the publication of a treatise in comparative law by Gustav Radbruch, principally known outside Germany as a legal philosopher. Later, as the Social-Democratic Minister of Justice, Radbruch proposed legalizing abortion during the early stage of pregnancy as part of a 1922 reform bill.¹¹ After these legislative efforts proved unsuccessful, the *Reichsgericht* (the highest German court), in a 1927 decision for the first time recognized an abortion that secured the pregnant woman's life and health as an "extra-statutory necessity" (*übergesetzlicher Notstand*). It also provided the doctor performing the abortion with a possible justification.¹² Whereas this "medical test" (*medizinische Indikation*) still turned on a balancing of personal values, specifically the value of the foetal life on the one hand and that of the mother's health on the other, the subsequent so-called "eugenic test" (*eugenische Indikation*) established by Nazi laws on hereditary health (*Erbgesundheitsgesetze* 1933/35)¹³ questioned the right to life of a child with possible hereditary defects.¹⁴ Since the eradication of such offspring was thought to purify the German race and population, existing life was no longer regarded as worthy of protection for its own sake, but only if it conformed to a specific social-hygienic standard.¹⁵ When the eugenic test was repudiated at the end of World War II, the legality of abortion once again depended exclusively on medical criteria.

Similarly, the first official government draft of the new Criminal Code of 1962 did not admit additional exceptions and therefore merely endorsed the medical test established by judge-made law (§ 157 *Entwurf* 1962).¹⁶ In practice, however, this test became increasingly responsive to social factors in assessing the risk to the pregnant woman's health. As a result of such a "medical social test", the number of legal abortions increased from 2,858 in 1968 to 13,201 in 1973, and 17,814 in 1974.¹⁷ At the same time, the number of those convicted of illegal abortion declined from 596 to 94, the punishment being a fine or probation.¹⁸

3. The "Alternative Draft"

This important attitudinal change would not have been possible without the reform efforts beginning in the mid-1960s. Liberaliza-

11. Cf. the arguments of Radbruch in Grotjahn & Radbruch, *Die Abtreibung der Leibesfrucht* (1921).

12. 61 *Entscheidungen des Reichsgerichts in Strafsachen* 242 (1937).

13. 1935 *Reichsgesetzblatt*, Part I at 773.

14. Cf. Schroeder, *Abtreibung, Reform des § 218*, 9 (1972); Mitscherlich & Mielke, *Das Diktat der Menschenverachtung* 109 (1947).

15. Cf. Eser, *supra* n. 4 at 402.

16. *Entwurf eines Strafgesetzbuchs E* 1962; cf. Schroeder, *supra* n. 14 at 43.

17. Cf. Laufhütte & Wilkitzki, "Zur Reform des Strafvorschriften über den Schwangerschaftsabbruch," 1976 *JZ* 329, 335.

18. 1968/1974 *Statistisches Bundesamt*, Fachserie 17 (Bevölkerung und Kultur), Reihe 9; "Rechtspflege".

tion had already begun in socialist countries in the 1950s, and had extended to Western Europe, and especially Scandinavia and England;¹⁹ its influence reached Germany, as well.²⁰ Increasingly, the traditional prohibition against abortion came to be considered too rigid to relieve the predicament facing pregnant women,²¹ who were forced to risk their lives at the hands of charlatans or find physicians who would assume the risk of criminal punishment. The ineffectiveness of strict prohibition is evidenced by the fact that only several hundred of the approximately 75,000 to 300,000 illegal abortions performed ended in convictions.²² The objective of the reform was to reduce the threat of punishment in order to permit a legal solution, to involve doctors in the process, and to attain a long-term reduction in the rate of abortion through increased social care and counseling.²³

Though there was consensus as to the basic objective of the reform, there was disagreement regarding the means to be adopted. In the context of this confusion, the proposals of the so-called "alternative-draft" (AE) proved to be guiding. This reform draft was created by a group of German and Swiss professors in criminal law as an alternative to the official model of the federal administration (*Entwurf* 1962, mentioned above). Though the professors shared a relatively similar view of criminal philosophy, they presented two separate alternatives.

A minority of these so-called "alternative-professors" believed that abortion could only be justified only under certain conditions and therefore could not be left to the mother's discretion. In its specifics, of course, the "indication model" (*Indikationsmodell*) went far beyond the medical test of traditional law in allowing abortion "when the carrying to term of the pregnancy cannot be expected of the mother considering all aspects of her situation" (AE § 106 Para. 1). With this broad clause, similar to the "indication model" of the English Abortion Act of 1967, the minority countenanced termination of pregnancy for social reasons, as in cases where continued pregnancy would jeopardize the well-being of existing children, or the mother was still a minor at the time of conception. In addition, even the minority plan left unpunishable abortion during the first

19. Cf. Eser, "Schwangerschaftsabbruch im Ausland," in Müller & Olbing (eds.), *Ethische Probleme in der Pädiatrie* 64-73 (1982); also Eser, "Aspekte eines Strafrechters zur Abtreibungsreform," in Hofmann, *Schwangerschaftsunterbrechung* 117-176, espec. 127 (1974).

20. On foreign abortion practice, see Hanack, "Rechtsvergleichende Bemerkungen zur Strafbarkeit des Schwangerschaftsabbruchs in der westlichen Welt," in Baumann, *supra* n. 1 at 209.

21. See also *Bundestags-Drucksache* VI/2025, 6 ff.; *Protokolle über die Sitzungen des Sonderausschusses für die Strafrechtsreform* (= *Protokolle*) VII, 1299 ff., 1948 ff.; see Rudolphi, 2 *Systematischer Kommentar zum Strafgesetzbuch* (= SK) prenote 2 to § 218 (1983).

22. Cf. *Protokolle* VI, *supra* n. 21 at 2218; *Bundestags-Drucksache* 7/1981 (neu) 6.

23. Cf. Eser in Schönke & Schröder, *Kommentar zum Strafgesetzbuch*, n. 2 to § 218 (19th ed. 1978).

four weeks after conception—an important step with respect to preventing nidation or an *abrasio eventualis*.²⁴

The majority of the “alternative-professors” greatly expanded the policy of legalizing abortion during certain periods. Their so-called “periodic model” (*Fristenmodell*) legalized termination during the first three months of pregnancy on the minimal condition that the woman had consulted a counseling service before having the abortion. On the one hand, then, this model, already adopted by some socialist countries and later recognized statutorily in France and Austria, gave priority to the mother’s right of self-determination in the first trimester of pregnancy. Yet by requiring the woman to consult a counseling service, proponents of this model sought to limit termination to situations of dire necessity.

4. From the “Periodic Model” to the “Indication Model”

Though formulated by a group of professors on a purely private basis, both models largely determined subsequent parliamentary debate.²⁵ Whereas the Christian-Democrats (CDU and CSU) would have tolerated the “indication model”, the coalition of Social-Democrats (SPD) and Liberals (FDP) used its parliamentary majority in 1974 to enact a very progressive “periodic model”.

But even before this statute came into force, the Christian-Democrats challenged its constitutionality before the Federal Constitutional Court (*Bundesverfassungsgericht*), claiming that legalizing abortion during the first three months of pregnancy was incompatible with the constitutionally guaranteed right to life of the foetus.²⁶ The Court eventually supported the claim. Unlike Austria and the United States, in which the highest courts did not find constitutional support for such a right,²⁷ or at least favored the mother’s “right to privacy” during the initial phase of pregnancy,²⁸ the German court maintained that the right to life extended even to the foetus, since the Constitution guaranteed it to “everyone” (*jedem*).²⁹ The resulting duty of the state to protect unborn life not only ruled out immediate state intervention, but also posited the state as guardian and advocate of the foetus, even vis-à-vis the mother.³⁰ Therefore, the law clearly had to express disapproval of abortion.³¹ Though the legislature is entitled to express such disapproval in ways other than threat of punishment, the decisive factor is whether the sum of all

24. Baumann et al., *Alternativ-Entwurf eines Strafgesetzbuches*, Besonderer Teil, Straftaten gegen die Person. 1. Halbband, 25 ff. (1971). See also Eser, *supra* n. 19 at 138.

25. For the following, cf. Eser, *supra* n. 19 at 120, 140.

26. Case documented in Arndt, Erhard & Funcke, *Der § 218 StGB vor dem Bundesverfassungsgericht* (1979).

27. 39 Entscheidungen des Bundesverfassungsgerichts (= BVerfGE) 1 ss. (1975).

28. Cf. Eser, *supra* n. 19 at 134.

29. 39 BVerfGE 36.

30. *Id.* at 42.

31. *Id.* at 44.

legal norms provides due protection to the foetus.³² The "periodic model" did not sufficiently satisfy this duty to protect. Legalizing abortion during the first twelve weeks could not be reconciled with the disapproval inherent in the Constitution, if the legalization is not counterbalanced by measures expressing such disapproval. For these reasons, the *Bundesverfassungsgericht* (by a bare majority of 5 to 3) rejected the "periodic model" insofar as "it exempts abortion from punishment, even in situations that do not involve values recognized by the Constitution".³³ Masked by this somewhat sibylline expression is the conclusion that under given circumstances, foetal life can only be adequately protected on the basis of an "indication model". At the same time, however, the *Bundesverfassungsgericht* was careful to state that an abortion, in order to be justified, need not depend on the medical test, but could also be based on "other situations of general necessity", thereby leaving open the possibility of a "social test" (*soziale Indikation*).³⁴

5. Final Enactment

The Court's decision required the legislature to fashion another draft.³⁵ Since the verdict on the "periodic model" left the "indication model" as the only viable alternative, parliamentary debate now centered on the contours of such a model. The result was a compromise which sought to take account of both the protection of the foetus and the possible predicaments of the mother.³⁶ The subtlety with which these conflicting interests were balanced, however, led to uncommon complexity. It did not promise to be an easy task.

III. BASIC STRUCTURE OF CURRENT ABORTION LAW

German abortion law can be characterized as an "indication model" subdivided into time periods and fortified by special procedures.³⁷

1. The Fundamental Prohibition

The fundamental prohibition of abortion needs to be mentioned first (§ 218 StGB = German Penal Code). Although there is no express distinction between abortion by the mother or by a third party,

32. Id. at 51.

33. Id. at 68.

34. In evaluating the decision cf. Kriele, "§ 218 nach dem Urteil des Bundesverfassungsgerichts," 1975 ZRP 73; Krumbiegel, "Strafnormen als Verfassungsauftrag? Zugleich ein Beitrag zur Neuordnung des 'Abtreibungsrechts'", 1975 FamRZ 550; Müller-Dietz, "Zur Problematik verfassungsrechtlicher Pönalisierungsbote," in *Festschrift für Eduard Dreher* 97 (1977).

35. For the following cf. Eser in Schönke & Schröder, *supra* n. 23 prenote to § 218.

36. 5. Gesetz zur Reform des Strafrechts (= StrRG) of 18.6.1974 in the version of 15. Strafrechtsänderungsgesetz of 18.5.1976.

37. For the following cf. the overview by Eser, "Schwangerschaftsabbruch: der rechtliche Rahmen," in Eser & Hirsch, *supra* n. 2 at 108.

the earlier distinction survives in the varied privileges attaching to the former.

The Early Stage of Pregnancy as a "Privileged Space"

The fundamental prohibition does not apply to the early stage of pregnancy. Excluding a certain period from the prohibition already represents an important temporal liberalization. According to § 219d StGB, acts whose effect occurs before the completion of nidation do not constitute abortion. The fertilized egg is left entirely unprotected by the criminal law until nidation. The pregnant woman can choose any method of conception or nidation prevention during the first four weeks after the last menses without consulting a doctor or counseling service. In this respect, current law, albeit only for the early stage of pregnancy, approximates the "periodic model".

3. *Exceptions*

Even after the privileged pre-nidation phase, various exceptions to the prohibition against abortion exist. These can be divided into three categories.³⁸

a. Justifying indications

The broadest exception from punishment is provided by an "indication", as defined by § 218a StGB.³⁹ The presence of an indication means that all participants cannot be punished for abortion. In German doctrine, however, it is disputed whether an indication provides a justification, since § 218a speaks only of "not punishable"; consequently, there is the occasional criticism that an indication merely entails an "excuse" or even the possibility of a mere "personal exemption from punishment". But as the legislative intent and systematic analysis reveal, the immunity occasioned by an indication is universal and should be understood as a "justification".⁴⁰ But what cases qualify as such? § 218a distinguishes four categories:

The first indication listed in the statute is triggered when the life and health of the mother are endangered (§ 218a Para. 1 Nr. 2). Though often referred to as "medical", it is in fact already a "medical-social indication". Since the law tolerates abortion even when the impact is psychological and not necessarily physiological, and additionally considers the "present and future living conditions" of the mother, this indication does not require a specific illness; the decisive inquiry is whether the pregnant woman's health is likely to deteriorate during pregnancy, irrespective of possible reasons.

38. Fundamental is Gropp, *Der straflose Schwangerschaftsabbruch* (1981).

39. Comprehensive treatment by Eser, "Indikation zum Schwangerschaftsabbruch," in Eser & Hirsch, *supra* n. 2 at 150.

40. See Eser in Schönke & Schröder, *Kommentar zum Strafgesetzbuch*, § 218a n. 5 s (22nd ed. 1985) with details on the diverging opinions. Deviating recently in the sense of a mere "excuse", see Dreher & Tröndle, *Strafgesetzbuch*, prenote 8 to § 218 (42nd ed. 1983).

Consequently, a combination of economic and familial hardships can justify an abortion, even if the condition is not pathological in the sense of classical psychiatry. One can imagine a similar psychological impact in the case of a teenager whose bodily or mental development is incomplete, or whose education would be severely jeopardized by carrying the pregnancy to term. If such a medical, or medical-social, indication is present, the foetus can be aborted at any time, theoretically even just before birth.

The second indication is satisfied if a genetic abnormality of the embryo is suspected, so that a continuation of pregnancy cannot be expected of the mother (§ 218a Para. 2 Nr. 1 StGB). To classify this exemption as "eugenic indication", as often happens, is easily misleading; unlike the laws of many other countries in which the inherited defect is in itself a sufficient ground to abort, the decisive factor in German law is the psychological conflict of the mother: The child can be aborted only if the mother regards the expected mental or physical abnormality as unbearable.⁴¹ Thus, this indication seeks to avoid a eugenic implication which might be prone to misuse. Unlike the temporally unlimited medical indication, this "genetic" indication is only valid for the first 22 weeks of pregnancy (§ 218a Para. 3 StGB). This limitation has already been criticized as too short by gynecologists and geneticists, since many abnormalities can be detected only in a later phase of pregnancy. Nevertheless, it seems justified, since the foetus could already be viable at this stage of pregnancy. On the other hand, the period in which an abortion is justified cannot be too short, since a dependable diagnosis of possible defects can only be made after the first trimester.

The third exemption is usually labeled "criminological indication" (§ 218a Para. 2 Nr. 2 StGB). It allows termination in cases where the pregnancy has been brought about illegally. Though applied mainly to rape, it also covers the case of a minor who has been impregnated, regardless of whether she consented (§ 176 StGB). Though this indication does not require that a criminal charge have been brought, but depends solely on the doctor's judgment, it does not play—contrary to some fears—an important role in practice.

The opposite holds for the "general emergency indication" (*allgemeine Notlagenindikation*), positioned last in the Penal Code but first in practice (§ 218a, Para. 2 Nr. 3 StGB). This broad clause is designed to take account of all other possible predicaments confronting the pregnant woman. The indication is based on the finding, as already enunciated by the *Bundesverfassungsgericht*, that even "the overall social situation of the pregnant woman and her family can generate conflicts of such magnitude that, beyond a certain limit, the measures of the criminal law cannot force further sacrifice in favor of unborn life."⁴² Since the emergency need not be medical, but can also have its origin and effect in social conflicts, the

41. Cf. Eser in Schönke & Schröder, *supra* n. 40 at § 218a n. 26.

42. 39 BVerfGE 49 (1975).

indication is classified as "social".⁴³ It would be erroneous, however, to regard it as a type of "poverty indication". The "emergency indication" arises when the pregnant woman experiences a situation of conflict that is as severe as a medical emergency.⁴⁴ Since this necessitates a weighing of all circumstances, one should reject certain factors which would automatically justify an abortion. Instead, commentators try to circumscribe, through general guidelines, certain paradigms in which a "general emergency indication" is likely, as in cases where the mother is overworked, (for example, where she retains continuing responsibility for other dependants who require particular attention), or where she is handicapped or otherwise incapacitated.⁴⁵ Similar emergencies occur when the woman's entire career is seriously endangered by incomplete vocational training, or when unusual economic burdens threaten to significantly lower her standard of living. The extent to which the mother could avoid such hardship by putting the child up for adoption remains sharply disputed.⁴⁶ As with the temporal limitation of the "criminological indication", this indication justifies an abortion only in the first twelve weeks of pregnancy.

Yet, justifying abortion presupposes not only one of the aforementioned indications, but also some general requirements: the consent of the mother (a problem especially with minors), the performance of the abortion by a doctor (but not necessarily trained in gynecology), and subjectively, the intent to protect the mother (which does not exclude the possibility that the doctor is also motivated by profit).⁴⁷

b. Personal exculpatory grounds

In the absence of the forementioned requirements abortion is not justified and is in principle also punishable. But even then, additional exceptions exist: If the foetus is aborted by a doctor in the first 22 weeks of pregnancy and the mother has undergone the requisite consultations, then, according to § 218 Para. 3 Nr. 2 StGB, she is not punishable. This "personal exempting ground" (*persönlicher Strafausschliessungsgrund*) applies only to the mother, and not to the doctor performing the abortion. This limitation forces her to seek an abortion abroad. Consequently, even the new legislation tolerates a degree of "abortion tourism", which benefits only those who can afford it, and therefore deserves the criticism it has received.

43. In this sense Rudolphi, *supra* n. 21 at § 218a n. 40; Dreher & Tröndle, *supra* n. 40 at § 218a n. 24.

44. Discussed in greater detail by Eser in Schönke & Schröder, *supra* n. 40 at § 218a n. 47.

45. Cf. Bayerisches Oberstes Landesgericht, 1978 *Monatsschrift für deutsches Recht* 951.

46. Cf. Eser in Schönke & Schröder, *supra* n. 40 at § 218a n. 50a.

47. Cf. in particular Eser in Schönke & Schröder, *supra* n. 40 at § 218a n. 54 ff. As to consenting minors see Landgericht München, 1980 *NJW* 646.

c. Hardship clause

Finally, the pregnant woman is allowed to abort in situations of "extraordinary duress" (§ 218 Para. 3 Cl. 3 StGB), in which case punishment can be suspended. This provision exonerates the mother even when no indication is present and the abortion is performed after the 22nd week of pregnancy, but under circumstances of "extraordinary duress", as in the case where the pregnant woman has been forced by the procreator, or by his sudden departure, to have a very late abortion.

4. *Supplemental Regulations of Protection and Control*

The German legislature, however, was not satisfied with the system of rule and exceptions just outlined. In addition to the aforementioned regulation of abortion as such, it enacted six supplementary rules to protect and control the abortion process and its participants.

a. Duties to seek consultation

The duty to be consulted, defined by § 218b StGB, provides that the pregnant women must submit to social and medical counseling before terminating the pregnancy.

The purpose of such social counseling, which must occur at least three days before the abortion, is to prevent premature intervention, and also to effectuate a long-term reduction in the abortion rate. The counseling must be done by either an officially recognized agency or a qualified physician. The requirement that the doctor be registered in Germany (certainly not expressed in the statute, but inferrable from the legislative purpose)⁴⁸ assures that the mother is counseled by someone who knows about available means of assistance.

The medical counseling, on the other hand, can be done by any physician regardless of whether he is registered or not, since such pre-operative counseling is common practice anyway.

The doctor acts criminally if he performs an abortion in the absence of the proscribed consultations, even if the abortion is justified by an indication. The subsidiary offense defined by § 218b StGB compels social consultation in every case, so that the pregnant woman may seriously consider whether she really wants an abortion that is permitted by the law.⁴⁹ This essentially reasonable goal is largely undermined by the personal privilege (§ 218b Para. 1 Cl. 2 StGB) enjoyed by the mother (the actual focus of the consultation duty), who is only indirectly forced to seek counseling by means of the threat of punishment to the doctor.

48. Cf. Bericht des Bundestagsausschusses zum 5. Strafrechtsreformgesetz, *Bundestags-Drucksache* 7/514.

49. Cf. Eser, *supra* n. 37 at 115.

b. Duty to ascertain indication

The duty to ascertain the indication (§ 219 StGB) is similarly structured so as to prevent an indication from being assumed negligently or prematurely. The foetus can be aborted only if another doctor has stated in writing that an indication is satisfied. However, the formal verification of an indication is not necessary to justify an abortion as such, but only provides an additional security measure. Consequently, an abortion can be justified even in the absence of such a verification, provided however that the objective existence of an indication can be proved in another way. In this case, the doctor cannot be punished for violating § 218 StGB, but only for neglecting the duty of ascertaining an indication as defined by § 219 StGB.

A further peculiarity of the current indication verification, which deviates from earlier custom, is that it does not constitute an "approval" of the abortion, but merely functions as an aid in the decision process. What matters is that the physician performing the abortion can refer to the opinion of a colleague in determining whether an indication is present regardless of whether the opinion is negative or positive. As a result—one that has to be heard twice to be believed—an abortion can be legal in every respect even if the first doctor expressly rejected the existence of an indication but the second for good reason accepted its existence. Hence, the justification of abortion depends on the objective existence of an indication, not on the corresponding verification by another physician or, as in earlier law, on approval by a specific agency.⁵⁰

c. Abortion in hospital

A third protective measure requires that the abortion be performed in a hospital or expressly authorized facility (Art. 3 of the 5th *Strafrechtsreformgesetz* = StrRG). This not only best safeguards the mother from eventual complications, but also controls the development of commercial "abortion clinics".⁵¹ The German states (*Länder*) do this in quite different ways. Many authorized other establishments, especially private practitioners, to perform abortions soon after the reform. The more conservative states of the South, however, persist in limiting the practice to hospitals. If an abortion justified by an indication is not performed in an authorized facility, the doctor, but not the pregnant woman, may be fined for an administrative violation (*Ordnungswidrigkeit*).

d. Prohibiting advertisement and trading of abortifacients

Additional supplemental regulations are designed to protect the unborn life before the decision to abort even arises: first, by prohib-

50. Cf. Eser in Schönke & Schröder, *supra* n. 40 at § 219 n. 1.

51. Cf. Lackner, "Die Neuregelung des Schwangerschaftsabbruchs," 1976 *NJW* 1233 ff., 1243. As to American experiences, see Lehfeld & Tietze in Eser & Hirsch, *supra* n. 2 at 207 ff.

iting the advertisement of any method, legal or illegal, of abortion (StGB § 219b), and secondly, by prohibiting the commerce in abortifacients that are used illegally (StGB § 219c).

e. Duty to register

The duty to notify the federal register, as defined by Art. 4 of 5th StrRG, effectuates more long-term goals in providing empirical information on the frequency of abortion, its underlying social causes and possible corrections.

f. Accompanying social measures

While the forementioned supplemental regulations primarily safeguard unborn life, a package of so-called "accompanying" measures (*"Flankierungsmaßnahmen"*) largely serves the interests of the pregnant woman:⁵² in particular, by providing her with insurance benefits and securing her employment during her temporary incapacity.

g. Physician's right of refusal

The physician's right of refusal also limits the abortion process. According to Art. 2 of the 5th StrRG, nobody is required to assist in an abortion except in a life- or serious health-threatening emergency.⁵³

IV. FIRST REACTIONS AND EXPERIENCES

Those expecting a certain quieting of public opinion as a result of this reform were soon disappointed. Approval and criticism naturally depend to a large extent on the ideology espoused by the individual: what proponents of liberalization celebrate as emancipatory progress is condemned by steadfast opponents as regressive, and vice-versa. From the plethora of arguments for and against, I can refer only to a limited, and admittedly subjective, selection.⁵⁴

1. Unborn Life Left Too Vulnerable?

Those committed to protecting the unborn life have as their main complaint that the new law contains a "hidden periodic model"⁵⁵ in two respects: first, the fertilized ovum—and therefore,

52. Overview given by Henke, "Ergänzende Maßnahmen zur Neuordnung des Schwangerschaftsabbruchs," 1976 *NJW* 1773. See also Gitter & Wendling, "Flankierende Maßnahmen' nach dem Strafrechtsreform-Ergänzungsgesetz," in Eser & Hirsch, supra n. 2 at 214.

53. Cf. Eser in Schönke & Schröder, supra n. 40 at § 218a n. 68. Comprehensive treatment by Gitter & Wendling, "Recht auf Sterilisation und Schwangerschaftsabbruch?," in Eser & Hirsch, supra n. 2 at 198.

54. For a comprehensive description of various positions, see Eser, supra n. 19 at 144; Wilkens, supra n. 1 at 1; Baumann, supra n. 1 at 1.

55. Cf., for example, Schreiber, "Der Spielraum des Gesetzgebers bei der Neuordnung des Schwangerschaftsabbruchs," 1975 *FamRZ* 669, 673.

as an embryo, already existing human life—is completely unprotected until implanted in the uterus;⁵⁶ secondly, and of more concern, the mother can abort free from any sanction until the 22nd week of pregnancy without having to substantiate a specific indication.⁵⁷ For these reasons, the constitutionality of this provision has frequently been questioned,⁵⁸ without, however, leading to a renewed claim to the *Bundesverfassungsgericht*.⁵⁹

Moreover, even the legal requirement of an indication is practically nominal. Effective state control is unattainable since the indications are formulated too broadly, their scope is probably undefinable, and every physician can warrant such an indication.⁶⁰ This is shown by the conspicuous rise in the “social” indication: while in 1977, one year after the reform became effective, the percentage of medical indications (including psychiatric cases) was still at 37% compared to the “social” indication at 57%, by 1982⁶¹ the former had dropped to 19% while the latter had risen to nearly 77%.⁶² Even if we ignore that three-fourths of all abortions are the result of social factors (or at least so declared), this number indicates that even under an indication regime almost every pregnant woman could obtain an indication if she did so with determination. Accordingly, the number of convictions for illegal abortion has declined steadily, whereas the number of legal or at least unprosecuted abortions has risen significantly since the reform: while in 1960, the police still registered 4,584 suspected offenders⁶³ of whom as many as 1,809 were ultimately convicted,⁶⁴ by 1974 (i.e., shortly before the reform) the number of suspects and convictions had fallen to 501⁶⁵ and 94,⁶⁶ respectively; the figures became negligible by 1981 with 168 police registrations⁶⁷ and 28 convictions.⁶⁸ Conversely, 4,882 legal abor-

56. Cf. § 219d StGB (see text, *supra* at III 1.2).

57. Cf. § 218 Par. 3 p. 2 StGB (see text *supra* II 3.2).

58. For example, by Jähnke in *Leipziger Kommentar zum StGB*, prenote 31 to § 218 (10th ed. 1983); see also Dreher & Tröndle, *supra* n. 40 at prenote 8 ff. to § 218.

59. Nevertheless, the *Sozialgericht Dortmund* (court for social matters) asked the *Bundesverfassungsgericht* to resolve the question whether medicare could be used to support legal abortions not justified on medical grounds without violating the fundamental rights, especially the freedom of conscience, of its members. The *Bundesverfassungsgericht*, however, dismissed the question on procedural grounds (1984 NJW 1807). The Court had also refused to decide an earlier constitutional claim brought by two lawyers and members of the state synod of the Württemberg Protestant Church, dismissing it as non-justiciable on formal grounds (1976 *Europäische Grundrechte-Z.* 410).

60. Cf. Jähnke, *supra* n. 58 at prenote 31 to § 218.

61. 1977 *Statistisches Bundesamt* (hereafter SB), Fachserie 12 (Gesundheitswesen), Reihe 3: Schwangerschaftsabbrüche at 11.

62. 1982 SB, Fachserie 12, Reihe 3 at 12.

63. 1960 S.B., Polizeiliche Kriminalstatistik at 37.

64. 1960 SB, Fachserie 17 (Bevölkerung und Kultur), Reihe 9, Rechtspflege 30.

65. 1974 S.B., Polizeiliche Kriminalstatistik, Anhang, Tabelle 2, Blatt 1.

66. 1974 S.B., Fachserie 17, Reihe 9 at 36, 38.

67. 1981 S.B., Polizeiliche Kriminalstatistik, Anhang, Tabelle 2, Blatt 1.

68. 1981 S.B., Fachserie 17, Reihe 9, at 14.

tions were reported in 1970, increasing to 17,814 by 1974.⁶⁹ By 1982 the number of legal abortions had risen to 91,000.⁷⁰ If to this is added the abortions performed on German women in the Netherlands, the total number was 110,000 per year⁷¹, which has since continued to increase. If the number of abortions is compared to the number of births, the average for the Federal Republic as a whole is 146 abortions for every 1,000 births,⁷² both still-born and live. There are, however, significant regional differences: whereas the Saar is far under the German average with 32 abortions, the Hanseatic city of Bremen ranks extremely high with 830 abortions per thousand births⁷³—largely attributable to the many women from other states seeking abortion in Bremen.⁷⁴

2. *More Self-determination for Expectant Mothers?*

In what ambivalent way these figures can be interpreted is shown, on the other hand, by the criticism of those who advocate a further liberalization in the context of the "periodic model". The very fact that indications can be interpreted in an almost wanton manner prevents their controlled or systematic use. As a result, the mother is subjected to the individual discretion of physicians and counseling services.⁷⁵ An eventual prosecution would either be pure coincidence or the result of a criminal charge occasioned by such ignoble motives as revenge.

Due to the deficiencies of the "indication model" the pregnant woman is forced to make a disproportionate sacrifice when she subjects herself to a complicated procedure in which she might have to tell her "story" four times—to the counseling service, the doctor ascertaining the indication, the doctor giving medical advice, and, should the latter not perform the abortion himself, the operating physician, assuming he wants to ascertain that an indication is present. Instead of sending her to four different places, would it not be better to let the pregnant woman decide for herself?⁷⁶

69. Quoted after Laufhütte & Wilkitzki, *supra* n. 17 at 110.

70. 1982 S.B., Fachserie 12, Reihe 3, at 10. This number remained almost the same in 1984 with 160 police registrations: 1985 *Bundeskriminalamt*, Polizeiliche Kriminalstatistik 1984, Tabelle 01, Blatt 1, Pos. 1000.

71. 1982 S.B., Fachserie 12, Reihe 3 at 8.

72. 1982 S.B., Fachserie 12, Reihe 3, at 10.

73. 1982 S.B., Fachserie 12, Reihe 3, at 11.

74. On so-called "abortion tourism", cf. the declaration by Pro Familia, "Profite mit Schwangerschaftsabbruch," 3 *Sexualpädagogik und Familienplanung* 20-21 (1983).

75. For the perspective of affected women, see a compilation of personal accounts in Pro Familia Bremen, *Wir wollen nicht mehr nach Holland fahren*, 19 (1978).

76. In this sense, e.g., Smaus, "§ 218 StGB - Frauen als Täter und Opfer einer strafrechtlichen Regelung," in Jung & Müller-Dietz (eds.), § 218 StGB. *Dimension einer Reform* 43, 71 (1983).

3. *Abortion: a Social Challenge*

This question finally brings us back to the crux of the problem: could the pregnant woman be made solely responsible for the abortion? This step will be possible only if—and in this respect I fully support the decision of the *Bundesverfassungsgericht*⁷⁷—the value of protecting unborn life and with it, the basic wrongfulness of abortion, is expressed by means other than the criminal law. In this respect, all one-sided attempts at emancipation miss the crux of the problem. Those who see only the woman and talk of her right to self-determination see only half the truth: self-determination is necessarily limited to one's own rights. If the right to life of the foetus is recognized, then its protection cannot be subjected to the purely subjective discretion of the mother. Consequently, I regard only those solutions as acceptable in which the abortion is expressed as an emergency situation requiring a balancing of interests.

Finally, and this certainly applies to all countries, one must recognize the complexity involved in effectively protecting unborn life. Criminal law can be only one of the means to counteract abortion in the long run.⁷⁸ A comprehensive individual and social prophylactic must be added, including not only appropriate sexual education and contraceptive counseling, but also effective measures of family planning and support for expectant and actual mothers.⁷⁹ Without this socio-economic assistance, criminal prohibition of abortion ultimately amounts to a half-hearted, if not deceptive, lip-service to protecting unborn life.

Whether the solution must conform to the current "indication model", or other alternatives are possible, are questions that are the subject of an extensive research project that we are currently pursuing at the Max Planck Institute for Foreign and International Criminal Law in Freiburg, and from which we hope to derive some illuminating results on the basis of individual comparative and criminological projects.

77. 39 BVerfGE 1/65 (1975); cf. text *supra* at II 4.

78. To what extent it can fulfill even this function remains disputed even after the decision by the *Bundesverfassungsgericht*: cf. Müller-Dietz, "Zur Problematik verfassungsgerichtlicher Pönalisierungsgebote," in Jung & Müller-Dietz, *supra* n. 76 at 77.

79. In this respect, cf. the proposals made by the commission charged with evaluating experiences with the reformed § 218 of the Criminal Code: "Empfehlungen der Kommission zur Auswertung der Erfahrungen mit dem reformierten § 218 StGB". Bundestags-Drucksache 8/3630, at 215.