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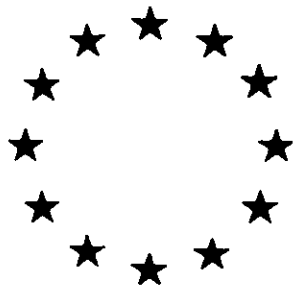

CONSEIL DE L'EUROPE

EUROPEAN COMMISSION
OF HUMAN RIGHTS

Application No. 6959/75

BRÜGGEMANN and SCHEUTEN
against
FEDERAL REPUBLIC OF GERMANY

Report of the Commission

(Adopted on 12 July 1977)

STRASBOURG

Application No. 6959/75

by

Rose Marie BRÜGGEMANN and Adelheid SCHEUTEN

against

the FEDERAL REPUBLIC OF GERMANY

REPORT OF THE COMMISSION

adopted on 12 July 1977

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I. INTRODUCTION

1. The following is an outline of the case as submitted by the parties to the European Commission of Human Rights.

2. The applicants are German citizens living in Hamburg. The first applicant, Rose Marie BRUGGEMANN, born in 1936 and single, is a clerk. The second applicant, Adelheid SCHEUTEN, née Patzeld, born in 1939, divorced and mother of two children, is a telephone operator and housewife.

1. The substance of the applicants' complaints

3. The application concerns the criminal law on the termination of pregnancy in the Federal Republic of Germany. It was initially directed against the judgment of the Federal Constitutional Court of 25 February 1975. The Court ruled that the Fifth Criminal Law Reform Act adopted by the Bundestag on 26 April 1974 (providing for advice to be given to pregnant women and containing new provisions as to the interruption of pregnancy) was void insofar as it allowed the interruption of pregnancy during the first twelve weeks without requiring any particular reason of necessity (indication). This part of the Act therefore never entered into force.

4. Following the Federal Constitutional Court's judgment the Fifteenth Criminal Law Reform Act entered into force in the Federal Republic of Germany on 21 June 1976. It maintains the principle that abortion is a criminal offence but provides that, in specific situations of distress of the woman concerned, an abortion performed by a doctor with her consent after consultation is not punishable.

5. The applicants submit that both the judgment of the Federal Constitutional Court and the Fifteenth Criminal Law Reform Act interfered in particular with their right to respect for their private life under Art. 8 (1) of the European Convention on Human Rights and they consider that this interference was not justified on any of the grounds enumerated in para. (2) of that Article.

2. Proceedings before the Commission (1)

6. The application was originally introduced by the "Weltschutzbund" and its president, Rechtsanwalt Sojka, on 24 March 1975 and registered on 27 March 1975. The present applicants, being members of the "Weltschutzbund", joined in the proceedings by letter of 27 May 1975.

7. By its partial decision of 3 October 1975 (2), the Commission declared the application inadmissible as being incompatible with the provisions of the Convention ratione personae insofar as it had been brought by the first two applicants. It further decided to invite the respondent Government to submit observations on the admissibility of the remainder of the application, i.e. insofar as it had been introduced by the present applicants.

(1) See also Appendix I to this Report.
(2) Appendix II to this Report.

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8. By its final decision of 19 May 1976 (1) the Commission, having regard to the parties' written submissions and after an oral hearing on the same day, declared the remainder of the application admissible.

9. The applicants' memorial on the merits of the application arrived on 15 November 1976, the Government's memorial on 9 December 1976. Further communications were received from the applicants on 12 and 31 January 1977.

An oral hearing of the parties on the merits of the application was held on 17 May 1977.

10. In the proceedings before the Commission, the parties were represented as follows: the applicants by Rechtsanwalt K. Sojka, a lawyer practising in Hamburg; the Federal Republic of Germany by Ministerialdirigent E. Bülow (admissibility stage) and Ministerialdirigentin I. Maier (subsequent proceedings), both of the Federal Ministry of Justice, as Agents, and by Regierungsdirektor P. Wilkitzki, Federal Ministry of Justice, as Adviser.

3. The present Report

11. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention and after deliberations and votes in plenary session, the following members being present (2):

MM. G. Sperduti , First Vice-President, Acting President
C.A. Nørgaard
E. Busuttil
L. Kellberg
B. Daver
T. Opsahl
J. Custers
J.A. Frowein
R.J. Dupuy
G. Tenekides
S. Trechsel
B.J. Kiernan
N. Klecker

12. The text of the Report was adopted by the Commission on 12 July 1977 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2) of the Convention.

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(1) Appendix III to this Report.
(2) Mr Fawcett was not present when the final votes were taken but the Commission decided, under Rule 52(3) of its Rules of Procedure, that he should be entitled to express his separate opinion in the Report.

13. A friendly settlement of the case has not been reached (1) and the purpose of the Commission in the present Report, as provided in Art. 31 (1) is accordingly:

(1) to establish the facts, and

(2) to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

14. The full text of the oral and written pleadings of the parties together with further documents handed in as exhibits are held in the archives of the Commission and are available to the Committee of Ministers if required.

(1) An account of the Commission's unsuccessful attempt to reach a friendly settlement has been produced as a separate document (Appendix IV).

II. ESTABLISHMENT OF THE FACTS

15. This application concerns the recent development of the criminal law on the termination of pregnancy in the Federal Republic of Germany (1), which has been as follows:

1. The situation before 21 June 1974

16. Under Art. 218 of the Criminal Code (Strafgesetzbuch) of 1871, as last amended in 1969, and as applied in the light of special legislation (2), and the case law of the Federal Court (Bundesgerichtshof) (3), any abortion, except one indicated on medical grounds, i.e. to save the mother's life or health, was punishable (4).

2. The Fifth Criminal Law Reform Act

17. On 26 April 1974 the Bundestag adopted the Fifth Criminal Law Reform Act (Fünftes Gesetz zur Reform des Strafrechts). The Act was promulgated on 21 June 1974. It contained a revised version of the provisions on abortion and provided for advice to be given to pregnant women.

18. The new provisions, insofar as they are of interest in the present case, read as follows:

"Art. 218. Termination of Pregnancy

(1) Whoever terminates a pregnancy later than on the thirteenth day after conception shall be punished by imprisonment for a term not exceeding three years or a fine.

(2) The penalty shall be imprisonment for a term of between six months and five years where the perpetrator

1. acts against the will of the pregnant woman, or

2. frivolously causes the risk of death or of a serious injury to the health of the pregnant woman.

The court may order the supervision of conduct (Art. 68, para (1), sub-para 2).

(3) If the act is committed by the pregnant woman herself the penalty shall be imprisonment for a term not exceeding one year or a fine.

(4) The attempt shall be punishable. The woman shall not be punished for attempt.

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(1) A summary of the criminal law on abortion in States which are Parties to the Convention is given at Appendix V to this Report.
(2) Art. 14(1) of the Genetic Health Act (Erbgesundheitsgesetz) of 1933.
(3) See Entscheidungen des Bundesgerichtshofs in Strafsachen, Vol. 2, pp. 111-116 (at pp. 113-114), 242-246 (244); Vol. 3, pp. 7-13 (8-9).
(4) Cf the commentary by (Schwarz-) Dreher, Strafgesetzbuch, 32nd edition (1970), pp. 814-815.

Art. 218a. No punishment for termination of pregnancy within the first twelve weeks.

An abortion performed by a doctor with the pregnant woman's consent shall not be punishable under Art. 218 if no more than twelve weeks have elapsed after conception.

Art. 218b. Termination of pregnancy on specific grounds (indications) after twelve weeks.

An abortion performed by a doctor with the pregnant woman's consent after twelve weeks have elapsed after conception shall not be punishable under Art. 218 if, according to the knowledge of medical science:

(1) the termination of pregnancy is advisable in order to avert from the pregnant woman a risk to her life or a risk of serious injury to her health, unless the risk can be averted in some other way that she can reasonably be expected to bear; or

(2) there are strong reasons for the assumption that, as a result of a genetic trait or harmful influence prior to birth, the child would suffer from an incurable injury to its health which is so serious that the pregnant woman cannot be expected to continue the pregnancy, provided that no more than twenty-two weeks have elapsed after conception.

Art. 218c. Termination of pregnancy in the absence of information and advice being given to the pregnant woman.

(1) Whoever terminates a pregnancy although the pregnant woman

1. did not prior thereto consult a doctor, or a consulting agency authorised thereto, regarding the question of termination of her pregnancy, and was not informed there about the public and private assistance available to pregnant women, mothers and children, in particular about such assistance as facilitates the continuance of pregnancy and the situation of mother and child, and

2. did not obtain medical counselling

shall be punished by imprisonment for a term not exceeding one year or by a fine, unless the act is punishable under Art. 218.

(2) The woman on whom the operation has been performed shall not be subject to punishment under para. (1).

Art. 219. Termination of pregnancy without a medical opinion.

(1) Whoever terminates a pregnancy after twelve weeks have elapsed after conception although no competent authority certified prior to the termination that the conditions of Art. 218b, para.(1) or (2), are fulfilled, shall be punished by imprisonment for a term not exceeding one year or by a fine, unless the act is punishable under Art. 218.

./.

(2) The woman on whom the operation has been performed shall not be subject to punishment under para. (1)."

3. The decisions of the Federal Constitutional Court

19. On 20 June 1974 the Land Government of Baden-Württemberg requested the Federal Constitutional Court (Bundesverfassungsgericht) to suspend, by a provisional ruling under Art. 32 of the Act on the Federal Constitutional Court (Gesetz über das Bundesverfassungsgericht), the entry into force of the Fifth Criminal Law Reform Act which had been signed by the Federal President on 18 June 1974.

20. On 21 June 1974 the Fifth Criminal Law Reform Act was promulgated in the Federal Gazette (Bundesgesetzblatt) (1). According to Art. 12(1) of the Act its essential provisions would have entered into force on the following day.

21. Still on 21 June 1974, however, the Federal Consitutional Court made the following order, as a provisional ruling under Art. 32 of the Act on the Federal Constitutional Court.

"1. Art. 218a of the Criminal Code as amended by the Fifth Criminal Law Reform Act of 18 June 1974 ... shall not enter into force for the time being.

2. Arts. 218b and 219 of the Criminal Code as amended by this Act shall be applied also to abortions performed within the first twelve weeks after conception.

An abortion performed by a doctor with the pregnant woman's consent within the first twelve weeks after conception shall not be punishable under Art. 218 of the Criminal Code if an unlawful act under Arts. 176 (sexual abuse of children), 177 (rape) or 179 (1) (sexual abuse of persons unable to defend themselves) of the Criminal Code was committed on the pregnant woman and there are strong reasons to suggest that the pregnancy was a result of the offence.

..."

22. After the promulgation of the Fifth Criminal Law Reform Act 193 members of the Bundestag and the Governments of five Länder (Baden-Württemberg, Saarland, Bavaria, Schleswig-Holstein and Rhineland-Palatinate) instituted proceedings for a review of the Act as to its conformity with the Basic Law (Grundgesetz). They invoked in particular Art. 2(2), first sentence, (3), in conjunction with Art. 1(1), (4), of the Basic Law.

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(1) Part I, pp. 1297-1300.
(2) Entscheidungen des Bundesverfassungsgerichts (BVerfGE), Vol. 37, pp. 324-328 (at p. 325)
(3) "Everyone has the right to life ... "
(4) "The dignity of man is inviolable. To respect and protect it is the duty of all state authority."

23. These proceedings were concluded by the judgment of the Federal Constitutional Court of 25 February 1975 (1). The operative part of this decision, which had the same effect as a statute (2), read as follows (3):

> "I. Art. 218a of the Criminal Code as amended by the Fifth Criminal Law Reform Act of 18 June 1974 ... is incompatible with Art. 2(2), first sentence, read in conjunction with Art. 1(1) of the Basic Law and void as far as it exempts abortion from punishment even if there are no reasons which - within the meaning of the reasons given for this decision - are justifiable under the system of values incorporated in the Basic Law.
>
> II. Pending the coming into force of a new statute, the following order is made in accordance with Art. 35 of the Federal Constitutional Court Act (6):
>
> 1. Arts. 218b and 219 of the Criminal Code as amended by the Fifth Criminal Law Reform Act of 18 June 1974 ... shall be applied also to abortions performed within the first twelve weeks after conception.
>
> 2. An abortion performed by a doctor with the pregnant woman's consent within the first twelve weeks after conception shall not be punishable under Art. 218 of the Criminal Code if an unlawful act under Arts. 176 to 179 of the Criminal Code was committed on the pregnant woman and there are strong reasons to suggest that the pregnancy was a result of the offence.
>
> 3. Where the pregnancy was terminated by a doctor with the pregnant woman's consent within the first twelve weeks after conception in order to avert from the pregnant woman the risk of serious distress that cannot be averted in any other way she might reasonably be expected to bear, the Court may abstain from imposing punishment in accordance with Art. 218 of the Criminal Code."

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(1) BVerfGE 39, pp. 1 to 95 - see Appendix VI to this Report.
(2) According to Art. 31 (2) of the Act on the Federal Constitutional Court.
(3) BVerfGE 39, pp. 2-3.
(4) Cf. para. 21 above.

24. The grounds for this decision were summarised by the Federal Constitutional Court as follows (1) :

"1. The life of the child developing in the mother's womb constitutes an independent legal interest protected by the Constitution (Arts. 2(2) first sentence and 1(1) of the Basic Law). The state's duty of protection not only forbids direct state interference with the life of the developing child but also requires the state to protect and foster it.

2. The state's duty to protect the life of the developing child applies even as against the mother.

3. The protection of the life of the embryo enjoys in principle priority over the pregnant woman's right of self-determination throughout the period of pregnancy and may not be considered as subject to derogation during a certain period.

4. The legislator may express the legal disapproval of termination of pregnancy which is in principle required otherwise than by the imposition of criminal penalties. The essential point is that the totality of the measures designed to protect the unborn child in fact provides a degree of protection which corresponds with the significance of the interest to be protected. In an extreme case where the protection required by the Constitution cannot be attained in any other way, the legislator is bound to make use of the criminal law in order to protect the life of the developing child.

5. A woman cannot be required to continue her pregnancy if its termination is necessary in order to avert a danger to her life or of serious injury to her health. Furthermore, the legislator is free to decide that there exist other exceptional adverse circumstances of similar gravity affecting a pregnant woman which she cannot reasonably be expected to bear and that in such cases an termination of pregnancy shall not render her liable to punishment.

6. The Fifth Criminal Law Reform Act of 18 June 1974 ... does not comply in a sufficient degree with the constitutional obligation to protect the unborn child."

4. The Fifteenth Criminal Law Amendment Act

25. On 12 February 1976 the Bundestag adopted the Fifteenth Criminal Law Amendment Act (Fünfzehntes Strafrechtsänderungsgesetz). The Act was promulgated on 21 May 1976 (2), and entered into force one month thereafter (3).

26. The relevant provisions of the Criminal Code, as amended by the Fifteenth Criminal Law Amendment Act, read as follows:

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(1) BVerfGE 39,1 (translation by the Council of Europe).
(2) Federal Gazette I, 1213.
(3) According to Art. 6 of the Act.

"Art. 218. Termination of Pregnancy

(1) Whoever terminates a pregnancy shall be punished by imprisonment for a term not exceeding three years or a fine.

(2) In particularly serious cases the punishment shall be imprisonment for a term between six months and five years. As a rule, a case is particularly serious where the perpetrator:

1. acts against the will of the pregnant woman, or

2. frivolously causes the risk of death or of a serious injury to the health of the pregnant woman.

The court may order the supervision of conduct (Art. 68, para. (1), sub-para. 2).

(3) If the act is committed by the pregnant woman herself the penalty shall be imprisonment for a term not exceeding one year or a fine. The pregnant woman is not punishable under the first sentence if the pregnancy is interrupted by a doctor after consultation (Art.218b,(1), sub-paras. 1, 2) and if not more than twenty-two weeks have elapsed since conception. The court may abstain from punishing the pregnant woman if at the time of the intervention she was in a situation of particular distress.

(4) The attempt shall be punishable. The woman shall not be punished for attempt.

Art. 218a. Indications for termination of pregnancy

(1) An abortion performed by a doctor shall not be punishable if:

1. the pregnant woman consents, and

2. in view of her present and future living conditions the termination of the pregnancy is advisable according to medical knowledge in order to avert a danger to her life or the danger of a serious prejudice to her physical or mental health, provided that the danger cannot be averted in any other way she can reasonably be expected to bear.

(2) The prerequisites of para. (1) sub-para. 2 are also considered as fulfilled if, according to medical knowledge:

1. there are strong reasons to suggest that, as a result of a genetic trait or harmful influence prior to birth, the child would suffer from an incurable injury to its health which is so serious that the pregnant woman cannot be required to continue the pregnancy;

./.

2. an unlawful act under Arts. 176 to 179 (1) has been committed on the pregnant woman and there are strong reasons to suggest that the pregnancy is a result of that offence; or

3. the termination of the pregnancy is otherwise advisable in order to avert the danger of a distress which

   a) is so serious that the pregnant woman cannot be required to continue the pregnancy, and

   b) cannot be averted in any other way she can reasonably be expected to bear;

(3) Provided that, in the cases envisaged in para (2) sub-para 1, not more than twenty-two weeks have elapsed since conception and, in the cases envisaged in para 2 sub-paras 2 and 3, not more than twelve weeks.

Art. 218b. Termination of pregnancy in the absence of advice being given to the pregnant woman.

(1) Whoever terminates a pregnancy although the pregnant woman

1. did not at least three days before the intervention consult a counsellor (para 2), regarding the question of termination of her pregnancy, and was not informed there about the public and private assistance available to pregnant women, mothers and children, in particular about such assistance as facilitates the continuance of pregnancy and the situation of mother and child, and

2. was not advised by a doctor on the medically significant aspects,

shall be punished by imprisonment for a term not exceeding one year or by a fine, unless the act is punishable under Art. 218. The pregnant woman is not punishable under the first sentence.

(2) Counsellor within the meaning of para (1) sub-para 1 is:

1. an advisory board approved by a public authority or by a corporation, institution or foundation under public law;

2. a doctor who does not himself perform the abortion and who

   a) as a member of an approved advisory board (sub-para 1) is charged to give advice within the meaning of para (1) sub-para 1;

   b) is approved as a counsellor by a public authority or by a corporation, institution or foundation under public law; or

   c) has - by consulting a member of an approved advisory board (sub-para 1) who is charged with giving advice within the meaning of para (1) sub-para 1, by consulting a social authority or in another appropriate way - obtained information about the assistance available in individual cases.

./.

(1) Cf. para 21. above.

(3) Para 1 sub-para 1 does not apply where termination of pregnancy is advisable in order to avert from the pregnant woman a danger to her life or health caused by a physical disease or physical injury.

Art. 219. Termination of pregnancy without medical certificate

(1) Whoever terminates a pregnancy although no written certificate, by a doctor who does not himself perform the abortion, has been submitted to him on the question whether the conditions of Art. 218a, para (1) sub-para 2, paras (2),(3) are fulfilled, shall be punished by imprisonment for a term not exceeding one year or by a fine, unless the act is punishable under Art. 218. The pregnant woman is not punishable under the first sentence.

(2) A doctor may not give a certificate under para (1) if the comptetent authority has forbidden him to do so, on the ground that he has been finally convicted of an unlawful act under para (1), or under Arts. 218, 218b, 219a, 219b or 219c, or of another unlawful act which he committed in connection with an interruption of pregnancy. The comptetent authority may provisionally forbid a doctor to give certificates under para (1) if he has been committed for trial on suspicion of having committed such an unlawful act.

Art. 219a. False medical certificate

(1) Whoever as a doctor knowingly gives a false certificate on the conditions of Art. 218a para (1), sub-para 2, paras (2),(3), shall be punished by imprisonment for a term not exceeding two years or by a fine, unless the act is punishable under Art. 218.

(2) The pregnant woman is not punishable under para (1).

Art. 219b. Publicity for termination of pregnancy

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Art. 219c. Dealing with means for termination of pregnancy

. . .

Art. 219d. Definition

Acts, the effects of which occur before the termination of the implantation of the fertilised egg in the uterus, are deemed not to be interruptions of pregnancy within the meaning of this Code."

III. SUBMISSIONS OF THE PARTIES

27. The applicants allege violations of Arts. 8, 9, 11, 12, 14, 17 and 18 of the Convention. Their main submissions are under Art. 8.

1. Art. 8 of the Convention

a) The applicants' submissions

28. The applicants submit that, under Art. 218a of the Criminal Code in the version of the Fifth Criminal Law Reform Act (1), they would have been free to terminate a pregnancy during the first twelve weeks or to refrain from an abortion. The judgment of the Federal Constitutional Court of 25 February 1975 (2) and the subsequent regulation of the interruption of pregnancy by the Fifteenth Criminal Law Amendment Act (3) deprived them of this freedom of self-determination and thereby interfered with their right under Art. 8(1) of the Convention to respect for their private life (in the case of the second applicant, also family life). This interference is not justified on any of the grounds enumerated in Art. 8(2), (4).

29. As regards the scope of the protection afforded by Art. 8, sexual relations and family planning come within the sphere of "private and family life" within the meaning of para. (1), (5). Under the Judgment of the Federal Constitutional Court and the subsequent legislation the applicants, in order to avoid unwanted childbirths, are obliged either to renounce sexual intercourse or to apply methods of contraception which are unreliable, unhealthy and not always available when needed (6).

It is true that a woman who has her pregnancy terminated may be exempt from punishment even in the absence of an indication within the meaning of Art. 218a of the Criminal Code (7) but the doctor performing the abortion and other persons participating in it are punishable. Thus a woman seeking a termination of pregnancy in the absence of such an indication must either deceive a doctor as to its existence or find one who is prepared to carry out an illegal abortion (8).

30. Contrary to the Government's submissions the judicial and legislative interference complained of is not justified under Art. 8(2) of the Convention as being "necessary ... for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". In the applicants' opinion:

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(1) See para. 18 (p. 5) above.
(2) See para. 23 above.
(3) See para. 26 above.
(4) Application of 24.3.75, p.2; letter of 27.5.75, p.2; letter of 24.1.76,p.3; Verbatim Record of the hearing on admissibility, pp. 29-30; observations of 7.1.77 (English translation by the Council of Europe),p.2-4; Verbatim Record of the hearing on the merits, pp. 4-7.
(5) Observations of24.1.76 on the admissibility p.3; Verbatim Record(merits),p.5. The applicants also consider that Art 8(1) obliges the State to provide for the performance of an abortion at a pregnant woman's request, ibid. pp.9-10.
(6) Verbatim Record (admissibility), p. 33; Verbatim Record (merits),pp.5-6.
(7) See para. 26 (pp. 9-10 above)
(8) Observations of 7.1.77, p. 2.

- the Government's "prevention of crime" argument is circular (1);

- the "protection of health" cannot be invoked as a termination of pregnancy is not more dangerous than a normal operation (2);

- the Federal Constitutional Court was not authorised to give a binding decision as regards "morals"; moreover, the penalisation of terminations of pregnancy is itself immoral in that it puts those who have a pregnancy terminated in a shameful position (3);

- the interference complained of can finally not be justified by the protection of the "unborn life", which "cannot be regarded as possessing human rights and fundamental freedoms" and consequently can neither restrict the rights protected by the Convention nor be a relevant element under Art. 60, as argued by the Government (4) .

31. The applicants accept that conceptions may differ from one country to another regarding such matters as pregnancy, its prevention and termination but they consider that the relevant legislation is moving steadily towards the realisation of freedom of self-determination for women (5).

b) The Government's submissions

32. The respondent Government deny that the judgment of the Federal Constitutional Court or the subsequent legislation constitute an interference with the applicants' "private life" in the sense of Art. 8(1) of the Convention.

33. In the Government's view the applicants have failed to show that they suffered any concrete disadvantage either during the time the provisional rules laid down by the Federal Constitutional Court (6) were in operation or as a result of the Fifteenth Criminal Law Amendment Act (7).

34. In fact, as compared with the situation before 21 June 1974, when only abortions indicated on medical grounds were exempt from punishment (8), the Federal Constitutional Court's decision of that day (9), by admitting the eugenic and ethic indications, already liberalised the law on abortion. The Court's subsequent ruling, in its judgment of 25 February 1975, concerning the exemption from punishment of abortions performed in situations of serious distress (10), constituted a further step in this direction. The Fifteenth Criminal Law Amendment Act, in the case envisaged in Art. 218(3) second sentence of the Criminal Code as amended (11), finally exempted the pregnant woman from punishment even in the absence of any indication. Thus, since 21 June 1974, the relevant legal situation had gradually become more favourable(12

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(1) Verb. Rec. (merits), p. 7.
(2) Ibid. p. 6.
(3) Ibid. pp. 6-7.
(4) Observations of 7.1.77, pp. 8-9.
(5) Ibid. pp. 6-7.
(6) See para. 23 above.
(7) Memorial on the merits (English translation by the Government), pp. 21-24.
(8) See para. 16 above.
(9) See para. 21 above.
(10) See para. 23 in fine above.
(11) See para. 26 (p. 8) above.
(12) Memorial on the merits, pp. 10-12.

35. In any case the Convention does not contain any express or implied provision concerning interruption of pregnancy; in particular, it cannot be inferred from Art. 8 that the Contracting States are bound to exempt from punishment all abortions performed furing the first three months of pregnancy (1). This gap in the Convention cannot be filled by a creative interpretation as the views held in the matter in the Contracting States were and are not uniform (2).

36. Alternatively the Government submit that the criminal law complained of was and is justified under Art. 8(2) of the Convention as being necessary in a democratic society for the prevention of crime, for the protection of health or morals, or for the protection of the rights of others. Even if it is assumed that Art. 8(1) covers sexual relations to the extent claimed by the applicants, i.e. including the freedom of abortion during the first twelve weeks after conception, Art. 8(2) permits such restrictions of sexual life, on any of the grounds enumerated, as "are not disproportionate to the object pursued" (Application No. 5935/72, Decisions and Reports 3, pp. 46 to 56, at p. 56), (3). Analogous considerations apply in the cases of pregnant women, whose private and, possibly, family life may indeed be affected by legal provisions governing abortion (4). In either case the domestic legislator has a margin of appreciation as recognised by the European Court of Human Rights in the Handyside case (5).

37. In the Government's view the provisions complained of were and are necessary for the protection of health: any abortion constitutes a considerable interference with the woman's body and health which, as a rule, has much graver consequences than the preventive use of means of contraception (6).

38. The protection of "morals" and of "the rights of others" constitutes a further justification for the criminal law on abortion (7). In fact, all European States recognise certain rights of the nasciturus, e.g. succession rights in civil law (8), and generally the necessity of its special protection (9) in their domestic legal systems. Moreover, although Art. 2 of the Convention does not seem to cover the unborn life (10), its constitutional protection in the Federal Republic of Germany (11) is relevant for the interpretation of Art. 8, read in conjunction with Art. 60 of the Convention (12).

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(1) Memorial on the merits, pp. 25-31.
(2) Ibid. pp. 31-43.
(3) Ibid. pp. 51-52.
(4) Verb. Rec. (merits), pp. 20 et seqq.
(5) Ibid. p. 23.
(6) Memorial on the merits, p. 52.
(7) Verb. Rec.(merits), pp.23, 27, 29-30.
(8) Ibid. p. 30.
(9) Ibid. pp. 23, 30.
(10) Memorial on the merits, pp. 25-30.
(11) See paras. 23-24 above.
(12) Letter of 26.7.76 (English translation by the Government), pp. 2-3; memorial on the merits, p. 58.

39. The Government conclude that the present system of indications, together with the consultation procedure provided for and the pregnant woman's exemption from punishment even in cases where no indication applies, duly takes into account the various rights and values involved (1). In view of the relevant legislation in other Contracting States (2), and the variety of opinions held in this field in Europe (3), it strikes a reasonable balance which is clearly within the margin of appreciation of the domestic legislator (4).

2. Art. 9 of the Convention

40. The applicants submit that the criminal law complained of violates Art. 9 of the Convention in that, being based on ethical-religious considerations, it obliges them to adopt views which they do not hold (5).

41. The Government consider that the relevant provisions do not in any way affect the freedom of thought, conscience or religion (6).

3. Arts. 9 and 11 of the Convention

42. The applicants submit that the judgment of the Federal Constitutional Court of 25 February 1975 violated Arts. 9 and 11 of the Convention, in that it disregarded the principle of the separation of powers (7).

43. The Government reply that this principle does not exclude the review of legislation by a constitutional court and that, in any case, no issue arises under Arts. 9 or 11,(8).

4. Art. 12 of the Convention

44. The second applicant submits that the criminal law on abortion violates her right under Art. 12 of the Convention to marry and to found a family, in that an unwanted child would reduce her prospects of marriage (9).

45. The Government deny any violation of Art. 12 and submit that the chances of a person to marry are not protected as a human right (10).

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(1) Verb.Rec. (merits), p. 27.
(2) Set out in the Memorial on the merits, pp. 39-42.
(3) Ibid. pp. 34-39.
(4) Verb.Rec. (merits),pp. 25-27.
(5) Application of 24.3.75,pp. 3-4; letter of 14.5.75,pp. 3-4; letter of 27.5.75,pp. 2-3; Verb.Rec. (merits), p. 7.
(6) Observations of 11.12.75 on the admissibility (English translation by the Government), p. 11.
(7) Application of 24.3.75,pp. 4-5; letter of 14.5.75,p. 4; Verb.Rec. (merits), pp. 4, 7.
(8) Observations of 11.12.75, p. 12.
(9) Letter of 27.5.75, p. 2; Verb.Rec. (admissibility), p. 29.
(10) Observations of 11.12.75, p. 11.

5. Art. 14 of the Convention

a) in conjunction with Art. 8

46. The applicants submit that the legislation complained of results in a discrimination as regards their private life, in that abortions can more easily be obtained by wealthy than by poor persons (1).

47. The Government reply that the solution advocated by the applicants, i.e. the legalisation of all abortions during the first three months of pregnancy, would not remove this difference (2).

b) in conjunction with Art. 9

48. In their submissions under Art. 9, (3), the applicants also refer to Art. 14 of the Convention, (4).

6. Arts. 17 and 18 of the Convention

49. In support of their interpretation of the Convention the applicants finally invoke Arts. 17 and 18, (5).

(1) Observations of 7.1.77, p. 7.
(2) Memorial on the merits, pp. 45-47.
(3) Para. 40 above.
(4) Application of 24.3.75, p. 4; letter of 14.5.75, p. 4.
(5) Annex to letter of 24.1.76, p. 11.

IV. OPINION OF THE COMMISSION

1. The point at issue

50. The applicants mainly allege a violation of Art. 8 of the Convention by the Federal Republic of Germany in that they are not free to have an abortion carried out in case of an unwanted pregnancy. They state that, as a result, they either have to renounce sexual intercourse or to apply methods of contraception or to carry out a pregnancy against their will.

Art. 8 of the Convention provides:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

51. The applicants further allege a violation of Art. 9 of the Convention in that the judgment of the Federal Constitutional Court was based on religious grounds, as well as violations of Arts. 9 and 11 of the Convention on the ground that the Constitutional Court interfered with the separation of powers which they allege to be codified in the Convention. The second applicant further alleges a violation of Art. 12 of the Convention in that illegitimate children reduce their mothers' chances to marry. Finally, Arts. 14, 17 and 18 of the Convention have also been invoked.

52. In its decision on admissibility of 19 May 1976 the Commission found that the application raised issues under Art. 8 of the Convention, but did not find it necessary to decide upon further allegations.

53. The Commission now finds unanimously that the legal provisions complained of do not in any way interfere with any of the other Convention rights invoked by the applicants and that, consequently, the only issue arising under the Convention in the present case is the question whether or not the rules on abortion existing under German law since the judgment of the Federal Constitutional Court of 25 February 1975 violate the applicants' right under Art. 8 of the Convention to respect for their private life.

2. The interference with the right to respect for one's private life

54. According to Art. 8 of the Convention "everyone has the right to respect for his private ... life ...". In its decision on admissibility the Commission has already found that legislation regulating the interruption of pregnancy touches upon the sphere of private life. The first question which must be answered in the present Report is whether the legal rules governing abortion in the Federal Republic of Germany since the judgment of the Constitutional Court of 25 February 1975 constitute an interference with the right to respect for private life of the applicants.

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55. The right to respect for private life is of such a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfilment of his personality. To this effect, he must also have the possibility of establishing relationships of various kinds, including sexual, with other persons. In principle, therefore, whenever the State sets up rules for the behaviour of the individual within this sphere, it interferes with the respect for private life and such interference must be justified in the light of para (2) of Art. 8.

56. However, there are limits to the personal sphere. While a large proportion of the law existing in a given State has some immediate or remote effect on the individual's possibility of developing his personality by doing what he wants to do, not all of these can be considered to constitute an interference with private life in the sense of Art. 8 of the Convention. In fact, as the earlier jurisprudence of the Commission has already shown, the claim to respect for private life is automatically reduced to the extent that the individual himself brings his private life into contact with public life or into close connection with other protected interests.

57. Thus, in its decision on the admissibility of Application No. 6825/75, X. against Iceland, the Commission held that the concept of private life in Art. 8 was broader than the definition given by numerous Anglo-Saxon and French authors, namely the"right to live as far as one wishes, protected from publicity", in that it also comprises,"to a certain degree, (1) the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality". But it denied "that the protection afforded by Art. 8 of the Convention extends to relationships of the individual with his entire immediate surroundings". It thus found that the right to keep a dog did not pertain to the sphere of private life of the owner because "the keeping of dogs is by the very nature of that animal necessarily associated with certain interferences with the life of others and even with public life " (Decisions and Reports Vol. 5, p. 86 at p. 87).

58. In two further cases the Commission has taken account of the element of public life in connection with Art. 8 of the Convention. It held that subsequent communication of statements made in the course of public proceedings (Application No. 3868/68, X. against the United Kingdom, Collection of Decisions 34, p. 10 at p. 18) or the taking of photographs of a person participating in a public incident (Application No. 5877/72, X. against the United Kingdom, Collection of Decisions 45, p. 90 at p. 93) did not amount to interference with private life.

59. The termination of an unwanted pregnancy is not comparable with the situation in any of the above cases. However, pregnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant her private life becomes closely connected with the developing foetus.

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(1) Emphasis added.

60. The Commission does not find it necessary to decide, in this context, whether the unborn child is to be considered as "life" in the sense of Art. 2 of the Convention, or whether it could be regarded as an entity which under Art. 8(2) could justify an interference "for the protection of others". There can be no doubt that certain interests relating to pregnancy are legally protected, e.g. as shown by a survey of the legal order in 13 High Contracting Parties (1). This survey reveals that, without exception, certain rights are attributed to the conceived but unborn child, in particular the right to inherit. The Commission also notes that Art. 6(5) of the United Nations Covenant on Civil and Political Rights prohibits the execution of death sentences on pregnant women.

61. The Commission therefore finds that not every regulation of the termination of unwanted pregnancies constitutes an interference with the right to respect for the private life of the mother. Art. 8(1) cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother. In this respect the Commission notes that there is not one Member State of the Convention which does not, in one way or another, set up legal rules in this matter. The applicants complain about the fact that the Constitutional Court declared null and void the Fifth Criminal Law Reform Act, but even this Act was not based on the assumption that abortion is entirely a matter of the private life of the pregnant woman. It only provided that an abortion performed by a physician with the pregnant woman's consent should not be punishable if no more than twelve weeks had elapsed after conception.

62. The legal solutions following the Fifth Criminal Law Reform Act cannot be said to disregard the private-life aspect connected with the problem of abortion. The judgment of the Federal Constitutional Court of 25 February 1975 (2) not only recognised the medical, eugenic and ethical indications but also stated that, where the pregnancy was terminated by a doctor with the pregnant woman's consent within the first twelve weeks after conception "in order to avert from the pregnant woman the risk of serious distress that cannot be averted in any other way she might reasonably be expected to bear, the Court may abstain from imposing punishment".

According to Art.218a of the Criminal Code in the version of the Fifteenth Criminal Law Reform Act of 18 May 1976, (3), an abortion performed by a physician is not punishable if the termination of pregnancy is advisable for any reason in order to avert from the pregnant woman the danger of a distress which is so serious that the pregnant woman cannot be required to continue the pregnancy and which cannot be averted in any other way the pregnant woman might reasonably be expected to bear. In particular, the abortion is admitted if continuation of the pregnancy would create a danger to the life or health of the woman, if it has to be feared that the child might suffer from in incurable injury to its health or if the pregnancy is the result of a crime. The woman is required also to seek advice on medically significant aspects of abortion as well as on the public and private assistance available for pregnant women, mothers and children.

(1) Appendix VII to this Report
(2) See para 23 above.
(3) See para 26 (pp. 9-10) above.

In the absence of any of the above indications the pregnant woman herself is nevertheless exempt from any punishment if the abortion was performed by a doctor within the first 22 weeks of pregnancy and if she made use of the medical and social counselling.

63. In view of this situation the Commission does not find that the legal rules complained about by the applicants interfere with their right to respect for their private life.

64. Furthermore, the Commission has had regard to the fact that, when the European Convention of Human Rights entered into force, the law on abortion in all Member States was at least as restrictive as the one now complained of by the applicants. In many European countries the problem of abortion is or has been the subject of heated debates on legal reform since. There is no evidence that it was the intention of the Parties to the Convention to bind themselves in favour of any particular solution under discussion - e.g. a solution of the kind set out in the Fifth Criminal Law Reform Act ("Fristenlösung" - time limitation) which was not yet under public discussion at the time the Convention was drafted and adopted.

65. The Commission finally notes that, since 21 June 1974, the relevant legal situation has gradually become more favourable to the applicants (1).

CONCLUSION

66. The Commission unanimously concludes that the present case does not disclose a breach of Art. 8 of the Convention.

Secretary to the Commission — Acting President of the Commission

(H.C. KRÜGER) — (G. SPERDUTI)

(1) Cf para 34 above.

V. SEPARATE OPINIONS

1. DISSENTING OPINION OF MR. J. E. S. FAWCETT (1)

I do not agree with the reasoning or conclusion of the Commission on Art. 8 which is in my opinion to be applied to the facts before us in the following way:

1. "Private life" in Art. 8(1) must in my view cover pregnancy, its commencement and its termination: indeed, it would be hard to envisage more essentially private elements in life. But pregnancy has also responsibilities for the mother towards the unborn child, at least when it is capable of independent life, and towards the father of the child, and for the father too towards both. But pregnancy, its commencement and its termination, as so viewed is still part of private and family life, calling for respect under Art. 8(1). I am not then able to follow the Commission in holding, if I understand its reasoning correctly, that there are certain inherent limits to treating pregnancy and its termination as part of private life. Such limits, beyond those mentioned, at least in the form of intervention by legislation, must be found and justified in Art. 8(2): in the absence of such limits, the decision to terminate a pregnancy remains a free part of private life.

2. I find it necessary to distinguish here between intervention and interference. By intervention in the present context I mean regulation of the termination of pregnancy by law, ranging from prohibition to requirements that various conditions be met; by interference I mean forms of regulation which fail to respect private and family life in the sense of Art. 8. Intervention may be justified under Art. 8(2); only if it is not justified does it become interference. But it must be added that regulation of termination of pregnancy by law constitutes intervention in private and family life even before pregnancy has begun because it will influence or govern decisions about commencement and termination of pregnancy.

3. The provisions of Art. 218a of the Federal Act, which were declared by the Federal Constitutional Court to be contrary to Art. 1 of the Basic Law (1949), themselves imposed limiting conditions on the termination of pregnancy, which could be justified under Art. 8(2) as necessary for the protection of health. However, it is not clear to me upon what grounds in Art. 8(2) the elimination of Art. 218a, and the introduction of additional limiting conditions in the Act which replaces it, are in fact based. The only possible grounds appear to be "the economic well-being of the country"; "the prevention of crime"; "the protection of health or morals"; "the protection of the rights and freedoms of others".

4. No facts have been produced to the Commission to show that the new legislation is aimed in part at maintaining or increasing the birth-rate for the economic well-being of the country: indeed, its well-being might call for an opposite policy. Again, there is evidence in a number of countries that over-restrictive legislation not only fails to prevent "back-street abortions", incompetently and even criminally performed, but may even encourage recourse to them.

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(1) Cf. p. 2, footnote 2 above.

5. The new legislation, like Art. 218a which it replaces, certainly secures the protection of health; but there is the further limitation that unacceptable distress to the mother from continuance of the pregnancy must be shown before it can be terminated simply at her wish. It may of course be said that this limitation will be generously interpreted, that in practice there will be little difference between the new provision and the original Art. 218a, and that that additional limitation is a compromise gesture to the anti-abortionists. But even if this were correct - and practice might well vary over the country in applying the limitation - I do not think it renders to the new legislative provision "necessary" under Art. 8(2).

6. The intervention of the legislator in sexual morality may here have the purpose of preventing abortion being often reduced simply to a form of contraception, or of inducing a sense of moral responsibility in the commencement of pregnancy, but it is not shown how the new legislation, as distinct from what it replaces, will achieve these purposes. On the contrary, the statistics and other evidence quoted in the minority judgment in the Federal Constitutional Court demonstrate the ineffectiveness of the earlier restrictive law in achieving these purposes or, for that matter, those considered in paragraph 4 above. Even though the new legislation is less restrictive of termination of pregnancy than the old law, it has not in my view been shown, in relation to the earlier Art. 218a, that it is "necessary" under Art. 8(2) for the protection of morals.

7. There remains "the protection of the rights and freedoms of others" and the question how far this can cover the unborn child. The Convention does not expressly extend the right to life, protected by Art. 2, to an unborn child; but that is not I think conclusive. However, it would serve no purpose for me to try to answer so controversial a question at any length here and I can only say that I am unable to attribute rights and freedoms under the Convention to an unborn child not yet capable of independent life, that Art. 218a did not extend the permitted termination of pregnancy beyond 12 weeks from conception, and that the elimination of that section of the Act was therefore not"necessary" for the protection of the rights and freedoms of others.

I can only conclude that the changes in the law on termination of pregnancy that have taken place in consequence of the decision of the Federal Constitutional Court are interventions in private and family life, which are not justified under Art. 8(2), and are therefore an interference with it contrary to the Convention.

2 . SEPARATE OPINION OF MR. T. OPSAHL
WITH WHICH MM. C. NØRGAARD and L. KELLBERG concurred

1. The main claim of the applicants concerns the right to respect for private (and family) life and was to some extent clarified during the proceedings. As regards the argument that the State must provide for the performance of abortions as an unconditional right upon the woman's request (1), such an obligation could not easily be made an aspect of the right to respect for private life, on any interpretation of Art. 8. If, however, the self-determination of the woman is the essential claim, the main obligation of the State would be not to interfere with her decision in particular by such punishment as the law of the Federal Republic makes possible if the conditions for abortion are not met. Such interference in the case of the applicants remains hypothetical, but the possibility is said to affect their private life in various ways.

2. Although we have reached the same conclusion as the majority of the Commission, we agree with many of the views expressed by Mr. Fawcett in his dissenting opinion. And we take the view, personally, that laws regulating abortion ought to leave the decision to have it performed in the early stage of pregnancy to the woman concerned. We do not wish to imply that members of the Commission who have not found it necessary to express themselves on this point must be of a different opinion. But we say this because we consider that among the various possible solutions, this one - a "Fristenlösung" based on self-determination - is the one most consistent with what we think a right to respect for private life in this context ought to mean in our time.

3. Nevertheless, we must admit that such a view cannot easily be read into the terms of Art. 8. The problem is not a new one and traditional views of the interpretation and application of this Article have to be taken into account, notwithstanding the rapid development of views on abortion in many countries. We are aware that the reality behind these traditional views is that the scope of protection of private life has depended on the outlook which has been formed mainly by men, although it may have been shared by women as well.

4. Under the Convention, the legal argument against the claim of the applicants can be made in various ways. Mr. Kellberg has come to the conclusion that there is an interference, but that it can be justified under Art. 8(2), taking into account the way the conditions for such interference have traditionally been understood and the margin of appreciation allowed, the legal position in Germany being in fact relatively liberal. Mr. Nørgaard and Mr. Opsahl have noted the distinction between intervention and interference. One could, for instance, say that legislative intervention (even when backed by criminal sanctions) does not necessarily amount to interference in the sense of Art. 8, although in various ways affecting private life. There are many examples of legislation intervening in private or family life in ways which do not represent interference with the right to respect for private or family life, e.g. by regulating relations between family members, and which therefore do not need to be justified within the limits set out in Art. 8(2). Mr. Nørgaard is of the opinion that in this case there is no interference in relation to the applicants within the meaning of Art. 8. Mr. Opsahl shares this opinion and in addition wishes to state, like Mr. Fawcett, that punishment for unlawful abortion, or the threat of it, cannot generally be justified on any of the grounds set out in Art. 8(2).

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(1) See p. 12, footnote 5 above.

APPENDIX I

HISTORY OF PROCEEDINGS

Item	Date	Note
1. Examination of admissibility		
Introduction of the application by "Weltschutzbund" and Rechtsanwalt Sojka	24 March 1975	
Registration of the application	27 March 1975	
Receipt of Dr Sojka's letter of 14 May 1975 with enclosures	20 May 1975	
Receipt of Dr Sojka's letter of 22 May 1975 enclosing judgment of Federal Constitutional Court	27 May 1975	
Receipt of Dr Sojka's letters of 27 and 29 May 1975	2 June 1975	The present applicants join in the proceedings
Preliminary examination of the application by a Rapporteur	20 June 1975	Rule 40
Commission deliberates and decides: - to declare the application inadmissible insofar as it was brought by the "Weltschutzbund" and Dr Sojka; - to invite the Government's observations on the admissibility of the remainder of the application (Rule 42b,2)	3 October 1975	MM. J.E.S. FAWCETT (President) G. SPERDUTI (First Vice-President) C.A. NØRGAARD (Second Vice-President) F. ERMACORA E. BUSUTTIL L. KELLBERG B. DAVER J. CUSTERS C.H.F. POLAK G. JÖRUNDSSON S. TRECHSEL N. KLECKER B. KIERNAN
Receipt of the Government's observations of 11 December 1975	15 December 1975	
Receipt of the applicants' reply of 24 January 1976	28 January 1976	

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Item	Date	Note
Commission's deliberations	6 March 1976	MM. J.E.S. FAWCETT F. ERMACORA E. BUSUTTIL L. KELLBERG B. DAVER J. CUSTERS C.A. NØRGAARD C.H.F. POLAK J.A. FROWEIN G. JÖRUNDSSON G. TENEKIDES S. TRECHSEL B.J. KIERNAN N. KLECKER
Receipt of documents (reports of the Bundestag) from Government	8 March 1976	
Commission deliberates and decides to hold oral hearing (Rule 42, 2 in fine)	9 March 1976	MM. J.E.S. FAWCETT F. ERMACORA E. BUSUTTIL L. KELLBERG B. DAVER T. OPSAHL J. CUSTERS C.A. NØRGAARD C.H.F. POLAK J.A. FROWEIN G. JÖRUNDSSON R.J. DUPUY G. TENEKIDES S. TRECHSEL B.J. KIERNAN
Oral hearing and final decision on admissibility	19 May 1976	MM. J.E.S. FAWCETT G. SPERDUTI C.A. NØRGAARD M.A. TRIANTAFYLLIDES L. KELLBERG B. DAVER T. OPSAHL J. CUSTERS J.A. FROWEIN G. JÖRUNDSSON G. TENEKIDES S. TRECHSEL B.J. KIERNAN N. KLECKER

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Item	Date	Note
2. Examination of the Merits		
Rapporteur invites parties to produce information and documentation	26 May 1976	Rule 45 (2)
Receipt of applicants' communication of 14 June 1976	22 June 1976	
Receipt of Government's communication of 14 June 1976	28 June 1976	
Receipt of applicants' communication of 7 July 1976	14 July 1976	
Receipt of applicants' communication of 22 July 1976	26 July 1976	
Receipt of Government's communication of 26 July 1976	30 July 1976	
Commission deliberates and decides to invite the parties' written observations on the merits	6 October 1976	MM. J.E.S. FAWCETT G. SPERDUTI C.A. NØRGAARD E. BUSUTTIL L. KELLBERG B. DAVER T. OPSAHL J. CUSTERS C.H.F. POLAK J. A FROWEIN G. JÖRUNDSSON R.J. DUPUY G. TENEKIDES S. TRECHSEL B.J. KIERNAN N. KLECKER
Rapporteur invites Government to produce further documents	6 October 1976	
Receipt of Government's communications of 13 and 15 October 1976	October 1976	
Receipt of Government's communication of 3 November 1976	8 November 1976	
Receipt of applicants' memorial of 9 November 1976 on the merits	15 November 1976	

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Item	Date	Note
Receipt of Government's memorial of 6 December 1976 on the merits	9 December 1976	
Receipt of applicants' communication of 8 December 1976	13 December 1976	
Commission deliberates and decides to hold oral hearing on the merits	16 December 1976	MM. J.E.S. FAWCETT G. SPERDUTI C.A. NØRGAARD F. ERMACORA T. OPSAHL J. CUSTERS J.A. FROWEIN G. JÖRUNDSSON R.J. DUPUY S. TRECHSEL B. KIERNAN
Receipt of applicants' further observations of 7 January 1977	12 January 1977	
Receipt of applicants' communication of 26 January 1977	31 January 1977	
Commission's deliberations	10 March 1977	MM. G. SPERDUTI C.A. NØRGAARD E. BUSUTTIL L. KELLBERG B. DAVER T. OPSAHL J. CUSTERS C.H.F.POLAK J.A. FROWEIN G. JÖRUNDSSON G. TENEKIDES S. TRECHSEL B. KIERNAN N. KLECKER
Oral hearing; Commission's deliberations under Rule 46	17 May 1976	MM. J.E.S. FAWCETT G. SPERDUTI C.A. NØRGAARD F. ERMACORA L. KELLBERG B. DAVER T. OPSAHL J. CUSTERS C.H.F. POLAK J.A. FROWEIN R.J. DUPUY G. TENEKIDES S. TRECHSEL B. KIERNAN N. KLECKER

Item	Date	Note
Commission's deliberations (Rule 52) and adoption of the present Report	12 July 1977	MM. G. Sperduti C.A.Nørgaard E. Busuttil L. Kellberg B. Daver T. Opsahl J. Custers J.A. Frowein R.J. Dupuy G. Tenekides S. Trechsel B.J. Kiernan N. Klecker

THE FACTS

The facts of the case, as submitted by the applicants, may be summarised as follows:

The first applicant is an association (Vereinigung) which was founded by 20 individuals, including the second applicant, on 30 October 1973 at Hamburg.

It's purpose is the development and protection of environmental and other conditions of life, fair distribution of resources excluding abuse of power against environment, economy, peoples, groups of individuals, animals and plants. It abides by Human Rights and Freedoms, completed by everyone's right to a sound and promising environment.

It intends to take part in political life in the Federal Republic of Germany.

Its president is authorised to represent the association. The second applicant was elected as president.

The third and fourth applicants are members of the first applicant, who refuse to apply means of contraception for several health and other reasons.

The third applicant is unmarried and afraid of the disadvantages of illegitimate motherhood.

The fourth applicant is married and mother of two minor children. She does not want to have more children.

The statute adopted on 18 June 1974 by a narrow majority in the Federal Diet (Bundestag) exempted interruptions of pregnancy caused by doctors in the first 12 weeks of pregnancy from criminal prohibition, if the mother consented after receiving social and medical advice.

The constitutionality of this statute was challenged before the Federal Constitutional Court (Bundesverfassungsgericht) by 193 members of the Federal Diet and the Governments of five Länder.

In its decision of 27 February 1975 the Federal Constitutional Court declared this statute to be contrary to Arts. 2 (2,1) and 1 (1) of the Constitution (Grundgesetz) and void as far as it exempts interruptions of pregnancy from punishment "even though there may be no reasons which are valid under the system of values incorporated in the Constitution".

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The Court further made an interim order leaving in force part of the Act exempting only cases in which the mother is victim of a sexual crime and there are cogent reasons that this is the cause of the pregnancy and authorised the criminal courts to abstain from sentencing in cases of a serious emergency, which the mother could not reasonably resolve otherwise.

The applicants ask the Commission to declare the judgment of the Federal Constitutional Court void and to confirm that the statute of 18 June 1974 is fully valid on the following grounds:

1. The Court had no competence to annul the statute of 18 June 1975 and to replace it by its own rulings. This is in violation of the separation of powers.

2. The ruling of the court interferes with the right to private life as guaranteed in Art. 8 of the Convention, no legislator having the right to interfere with the private and family life of a person in a sense that a woman can be forced to carry out a pregnancy against her will.

3. The criminalisation of abortion is based on religious morality. As the Court has based its decision on religious grounds, it violates Art. 9 of the Convention as wells as Art. 14, because people are compelled to live by standards set out by a specific religious teaching.

4. The fact that the application to the Constitutional Court was, inter alia, filed by the Governments of five Länder, violates the principle of Volksherrschaft (power of the people) as codified in Art. 11 and 9 of the Convention. It is equally a violation of these human rights if a Court decides by a bare majority to change or abolish statues adopted by parliament.

5. The third applicant alleges a violation of Art. 12, because an unwanted child would reduce considerably her prospects to marry.

THE LAW

Art. 25 of the Convention provides that the Commission may receive petitions from any person, non-governmental organisation or group of individuals claiming to be a victim by one of the High Contracting Parties of the rights set forth in the Convention.

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The Commission has consistently held that it can examine the compatibility of domestic legislation with the Conventim only with respect to its application to a person, non-governmental organisation or group of individuals insofar as its application is alleged to constitute a violation of the Convention in regard to the applicant person, organisation or group in question, and that it is not competent to examine in abstracto the question of the conformity of domestic legislation with the provisions of the Convention (Application No. 280/57, Coll. 2, Ann. III p. 214; Application No. 867/60, Coll. 6, p. 34 (37); it is to be noted that the latter application was directed against a statute allowing an interruption of pregnancy in certain cases.)

The Commission applies the same principle to the present case in which the application is not directed against a legislative act stricto sensu, but against a judicial act which, according to German law, has the same effect as a statute.

The Commission finds that the criminal law on abortion as it stands after the judgment of the Constitutional Court cannot possibly be applied to the first applicant, as it is not a natural person.

As to the second applicant, the Commission finds that the law concerned has not been applied to him, and it notes that the second applicant has not shown, in what other way its mere existence might affect him so that he could claim to be a victim of a violation of the Convention. It follows that the conditions under which the Commission may receive an application from an individual are not satisfied. The Commission concludes that the application is incompatible ratione personae within the meaning of Art. 27, para. 2, as far as it was brought by the first and second applicants.

As far as the third and fourth applicants are concerned, the Commission considers that it is not sufficiently informed to decide before it has received observations of the parties on the admissibility of the application.

For these reasons, the Commission

1. Declares this application INADMISSIBLE as far as it was introduced by 1. Weltschutzbund and 2. Klaus Sojka.
2. Adjourns its examination as far as it was introduced by 3. Rose Marie Brüggemann and 4. Adelhaid Scheuten.

Head of Division replacing the Secretary to the Commission — President of the Commission

(J. RAYMOND) (J. E. S. FAWCETT)

APPENDIX III

FINAL

DECISION OF THE COMMISSION

AS TO THE ADMISSIBILITY

Application No. 6959/75
by 1. Rosemarie Brüggemann
2. Adelheid Scheuten
against the Federal Republic of Germany

The European Commission of Human Rights sitting in private on 19 May 1976, the following members being present:

MM. J. E. S. FAWCETT, President
G. SPERDUTI, Vice-President
C. A. NØRGAARD, Second Vice-President
M. A. TRIANTAFYLLIDES
L. KELLBERG
B. DAVER
T. OPSAHL
J. CUSTERS
J. A. FROWEIN
E. JORUNDSSON
R. J. DUPUY
G. TENEKIDES
S. TRECHSEL
B. KIERNAN
N. KLECKER

Mr. A. B. McNULTY, Secretary to the Commission

Having regard to Art. 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 24 March 1975 by 1. Rosemarie Brüggemann and 2. Adelheid Scheuten against the Federal Republic of Germany and registered on 27 March 1975 under file No. 6959/75;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having deliberated,

Decides as follows:

THE FACTS

I

The facts presented by the Parties and apparently not in dispute between them may be summarised as follows:-

On 18 June 1974 the Federal Diet (Bundestag) passed a statute (Fifth Criminal Law Reform Act, Federal Law Gazette I, p. 1297) providing for advice to be given to pregnant women and containing new provisions of the Criminal Code which read as follows:

"Section 218

Abortion

(1) Whoever terminates a pregnancy later than on the thirteenth day after conception shall be punished with imprisonment for a term not exceeding three years or a fine.

(2) The penalty shall be imprisonment for a term of between six months and five years if the offender

1. acts against the will of the pregnant woman, or

2. negligently causes the risk of death or of a serious injury to the health of the pregnant woman.

The court may order the supervision of conduct (Section 68, subsection 1, paragraph 2).

(3) If the offence is committed by the pregnant woman herself the penalty shall be imprisonment for a term not exceeding one year or a fine.

(4) The attempt shall be punishable. The woman shall not be punished for attempt.

Section 218a

No punishment for abortion within the first twelve weeks

An abortion performed by a physician with the pregnant woman's consent shall not be punishable under Section 218 if no more than twelve weeks have elapsed after conception.

Section 218b

Abortion on specific grounds after twelve weeks

An abortion performed by a physician with the pregnant woman's consent after twelve weeks have elapsed after conception shall not be punishable under Section 218 if, according to the knowledge of medical science,

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1. the termination of pregnancy is advisable in order to avert from the pregnant woman any risk to her life or risk of serious injury to her health, unless the risk can be averted in some other way that she can reasonably be expected to bear, or

2. there are strong reasons for the assumption that, as a result of a genetic trait or harmful influence prior to birth, the child would suffer from an irreparable injury to his health which carries so much weight that the pregnant woman cannot be expected to continue the pregnancy, provided that no more than twenty-two weeks have elapsed after conception."

The Fifth Criminal Law Reform Act having been adopted by the majority in the Federal Diet and published in the Federal Law Gazette, 193 members of the Federal Diet and the Governments of five Laender applied to the Federal Constitutional Court for proceedings to be instituted for a review of the Fifth Criminal Law Reform Act as to its constitutionality.

These proceedings were concluded by the decision of the Federal Constitutional Court of 25 February 1975 (Decisions of the Federal Constitutional Court, Vol. 39, pp. 1 et seq.) which has been challenged by the applicants. The operative part of this decision reads as follows:

"I. Section 218 of the Criminal Code as amended by the Fifth Criminal Law Reform Act of 18 June 1974 (Federal Law Gazette I, p. 1297) is incompatible with Article 2, paragraph 2, first sentence, read in conjunction with Article 1, paragraph 1, of the Basic Law and void as far as it exempts abortion from punishment even if there are no reasons which - within the meaning of the reasons given for this decision - are justifiable under the system of values incorporated in the Basic Law.

II. Pending the coming into force of a new statute, the following order is made in accordance with Section 35 of the Federal Constitutional Court Act:

1. Section 218b and 219 of the Criminal Code as amended by the Fifth Criminal Law Reform Act of 18 June 1974 (Federal Law Gazette I, p. 1297) shall be applied also to abortions performed within the first twelve weeks after conception.

2. An abortion performed by a physician with the pregnant woman's consent within the first twelve weeks after conception shall not be punishable under Section 218 of the Criminal

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Code if an unlawful act under Sections 176 - 179 of the Criminal Code was committed on the pregnant woman and there are strong reasons to suggest that the pregnancy was a result of the offence.

3. Where the pregnancy was terminated by a physician with the pregnant woman's consent within the first twelve weeks after conception in order to avert from the pregnant woman the risk of serious distress that cannot be averted in any other way she might reasonably be expected to bear, the Court may abstain from imposing punishment in accordance with Section 218 of the Criminal Code."

According to Section 31, subsection 2, of the Federal Constitutional Court Act the operative part of the decision under I. has the same effect as a statute. The operative part under I. and II. was published in the Federal Law Gazette of 1975 Part I p. 625.

Complaints

II

The application is directed against the judgment of the Constitutional Court.

1. The applicants allege a violation of Art. 8, para. 1 of the Convention in that they are obliged either to renounce sexual intercourse or to apply methods of contraception of which they disapprove for health and other reasons or to carry out a pregnancy against their will.

2. The applicants further allege a violation of Art. 9 of the Convention in that the judgment of the Constitutional Court was based on religious grounds.

3. The second applicant further alleges a violation of Art. 12 of the Convention in that illegitimate children reduce their mothers' chances to marry.

4. Both applicants finally allege a violation of Arts. 9 and 11 as the Constitutional Court interfered with the separation of powers which they allege to be codified in these Articles of the Convention.

III

PROCEEDINGS BEFORE THE COMMISSION

The application was originally introduced by four applicants and was on 3 October 1975 declared inadmissible as being incompatible with the provisions of the Convention ratione personae as far as it was brought by two of the applicants. Its examination was adjourned as far as it was introduced by the remaining two applicants. The respondent Government were invited to submit observations on the admissibility of the application, which were received on 15 December 1975. The comments submitted by the applicants' representative were received on 28 and 30 January 1976. The Commission decided on 9 March 1976 to invite the parties to present their arguments on admissibility at an oral hearing which was held on 19 May 1976.

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IV

OBSERVATIONS SUBMITTED BY THE RESPONDENT GOVERNMENT ON 11 DECEMBER 1975 (Part B "The Law" and Part C "Motion")

B. The Law

I. Question of individual grievance and exhaustion of all domestic remedies

1. According to Art. 25, para. 1, first sentence, of the Convention only such person is entitled to introduce an individual application who can claim to be individually the victim of a violation of the human rights and fundamental freedoms guaranteed in the Convention. In the aforementioned decision the Commission, referring to its consistent line of decisions, rightly pointed out that the Convention cannot be used to examine in abstracto the conformity of domestic legislation with the provisions of the Convention. It is only when the application of legislation violates any of the applicant's human rights and fundamental freedoms guaranteed in the Convention that such measure is subject to a review in accordance with the Convention.

2. No consequences under criminal law were drawn from the legal situation resulting from the decision of the Federal Constitutional Court, as far as the applicants are concerned. To our knowledge, the applicants were neither punished for an offence under Section 218 of the Criminal Code, nor are they involved in criminal proceedings in which they are charged with such an offence. Also in other respects it is not apparent that the applicants should have to fear concrete disadvantages in connection with the decision of the Federal Constitutional Court challenged by them.

3. In order to substantiate their individual grievance the applicants have confined themselves to the argument that in their private and sexual life they will have to conform to the legal situation resulting from the judgment of the Federal Constitutional Court. Taking for granted that the applicants' statements are correct, it cannot be inferred therefrom that they are individually aggrieved. It is in the nature of generally valid legislation that everybody affected by it is obliged to behave in such a manner that it is in agreement with the relevant statutory provisions. Nor is it an extraordinary feature that by abiding by the statutory command the individual addressees of the statute should be affected differently in their interests. In this respect, as compared with other women in a similar situation, the applicants are not an exception. Apart from that, the statutory command in the version appearing from the decision of the Federal Constitutional Court is aimed not at a specific behaviour in sexual life but at the prohibition of abortion. It is, therefore, not justified to review the decision in abstracto, different from other criminal legislation, as to its compatibility with the Convention.

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4. As there is no individual grievance the applicants could not file any domestic remedies. Consequently, the prerequisites of Art. 26 of the Convention have not been fulfilled either.

5. In the result it must, therefore, be found that the remainder of the application is incompatible with the provisions of the Convention and thus inadmissible in accordance with Art. 27, para. 2, and/or para. 3, because the prerequisites of Art. 25, para. 1, first sentence, and of Art. 26 of the Convention do not lie. It is only subsidiarily, in case the Commission should not follow these arguments, that we deal below also with the question whether the challenged decision is, in abstracto, compatible with the Convention.

II. Compatibility with Article 8 of the Convention

1. According to Art. 8, para. 1, of the Convention everyone has the right to respect for his private and family life, his home and his correspondence. There are no objections to the assumption that the arrangement of the sexual relations as well as family planning come, on princple, within the sphere of private and family life protected by Art. 8, para. 1.

2. However, the decision of the Federal Constitutional Court which has been challenged by the applicants does not interfere with this protected sphere. As far as sexual life is concerned, there is nothing in the decision that might in any way restrict the freedom to arrange this sphere. Nor does the decision of the Federal Constitutional Court cut off the possibility to engage in family planning. Although it does prohibit the termination of pregnancy to a larger extent than did the statute passed by the Bundestag, it does not thereby subject the affected persons to any restrictions in the choice of the means for family planning. Termination of pregnancy as such is not an adequate or appropriate method of "family planning" within the meaning that could comply with the claim to responsible acting which is expressed by this term.

3. But even if we were to assume that the decision of the Federal Constitutional Court "interferes" with the right protected in Art. 8, para. 1, of the Convention, there would nevertheless be no violation of Art. 8 of the Convention as alleged by the applicants because the "interference" would be admissible under Art. 8, para. 2, of the Convention; for it would, assuming it is in the nature of an interference, be provided by statute (namely based on a decision which has the force of law) and constitute a measure necessary in a democratic society for the prevention of crime and for the protection of the rights of others. The question to what extent abortion should be subject to punishment is, according to Art. 8, para. 2, of the Convention, left to the discretion of the Contracting States. This discretion was not exercised arbitrarily. In particular, the protection of human life on

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which the Federal Constitutional Court based its judgment is not inconsistent with the objects and aims of the European Human Rights Convention. "The rights and freedoms of others", for the protection of which Art. 8, para. 2, of the Convention makes provision, include the life growing in the mother's womb, this being independent property protected by law. The employment of means of criminal law keeps within the scope of the legislator's discretion. The exercise of such discretion also appears from the fact that the scope of the protection by criminal law varies in detail among the Member States of the Council of Europe.

An "interference with the private life" would be inadmissible only if none of the grounds of justification mentioned in Art. 8, para. 2, of the Convention, could be relied on. However, this is not the case - as has been shown above.

4. Consequently, there is no violation of Art. 8 of the Convention.

III. Violation of Article 9 or 12 of the Convention

1. The allegation that the challenged decision of the Federal Constitutional Court is based on ecclesiastical dogmas, religious concepts of values, etc., cannot justify ab initio the assumption that Art. 9 of the Convention has been violated. It is not apparent that the decision affects the exercise of the right to freedom of thought, conscience and religion which is guaranteed in Art. 9, par. 1, of the Convention. Apparently the applicants themselves do not mean to say that abortion is an expression of the freedom of thought or conscience or a religious act.

2. Art. 12 of the Convention has not been violated either. This Article guarantees the right to marry and to found a family. This right has obviously not been affected by the decision of the Federal Constitutional Court. The chances of a person to marry, which depend on many objective and subjective factors, are not, and cannot, be protected as human rights.

IV. Violation of the principle of separation of powers and of the principle that all state authority emanates from the people

In this respect the applicants fail to understand the nature of modern democracy based on the rule of law, and the nature of the separation of powers, as well as the significance of the basic rights and human rights which, according to the Constitution of the Federal Republic of Germany, are not merely theses of a programme but directly applicable law having priority. As such they are binding also on the

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legislature. This pro-human-rights tendency of the Basic Law is in accordance with the intentions of the European Human Rights Convention. The fact that the Basic Law expressed that also the legislature is bound by the basic rights, specifically by subjecting the legislature in this respect to the control by a supreme court is not inconsistent with the idea of the separation of powers, if properly understood, because the human rights are binding on each power, the legislative, judicial and executive powers.

Moreover, Art. 3 of the Protocol to the Human Rights Convention grants a title to participation in politics by free elections by secret ballot; over and beyond this the individual is not entitled under the Convention to a specific adjustment of the constitutions of the Contracting States. Arts. 9 and 11 of the Convention, which have been invoked by the applicants in this connection, are obviously irrelevant.

Even if standards of substantive law are applied, it appears from the above observations that the application is manifestly ill-founded.

C. Motion

I therefore apply

> for the application to be rejected as inadmissible on the ground that it is incompatible with the provisions of the Convention, subsidiarily on the ground that it is manifestly ill-founded.

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V

COMMENTS IN REPLY SUBMITTED BY THE APPLICANTS' REPRESENTATIVE

The applicants' comments in reply may be summarised as follows:-

1. Natural persons may complain of a violation of the Convention whenever there is an illegal restriction of the exercise of human rights and fundamental freedoms. It is not necessary to offend against that restriction and to be punished. There must be a remedy against laws of general application (allgemeine Gesetze) which encroach upon and restrict legal guarantees of a higher authority. The applicants feel compelled either to renounce sexual intercourse or to apply inconvenient contraceptives or to give birth to unwanted children.

2. It cannot be said that the applicants have failed to exhaust domestic remedies, because there is no remedy open to everybody (Popularklage), against decisions of the Constitutional Court. Such a remedy would be inconceivable in view of the force of law (Gesetzerkraft) attributed to those decisions.

3. a) The applicants argue under Art. 8, para. 1 of the Convention that a majority of a court cannot rule that the citizen may not shape his private and family life by interruption of pregnancy within a certain period, which is an indispensable means of family planning as is shown by daily practice.

b) Such an interference which consists in the penalisation of an act which would otherwise be lawful cannot be considered as in accordance with the law and necessary in a democratic society within the meaning of Art. 8 (2) of the Convention. Nor is it necessary for the protection of rights and freedoms of others, because "other" means clearly born human beings.

In any case the discretion of the state is restricted by the notion of "democratic society" and in particular a pluralistic society, which allows interference with rights of the personality only as far as they are compatible with the convictions of all orderly and right-minded citizens.

Finally such an interference is not at the disposal of the Constitutional Court under Art. 8 (2) of the Convention because courts have no power to enact criminal law and to determine the extent to which a norm enacted formally by the legislative power is binding.

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4. The applicants argue under Art. 12 of the Convention that not only the chances to marry of unmarried women with illegitimate children are gravely interfered with, but that also the liberty to contract marriage is reduced because unwanted children might be a consequence.

5. The applicants support their allegation of a violation of Art. 9 of the Convention with the argument that the opposition against interruption of pregnancy within a certain period is based on religious convictions of an orthodox minority which must not be enforced by the state.

Whereas the solution enacted by the Bundestag did not compel anybody to act in a certain way which is not compatible with a conviction (Weltanschauung), the decision of the Constitutional Court prohibits all citizens to interrupt a pregnancy during the first twelve weeks, if no special indication is applicable, and thereby forces all pregnant women, including those of different, namely "liberal", convictions, to abide by the convictions of an orthodox minority. Under Art. 9, para. 2, of the Convention, the applicants refer to their above submissions under Art. 8, para. 2.

6. The applicants further argue at length against the assumption of legislative power by the judiciary, the institution of the Federal Constitutional Court and the validity of the Constitution (Grundgesetz) itself.

The applicants further contend that neither the Grundgesetz nor German ordinary law support the principles of equal protection of unborn and born life and of a priority of life amongst the values protected. They claim one principle of the Constitution, that of humanity (Menschlichkeit), which forbids state interference with the intimate sphere to which the carrying out of pregnancy belongs.

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VI

Summary of the oral submissions of the respondent Government

1. The representatives of the respondent Government first described the development of the relevant law in the Federal Republic.

Section 218 of the Criminal Code which had been in force from 1871 to June 1974 imposed in its wording a criminal penalty on every interruption of pregnancy. An exception was made, however, for cases of a medical indication concerning health and life of the mother.

Section 218 of the Fifth Criminal Law Reform Act of June 1974 maintained the penalty in principle. It was, however, not applicable to any interruption of pregnancy carried out by a doctor with the counsent of the mother and within 12 weeks after conception (Fristenlösung) (Section 218a). Only at the later stages special reasons were required in order to justify an interruption of pregnancy. The above Act provided further for advice to be given to the pregnant woman which takes account of the situation in which she finds herself and helps to protect the unborn life.

In the judgment of 25 February 1975 the Federal Constitutional Court declared Section 218a null and void insofar as it exempted interruptions of pregnancy even if there were no reasons which are justifiable under the system of values incorporated in the Basic Law. At the same time the Court ordered provisionally, i.e. for the time until new law would enter into force, that from the moment of implantation an interruption of pregnancy was justified only if special reasons (indications) were applicable.

In the meantime a new law, the Fifteenth Criminal Law Reform Act, had been passed by the legislative bodies and was to be promulgated and to come into force in June 1976. This Act incorporated the following principles:

a) Acts of which the effects occur before implantation of the fertilised egg are deemed not to be interruptions of pregnancy

b) For the following stage a penalty was imposed in principle by Section 218. There was, however, a personal exemption of the pregnant woman for an interruption of pregnancy not justified by an indication which was carried out by a doctor within 22 weeks and after social and medical consultation. This did not imply a justification or affect the punishability of the doctor or other persons involved. Even if the interruption was not performed by a doctor, the court was empowered to impose no sentence if the pregnant women was in a special emergency which did not amount to an indication.

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c) Section 218(a) describes an overlapping medical-social indication, with which cases are put on a par in which a child gravely damaged in his health is expected, or the pregnancy was imposed by a crime or if the woman was in grave distress which allowed no other solution.

d) Section 219 provided further for a preceding consultation and a written certificate of indication established by a doctor who must not be the operating doctor.

Section 218(b) para. 2 provided that the persons authorised to be consulted had to show that they were sufficiently informed. The consultation was to help the pregnant woman to make her own decision, and a plurality of persons who could be consulted was to ensure that the pregnant woman found a person in whom she could have confidence. It was not found possible to establish an exhaustive catalogue of subjects which must be covered by the consultation. It should, however, cover the indications contained in Section 218 (a) and the public and private assistance available in particular for continuing the pregnancy and for mother and child (Section 218 (a), para. 1).

As to the certificate of indication, the representatives of the Federal Government stressed that the doctor was not deciding, but only applying a decision contained in the law. The certificate was not binding on the operating doctor, i.e. even if it stated that the reasons put forward by the pregnant woman did not amount to an indication, the operating doctor could arrive at a different conclusion. The justification did not depend on a formal statement but on the existence of an indication.

e) There were special provisions ensuring a responsible assessment by doctors. There was, however, no direct control of doctors. The duty of the doctor under Art. 4 of the Fifth Criminal Law Reform Act to report quarterly to the Federal Statistics Office the number of interruptions and the indications applied served only for statistical purposes. Detection and prosecution of unlawful interruptions depended therefore largely on denouncement and was further impeded by the professional discretion incumbent on doctors.

f) Interruption may only be performed in clinics or in institutions with a special licence.

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The representatives of the Federal Government further explained the situation concerning abortions performed abroad. As far as the practice of interruptions of pregnancy was more liberal abroad, perhaps in the United Kingdom, there existed a tendency of evasion, which existed similarly in the field of drugs.

The Fifth Criminal Law Reform Act as well as the judgment of the Constitutional Court and the new law served, however, to avoid discrimination between those who were able to go abroad for an interruption of pregnancy and those who were not, in that any women who had valid reasons could obtain an interruption of pregnancy irrespective of her financial resources.

As to the punishability of abortions performed abroad, Section 5 No. 9 of the old Criminal Code provided that an abortion committed abroad can be prosecuted in the Federal Republic even though it is not punishable where it was committed, provided that the offender was German and there existed no indication.

If there existed an indication, the pregnant woman was exempted from punishment for the mere failure to undergo the procedure; accessories acting from the Federal Republic, however, could be punished.

2. As to the question whether the applicants could claim to be victims within the meaning of Art. 25 of the Convention, the representatives of the Federal Government recalled that the operative part of the judgment of the Constitutional Court had force of law and that the enactment of a statute did usually not in itself cause anybody to be a victim.

There might be exceptions. The Commission however, required an act to be applied to a person before such a person could bring an application. The applicants, however, claimed neither to be pregnant nor to have been prosecuted for abortion.

He referred to the Commission's decision of 1961 concerning the Norwegian abortion legislation and to the judgment of the United States Supreme Court of 22 January 1973 (Doe and Roe v. Wade) which did not accept that such an indirect interference constituted an actual case or issue.

Assuming, finally, that the applicants had been in a position to claim to be victims, they were no longer, because the new law exempted the pregnant woman who had obtained the necessary consultation and medical treatment, even if no indication was applicable.

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3. i. As to the question whether the application was manifestly ill-founded the representatives of the Federal Government stressed that there was a connection between the right to private life and the right to life, in particular in the context of interruption of pregnancy. In a conflict of both rights the latter prevailed.

This was evident in the case of born life as is shown by the duty to give assistance in an emergency.

Art. 2, para. 1, first sentence, in connection with Art. 1, para. 1 of the Basic Law, however, was also applicable to human life before birth. This was confirmed by the judgment of the Constitutional Court according to which not only state interferences with developing life were prohibited but even a duty was imposed on the state to protect and further such life.

The Constitutional Court found that life in the sense of the historic existence of a human individual existed according to ascertained biological and physiological knowledge at least as from the fourteenth day after conception.

It then had in mind the process and the chances of life incorporated in the embryo.

This did, however, not exclude restrictions of the protection of the unborn life and distinctions from the born life.

The decisive issue according to the judgment was whether the pregnant woman was in a normal situation or whether there were circumstances or burdens considerably beyond the normal measure. In the latter case it was asked what could be expected from her.

He left open the question whether the protection under Art. 2 of the Convention extended to unborn life (which was denied by the Austrian Constitutional Court on 11 October 1974), as the Convention did not exclude more extensive systems of protection of human rights. It resulted from Art. 60 of the Convention that such a protection was not derogated by the Convention.

It was even in the interest of the Convention that the protection of human rights was extended as far as possible.

The relevance of the legal situation under the national constitution was supported by a dictum of the U.S. Supreme Court which had based its decision on the principle that the embryo cannot be considered as a person under the 14th amendment.

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ii. The representatives of the Federal Government relied further on Art. 8 (2) of the Convention. They referred to differences of opinion between the United States and Europe and even amongst the High Contracting Parties such as Sweden and Ireland as to the particulars of interferences with private life in the field of interruption of pregnancy. Whilst there was no uniform right to respect for private and family life, Art. 8 of the Convention protected only a minimum standard which was manifestly not violated by the judgment of the Constitutional Court. A detailed application of Art. 8 (2) of the Convention was given only as an auxiliary argument.

The general condition that an interference must be in accordance with the law was satisfied because the judgment of the Constitutional Court had force of law. As to the further requirement of necessity the representatives of the Federal Government claimed the right to rely on national criteria in the light of different conditions prevailing in the countries. There might be no necessity if a measure serves in fact a different purpose (détournement de pouvoir) or if there was no real danger or if interferences were out of proportion or arbitrary. Neither of these possibilities, however, applied. He referred in this connection to a prohibition of contraceptives compared to which the prohibition of abortions was a very different matter.

The necessity was further not excluded by the low number of convictions for abortion. Whilst the argument of the low number of convictions could equally be used with regard to other offences such as theft, the legislator was entitled to use other criteria.

The representatives of the Federal Government further maintained that the society in the Federal Republic was a democratic society with a democratic constitution. This was not excluded by the control of legislative decisions by the Constitutional Court, because even the majority was bound by the constitution.

The representatives of the Federal Governments referred to each of the particular grounds of interference contained in Art. 8 (2) of the Convention.

a) The interference was necessary for the protection of the rights and freedoms of others in the light of the protection accorded by the constitutional order of the Federal Republic to the unborn life which existed more or less in all member countries. It followed that the unborn child was covered by the notion of "others" in Art. 8 (2) of the Convention. This was confirmed by the protection of the unborn child in the law of torts and in the law of succession. There were differences

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between the member states which existed however also concerning the rights and freedoms of children and adolescents and the restriction of the private sphere of parents and other adults as e.g. in the field of the protection of minors from sexual acts. Despite all these differences there existed a protection of the private sphere.

b) The "protection of morals" was quoted mainly in order to show the influence of moral ideas on the national laws and the resulting differences such as in the law of divorce, the punishability of adultery and of sexual acts between relatives or between men.

If the legislator of a member country reasonably decided that certain acts such as interruption of pregnancy must be punishable lest the boundary between right and wrong was violated in the moral conscience of the population and the dangerous conclusion from the absence of sanction to permission was drawn, this had to be respected in the interpretation of the Convention.

c) Interferences for the "protection of health" were allowed not only for the protection of the health of others, but also for the protection of the health of the very person claiming his right to private life, as in the case of restriction of access to drugs. Many countries which permitted interruptions of pregnancy in certain cases required for the same reason the consultation of a doctor. Although this might already be considered as an interference with the woman's private sphere, it was not the opinion of the Federal Government that she should be free to choose any means.

All laws permitting interruption of pregnancy and in particular the French one did not accept abortion as a means of birth control. There were no binding criteria in Art. 8 (2) of the Convention as to the stage of pregnancy at which the protection of the woman's health became necessary. Social, medical and other conditions might permit different solutions. Any rules, however, which provided for such a protection at an early stage could not be considered to be arbitrary.

d) The protection of crime was not a decisive factor. It served, however, to show that considerabl differences existed between the criminal laws of member countries, which influenced the field of private life.

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VII

Summary of the oral submissions of the applicants

The representative for the applicants contended that the attitude of the Federal Government was contradictory in that it first had enacted the Fifth Criminal Law Reform Act containing the three-months' solution and now defended a system of indications. He maintained further that the new law was only a disguised three-months' solution. He did not consider that the judgment of the United States Supreme Court was relevant, as the United States had not signed the Convention. He claimed, however, that there was a tendency in Europe towards the three-months' solution and he referred to the discussions in Italy and to the judgment of the Austrian Constitutional Court of 11 April 1974. He did not accept the argument that the Convention was ratified without reservation by countries in which interruptions of pregnancy were allowed only if an indication applied.

He submitted that the applicants could claim to be victims of a violation of the Convention by the judgment of the Federal Constitutional Court, because they were faced with the alternative either to renounce sexual intercourse or to use contraceptives which they did not want to use for medical or other reasons or to carry out an eventual pregnancy against their will. They could not be expected to undergo a criminal procedure and punishment before they can bring an application.

The applicants understood family planning to be a matter of private life within the meaning of Art. 8 of the Convention.

As to the situation created by the judgment of the Constitutional Court, they felt that the prohibition of interruption of pregnancy which forced them to carry out an eventual pregnancy under the threat of a criminal sanction unduly influenced their private life.

As to the situation under the new law he maintained that there was a violation of Art. 8 of the Convention in that interruption of pregnancy remained in principle an offence and could only be justified by the observance of procedural provisions and by the existence of an indication.

The mere obligation to consult a doctor who had the quasi-judicial power to decide whether or not there was an indication, constituted a grave interference with private life. The system of indications prescribed by the Constitutional Court was in the submissions of the applicants' representative

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further contrary to Art. 9 of the Convention in that it obliged the applicants to abide by certain religious moral principles. These christian principles were no longer valid in an overpopulated world the future of which was not secured and in which it might be better not to be born than to be born.

The applicants' representative also relied on the element of discrimination under Art. 14 of the Convention which consisted in the fact that a wealthy person could easily evade the prohibition of interruption of pregnancy whilst the effects of the prohibition would come down more heavily on a poor person.

A comparison with the problem of drugs and of theft was inadmissible in the matter of interruption of pregnancy and private life.

Speaking for the first applicant, who is not married, he finally submitted that the prohibition of interruption of pregnancy resulted in a violation of Art. 12 of the Convention in that an unwanted illegitimate child would reduce considerably her chances to marry.

THE LAW

1. The applicants complain that under the law in force in the Federal Republic of Germany concerning interruption of pregnancy they must either renounce sexual intercourse or use contraceptive measures or run the risk of unwanted offspring.

They take the view that this is the result of the judgment of the Federal Constitutional Court of 25 February 1975 which declared Section 218 of the Criminal Code, as amended by the Fifth Criminal Law Reform Act, null and void.

This Section provided that abortion, performed in the first twelve weeks of pregnancy by a doctor and with the consent of the mother, shall not constitute a punishable offence. The Court made a provisional order pending the coming into force of a new statute.

2. In the meantime, the Federal Parliament has adopted a new amendment, the Fifteenth Criminal Law Reform Act, based on the decision of the Federal Constitutional Court. It is foreseen that this amendment will be promulgated and enter into force in June 1976.

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3. Under Article 25 (1) of the Convention only the victim of an alleged violation of the Convention may bring an application.

When dealing with an application introduced in 1960 by a man who complained of a Norwegian statute permitting interruption of pregnancy under certain conditions, the Commission had held that the applicant, who declared that he acted in the interest of third persons, could not claim to be himself the victim of a violation of the Convention and that it could not examine in abstracto the compatibility of a statute with the Convention (Application No. 867/60, Coll. 6, p. 34).

4. The applicants have not here claimed to be pregnant, or to have been refused an interruption of pregnancy, or to have been prosecuted for unlawful abortion.

However they claim that pregnancy and its interruption are a part of private life, and that the legal regulation of abortion is an intervention in that private life.

5. The Commission considers that pregnancy and the interruption of pregnancy are part of private life, and also in certain circumstances of family life. It further considers that respect for private life "comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field, for the development and fulfilment of one's own personality": Decision on Application No. 6825/74 X against Iceland, and that therefore sexual life is also part of private life; and in particular that legal regulation of abortion is an intervention in private life which may or may not be justified under Article 8 (2).

Consequently the Commission concludes that the application is not incompatible with the Convention and that the applicants are entitled under Article 25 to claim to be victims of a breach of the Convention.

6. The situation of which the applicants complain was created by the judgment of the Federal Constitutional Court of 25 February 1975, against which there is no remedy under German law.

Assuming, however, that the six months' time-limit contained in Article 26 of the Convention is applicable to an application directed against a legislative situation resulting from a judgment of a constitutional jurisdiction, it can be noted that the present application was introduced on 24 March 1975, i.e. less than six months after the judgment concerned. It follows that the application cannot be rejected for one of the reasons mentioned in Articles 26 and 27 (3) of the Convention.

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7. The Commission having examined the observations of the applicants and the respondent Government, finds that the application is not manifestly ill-founded, since it raises issues under Article 8 of the Convention and in particular the question whether the intervention in their private life, of which the applicants complain, is justifiable. These issues are of a complexity and importance which require a consideration of the application on its merits.

8. One of the applicants has also alleged a violation of Article 12 of the Convention in that being unmarried she could by unwanted motherhood suffer an interference with her chances to marry. The applicants have further invoked Article 9 which guarantees the freedom of thought, conscience and religion, of Article 11 which guarantees the freedom of association, and Article 14 which prohibits discrimination in the enjoyment of the rights and freedoms set forth in the Convention.

Having decided to submit the application to an examination of the merits, the Commission did not find it necessary to decide upon these further allegations at the present stage.

For these reasons, the Commission

DECLARES THE APPLICATION ADMISSIBLE

For the Secretary to the Commission — President of the Commission

(J. RAYMOND) — (J.E.S. FAWCETT)

Appendix V

ABORTION LAWS IN EUROPE

I. Austria

1. The legislation

1. In Austria interruption of pregnancy is regulated in Arts. 96 to 98 of the new Penal Code of 1974 which entered into force on 1 January 1975. According to Art. 97 (1) an interruption of pregnancy is not punishable:

a) when performed by a doctor (2) after medical consultation and within the first three months from the beginning of pregnancy (3) (time-limitation, "Fristenlösung");(4)

b) when carried out by a doctor in order to avoid a serious danger (5) to the life or a severe injury to the physical or mental health of the pregnant woman which cannot otherwise be prevented, or if there is a serious danger that the child may be mentally or physically seriously defective, or if the pregnant woman was under eighteen years of age or was under guardianship ("unmündig") at the time of fecundation;

c) when the pregnancy is terminated in order to save the pregnant woman's life from an immediate and not otherwise avoidable danger and medical help has not been available in time.

2. The social indication is not recognised in Austrian law as a ground for abortion, nor is that part of the ethical indication which concerns pregnancy resulting from indecent assault or incest. Abortions carried out in such cases after the end of the third month of pregnancy are punishable under Art. 96 of the Penal Code (6).

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(1) Not necessarily in a hospital, see Foregger-Serini, Strafgesetzbuch 1975, p.141.

(2) Not necessarily a gynaecologist, see ibid.

(3) The pregnancy is considered to begin with the nidation, Foregger-Serini, loc. cit., p. 139.

(4) The Austrian Parliament has recently been seized by a popular initiative (Volksbegehren) to repeal this clause.

(5) An existing danger which cannot otherwise be prevented, Foregger-Serini, loc.cit., p. 142.

(6) Ibid.

2. The compatibility of the Austrian "Fristenlösung" with the Austrian Constitution and the European Convention on Human Rights

3. In a decision of 11 October 1974 (1) the Austrian Constitutional Court, seized by the Land Government of Salzburg, ruled that the "Fristenlösung" in Art. 97 (1) of the Penal Code was compatible both with the Austrian Constitution and with the European Convention on Human Rights.

The Regional Government had maintained that this provision violated the Austrian Constitution, in particular the right to life and the principle of equality, and Arts. 2, 8 and 12 of the European Convention on Human Rights, which in Austria has the rank of constitutional law.

4. With regard to the alleged right to life under "constitutional law based on treaties" the Court stated that such a right could, if it existed, protect the individual only against interferences by the State. The Court found that an interruption of pregnancy did not constitute such an interference.

5. The Court further held that the impunity of abortion during the first three months of pregnancy did not violate the principle of equality as the distinction made by the legislator between abortions before and after the end of the third month was not arbitrary. The Court noted in this connection that interruptions of pregnancy were considered to be more dangerous to the health of the mother if performed after the third month.

6. The Court finally held that the three months' clause in Art. 97 (1) of the Code did not violate Arts. 2, 8 or 12 of the Convention. The Court considered:

- that it was clear from the text of Art. 2 that this provision did not protect the life of the unborn child; and

- that neither Art. 8 nor Art. 12 obliged the national legislator to penalise abortions. The impunity of early abortions under Art. 97 (1) of the Code therefore did not violate either provision.

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(1) EuGRZ (Europäische Grundrechte-Zeitschrift), 1975, p. 74.

II. Belgium

7. In Belgium, abortion is dealt with in Arts. 348 to 353 of the Penal Code. According to these provisions an interruption of pregnancy is an illegal act and no exception is expressly provided for. However, an abortion is considered as justified if carried out in order to save the life of the mother. This exception, based on the preparatory works, has on various occasions been confirmed by the Belgian courts (1).

8. In 1974 a National Commission for Ethical Problems was set up by the Government with the task of formulating an opinion as to the use of contraceptives, the problem of abortion and the review of the provisions in the Penal Code regarding abortion. The Commission's Report (2) was adopted on 4 May 1976 by 13 of its 25 members (3).

9. This majority states as its general object "the maximum reduction of the number of abortions, whether clandestine or not" - an object which, in their view, cannot be achieved by making abortion legal but only by dealing with the causes of abortion (4). Interruptions of pregnancy should not be used as an instrument of demographic policy, be it in a restrictive or permissible sense (5), and reform should inter alia aim at eliminating social inequalities between women as regards access to abortion without risking adverse medical and legal consequences (6). Abortion must be an exception, not a rule. Regard must be had not only to the situation of the woman but also to the existence of the foetus, and only very serious circumstances, not simply personal convenience, could be taken into consideration as indications for abortion (7).

10. The Report does not suggest a system of precise indications which could justify abortion. It finds that one specific indication rarely corresponds to the complex situation ("living conditions") of a woman seeking abortion and that any system of indications would be open to very different interpretations in practice (8). It consequently proposes the following "basic principle" (9):

> "An interruption of pregnancy carried out when there exists a set of circumstances of a nature that would seriously and durably threaten the living conditions of the woman does not constitute either a crime or an offence. The appreciation of each individual situation is based on a global evaluation in which the somatic, psychologic and social elements must be taken into consideration. These various aspects are furthermore comprised in the present notion of health."

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(1) Revue trimestrielle de Droit, Annales de droit 4, Tome XXXI, 1971, p. 411.
(2) "Proposition relative a l'interruption de grossesse dans le cadre d'une politique de parente responsable", Brussels 1976.
(3) See p. 1 (last para.) of the Report. Although expressing different views in other respects, both the majority and the minority condemned a total freedom of abortion.
(4) P. 31 (para. 138).
(5) P. 33 (para. 140).
(6) P. 33 (paras. 142-143).
(7) P. 34 (para. 147)
(8) Pp. 34-35 (paras. 148-158); in this connection, the notion of "health" is also discussed.
(9) Pp. 41-43 (para. 182).

The decision as to abortion shall be taken jointly by the woman and the doctor after having been informed by a team from the advisory service (1).

11. The Report stresses the importance of the use of contraceptives and of alternative solutions that would make it possible to reduce to the largest possible extent the motives for abortion. It proposes to build up a "reception structure" (une structure d'acceuil) that would provide a woman demanding abortion with the necessary information and help. Education should furthermore be used as a means of reducing the number of abortions and of developing a responsible parenthood (2).

III. Cyprus

12. The present legislation contains a system of indications: it appears that, besides the medical, eugenic and ethical indications, also the social indication is recognised as a valid ground for interrupting a pregnancy (3).

IV. Denmark

13. A new Act on interruption of pregnancy was adopted in Denmark on 13 June 1973 and entered into force on 1 October 1973. It is more liberal than the earlier legislation of 1970.

14. According to the new law a woman residing in Denmark has the right to have her pregnancy terminated provided that the abortion can take place before the end of the twelfth week of pregnancy (Art. 1). The request for abortion shall be addressed to a doctor or a maternity assistance clinic. No particular authorisation is required during this period but, if the request is made to a doctor, the woman must be informed about the means of assistance available after the birth of a child. If the request is addressed to a maternity assistance clinic, the said information shall be given to the woman if she so wishes. She must furthermore always be informed of the character of the surgical intervention, its direct consequences and the risks which may be presumed connected therewith (Art. 8).

15. After the end of the twelve week period a pregnancy may be interrupted without authorisation if this is considered necessary to avoid a danger to the woman's life or a serious impairment of her phsyical and mental health, and provided that this danger is exclusively or mainly of a medical nature (Art. 2). A woman residing in Denmark can furthermore obtain authorisation for abortion after twelve weeks of pregnancy if one of the following prerequisites is fulfilled:

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(1) Para. 200.
(2) Paras. 185 et seq.
(3) See the German Government's observations of 6 December 1976 on the merits of the present application, pp. 41, 43.

(1) if the pregnancy, birth or care of the child would impair the woman's physical or mental health;

(2) if the pregnancy is the result of a criminal act mentioned in Art. 210 or Arts. 216 - 224 of the Penal Code (i.e. incest, indecent assault, etc.);

(3) if there is a danger that the child would suffer from a serious physical or mental illness due to hereditary predispositions or lesion or illness of the foetus;

(4) if the woman by reason of physical or mental illness or mental deficiency is incapable of providing for the child in a satisfactory manner;

(5) if the woman on grounds of her youth or immaturity is not capable of providing for the child in a satisfactory manner or, finally,

(6) if the pregnancy, birth or care of the child may be supposed to involve a serious burden for the woman which cannot be avoided in some other way, having regard to the woman, the maintenance of the home and the care of the other children of the family. In judging this, consideration must be given to the age of the woman, her work-load and other personal conditions as well as to the family's housing, economy and health conditions (Art. 3(1), 1 - 6).

However, an interruption of pregnancy may in these cases only be authorised if the conditions underlying the request are of such importance that it is justified to expose the woman to the increasing risk to her health involved in the operation (Art. 3 (2)).

A consultative board can approve a request for abortion in cases falling under Arts. 1 and 3 of the Act even if the woman concerned is not residing in Denmark provided, however, that she has a particular attachment to the country (Art. 7).

V. France

1. The legislation

16. The Act No. 75-17 of 17 January 1975 on intentional interruption of pregnancy partially suspended for a period of five years the application of Art. 317 of the French Penal Code (Art. 2 of the Act) which provides for the punishment of abortion.

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17. This new Act amended the provisions of the Public Health Code to the effect that a pregnant woman whose conditions place her in a situation of distress can now request a doctor to terminate her pregnancy. However, the intervention must take place before the end of the tenth week of pregnancy. The woman must be informed about the medical risks of abortion and about the means of assistance which are available to her during pregnancy and would be available after the birth of a child ((Arts. 3 and 4 of the Act).

18. An interruption of pregnancy may also be carried out for therapeutic reasons at any time, provided that two doctors (1) certify, after examination and discussion:

a) that the continuance of the pregnancy would seriously jeopardize the health of the woman; or

b) that there is a strong probability that the child would be affected by a particularly serious disease which at the time of diagnosis is known to be incurable.

2. The compatibility of the Act on intentional interruption of pregnancy with the French Constitution (2)

19. Some members of the French National Assembly seized the Conseil constitutionnel claiming that Art. 4 of the Act on intentional interruption of pregnancy was incompatible both with the Preamble of the French Constitution and with Art. 2 of the European Convention on Human Rights.

They submitted with regard to the Convention that, by virtue of Art. 55 of the Constitution, it was superior to ordinary statutes; as an international treaty, it prevailed over subsequent statutes.

Art. 2 of the Convention obliged the High Contracting Parties to protect the right to life and the intentional deprivation of a person's life could only be considered lawful in the cases enumerated in this provision.

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(1) One must exercise his occupation in a public hospital, or in a private hospital satisfying the conditions laid down by the law; the other one must be listed at the Cour de Cassation or a Court of Appeal.

(2) EuGRZ 75, pp. 60-67.

Art. 2 also covered the life of the unborn child which was considered as a person in the law of civilized nations, as shown by the following instruments:

- The Declaration of the Rights of Man contained in the draft constitution, which was adopted by the National Assembly on 19 April 1946 but was rejected by a referendum on 5 May 1946, provided in Art. 23 that the protection of health "as from conception" was guaranteed to everybody.

- The resolution of the United Nations General Assembly on the Rights of the Child (Res. 1386 - XIV) stated in its Preamble:

> "Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care including appropriate legal protection, before as well as after birth."

20. The Conseil constitutionnel, in its judgment of 15 January 1975 (1) found that it was not competent to rule on the compatibility of the Act on intentional interruption of pregnancy with the European Convention on Human Rights, but only on the compatibility with the Constitution.

The Conseil constitutionnel held that the Act on intentional interruption of pregnancy was not incompatible either with the facts to which the Preamble of the Constitution of 4 October 1958 referred or with any provision of the Constitution.

It respected the liberty of persons called upon to perform, or to assist at, an interruption of pregnancy and therefore did not violate Art. 2 of the Declaration of the Rights of Man and of the Citizen. The Act further allowed an interference with the principle of respect for every human being as from the commencement of life only in cases of necessity and in accordance with the conditions and limitations defined in the Act itself. Moreover, none of the exceptions provided for in the Act was contrary to any of the fundamental principles recognised by the laws of the Republic, nor did it disregard the protection of the child's health as enounced in the Preamble of the Constitution of 27 October 1946, or any other principle of constitutional status. It followed that the Act was not unconstitutional.

VI. Federal Republic of Germany

/ See paras. 16 to 26 of the present Report. /

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(1) Ibid. pp. 54-56.

VII. Greece

21. According to Art. 304 of the Greek Penal Code of 1950, abortion is a punishable offence. It is not punished, however, if performed by a doctor in order to avert an otherwise unavoidable danger to the life or a serious and permanent injury to the health of the pregnant woman, provided that this action is certified as necessary by a second doctor. An abortion performed by a doctor with the consent of the pregnant woman is also not punished if the pregnancy followed a rape, abuse of a person incapable of resistance, seduction of a girl under sixteen ears of age, or incest.

VIII. Iceland

22. Iceland was the first Scandinavian country to introduce a law specifically dealing with abortion (1) and the first country in the world which in 1935 introduced the concept of medico-social indications as a ground for granting abortions (2). Abortion was, on the other hand, not permissible on either eugenic or ethical grounds.

23. The law of 1935 has now been replaced by Act No. 25 of 22 May 1975 which liberalised the previous legislation. The new Act permits an interruption of pregnancy in the following cases:

1. for social reasons:

when it is presumed that pregnancy and childbirth will be too difficult for the woman and her next-of-kin, owing to social reasons beyond control. It shall be taken into account:

(a) that the woman has given birth to many children at short intervals, and that a short time has passed since the last birth;

(b) that the woman suffers from domestic plight (large number of small children needing care, poor health of other members of the household;

(c) that the woman, because of her youth or immaturity is not not able to take care of her child in a satisfactory manner;

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(1) Abortion Laws, a survey of current world legislation, World Health Organisation, Geneva 1971, p. 64.

(2) Ibid, p. 8.

(d) that there are other analogous reasons;

2. for medical reasons:

(a) when it may be presumed that the woman's physical or mental health is endangered by continued pregnancy and childbirth;

(b) when it may be presumed that the child is in danger of being born deformed or suffering from a serious disease owing to heredity or injury of the uterus;

(c) when a physical or mental disease imposes a serious reduction in the capacity of a woman or a man to take care of and bring up the child.

24. Any abortion permitted under the new Act shall be carried out as early as possible and preferable before the end of the twelfth week of pregnancy. It shall not be performed after the sixteenth week of pregnancy unless medical evidence unequivocally shows that the life and health of the woman are more endangered by prolonged pregnancy and/or childbirth. However, even if carried out after the sixteenth week, an interruption of pregnancy is permissible if there is a strong likelihood of deformation, hereditary defects or injury of the foetus.

IX. Ireland

25. In Ireland the question of abortion is dealt with in Sections 58 and 59 of the Offences against the Person Act, 1861 (1). An abortion is not lawful in any circumstances.

X. Italy

1. Legislation

26. In the Italian legislation abortion is dealt with in Arts. 545 to 555 of the Penal Code of 1930. It appears that, whether carried out by a third person or by the pregnant woman herself, a termination of her pregnancy is an illegal act liable to punishment.

2. Judgment of the Constitutional Court

27. The Italian Constitutional Court, in a decision of 18 February 1975, declared Art. 546 unconstitutional insofar as it prohibits an abortion when the continued pregnancy involves

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(1) An Act of the United Kingdom Parliament which still is in force in Ireland.

a grave injury or danger to the health of the mother which is medically certified as to its grounds and which cannot be prevented otherwise(1).

3. Recent Development

28. On 21 January 1977 the Chamber of Deputies adopted by a majority of 310 against 296 votes with one abstention a new Abortion Bill.

Under the Bill a woman could decide to terminate her pregnancy within the first 90 days if there should be serious danger to her physical or mental wellbeing because of her state of health or for economic, social or family reasons. A termination would also be permitted in cases of rape and incest, or if there should be danger of a malformed child. After 90 days an abortion could be performed only if there was a danger to the woman's life or grave danger to her health (2).

29. On 7 June 1977 the Bill was rejected by a narrow majority in the Senate.

On 9 June 1977 it was again introduced in the Chamber.

XI. Luxembourg

30. In Luxembourg, abortion is dealt with in Arts. 348 to 353 of the Penal Code. According to these provisions an interruption of pregnancy is an illegal act and no exception is expressly provided for. It appears, however, that abortions are not prosecuted if carried out in order to save the life of the mother.

31. A draft Bill (3) provides that abortions are not punishable if:

- the continuation of pregnancy would endanger the physical, mental or psychic health of the woman;
- there is a risk that the child to be born would suffer from a serious disease or physical deformation or severe psychic impairment; or
- the pregnancy is the result of an act of violence or a criminal act.

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(1) EuGRZ 1975, pp. 162-165.
(2) Council of Europe, Newsletter on Legal Activities, No. 26 (Jan.-Feb. 1977), pp. 8-9.
(3) Prepared by the Government but not yet submitted to Parliament.

XII. Malta

32. In Malta abortion is dealt with in Arts. 255-257 of the Penal Code of 1854. According to these provisions abortion is an illegal act and they do not expressly provide for any exceptions. However, a medical indication is apparently recognised (1).

XIII. The Netherlands

1. Legislation

33. Under Art. 251 bis and Arts. 295 to 299 of the Dutch Penal Code of 1881 all interruptions of pregnancy are punishable.

2. Practice

34. Prosecutions for abortions are rare. From replies given by the Minister of Justice to questions put in Parliament (2), it appears that there are no directives for Public Prosecutors as to the policy of prosecuting doctors having carried out abortions. In 1971, the Attorneys-General adopted the view that prosecution should only take place after consultation with the State Control of Public Health. Doctors performing abortions would furthermore not commit a crime if acting in accordance with the rules of their profession. The State Control of Public Health has adopted a restrained position in this respect as it is difficult for the medical inspector of the Public Health Authority to determine whether a medical indication has been established in accordance with the medical rules. Accordingly prosecution of doctors has become almost impossible (3).

35. In a letter dated 28 October 1974 from the Minister of Justice to the President of the Second Chamber concerning the criminal investigation into the activities of a certain abortion clinic where pregnancies of more than 12 weeks were interrupted, the Minister stated that an investigation procedure would be instituted by the Public Prosecutor and that doctors of the clinic would be prosecuted in order to obtain a court decision as to whether the treatment in that clinic was to be considered as a crime. However, there was no intention to tighten the policy of prosecution with regard to abortion clinics where pregnancies of less than 12 weeks were interrupted.

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(1) See the Government's observations of 6 December 1976 on the merits of the present application, p. 40.

(2) Tweede Kamer, zitting 1974-1975, 13 161, No. 1, zitting 1975-1976, 13 964, No. 1 and Aanhangsel.

(3) Ibid.

3. Recent Development

36. A new Bill on termination of pregnancy containing important changes of the present legislation was adopted by the Second Chamber of the Dutch Parliament on 29 September 1976. According to Art. 2 of the Bill a doctor who examines whether a woman should be treated for the purpose of interrruption of her pregnancy shall consider whether she has reached her decision freely and has taken account of her responsibility towards herself as well as the unborn child. If necessary, he shall consult one or more other experts and, with the woman's consent, also the father of the child to be born and the woman's legal representative. In evaluating the various considerations, in particular the length of the pregnancy, the doctor must ensure that the woman can be supported and informed sufficiently in accordance with medical knowledge. His findings shall be made known to the woman within a period of eight days after she has contacted him with a view to abortion.

The Bill did not contain any provisions regarding the time within which an abortion may be carried out. It was proposed, however, to amend the Penal Code to the effect that deprivation of life shall include the killing of a foetus which may reasonably be expected to be able to live outside the body of the mother.

37. On 14 December 1976 the First Chamber rejected the Bill by 41 votes against 31.

XIV. Norway

38. The Norwegian Act on interruption of pregnancy (No. 50) was adopted on 13 June 1975.

39. Norwegian law does not allow a pregnant woman to decide herself that her pregnancy be terminated. The above Act, however, enumerates in Art. 1 the following cases in which a pregnant woman can be authorised to have her pregnancy interrupted:

(a) if the pregnancy, birth or care for the child may involve an unreasonable burden on the woman's physical or mental health. The fact that she has a predisposition for malady shall be taken into consideration;

(b) if the pregnancy, birth or care of the child may bring the woman into a difficult situation of life;

(c) if there is a great danger that the child may contract a serious illness as a result of hereditary predisposition, illness, or injurious influence during pregnancy.

(d) if the pregnancy is the consequence of incest or indecent assault (cf Arts. 207-209 and 192-199 of the Norwegian Penal Code);

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(e) if the woman has a serious mental disease or if she is severely mentally retarded.

40. When a request for abortion is examined under the circumstances mentioned in Art. 1 (a), (b) and (c) above, the woman's entire situation must be taken into consideration, including her ability to provide care for the child in a satisfactory way. Particular importance shall be attached to the woman's own opinion on her situation.

41. An interruption of pregnancy shall be carried out as early as possible during the pregnancy, in general before the end of the twelfth week. If an abortion is to be performed after the twelfth week the requirements for permission increase with the advancement of pregnancy. After the eighteenth week a pregnancy cannot be terminated except if there are particularly serious reasons for such an operation. If there is a reason for presuming that the foetus is viable, an interruption of pregnancy cannot be authorised (Art. 2).

. If the pregnancy involves an imminent risk to the life or health of the pregnant woman, it may be terminated without consideration being taken of the requirements set out in the Act (Art. 10).

42. A pregnancy shall only be terminated by a doctor and, after the twelfth week, only in a hospital. During the first three months, an abortion can also take place in another institution, approved by the county physician (Art. 3).

XV. Sweden

43. The present Act on Abortion of 14 June 1974 entered into force on 1 January 1975. It replaced the old Act from 1938 on interruption of pregnancy.

44. The main principle in the new Act is that the woman herself decides whether an abortion is to be carried out upon her (1). Accordingly, abortion is free on demand up to the end of the eighteenth week of pregnancy.

45. If the abortion can be carried out before the end of the twelfth week of pregnancy the woman need only consult a doctor; after the twelfth week she also has to discuss the matter with a counsellor. The purpose of this discussion is to assist the woman in making a difficult decision (2).

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(1) Fact Sheets on Sweden, published by The Swedish Institute, July 1976.

(2) Ibid.

46. An abortion can only be refused if it would involve a serious danger to the woman's life or health. It is for the doctor to decide whether there are any medical obstacles to the operation.

47. After the end of the eighteenth week of pregnancy, an abortion may only be carried out with the authorisation of the National Board of Health and Welfare (Socialstyrelsen), which may only be given if there are particular reasons for an abortion; it may not be granted if there is reason to believe that the foetus is viable (Art. 3).

When it can be assumed that the pregnancy constitutes a severe danger to the woman's life or health by reason of a malady or physical defect, the National Board of Health and Welfare authorises an abortion even if the foetus may be presumed viable (Art. 6). In emergency situations such an authorisation is not required.

48. If an abortion is refused before the pregnancy has continued for eighteen weeks, the case must be submitted to the National Board of Health and Welfare for decision. There is no appeal against the Board's decision.

49. An abortion may only be performed if the woman is a Swedish citizen or residing in Sweden or if the National Board of Health and Welfare for particular reasons authorises the abortion.

50. An abortion may only be performed by a person competent to discharge the profession of a physician and in a public hospital or other dispensary approved by the National Board of Health and Welfare (Art. 5).

XVI. Switzerland

1. The legislation

51. The Swiss legislation on abortion is to be found in Arts. 118 to 121 of the Federal Penal Code of 1937. In principle, abortions are punishable offences.

52. Under Art. 120, an abortion is not punishable when the pregnancy is terminated by a licensed physician with the written consent of the pregnant woman (1) and with the concurrent opinion of a second licensed physician, provided that the abortion is performed in order to prevent a danger to the life of the woman, or a serious danger that her health might be seriously and permantly injured, and that this danger cannot be averted otherwise.

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(1) If she is incapable of understanding her situation, the written consent of her legal representative is required.

53. The concurrent opinion shall be given by a doctor authorised by the competent cantonal authority.

It is not required in the case of an emergency (immediate danger) where the doctor, however, must, within twenty-four hours, notify the competent cantonal authority (Art. 120 (2) read in conjunction with Art. 34 (2) of the Penal Code).

54. If the pregnancy is interrupted because the woman was in another state of distress, the judge can mitigate the sentence.

2. The application of Art. 120

55. The application of Art. 120 of the Penal Code varies significantly from one canton to another. It generally appears that this provision is being applied literally in rural and Catholic cantons; consequently, only a very serious danger to the life or health of the pregnant woman can there justify an abortion. In urbanised and Protestant (and non-religious) cantons, on the other hand, psychiatrists are in general defining the notion of danger to the health of the pregnant woman in a wide manner and abortions can be obtained without great difficulty. Still, even in one of these cantons, namely in Neuchâtel, it was recently revealed that some physicians had performed a considerable number of abortions found to be illegal

3. Proposed changes of the law

56. A liberalisation of the rules governing aborttion has been prepared during the last years. There is, however, no consensus on how far it should go.

In a first phase, the Government took a position declining the "Fristenlösung" (time-limitation). On 22 January 1976 an initiative for this solution - proposing a change of the constitution - was filed with 67,769 signatures. It will be put to public vote, the Government proposing to reject it. Parliament has not yet decided what to propose to the voter.

XVII. Turkey

57. The present Turkish legislation on abortion comprises the Law of 1 April 1965 on family planning and the Regulations of 12 June 1967 concerning the interruption of pregnancy and sterilisation.

Prior to this legislation an abortion was only permitted when it constituted the sole means of saving the life of the pregnant woman (1).

58. An abortion may now be authorised:

1. if the life of the woman is endangered or is liable to be endangered by the pregnancy; or
2. if the embryo or foetus is unable to develop normally or if there is a risk of a serious congenital defect affecting the child or succeeding generations.

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(1) Abortion Laws loc. cit. p. 43.

59. The diseases and conditions which constitute indications for therapeutic abortions (No. 1 above) are enumerated in Annex I to the 1967 Regulations. They include a number of diseases of various organs and systems, as well as mental diseases, such as schizophrenia, manic-depressive psychosis, psychosis and paranoia.

60. The 1967 Regulations also enumerate the cases in which there is a risk of a serious deformity affecting the foetus or succeeding generations(1).

XVIII. United Kingdom

61. The Abortion Act 1967, which entered into force on 27 April 1967, deals with medical terminations of pregnancy and extended the grounds for legal abortion to cover also eugenic and medico-social indications. It applies to England, Wales and Scotland but not to Northern Ireland.

62. The Act states that 'anything done with intent to procure the miscarriage of a woman is unlawfully done unless "authorised by Section 1" 5(2). (2)

63. Sect.1 (1) of the Act permits the termination of a pregnancy by a registered medical practitioner if two registered medical practitioners find:

(a) that the continuance of the pregnancy would involve risk to 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

(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.

In determining the risk of injury to health, "account may(3) be taken of the pregnant woman's actual or reasonably foreseeable environment" (Sect. 1(2)).

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(1) Diseases treated during pregnancy with cortisone or by means of medicaments liable to be seriously prejudicial to the foetus; treatment with X-rays or radioisotopes, liable to affect the embryo or foetus; hereditary mental diseases in the father or the mother; the parents have already a number of children who are mentally retarded as a result of a chromosome defect or anomaly; the following diseases have occurred during the first three months of pregnancy: 1. rubella 2. viral hepatitis ~~3. toxoplasmosis~~ 4. varicella and 5. other serious viral infections.

(2) According to Sect. 5(1), the Act does not affect the provisions of the Infant Life (Preservation) Act 1929 which protects the life of the viable foetus.

(3) To be read as meaning "shall", cf. Re Chuter (No. 2), [1959] 3 All E.R. 481; [1960] 1 Q.B. 142.

64. Any treatment for the termination of pregnancy must be carried out in a hospital authorised by the Minister of Health or the Secretary of State under the National Health Service Act, or in a place approved by the said Minister or the Secretary of State (Sec. 1(3). Neither this provision however, nor the requirement of the opinion of two registered medical practitioners shall "apply to the termination of pregnancy by a registered medical practitioner in a case where he is of the 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"(Sec. 1(4)).

65. As in most other countries, no person in the United Kingdom is obliged to take part in an abortion to which he or she has a conscientious objection. However, this clause does not affect a person's 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 (Sect. 4 of the Act.)

66. A private members' Bill to amend the Abortion Act 1967 has recently been introduced to the House of Commons. It prohibits Advice Bureaux from sending women to clinics with which they have a financial "or other" agreement. It also cuts the pregnancy period during which abortions are allowed from 26 weeks to 20, unless a child would be born seriously disabled, or the mother would be gravely and permanently injured. It allows only doctors who have been qualified for five years to authorise abortions (1).

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(1) Council of Europe, Newsletter on Legal Activities, loc. cit., pp. 9-10.

Annex I: Procedures prescribed for permitted abortions

1. In certain countries specific procedures are prescribed for permitted abortions.

I. Austria

2. Art. 97 (1) of the Penal Code authorises interruptions of pregnancy "after medical consultation". It appears from the Report of the Legal Committee (Justizausschussbericht) of the Austrian Parliament (Nationalrat) that the purpose of this consultation is to provide the woman with the necessary information enabling her to reach a decision. This information can be obtained from an information centre or from a doctor (1).

The interruption of pregnancy may be performed by the doctor who was consulted by the woman, or by any other doctor (2). No doctor can be compelled to perform an abortion (3).

II. Denmark

3. The Minister of Justice has set up one or several Consultative Boards (samråd) in each maternity assistance institution. These boards shall inter alia decide cases under Art. 3 of the Act of 1973 on interruption of pregnancy and also cases concerning women who for mental or other grounds are unable to understand the significance of the abortion (Art. 5 (2) of the said Act).

Each board shall consist of the director of the institution, or of a collaborator with a corresponding education, and two doctors. One of the doctors shall be a gynaecologist or surgeon, the second shall be a psychiatrist or have a particular social-medical knowledge (Art. 4).

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(1) Foregger-Serini loc. cit. p. 141.

(2) Ibid.

(3) The Status of Women in Austria (published by the Austrian Federal Ministry of Social Affairs), 1976, p. 10.

4. A decision by a Consultative Board can be appealed against to an Appeals Board which shall also supervise the activities of the Consultative Board. The Appeals Board, again set up by the Minister of Justice, consists of a president and a varying number of members. The president shall be a lawyer and acquainted with the work in the maternal health institutions.

At least three members of the Appeals Board must take part in the examination of a complaint. One of them shall be the president or the member fulfilling the conditions of president. The second member shall be an expert in gynaecology or surgery and the third shall be a psychiatrist or have particular knowledge of social medicine.

5. A decision authorising an abortion can only be taken if the members of the Consultative Board concerned are unanimous (Art. 4 (3)).

6. Members of the two bodies shall be appointed by the Minister of Justice for a term of up to four years.

7. A request for abortion shall be submitted by the woman herself (Art. 5 (1)). If, by reason of mental illness or debility or for some other reason, she is unable to understand the importance of the operation, the Board may approve an abortion upon request by a specially appointed guardian when it considers it necessary. The guardian may appeal against the decision (Art. 5 (1)(2)).

When the woman is under 18 years of age or incapacitated, the holder of the parental rights must agree to the request for abortion. When the circumstances so require, the Board may nevertheless decide to authorise an abortion without such a consent. In such a case, the woman may appeal against the decision taken. If necessary the Board can also authorise an abortion notwithstanding that the holder of the parental rights or the guardian can complain against a decision thus taken by the Board.

8. An abortion may only be performed by a doctor in a public or municipal hospital.

Physicians, nurses and nurse-pupils may refuse to assist in performing an abortion if this would be contrary to their ethical or moral convictions.

9. The costs of abortion fall under the regulations concerning the general treatment of disease.

III. France

10. The Public Health Code, as amended by the Act of 17 January 1975 on intentional interruption of pregnancy, stipulates that a doctor who has been contacted by a woman with a view to abortion shall inform her about the medical risks for herself and for future pregnancies. He shall provide her with a "dossier-guide" indicating the rights, assistance and other advantages guaranteed

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by law to families, mothers, whether single or not, and to their children, as well as the possibilities offered by the adoption of a child to be born (Art. L. 162-3).

11. A woman requesting an abortion under Art. L. 162-1 of the Public Health Code shall, after having been informed in accordance with Art. L. 162-3, consult one of the following institutions: an information centre, a centre for consultation or family advice, for family planning or education, an office for social service or any other approved organ which shall provide her with a certificate of consultation. The consultation shall include a personal interview during which the woman shall be offered assistance, be advised with regard to her situation and be provided with the necessary means for solving her social problems (Art. L. 162-4).

12. If the woman maintains her request for abortion, the doctor shall request her written confirmation. He cannot accept this confirmation, however, until after the expiration of one week from her first request (Art. L. 162-5).

13. In case of confirmation, the doctor may perform the abortion himself, provided that it takes place in a public hospital or in a private hospital fulfilling the conditions laid down in the Public Health Code. If he does not himself perform the abortion he shall return the written request to the woman who may deliver it to another doctor of her choice; he shall also provide her with a certificate showing that she has complied with Arts. L. 162-3 and L. 162-5.

14. No doctor is obliged to accept a request for, or to perform an, abortion, but he shall inform, at her first visit, the woman concerned of his refusal (Art. L. 162-8).

No midwife, male or female, nurse, medical assistant, is obliged to assist at an interruption of pregnancy. Private hospitals may refuse to have abortions carried out within their premises (ibid.).

15. If the pregnant woman is under-age and unmarried, she must have the consent of one of the persons exercising the parental rights or, when necessary, the consent of her legal representative (Art. L. 162-7).

A foreign woman can only be granted an abortion if fulfilling the statutory requirements of residence (Art. 162-11).

16. Any institution in which an abortion is performed shall ensure that, after the operation, the woman is informed on birth control (Art. L. 162-9).

17. Every interruption of pregnancy shall be recorded by the doctor and notified by the clinic to the regional medical health inspector; the record shall not identify the woman (Art. L. 162-10).

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IV. Federal Republic of Germany

18. A woman seeking an abortion shall address herself to a counsellor not later than three days before the termination of her pregnancy. She shall be advised about the public and private assistance available to pregnant women, mothers and children and, in particular, about assistance which would facilitate the continuance of pregnancy and the situation of mother and child. She shall also be advised by a doctor on the important medical aspects (Art. 218 b of the Penal Code as amended by the Act of 1976) (1).

19. A consultation is not required when termination of the pregnancy is advisable in order to avert from the pregnant woman a danger to her life or health caused by physical disease or physical injury (Art. 218 b (3)).

20. Abortions may only be performed in hospitals or other suitable institutions (Art. 3 of the Fifth Criminal Law Reform Act of 1975). Persons insured under the statutory health insurance system may claim medical treatment and refund of costs for medicine and hospital nursing in cases of lawful termination of pregnancy; if such an operation renders them unfit for work payment of their wages will be continued in the same way as in the case of sickness (2).

21. No one is obliged to take part in an abortion, except when it is necessary to save the life or to prevent grave injury to the health of the woman (Art. 2 of the Fifth Criminal Law Reform Act).

Persons participating in consultations or in medical examinations or treatment are obliged to keep the information obtained confidential (Art. 203 of the Criminal Code).

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(1) See para. 26 (p.10) of the present Report

(2) Act on Measures Supplementary to the Fifth Criminal Law Reform Act (Gesetz über ergänzende Massnahmen zum Fünften Strafrechtsreformgesetz) of 28 August 1975, quoted in the Government's Memorial on the merits, pp. 6-7.

V. Luxembourg

22. There is no prescribed procedure for permitted abortions in Luxembourg.

In practice, however, the following "pratique prétorienne" is normally observed: the Public Prosecutor's Office is informed of the proposed abortion and of the medical reasons therefor. If the Prosecutor gives his "nihil obstat" (1) the abortion is performed.

VI. Norway

23. According to Art. 4 of the Act of 1975 an interruption of pregnancy, a request for abortion shall be made by the woman herself. If she is under 16 years of age, the holder of the parental rights shall, unless there are particular reasons against this, be given an opportunity to express his opinion. If she is mentally retarded her custodian's views shall likewise be obtained. If she is demented, or seriously mentally deficient, an application for abortion may be lodged on her behalf by the custodian; her consent to an abortion is, however, required if it can be presumed that she is able to understand the significance of the surgical intervention.

24. Any request for abortion shall be submitted to a doctor or to a board consisting of two doctors. The applicant (i.e. the woman or her guardian) shall be informed by the doctor or the board about the nature of the surgical intervention and its medical effects. If she or he wishes, she or he shall also be informed about the possibilities of obtaining economic help and other kinds of assistance in case the pregnancy is continued (Art. 5).

25. When the information has been given, the doctor shall forward the request to the board together with a statement of the grounds advanced by the applicant and of his own observations. If the application has been sent directly to the board, the board shall itself deliberate and decide the case (Art. 6).

26. The Board decides on a request for abortion after consultation with the woman. It can also authorise one of its members to approve an abortion before the end of the twelfth week of pregnancy in accordance with regulations issued by the King; in cases of doubt, however, the request shall be examined by the whole board (Art. 7). The grounds for approving or refusing a request for abortion shall be given in writing.

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(1) If not, a second doctor is consulted in order that action may be taken on the basis of a joint medical opinion.

27. If the board refuses a request, it shall also inform the woman that if she does not withdraw her application within three days after notification of this refusal her request will be reconsidered by another board. The case-file shall then be sent to the county-physician who shall, in consultation with the woman, submit the case to a different board for a new examination of the request. The board which re-examines the request shall be composed of three members: two doctors and a third member appointed by the county physician; the third member shall not be a doctor. The decision is taken by simple majority (Art. 8).

28. An abortion, even if authorised by a board, is nevertheless not permitted without the consent of the county physician where:

(a) the woman is less than 16 years of age, and the holder of the parental rights or the custodian has opposed the request;

(b) the woman is mentally retarded and the custodian has opposed the request;

(c) the woman has not consented in cases where the request has been made by her custodian (Art. 9).

29. The Board can make inquiries into the woman's health, social and safety conditions, provided that she has consented thereto.

Any person who takes part in the examination of cases under the present Act is obliged to keep the information obtained confidential (Art. 11).

VII. Turkey

30. Under the Law of 1965 an abortion is dependent upon the written consent of the woman concerned or, if she is a minor, on that of her parents. If she is under guardianship, the authorisation of a magistrate's court is required. Prior consent or authorisation are not required in emergency situations (1).

31. The decision on a request for abortion is taken by a committee of three specialists. One of them shall be an obstetrician or gynaecologist appointed by the Minister of Health and Social Welfare. An appeal may be lodged to a Higher Committee on Therapeutic Abortion and Sterilization against negative decisions by the committee (2).

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(1) Abortion Laws loc. cit. p. 44.

(2) Ibid. p. 15.

Annex II: Penalties provided for prohibited abortions

I. Austria

1. Art. 96 of the Austrian Penal Code provides that anyone who unlawfully interrupts a pregnancy with the consent of the pregnant woman is to be punished by imprisonment of up to one year or, if the act has been committed for gain, by imprisonment of up to two years.

2. If the direct perpetrator is not a doctor he is to be sentenced to a maximum of three years' imprisonment, or to imprisonment from six months to five years if the act has been committed for gain or has resulted in the death of the woman.

3. A woman who herself terminates her pregnancy shall be sentenced to a maximum of one year's imprisonment. She is liable to the same penalty when the pregnancy has been terminated by another person (Art. 96 (3)).

4. Finally, anyone who carries out an abortion without the permission of the pregnant woman shall be punished by imprisonment of up to three years, or from six months to five years if the pregnant woman has died as a result of the act. The perpetrator is, however, exempted from punishment if he has interrupted the pregnancy with a view to saving the woman from an immediate danger to her life which could not be prevented by other means and for which her consent could not be given in time (Art. 98).

II. Belgium

5. Insofar as the woman herself is concerned, the Belgian Penal Code stipulates that, if she voluntarily has an abortion carried out upon her, she is to be punished by imprisonment ranging from two to five years and a fine amounting to 100 to 500 francs (Art. 351). A third person who performs an abortion by aliments, beverages, medicaments or any other means is liable to the same penalty if the woman has consented to the act (Art. 350). If a person intentionally carries out an abortion without the consent of the pregnant woman he shall be punished by severe imprisonment (réclusion) of at least five years (Art. 348).

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6. When the means used for procuring an abortion cause the death of the woman, the person having administered or prescribed the means shall be sentenced to severe imprisonment of at least five years if the woman has consented to the abortion, and to forced labour from ten to fifteen years if she has not consented (Art. 352).

7. If the acts described by Arts. 348, 350 and 352 of the Code are committed by a physician, surgeon, obstetrician, midwife, public health officer or pharmacist, the penalty stipulated in these provisions shall respectively be replaced by severe imprisonment of five years, forced labour from ten to fifteen years or from fifteen to twenty years, depending on whether the said penalty is imprisonment, solitary confinement or forced labour from ten to fifteen years (Art. 353).

III. Denmark

8. The Danish Act of 13 June 1973 on interruption of pregnancy also contains certain provisions regarding unlawful termination of pregnancy.

9. If a doctor carries out an abortion contrary to the provisions of the Act, he shall be fined, or sentenced to imprisonment of up to two years provided that a higher penalty is not prescribed by the Penal Code.

10. A person who, without being a doctor, performs an abortion on another person shall be punished by imprisonment of up to four years, provided that a higher penalty is not prescribed in the Penal Code.

11. A woman who has her pregnancy terminated without authorisation is not punishable under the Act.

IV. France

12. The Act No. 75 - 17 of 17 January 1975 partially suspended for a period of five years the application of Art. 317 of the French Penal Code.

13. Apart from this exception Art. 317 stipulates that any person who, by means of food, beverages, medicaments, manipulation, force or any means causes or attempts to cause an abortion on a pregnant woman or a woman considered to be pregnant, shall, regardless of whether or not she consents, be punished by imprisonment from one to five years and by a fine of 1,800 to 36,000 Francs (para. 1).

14. Imprisonment shall be from five to ten years, and the fine from 18,000 to 72,000 Francs, if it is proven that the perpetrator habitually performs such acts (para. 2).

15. A woman who performs, or attempts to perform, an abortion on herself, or has agreed to use means indicated or prescribed to her for that purpose, shall be punished by imprisonment from six months to two years and by a fine of 360 to 7,200 Francs (para. 3).

16. Physicians, health officials, midwives, dentists, pharmacists, as well as medical students, pharmacy students or pharmacy employees, herbalists, trussmakers, sellers of srugical equipment, hospital attendants, female and male nurses, and masseurs, who indicate, aid, or use means for causing an abortion shall receive the punishment provided for in (1) and (2) of the Article (cf. paras. 13 and 14 above). Conviction shall also entail the loss, for at least five years, of the right to practise, or the complete exclusion from, their profession (para. 4). Any person who violates the prohibition of exercising his profession shall be punished by imprisonment of six months to two years, and by a fine of 3,600 to 36,000 francs, or either punishment (para. 5).

V. Federal Republic of Germany

17. According to Art. 218 of the Criminal Code, as amended by the Act of 1976 (1), any person who terminates a pregnancy shall be punished by imprisonment of not more than three years or by a fine (para. (1)).(2)

The punishment shall be imprisonment from six months to five years in particularly serious cases. An abortion is, as a rule, a particularly serious case when the perpetrator acts against the will of the pregnant woman or when he frivolously endangers her life or causes a risk of serious injury to her health. The Court may order the supervision of conduct (para. 2).

18. If the act is committed by the pregnant woman herself, the penalty shall be imprisonment of up to one year or a fine. Her act is not punishable if the pregnancy is terminated by a doctor after consultation and not more than twenty-two weeks have elapsed since conception. The court may decide not to impose a punishment if the woman at the time of the abortion was in a situation of particular distress.

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(1) See para. 26 (page 9) of the present Report.
(2) Under certain conditions, an abortion performed by a doctor is not punishable under Art. 218 (Art. 218a - cf. p. 8, paras. 26 and 27).

19. Any person who terminates a pregnancy without the woman's having addressed herself to a consultant at least three days before the abortion and without her having been advised by a doctor about the important medical aspects shall be punished by imprisonment of up to one year, or by a fine, if the act is not punishable under Art. 218 (Art. 218b (1)). The woman herself is not liable to punishment under this provision.

20. A consultation is not required when termination of the pregnancy is advisable in order to avert from the pregnant woman a danger to her life or health caused by physical disease or physical injury (Art. 218b (3)).

21. Any person who terminates a pregnancy without a written certificate from a doctor, who does not himself carry out the abortion, stating that the prerequisites of Art. 218a paras. (1) No. 2, (2) and (3) are fulfilled, shall be punished by imprisonment up to one year or by a fine, if the act is not punishable under Art. 218. The woman is not punishable (Art. 219 (1)).

VI. Greece

22. According to Art. 304 of the Greek Penal Code , a woman who, by an abortion or by other means, intentionally kills her foetus, or permits another person to do so, shall be punished by imprisonment between four days (1) and three years.

23. A third person who, with the consent of the woman, causes the death of her foetus or supplies her with instruments suited therefor, shall be punished by imprisonment for not less than six months. If he habitually commits abortions, he shall be punished by confinement in a penitentiary for not more than ten years (2).

Any person intentionally causing the death of a foetus against the will of a pregnant woman or upon her silence shall be punished by confinement in a penitentiary (ibid.).

24. Any person who advertises or otherwise gives publicity to medicines or other means suitable for provoking an abortion, or who in such a way offers his own or other persons' services with a view to performing abortions, shall be punished by imprisonment for not more than one year, (Art. 305 of the Code).

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(1) Cf. Art. 53 of the Penal Code
(2) According to Art. 53, confinement in a penitentiary lasts from five to twenty years.

VII. Iceland

25. Under Icelandic law, an abortion, or participation in it, shall be punished by imprisonment up to four years.

If the abortion is performed without the woman's consent, the punishment shall be imprisonment between two and fourteen years.

VIII. Ireland

26. The Offences Against the Person Act, 1861, makes it an offence for

(a) any pregnant woman to administer to herself any poison or other noxious thing or to use any instrument or other means with intent to procure her miscarriage (Sect.58);

(b) any person unlawfully to administer to or cause to be taken by any woman, whether with child or not, any poison or noxious thing with intent to procure her miscarriage, or to use any instrument or other means with that intent (ibid.);

(c) any person to procure or supply poison or other noxious thing, or any instrument or other thing whatsoever, knowing that the same is intended to be unlawfully used to procure the miscarriage of a woman, whether she is pregnant or not (Sect. 59).

The maximum penalties for (a) and (b) are imprisonment for life; for (c), the maximum penalty is imprisonment for five years.

27. If, as a result of an attempt to procure abortion, the woman dies, the abortioner may be charged with murder.

28. If the woman is not pregnant, she cannot be convicted of using means in order to procure her miscarriage, but she may be convicted of conspiracy to procure an abortion (1), or of aiding and abetting others in committing the felony of administering poison or some noxious thing to her with intent to procure her miscarriage (2).

IX. Italy

29. Under the Italian Penal Code, any person who procures an abortion with the consent of the pregnant woman shall be sentenced to imprisonment from two to five years. This penalty also applies to the consenting woman (Art. 546).

30. Any woman who terminates her own pregnancy shall be punished by imprisonment from one to four years (Art. 547).

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(1) Cf. R.V. Whitchurch (1890), 24 Q.B.D. 420, C.C.R. as quoted in Halsbury's Laws of England, 3rd ed. Vol. 10, p. 731.

(2) Cf. R.V. Sockett (1908), 72 J.P. 428, C.C.A. as quoted in Halsbury's Laws of England, 3rd ed. Vol. 10, p. 731.

31. Any person who performs an abortion without the consent of the pregnant woman shall be punished by imprisonment from seven to twelve years (Art. 545). The same penalty applies, irrespective of whether or not she has consented, if:

- the woman is under 14 years of age or not criminally responsible;
- her consent has been obtained by violence, menace, under duress or by deceit..

32. If the woman dies as a result of an abortion to which she did not consent, the person who committed the abortion shall be punished by 12 to 20 years' imprisonment. If she has been injured, the punishment is 10 to 15 years' imprisonment. If an abortion to which the woman consented has either of the said effects, the penalty shall be imprisonment from 5 to 12 years and 3 to 8 years respectively.

X. Luxembourg

33. The provisions of Arts. 348 to 352 of the Penal Code of Luxembourg are similar to those of Arts. 348 et seq. of the Belgian Penal Code (1).

XI. Malta

Art. 255 (1) of the Penal Code stipulates that any person who, by means of food, beverages, medicaments, violence or any other means whatever, causes the miscarriage of any woman with child shall, whether the woman consents or not, on conviction, be sentenced to hard labour or imprisonment for a term from eighteen months to three years.

Any woman who procures her own miscarriage or who consents to the use of the means by which the miscarriage is procured shall be liable to the same penalty (Art. 255 (2)).

If the means used cause the death of the woman or serious injury to her person, regardless of whether the miscarriage has taken place or not, the offender shall, on conviction, be liable to the punishment applicable to homicide or bodily harm, reduced by one to three degrees (Art. 256).

Pyhsicians, surgeons, obstetricians or apothecaries who knowingly have prescribed or administered the means whereby the miscarriage is procured shall, on conviction, be liable to hard labour for a term from eighteen months to four years, and to perpetual interdiction from the exercise of their profession.

XII. The Netherlands

34. The Dutch Penal Code provides that a woman who intentionally causes, or admits, the abortion or the death of her foetus shall be punished by imprisonment of up to three years (Art. 295).

35. A third person, who intentionally brings about an abortion or the death of a foetus without the consent of the pregnant woman, shall be sentenced to imprisonment up to 12 years or, if the woman dies following the abortion, up to 15 years (Art. 296).

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(1) See under II above.

36. A third person who terminates a pregnancy with the consent of the pregnant woman shall be sentenced to imprisonment up to four years and six months or, if the woman dies as a result of the act, up to six years (Art. 297).

37. The above penalties shall be increased by a third in the case of a doctor, midwife or pharmacist who participates in the crime mentioned in Art. 295, or who is guilty of or has assisted in the carrying out of the acts envisaged in Arts. 296 and 297. These persons can also be forbidden to practise their respective professions (Art. 298).

XIII. Norway

38. According to the Norwegian Act on interruption of pregnancy a person who deliberately interrupts a pregnancy or participates in such an act shall be punished by a fine or imprisonment up to three months, provided that the act is not punishable by a more severe penalty.

This provision does not apply to a pregnant woman who terminates the pregnancy herself or participates in its termination.

The above penalty is also provided for persons who, either orally or in writing, intentionally give erroneous information when requesting an abortion, or who violate their duty to keep information confidential (Art. 13, cf. also Art. 11).

39. Art. 245 of the Penal Code of 1902 provides that a person who terminates a pregnancy or assists at such an act (illegal abortion) shall be punished by imprisonment of up to three years. The same applies to a person who interrupts a pregnancy without permission of a competent person.

If the act has been repeated, carried out for gain, or committed in other particularly aggravating circumstances, the punishment is up to six years' imprisonment.

If the perpetrator has acted without the woman's consent he shall be punished by imprisonment of up to fifteen years, and for life if the woman dies as a result of the illegal act.

A new provision inserted in 1975 (Art. 245 (2)) stipulates that a woman who interrupts or contributes to the interruption of her own pregnancy shall not be punished.

40. The above provisions of the Penal Code apply to persons who interrupt a pregnancy without authorisation. The Penal provisions of the Act on interruption of pregnancy, on the other hand, concern persons who authorise interruptions of pregnancy when the conditions are not present, give incorrect information in an application form, and so forth.

XIV. Sweden

41. According to Art. 9 of the Swedish Act on Abortion , any interruption of pregnancy performed by a person who is not a doctor shall be punished by a fine or imprisonment up to one year. The sentence may vary from six months to four years if the crime is considered as serious; this is the case, in particular, if the act has been committed for gain or habitually, or if it has involved a special danger to the life or the health of the woman.

42. A medical practitioner who contravenes the provisions of the Act, e.g. the requirement of permission by the National Board of Health and Welfare, shall be fined or sentenced to imprisonment up to six months.

43. The woman who terminates, or assists in the termination of, her pregnancy is no longer punishable.

XV. Switzerland

44. Art. 118 of the Federal Penal Code provides that a pregnant woman who performs an abortion, or has an abortion performed, upon her shall be sentenced to imprisonment from three days to three years.

45. Art. 119 (1) stipulates that any person who performs an abortion with the consent of the pregnant woman, or who assists a pregnant woman with a view to abortion, shall be punished by imprisonment up to five years.

46. Any person who termintes a pregnancy without the consent of the pregnant woman shall be punished by imprisonment up to ten years (Art. 119 (2)).

47. A minimum penalty of three years imprisonment is provided for persons who habitually perform abortions for gain or if the pregnant woman dies as a consequence of the act and the offender was able to foresee that (Art. 119 (3)).

XVI. Turkey

48. According to Art. 468 (1) of the Turkish Penal Code, any person who performs an abortion upon a woman without her consent shall be punished by imprisonment from seven to twelve years.

49. Any person who terminates a pregnancy with the woman's consent shall be punished by imprisonment from two to five years; the same penalty is stipulated for the woman (Art. 468 (2)).

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50. A pregnant woman who induces an abortion on herself shall be punished by imprisonment from one to four years (Art. 469).

51. Any person who provides a woman presumed to be pregnant with the means for carrying out an abortion, or who performs an act on her with a view to abortion, shall be punished in accordance with Arts. 452 (1) and 456 of the Code (2), if the acts have resulted in the death of the woman or have caused her bodily harm (Art. 470).

XVII. The United Kingdom

52. Under Sect. 58 of the Offences against the Person Act, 1861 it is a felony:

(1) for any woman with child unlawfully to administer to herself any poison or other noxious thing or to use any instrument or other means whatsoever with intent to procure her own miscarriage (3) (4); or

(2) for any person unlawfully to administer to or cause to be taken by any woman, whether she is with child or not, any poison or noxious thing with intent to procure her miscarriage, or to use any instrument or other means with that intent (4).

The punishment for such offence shall be imprisonment for life or for any shorter term (5).

53. A woman cannot be congicted under Sect. 58 of the Offences against the Person Act 1861 unless she is in fact pregnant. If she is not with child she may be convicted of conspiracy to procure an abortion (6), or of aiding and abetting others in committing the offence of administering poison or some noxious thing to her with a view to procuring her miscarriage (7).

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(1) Death caused by violence but without the intention of committing homicide

(2) Causing bodily harm without intention to kill.

(3) If the substance is in fact harmless although the woman beleives that it is noxious, she is guilty of the common law misdemeanour of an attempt to procure an abortion, cf. R. v. Brown (1899), 637 J.P. 790 as quoted by Halsbury's Laws of England Vol. 10, Third ed., p. 731

(4) The statutory offence presupposes that the thing supplied or administered must be proved to be noxious, cf. R.v. Isaacs (1862) Le & Ca. 220, C.C.R.; R.v. Osborn (1919), 84 J.P. 63 as quoted by Halsbury's Laws of England, Vol. 10, Third ed.ibid.

(5) Offences against the Person Act, 1861 (24 & 25 Viet. c. 100 558; Criminal Justice Act, 1948 (11 & 12 Geo. 60. 58), s.1.

(6) R.v. Whitchurch (1890), 24 Q.B.D. 420, C.C.R., as quoted by Halsbury's Laws of England, ibid.

(7) R.v. Sockett (1908), 72 J.P. 428, C.C.A. as quoted by Halsbury's Laws of England, ibid.

54. Sect. 59 of the Act provides that everyone is guilty of misdemeanour who unlawfully supplies or procures any poison or other noxious thing, or any instrument or thing whatsoever, knowing that it is intended to be unlawfully used with intent to procure the miscarriage of a woman, whether she is with child or not (1).

The punishment for this offence shall be imprisonment for a maximum of five years.

55. The Infant Life (Preservation) Act, 1929, provides in Sect. 1(1) that any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of child destruction, provided that it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother (2).

The punishment shall be imprisonment for life or for any shorter term (3).

56. It is neither murder nor manslaughter to kill an unborn child which is still in its mother's womb (4). However, if a child dies after birth on grounds of an unlawful act done to it while in the mother's womb or during the act of birth, the perpetrator shall be guilty of murder (5).

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(1) To constitute this statutory offence of misdemeanour it must be shown that the substance in question is noxious for the purpose of procuring a miscarriage, cf. R. V. Isaacs (1862), Le. & Ca. 220, C.C.R., as quoted by Halsbury's Laws of England, Vol. 10, Third ed. p. 732.

(2) 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 ca capable of being born alive, see The Infant Life (Preservation) Act, 1929, 19 & 20 Geo. 5C.34), Sect. 1(2).

(3) Infant Life (Preservation) Act, 1929 (19 & 20 Geo. 5C. 34), S. 1(1); Criminal Justice Act, 1948 (11 & 12 Geo. 6c. 58), S. 1(1).

(4) Halsbury's Laws of England, 3rd ed., Vol. 10, p. 705

(5) Ibid.

Annex III: Legislation on Contraception (1)

I. Austria

1. In 1974 an Act to Promote Family Planning (Familienberatungsförderungsgesetz) was passed. Family planning agencies, supported by federal grants, function in the public and private sector. They help persons to plan the size of their families and the spacing of their children (2).

II. France

2. Art. 13 of the Act on intentional interruption of pregnancy states that an intentional interruption of pregnancy must not be a means of birth control. The State shall therefore provide as much information on birth control as possible, in particular by setting up family planning and education centres in the institutions for protection of mothers and children and by using all means of information.

III. Greece

3. Contraception is forbidden in Greece, but contraceptive pills are used to a fairly large extent in the Greek cities.

IV. Ireland

4. In 1933, legislation was passed designed to make contraceptives unavailable in Ireland. Sect. 17 of the Criminal Law (Amendment) Act, 1933 made it unlawful for any person to sell or import any contraceptives.

In 1973 the Supreme Court by a majority of four to one held that Sect. 17 was unconstitutional in so far as it made it unlawful to import contraceptives. The case arose out of the seizure by the Customs authorities of a quanitity of spermicidal jelly ordered from England by a Mrs. McGee for her own use for contraceptive purposes. Each member of the Court gave a separate judgment. The majority agreed that the right of marital privacy is a personal right and a family right guaranteed by the Constitution and that the refusal to allow Mrs. McGee to import contraceptives was a violation of those rights.

The prohibtion of the sale of contraceptives was not an issue before the Court but one of the judges said that if it were shown that the prohibition of sale restricted the availability of contraceptives for use by married couples that prohibition would have to be declared unconstitutional.

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(1) The following are examples of the variety of legislation on this subject in States which are Parties to the Convention.

(2) The Status of Women in Austria, p. 13.

5. In 1974, the Government introduced legislation to permit, subject to certain conditions, the importation, sale and manufacture of contraceptives. The Bill was defeated but a new initiative has recently been announced by the Prime Minister.

6. The definition of contraceptives in the 1935 Act does not include the Anovulent Pill which is freely importable but may be sold only on medical prescription.

V. Norway

7. There are no legal restrictions on the use of contraception in Norway and assistance and instruction about this matter forms part of the public health system.

8. Art. 377 of the Norwegian Criminal Code was originally intended to be applied to the public advertising or display of contraceptives. Means of contraception were regarded as falling within the terms "offensive to decency ... because of their purpose". Prosecution on this basis took place in 1924 when a pioneering experiment with advice to women was started.

Today, however, the advertising or display of contraceptives, which are freely on sale, is no longer regarded to be "offensive to decency".

VI. Sweden (1)

9. The main idea behind the new legislation on abortion is that the individual has the right to decide when and how many children he or she wishes to have. This also means that every child has the right to be wanted. It is understood, however, that a planned parenthood is primarily to be obtained by preventive measures and only in the second place by abortion.

To achieve this aim efforts have been made in three sectors: birth control, counselling, reducing the cost of contraceptives to the individual, and information on family planning.

10. Birth Control Counselling

Government subsidies are used to encourage expansion of contraceptive advisory services. The medical or other organisation sponsoring these services receives a grant through the public health insurance system.

The requirement for the grant is that the consultation must be free of charge to the person seeking advice and that contraceptives to some extent be dispensed free of charge.

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(1) The following information is taken from a Fact Sheet on Sweden - statistical data published by the Swedish Institute, May 1976.

Pessaries or IUD's fitted or applied during visits to birth control counsellors are free. Condoms and chemical preparations in limited quantities are distributed in connection with such consultations.

Contraceptive pills are sold under the same discount system as other medicines, i.e. they cost a maximum of Skr 20 per prescription.

A system of contraceptive advisory services linked to the public maternity clinics is in the process of being created. Free counselling is available at maternity clinics, at district physicians' offices, through private doctors or at clinics in Gothenburg and Stockholm operated by the Swedish Association for Sexual Information (RFSU). At about twenty locations there are special centres where young people can obtain advice on different methods of birth control. To a certain extent, school youngsters can also receive advice from school physicians or nurses.

11. Midwives as Counsellors

Because of the shortage of doctors in Sweden's system of health care and preventive medicine, midwives are beginning to be used as counsellors in family planning. Central training courses are given to make midwives capable of running a birth control clinic. So far, about 300 midwives in the maternity health care system have been trained in this way. Many of them are working independently, giving individual information to both men and women. They are trained to do gynecological examinations, to insert IUD's and prepare a prescription for contraceptive pills. The prescription still has to be signed by a doctor.

12. Information

To increase information on family planning substantial sums are allocated to the Health Education Committee at the National Board of Health and Welfare, which is working on a long-term information programme on family planning, and for information via youth and women's organisations.

VII. Turkey

13. An act on family planning, liberalising the earlier legislation, was introduced in 1965.

APPENDIX VI

JUDGMENT OF THE FEDERAL CONSTITUTIONAL COURT (FIRST SENATE) of 25 FEBRUARY 1975 (1)
- 1 BvF 1 - 6/74

/Summary/

1. The life of the child developing in the mother's womb constitutes an independent legal interest protected by the Constitution (Arts. 2(2) first sentence and 1(1) of the Basic Law). The state's duty of protection not only forbids direct state interference with the life of the developing child but also requires the state to protect and foster it.

2. The state's duty to protect the life of the developing child applies even as against the mother.

3. The protection of the life of the embryo enjoys in principle priority over the pregnant woman's right of self-determination throughout the period of pregnancy and may not be considered as subject to derogation during a certain period.

4. The legislator may express the legal disapproval of interruption of pregnancy, which is in principle required, otherwise than by the imposition of criminal penalties. The essential point is that the totality of the measures designed to protect the unborn child in fact provides a degree of protection which corresponds with the significance of the interest to be protected. In an extreme case where the protection required by the Constitution cannot be attained in any other way, the legislator is bound to make use of the criminal law in order to protect the life of the developing child.

5. A woman cannot be required to continue her pregnancy if its interruption is necessary in order to avert a danger to her life or of serious injury to her health. Furthermore, the legislator is free to decide that there exist other exceptional adverse circumstances of similar gravity affecting a pregnant woman which she cannot reasonably be expected to bear and that in such cases an interruption of pregnancy shall not render her liable to punishment.

6. The Fifth Criminal Law Reform Act of 18 June 1974 does not comply in a sufficient degree with the constitutional obligation to protect the unborn child.

Operative part

"I. Art. 218a of the Criminal Code as amended by the Fifth Criminal Law Reform Act of 18 June 1974 (Federal Law Gazette I p. 1297) is incompatible with Art. 2(2) first sentence, read in conjunction with Art. 1(1) of the Basic Law and void as far as it exempts abortion from punishment even if there are no reasons which - within the meaning of the reasons given for this decision - are justifiable under the system of values incorporated in the Basic Law.

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(1) Fully published in Entscheidungen des Bundesverfassungsgerichts (quoted hereinafter as BVerfGE), Vol. 29, pp. 1 - 95. Translation by the Council of Europe.

II. Pending the coming into force of a new statute, the following order is made in accordance with Art. 35 of the Federal Constitutional Court Act:

1. Arts. 218b and 218 of the Criminal Code as amended by the Fifth Criminal Law Reform Act of 18 June 1974 ... shall be applied also to abortions performed within the first twelve weeks after conception.

2. An abortion performed by a doctor with the pregnant woman's consent within the first twelve weeks after conception shall not be punishable under Art. 218 of the Criminal Code if an unlawful act under Arts. 176 to 179 of the Criminal Code was committed on the pregnant woman and there are strong reasons to suggest that the pregnancy was a result of the offence.

3. Where the pregnancy was terminated by a doctor with the pregnant woman's consent within the first twelve weeks after conception in order to avert from the pregnant woman the risk of serious distress that cannot be averted in any other way she might reasonably be expected to bear, the Court may abstain from imposing punishment in accordance with Art. 218 of the Criminal Code."

Grounds

A.

The proceedings concern the question whether the so-called time-limit system provided for by the Fifth Criminal Law Reform Act, which provides that an interruption of pregnancy in the first twelve weeks after conception is under certain circumstances not liable to punishment, is compatible with the Basic Law.

I.

1. The Fifth Criminal Law Reform Act ... of 18 June 1974 ... brought new provisions on the punishment of the termination of pregnancy. Arts. 218 to 220 of the Criminal Code were replaced by provisions containing principally the following modifications as compared with the previous legal position:

In principle a person who terminates a pregnancy later than the 13th day after conception is liable to punishment (Art. 218(1)). However, an abortion performed by a doctor with the pregnant woman's consent is not punishable under Art. 218, if not more than twelve weeks have elapsed from the date of conception (Art. 218a - Time-Limit-System). Furthermore an abortion performed by a doctor with the consent of the pregnant woman after the expiry of the twelve week period is not punishable under Art. 218 if it is considered necessary in the present state of medical knowledge to avert either a danger to the life of the pregnant woman or the danger of serious injury to her health, unless the danger can be averted in some other way that she can reasonably be expected to bear (Art. 218b No. 1 - medical indication), or because there are compelling reasons to assume that owing to hereditary factors or harmful influences prior to birth the child would suffer from incurable damage to its health which is so serious

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that the woman could not be expected to continue the pregnancy, provided always that not more than 22 weeks have elapsed since conception (Art. 218b No. 2 - eugenic indication). Any person who terminates a pregnancy before the pregnant woman has received welfare and medical counselling from an advice bureau or a doctor is liable to punishment (Art. 218c). Similarly liable to punishment is anyone who terminates a pregnancy after the expiry of twelve weeks from conception without its having previously been confirmed by a competent authority that the requirements of Art. 218b (medical or eugenic indications) are satisfied (Art. 219). The pregnant woman herself is not liable to punishment under Arts. 218c or 219.

In so far as they are material to the present proceedings the provisions of the Fifth Criminal Law Reform Act read as follows:

/not reproduced, see para. 18 of the present Report/

2. /Background of the Fifth Criminal Law Reform Act and the Court's proceedings/

II. - IV.

/Submissions/

B.

The Fifth Criminal Law Reform Act did not require the approval of the Bundesrat ... .

C.

The question of how the law ought to deal with abortion has been a subject of public discussion for several decades from many different points of view. In fact this social phenomenon raises numerous different biological, and especially genetic, anthropological, medical, psychological,

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welfare, social and not least ethical and theological problems touching on the fundamental questions of human existence. The legislator's task is to assess the often intricate web and woof of the arguments based on all these points of view, supplement them with specific considerations of legal policy and practical legal experience and on this basis come to a decision as to how the legal system should react to this social problem. The legislative solution incorporated in the Fifth Criminal Law Reform Act which was adopted after unusually extensive preparatory work can only be examined by the Federal Constitutional Court to see whether it is compatible with the Basic Law, which represents the highest law in the Federal Republic. The importance and seriousness of this constitutional question are clear when it is remembered that we are here considering the protection of human life, one of the central values in every system of law. The decision as to the standards and limits of the legislator's freedom of decision requires us to take a general view of the rules comprising the Constitution and the system of values it establishes.

I.

1. The protection provided by Art. 2 (1) first sentence of the Basic Law includes the life of the developing embryo in the mother's womb as an independent legal interest.

a. The express inclusion of the in-itself-obvious right to life in the Basic Law, as opposed for example to the Weimar Constitution, is principally to be understood as a reaction to the 'suppression of forms of existence not fit to live', the 'final solution ('Endlösung') and the 'liquidations' which were carried out as state measures by the National Socialist régime. In the same way as the abolition of capital punishment by Art. 102 of the Basic Law Art. 2 (2) first sentence of the Basic Law contains : "a profession of belief in the fundamental worth of human life and a conception of the state which consciously places itself in opposition to the views of a political régime for which the individual human life counted little and which accordingly committed unlimited abuse of its arrogated right over the life and death of its citizens' (BVerfGE 18, 112 /117/).

b. In interpreting Art. 2 (2) first sentence of the Basic Law we must start from the wording : "Everyone has a right to life ...." Life in the sense of the historical existence of a human individual exists according to established biological and physiological knowledge at least from the 14th day after conception (Nidation, Individuation) (cf on this point the explanations of Hinrichsen before the Special Committee for Criminal Law Reform. 6th parliament, 74th sitting, shorthand report, P 2142 ff). The process of development beginning from

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this point is a continuous one so that no sharp divisions or exact distinction between the various stages of development of human life can be made. It does not end at birth; for example, the particular type of consciousness peculiar to the human personality only appears a considerable time after the birth. The protection conferred by Art. 2 (2) first sentence of the Basic Law can therefore be limited neither to the 'complete' person after birth nor to the foetus capable of independent existence prior to birth. The right to life is guaranteed to every one who 'lives'; in this context no distinction can be made between the various stages of developing life before birth or between born and unborn children. 'Everyone' in the meaning of Art. 2 (2) of the Basic Law is 'every living human being', in other words : every human individual possessing life; 'everyone' therefore includes unborn human beings.

c. In the reply to the objection that 'everyone' refers as a rule both in ordinary speech and in legal language to a 'complete' human person and that accordingly a purely literal interpretation would appear to be against including unborn children within the scope of Art. 2 (2) first sentence of the Basic Law it should be emphasised that in any event the object and purpose of this provision of the Basic Law require that is protection should extend to the life of the developing child. The protection of human existence against interference by the state would be incomplete if it did not include the preliminary stage of the 'complete human being' i.e. the unborn human being.

This extensive interpretation is in accord with the principle established by the decisions of the Federal Constitutional Court 'which requires that in case of doubt that interpretation should be chosen which ensures the greatest effectiveness to the provision of the Basic Law (BVerfGE 32, 54 /71/; 6, 55/72/.

d. The history of Art. 2 (2) first sentence of the Basic Law can also be relied on to support this conclusion...

e. Moreover, when the 5th Criminal Law Reform Act was being discussed, there was general agreement on the need to protect the unborn child although the relevant problems of Constitutional Law were not exhaustively examined. In the report of the Special Committee for the Criminal Law Reform on the Bill tabled by the SPD and FDP we find the following observations on this subject :

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" The life of an unborn human being is a legally protected interest which in principle should be treated in the same way as that of a person already born."

The truth of this statement is obvious as regards that stage when the unborn human being would be capable of independent existence outside the mother's body. But it applies equally to the preceding stage of development beginning on about the 14th day after conception as Hinrichsen and others convincingly demonstrated in the public hearing(AP VI S 2142 ff) ...

That in the whole subsequent development there is no other break corresponding to this process is the predominant opinion in the medical, antliropological and theological sciences ....

This makes it impossible to look on an unborn human being after the termination of nidation as non-existent or not worthy of consideration.

In this connection it is not here necessary to answer the controversial question on which legal authors differ whether and, if so to what extent, it falls within the protection conferred by the Basic Law. At all events, ignoring the extreme opinions of isolated groups, the general view of the law is that the life of an unborn human being should be treated as a legal interest of high standing. The Bill is based on this understanding of the law." (BT-Drucks 7/1981 neu, S. 5).

The wording of the committee reports on the other Bills is almost identical on this point (BT-Drucks 7/1982, S. 5, BT-Drucks 7/1983, S. 5, BT-Drucks. 7/184, neu, S. 4).

2. The State's duty to protect all human life can therefore be derived directly from Article 2 (1) first sentence of the Basic Law. Apart from this, it may also be deduced from the express provision of Article 1 (1) Second Sentence of the Basic Law; for the life of the developing child shares the protection which Article 1(1) Basic Law affords to human dignity. Wherever human life exists it is entitled to the respect of human dignity; it is not decisive whether the person entitled is conscious of this dignity or himself capable of preserving it. The potential capacities latent from the beginning in human existence are a sufficient reason for conferring this human dignity.

3. On the other hand it is not necessary to decide the question, on which different opinions exist not only in the present proceedings but also in court decisions and legal literature, as to whether the unborn child is itself entitled to fundamental rights or whether on account of the absence of legal capacity and capacity

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to be entitled to fundamental rights it is 'only' protected in its right to life by the rules of the Constitution as such without their conferring on it any personal entitlement. The Federal Constitutional Court has always held that the rules conferring fundamental rights not only confer particular rights on the individual for his protection against the State but at the same time incorporate an objective system of values which constitutes a fundamental constitutional decision affecting all branches of the law and providing guidelines and inspiration for the legislature, the executive and the courts (BVerfGE 198 /205/ - Lüth; BVerfGE 35, 79 /114/ - universities judgment - with further reference). It can therefore be deduced from the objective legal content of the rules conferring fundamental rights whether and if so to what extent the State is obliged by the Constitution to provide legal protection for the life of an unborn human being.

II.

1. The State's duty of protection is a comprehensive one. It forbids not only - obviously - direct State interferences with the developing life of a human being but also requires the State to protect and further this life and above all to protect it from illegal interferences on the part of others. This requirement is binding for the various branches of the legal system according to their particular functions. The seriousness of the State's duty to provide protection increases with the standing of the relevant protected legal interest in the scale of values established by the Basic Law. It is not necessary to explain why human life is one of the highest values in the system established by the Basic Law; it constitutes the vital basis of human dignity and a precondition for all other fundamental rights.

2. The State's obligation to protect the developing life of a human being exists in principle even as against the mother. Undoubtedly the natural connection of the life of the unborn child with that of the mother constitutes a special relationship for which there is no parallel in other spheres of experience. Pregnancy belongs to the private life of a woman and its protection is constitutionally guaranteed by Art. 2 (1) in combination with Art. 1 (1) of the Basic Law. If the embryo was to be regarded merely as a part of the mother's organism an interruption of pregnancy would fall within the field of her private life into which the legislator was not entitled to penetrate (BVerfGE 6, 32/41/; 6, 389/433/; 27, 344/350/; 32, 373/379/. Since however the unborn child is an independent human being protected by the Constitution

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termination of pregnancy becomes a social matter which is accessible to regulation by the State and requires such regulation. A woman's right to the free development of her personality - which concerns her freedom of action in the comprehensive sense of the term and thus includes the right to decide on her personal responsibility not to accept parenthood and its concomitant duties - is admittedly also entitled to recognition and protection. This right is however not conferred without restriction - it is limited by the rights of others, the Constitution and the principles of morality. On principle it can never comprise the right to interfere with the protected rights of another without adequate justification still less to destroy that other's life and rights at the same time, least of all when in the nature of things the woman has a special responisibility for this particular life.

A compromise which both guarantees the protection of life of the unborn child and at the same time leaves the pregnant woman fee to terminate her pregnancy is not possible as the termination of pregnancy inevitably implies the destruction of the unborn child.

It is therefore necessary to strike a balance between these interests and in doing so 'both constitutionally recognised values must be considered in their relationship to human dignity as the centre of the system of values established by the Constitution' (BVerfGE 35, 202 / 225 / . In making a decision according to the principle of Art. 1 (1) of the Basic Law priority must be given to protecting life of the unborn child over the pregnant woman's right of self-determination. The latter may be subjected to many limitations in her possibilities of personal development by pregnancy, maternity and the education of children. On the other hand, the unborn child is destroyed by an termination of pregnancy. Following the principle that where there is a conflict between constitutionally protected situations the least damaging compromise shall be sought in accordance with the basic principle of Art. 19 (2) of the Basic Law priority must be given to protecting life of the unborn child. This priority applies in principle to the whole period of pregnancy and may not be called into question even for a certain period. The opinion expressed in Parliament on the 3rd reading of the Criminal Law Reform Act that the object of the Bill was to affirm the priority 'of a woman's right to self-determination based on human dignity over everything else, including the child's right to life, during a certain period' (Deutscher Bundestag 7. Wahlp., 96. Sitzung StenBer. S. 6492) is incompatible with the system of values recognised by the Basic Law.

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3. This is the key to the basic attitude of the legal system to interruption of pregnancy called for by the Constitution : the legal system may not make a woman's right to selfdetermination the only standard for its provisions on this matter. The State must in principle postulate a duty to complete the pregnancy and must therefore in principle consider its termination as wrong. The disapproval of the termination must be clearly expressed in the legal system of termination of pregnancy. It must avoid giving the false impression that an termination of pregnancy is a social act similar to visiting a doctor to be cured of an illness or simply an alternative to birth control of no legal significance. Nor may the State evade its responsibility by recognising 'an area not subject to the law' by refraining from judgment and leaving the matter to be decided by the individual on his own responsibility.

III.

How the State fulfils its duty to provide effective protection for the life of the developing child is a matter to be decided in the first place by the legislator.

He must decide which protective measures he considers necessary and expedient in order to ensure effective protection of life.

1. In this matter the concept of the priority of prevention over punishment applies very specially to the protection of the life of an unborn child (cf BVerfGE 30, 336 / 350 /. It is therefore the function of the State to resort in the first place to social and welfare measures in order to protect the life of the unborn child. What can be done in this connection and how the measures should be framed in detail is to a large extent a matter for the legislature and lies in general outside the scope of what may be decided on in a Constitutional Court. In this connection the chief consideration will be to reinforce the mother's willingness to accept the pregnancy on her own responsibility and bring the unborn child to birth. Despite all the State's duty of protection it must not be lost sight of that nature has in the first place entrusted the unborn child to the protection of its mother. The State's efforts to protect the child's life should above all be directed towards reawakening and where necessary strengthening the mother's will to protect the child in cases where this has ceased to exist. Naturally the legislator's means of bringing this about are limited. The measures he introduces will in many cases only take effect indirectly after a lapse of time and through their comprehensive educational effects lead to a change in the attitudes and opinions of the community.

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2. The question to what extent the State is bound by the Constitution to make use of the criminal law, the sharpest weapon in its arsenal, for the protection of the unborn child cannot be answered merely by posing the oversimplified question whether the State must punish certain acts. What is required is a general consideration taking into account firstly both the value of the legal interest infringed and the extent of the social damage caused by the act - which must also be compared with other acts of a similar social and moral quality which are subjected to punishment -, secondly the traditional legal provisions on this matter as well as the developments in the concept of the function of criminal law in modern society, and finally the practical effectiveness of criminal penalties and the possibility of replacing them by other legal sanctions.

In principle, the legislator is not obliged to adopt the same rules of criminal law to protect the life of the unborn child as he considers expedient and necessary to protect the lives of persons already born. As a glance at legal history shows this was never the case as regards the application of criminal sanctions nor was it true of the legal position which existed immediately prior to the 5th Criminal Law Reform Act.

a. It has always been the function of the criminal law to protect the basic values of the community. It has been shown above that the life of each individual person was one of the most important legally protected interests. The termination of a pregnancy destroys irretrievably human life which has come into being. Termination of pregnancy is a form of killing; this is clearly proved by the fact that the relevant penalty, even in the 5th Criminal Law Reform Act, is to be found in the section 'Felonies and Misdemeanours directed against Life' and was described in the previous criminal law as 'killing the foetus'; the current denomination as 'termination of pregnancy' cannot disguise this fact. No legal provisions can escape the fact that this act is contrary to the fundamental inviolability and indisposability of human life guaranteed by Article 2 (2) first sentence of the Basic Law. From this point of view the use of the criminal law to sanction 'acts of abortion' is indubitably legitimate; under varying conditions it represents the law in force in most civilised States and in particular is in accord with German legal tradition. From this too, it follows that a clear legal qualification of the act (abortion) as 'contrary to the law' must be retained.

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b. However punishment must never be an aim in itself. In principle its use is a matter to be decided on by the legislator. He is entitled, provided he takes account of the considerations mentioned above, to express the legal disapproval of the termination of pregnancy required by the Basic Law by other means than the imposition of criminal penalties. The essential thing is that the totality of the measures protecting the life of the unborn child, be they civil law or public law, in particular social or criminal law measures, guarantee an effective protection in consonance with the importance of the legal interest to be protected. As a last resort if the protection required by the Constitution cannot be assured in any other way the legislator may be under a duty to employ the criminal law. The criminal law is in a certain sense the 'ultima ratio' of the means available to the legislator. In accordance with the principle of proportionality which governs all public law including constitutional law, he must be careful and cautious in the use of this instrument. Nevertheless, this means too must be employed if it is otherwise impossible to ensure effective protection of life. This is required by the value and significance of the interest to be protected. We are thus concerned not with an 'absolute' duty to impose criminal penalties but rather with a 'relative' obligation to use criminal sanctions based on a realisation of the inadequacy of all available means.

The counter-argument that a fundamental rights provision conferring freedoms can never impose on the State an obligation to inflict penalties, is not convincing. If a fundamental rule establishing certain values requires the State effectively to protect a particularly important legal interest (inter alia) against violation by third parties measures will often be necessary which unavoidably affect the freedoms of other persons entitled to the benefit of fundamental rights. And in this respect there is no fundamental difference between the use of civil or social legislation and the enactment of criminal provisions. At the most there may be differences as regards the degree of the necessary interference. The fact is the legislator must solve the conflict which arises in these circumstances by striking a balance between the two opposing fundamental values or freedoms in accordance with the scale of values established by the constitution and having regard to the principle of proportionality dictated by the rule of law. If the duty to make use of the criminal law among other means, were to be generally denied this would place a considerable restriction on the protection of life thus afforded. The seriousness

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of the sanction imposed for destroying a given interest should correspond with the value of the interest threatened with destruction, and the fundamental value of human life is in accord with the punishment of its destruction by the criminal law.

3. As already stated, the State's duty to protect the life of the unborn child applies also vis-à-vis the mother. Here however the use of the criminal law raises special problems connected with the particular position of a pregnant woman. The drastic effects of pregnancy on the physical and spiritual state of a woman are obvious and do not require to be more particularly described. They often imply a considerable change in her entire way of life and a restriction of her possibilities for personal development. These disadvantages are not always and not entirely compensated through the woman's finding a new sense of fulfilment in her function as a mother and the fact that a pregnant woman is entitled to receive the assistance of the community as a whole (Art. 6(4) of the Basic Law). In individual cases this may lead to a serious state of conflict and indeed even to the extent of constituting a threat to life. The unborn child's right of life may impose a burden on the mother considerably in excess of that normally associated with pregnancy. This poses the question of how much she must be expected to bear: in other words, whether even in such cases the State is justified in compelling the completion of the pregnancy through the means of the criminal law. There is a conflict between respect for the life of the unborn child and the woman's right not to be required to sacrifice her own vital interests in order to ensure respect for those of the child beyond a reasonable point. In such a conflict situation with respect to which it is not as a rule possible to reach a clear cut moral assessment, and where the decision to terminate the pregnancy may be a true decision of conscience deserving our respect, the legislator is under a duty to exercise particular restraint. If in such cases he chooses not to regard the conduct of the pregnant woman as deserving of punishment and refrains from using criminal sanctions this must certainly be considered as acceptable from the point of view of constitutional law as being the result of a process of striking a balance between conflicting interests for which the responsibility lies with the legislator.

When deciding what can or cannot reasonably be expected to be borne, circumstances which do not cast a heavy burden on the person in question must be left out of consideration as they constitute the normal situation with which everyone is expected to cope. Indeed, particularly adverse circumstances must exist which make it more than ordinarily difficult for

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the person concerned to perform her duty so that she cannot reasonably be expected to do so. This is particularly the case when the performance of her duty would provoke serious inner conflict in the person concerned. The imposition of a criminal sanction is not in general an adequate means of solving such conflicts (cf. BVerfGE 32, 98 /109/ - healer by prayer) as it amounts to using external force in a situation where respect for the human personality calls for complete inner freedom of decision.

In particular it is not reasonable to expect a person to continue her pregnancy if it appears that termination is necessary in order to avert 'a risk to the life' of the pregnant woman 'or a risk of serious injury to her health' (Art. 218b (1) Criminal Code as enacted by the 5th Criminal Reform Act.). In this case her own 'right to life and physical integrity' (Art. 2 (2) first sentence of the Basic Law) is in danger and she cannot be expected to sacrifice it for the life of the unborn child. Furthermore the legislator is free not to impose criminal sanctions in other cases imposing an unusually heavy burden on the pregnant woman where the position as to what she may be expected to bear, is similar to those contemplated in Art. 218 (1). These could include the eugenic (cf. Art. 218b (2) Criminal Code), the ethical (criminological) and the social or hardship grounds for termination of pregnancy contained in the Government Bill tabled in the sixth Bundestag, which were discussed both publicly and in the course of the legislative procedure. In the discussions of the Special Committee for Criminal Law Reform (7. Wahlp. 25. Sitzung. StenBer. S. 1470ff), the representative of the Government explained with convincing reasons why, in cases where these four grounds applied, it was not reasonable to expect a woman to complete her pregnancy. The decisive consideration is that in all these cases another interest which the Constitution recognises as deserving protection becomes so pressing that the law cannot require the pregnant woman to give priority to the right of the unborn child in all circumstances.

The ground of general hardship (social ground) can also be included in this category. For the general social situation of the pregnant woman and her family can produce such serious conflicts that the pregnant woman cannot be compelled beyond a certain degree by the criminal law to sacrifice her interests for the life of the unborn child. In establishing the rule governing this ground the legislator must so define the position exempting from liability to punishment that the seriousness of the social conflict which must exist can be clearly recognized and the congruity of this ground with the others, from the point of view of what a person can be expected to bear, is

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maintained. If the legislator excludes genuine conflict situations of this kind from the protection of the criminal law, he is not violating his duty to protect life. In these cases too, the state must not be satisfied merely to examine the position and where necessary certify that the legal requirements for the non-liability to punishment of a termination of pregnancy are satisfied. On the contrary, here too, he must be expected to provide advice and help with the object of exhorting the pregnant woman to observe her normal duty of respecting the right to life of the unborn child and encouraging her to continue her pregnancy, and above all, in cases of social need, to support her by providing practical assistance.

In all other cases, the termination of pregnancy remains a wrong liable to punishment; because in this case the destruction of a legal interest of the highest standing is placed in the unfettered discretion of another person not acting under the compulsion of a situation of hardship. Were the legislator to decide in this case also not to apply criminal sanctions, this could only be reconciled with the duty of protection imposed by Article 2 (2) first sentence of the Basic Law, if he had at his disposal other effective legal sanctions which made clear that the act was wrong (the disapproval of the law) and were just as effective in preventing the interruption of pregnancies as a penalty imposed by the criminal law.

D.

If we apply these standards to the time limit system established in the 5th Criminal Reform Act (against which this application is brought) we find that that Act does not comply in a sufficient degree with the obligation arising out of Article 2 (2) first sentence, in conjunction with Article 1 (1) of the Basic Law, to provide effective protection for the unborn child.

I.

Admittedly the constitutional requirement to protect the life of the unborn child is adressed in the first place to the legislator. It is however the task of the Federal Constitutional Court on which this function has been conferred by the Basic Law to decide whether the legislator has complied with this requirement. The court must admittedly be careful to respect the legislator's margin of appreciation in judging the factual circumstances for which he must legislate, the prognosis which may be required and the choice of the means to be employed. The court may not put itself in the place of the legislator : it is however its function to consider whether the legislator has done what is necessary within the possibilities open

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to him to avert the dangers threatening the legal interest requiring protection. In principle, this also applies to the question whether the legislator has a duty to employ his most trenchant weapon i.e. the criminal law, though in this case the examination must stop short of considering the details of the punishment to be imposed.

II.

It is generally recognised that the protection of the life of the unborn child provided by the previous Art. 218 of the Criminal Code was in fact insufficient because it laid down an undifferentiated penalty for nearly all cases of interruption of pregnancy. For the realisation that there were cases in which the punishment imposed by the criminal law was inappropriate finally led to cases which really deserved punishment not being dealt with with the necessary severity. The position was made worse by the fact that it is frequently difficult to ascertain the facts owing to the nature of the circumstances in this offence. Admittedly the statistics quoted for the dark figure with respect to interruption of pregnancy vary widely, and it may well be practically impossible to obtain reliable data on this question by means of empirical investigations. In any event the number of illegal interruptions of pregnancies in the Federal Republic was high and the existance of an undifferentiated criminal sanction may have been one of the reasons why the State failed to take adequate measures to protect the life of the unborn child.

In the final version of the 5th Criminal Law Reform Act, the legislator was guided by the idea of giving preventive measures priority over penal sanctions (cf. on this point the motion tabled by the SPD and FDP and adopted by Parliament in connection with the passing of the 5th Criminal Law Reform Act - BT - Drucks 7/2042). The Act is based on the idea that the life of the unborn child is better protected by giving the pregnant woman individual advice than through the threat of punishment which makes a woman intending to comit abortion inaccessible to influence, and which is mistaken from the point of view of criminal policy and has in any case shown itself to be of no effect. From this the legislator drew the conclusion that under certain conditions during the first twelve weeks of pregnancy the criminal sanction should be completely abandoned and replaced by preventive advice and information (Arts. 218a and 218c).

There is no constitutional objection and it must be approved of if the legislator endeavours to fulfil his duty to provide better protection for the life of the unborn child through preventive measures including advice designed to strengthen the woman's own sense of responsibility. Nevertheless the system actually adopted is subject to conclusive constitutional objections in several respects.

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1. The disapproval of the interruption of a pregnancy required by the Constitution must also appear clearly in the legal system at the sub-constitutional level. As previously stated, the only exceptions can be those cases in which the woman cannot reasonably be expected to continue the pregnancy even having regard to the value judgment incorporated in Art. 2 (2) first sentence of the Basic Law. This general disapproval of the wrongness of the act in question is not expressed in the provisions of the 5th Criminal Law Reform Act relating to termination of pregnancy in the first twelve weeks; for after setting aside the criminal sanctions in Art. 218a of the Criminal Code the Act leaves it unclear whether a termination of pregnancy not based on one of the approved grounds is or is not lawful. This is so despite the fact that technically Article 218a of the Criminal Code constitutes an exception to the general criminal provision in Art. 218. This is so whatever position one adopts with regard to the question whether this provision in fact restricts the scope of Art. 218, provides a ground of justification or finally merely supplies a reason for exempting from guilt or punishment. The open-minded reader must receive the impression that Article 218a completely cancels the legal disapproval by a general repeal of the penalty irrespective of the reasons for which the act was committed and that under the conditions there specified a termination of pregnancy is legally permissible. The offence dealt with in Article 219 of the Criminal Code thus loses a great deal of its importance, especially since experience shows that by far the greater number of termination of pregnancy - according to information supplied by the Government representative (loc cit p. 1472) more than 9/10 - are undertaken in the first twelve weeks. This creates the impression of a practically complete exemption of the termination of pregnancy from criminal sanctions (the same opinion is expressed by Roxin in J Baumann, Editor, Das Abtreibungsverbot des Paragraphen 218 p. 185).

Moreover there is no other provision of the 5th Criminal Law Reform Act which makes it clear that a termination of pregnancy within the first twelve weeks not based on the approved grounds is still disapproved by the law. In particular Section 2 of the Act, which provides that in principle no one is under an obligation to take part in a termination of pregnancy, says nothing about the lawfulness or unlawfulness of such an act; the object of this provision is to make allowance for the freedom of conscience of the individual and the freedom of the moral convictions of a person who is faced with the question whether he can and should take an active part in the termination of a pregnancy exempted from criminal sanctions by Article 218a of the Criminal Code.

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A cursory examination of the social legislation contained in the Criminal Law Reform (Supplementary Provisions) Act forces one to the conclusion that a termination of pregnancy in the first twelve weeks is in no way reprehensible and may accordingly be encouraged and facilitated by social legislation. For statutory claims to receive social benefits imply a presumption that the factual circumstances in virtue of which they are granted do not constitue an act forbidden (or disapproved) by the law. These provisions therefore taken together can only be interpreted to mean that the termination of pregnancy undertaken by a doctor during the first twelve weeks is not illegal and thus permitted (by the law.)

This was also the position adopted by the Federal Government with respect to the Bill tabled in the 6th Bundestag ; the explanatory memorandum referring to clause 1 states (BT-Drucks VI/3434 S. 9):

"Whereas in other fields the legislator may assume that the repeal of a criminal law prohibition cannot be understood as conferring legal approval upon conduct hitherto liable to punishment, special considerations apply to the new provisions on the termination of pregnancy: The time-limit system can only fulfil the function expected of it in the field of health policy if every termination of pregnancy in the first three months is deemed to be approved of by the law. The operation must be undertaken as part of the general system of medical care. The contract for treatment by a doctor must be valid. In particular to ensure the non-applicability of Arts. 134 and 138 of the Civil Code these and other circumstances can only be interpreted in the sense that the law recognises an operation undertaken before expiry of the three months period as a normal social procedure in every case."

The Government representative appearing before the Special Committee on Criminal Law Reform, expressed himself in similar terms (7. Wahlp. 25. Sitzung StenBer p. 1473):

"The following point is important : termination of pregnancy by a doctor in the first trimester is not illegal under the time-limit system : it is permitted. This is the only way of integrating it into the system of the criminal law - freedom from liability to punishment of those taking part; exclusion of the defence of protecting third parties from attack - it is also the only way of justifying the civil law implications - the validity of the contract for treatment in spite of Art. 134 of the Civil Code - and the provisions of health legislation facilitating the operation and above all their proposed insertion in the system of social insurance as provided for in the Criminal Law Reform (Supplementary Provisions) Act."

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2. A merely formal statutory disapproval of termination of pregnancy would moreover not be sufficient; as it would not be considered as an obstacle by a woman determined to terminate her pregnancy. Recognising that positive measures to protect the life of the unborn child are also necessary, the legislator of the 5th Criminal Law Reform Act has replaced the penal provisions with a counselling system under Art. 218c of the Criminal Code in cases where a pregnancy is terminated by a doctor with the consent of the pregnant woman. However, the complete removal of liability to punishment creates a breach in the protective system which, in a not inconsiderable number of cases, totally destroys the guarantee of the life of the unborn child by making it subject to the untrammelled discretion of the woman concerned. There are many women who have made up their minds to a termination of a pregnancy and are not liable to be influenced by counselling of the type contemplated by Art. 218c(i) even where no ground exists such as would be recognised under the system of values established in the Constitution. These women are neither in pecuniary need nor subject to a serious mental conflict. They reject pregnancy because they are not willing to accept the sacrifice it demands and the natural duties of motherhood. They may have serious reasons for their attitude towards developing life but their reasons cannot be put into the balance against the duty to protect human life. According to the principles set out above, pregnancy is something which these women can be expected to bear. The actions of this group of women who are not entitled to terminate their pregnancy on any of the grounds recognised by the Constitution are also fully covered by Art. 218a of the 5th Criminal Law Reform Act. The life of the unborn child is abandoned to their arbitrary decision without any protection.

On this point it is objected that experience shows that in most cases women not amenable to influence would find a way to avoid punishment, so that the threat of punishment was in any case largely ineffective. Besides, the legislator was faced with the dilemma that preventive counselling and the threat of punishment were inevitably to a certain degree mutually exclusive as regards their effectiveness in protecting life : the threat of punishment which was part of the approved grounds system would it is true by its deterrent effect prevent unjustified terminations of pregnancies to an extent that could not be precisely ascertained. At the same time, however, the threat of punishment prevents life being saved in other cases through the counselling of women accessible to influence; for particularly in the case of those women where the requirements for one of the recognised grounds were not satisfied and indeed other women who had doubts about the outcome of the procedure

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for ascertaining the existence of such grounds the woman in question would keep their pregnancy secret on account of the liability to punishment and thus to a considerable extent avoid being influenced by their entourage and the counselling authorities. This showed that complete protection of the life of unborn children was impossible. The legislator had no choice but to weigh lives against lives i.e. the lives it was anticipated could be saved through a particular way of dealing with the question of abortion against those that would probably be sacrificed by the application of this same solution; for the effect of imposing penalties was not only to protect but at the same time to destroy the lives of unborn children. Since it was not clearly established that one system protected individual life better than the other the legislator, in choosing the time-limit system, had not transgressed the limits imposed on him by the Constitution.

(a) To begin with this conception does not do justice to the nature and function of the criminal law. A rule of criminal law is in principle directed towards all members of the community and imposes the same obligation on them all. Admittedly the prosecuting authorities practically never succeed in obtaining the punishment of all those who commit offences against the criminal law. The dark figure varies from offence to offence. It is not disputed that it is particularly high in the case of abortion. This however is not a reason for overlooking the function of the criminal law as a general deterrent. If the purpose of the criminal law is considered to be the protection of specially important legal interests and primary values of the community this particular function is of great importance. Just as important as the visible reaction in the individual case, are the remote effects of a rule of criminal law which laying down a rule of principle ("abortion is punishable") has now been in existence for a very long time. The mere existence of such a criminal sanction has an influence on the value judgments and behaviour of the population (cf Bericht des Sonderausschusses für die Strafrechtsreform, BT-Drucks 7/1981 (neu), S 10). The knowledge of the legal consequences of contravening the rule creates a barrier which many hesitate to cross. The opposite effect is produced if, by a complete removal of the liability to punishment, conduct which undaubtedly deserves to be punished is declared to be legally unobjectionable. This must lead to a confusion of the concepts of 'right' and 'wrong' existing in the community. The purely theoretical pronouncement that termination of pregnancy is 'tolerated' but not 'approved' must remain ineffective so long as there is no recognisable legal sanction which draws a clear distinction between the justified termination of pregnancy and cases in which it is reprenensible. A complete removal of the liability to punishment inevitably

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means that the average citizen will obtain the impression that termination of pregnancy is legally permissible in all cases and can therefore no longer be condemned by social morality. "The dangerous inference from the absence of legal sanction that the act is morally permissible" (Engisch, Auf der Suche nach der Gerechtigkeit, 1971, S. 104) is too apparent not to be drawn by many members of the community.

This is also the opinion of the Federal Government in the reasons given for the Bill tabled in the 6th Bundestag. (BT-Drucks VI/3434 S. 9):

"The time-limit system would mean that the general consciousness of the need to protect the life of the unborn child in the first three months of pregnancy would disappear. It would encourage the opinion that termination of pregnancy, at least at an early stage, was a matter within the discretion of the pregnant woman in the same way as the use of contraceptives. This conception is incompatible with the system of values contained in the Constitution."

(b) The weighing of lives against lives on a global basis, which means abandoning to destruction the supposedly smaller number in the interests of saving the allegedly larger number, is incompatible with the duty to protect each individual life.

In the decisions of the Federal Constitutional Court the principle has been developed that the unconstitutionality of a statutory provision, which through its structure and its actual effect harms a particular class of persons, cannot be contraverted by showing that the provision in question or other provisions of the same Act favour a different set of persons. Still less is it sufficient for this purpose to emphasise the general tendancy of the Act to protect legal rights. This principle (cf BVerfGE 12, 151/1687; 15, 328 /3337 ; 18, 97 /108 7 ; 32, 260 /2697) must apply in a particular degree to the strictly personal interest an individual has in his own 'life'. The protection of the life of each individual cannot be abandoned because one is pursuing an aim in itself worthy of respect, namely that of saving other lives. Every human life - even in its earliest stages - is of equal value and cannot therefore be subjected to any type of discriminatory assessment or, still less, made the object of a numerical calculation. The basic conception of legal policy underlying the 5th Criminal Law Reform Act reveals a notion of the function of the law in a society respecting the rule of law that cannot be accepted. The legal protection for each human individual life demanded by the Constitution is abandoned in favour of a more

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"sociologically technical" application of the Act as an operation by the legislator consciously directed to the attainment a specific and desirable goal of social policy, namely "the stopping of the abortion plague". However the legislator must not only consider the goal, however desirable; he must also bear in mind that every step on the way must be justified in the eyes of the Constitution and its unrelinquishable demands. The individual protection of fundamental rights must not be sacrificed to the efficiency of the system as a whole. Legislation is not only an instrument for directing social processes in accordance with sociological sciences and forecasts but also the permanent expression of the assessment of human acts by social morality, and in its footsteps by the law. Its task is to say what is right and what is wrong for the individual.

(c) Moreover there is no reliable factual basis for striking a general balance of this sort which is in any case unacceptable in principle. There is no sufficient evidence to show the number of interruptions of pregnancy will be materially less in future than under the previous legislation. On the contrary, after very detailed considerations and comparisons the Government representative before the Special Committee for Criminal Law Reform (7 Wahlp., 25. Sitzung. StenBer. S.1451) came to the conclusion that after the introduction of the time-limit system in the Federal Republic the total number of legal and illegal abortions would probably rise by about 40 %. This calculation was admittedly doubted by Professor Dr. Dr. Jürgens in the oral hearing. Nevertheless the figures available from abroad, particularly from England after the entry onto force of the Abortion Act of 1967 (cf the statement in the Report of the Committee on the Working of the Abortion Act - Lane - Report) and the German Democratic Republic after entry into force of the Interruption of Pregnancy Act of 9.3. 1972 (cf Deutsches Ärzteblatt 1974, 2765), make it impossible to infer with certainty that there would be a definite reduction in terminations of pregnancy. In view of the very high value of the legal interest to be protected experiments are not permissible.

Meanwhile the representatives of all the parties in the Special Committee for Criminal Law Reform have refused to accept figures from abroad as automatically applicable to the Federal Republic of Germany (7. Wahlp. 20. Sitzung StenBer, S. 1286 ff) as the effects of varying social structures, mentalities, religious convictions and patterns of behaviour were practically impossible to calculate. Even when all the particular features applying in the Federal Republic of Germany are interpreted in favour of the time-limit system, an increase in the number of interruptions of pregnancy must be anticipated because as

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already shown the mere existence of the criminal sanction imposed by Art. 218 of the Criminal Code exercised an influence on the value judgments and behaviour of the population. In this connection considerable importance must be attributed to the fact that as a result of the liability to punishment the possibility of obtaining an abortion, in particular a properly performed abortion, was considerably restricted (inter alia for financial reasons). At all events it is not evident that the time-limit system would bring about even a merely quantitative improvement of the protection of life.

3. The counselling and information of pregnant women provided for in Art. 218 (c) (i) of the Criminal Code can - regarded in itself - not be considered as adequate to persuade women to continue their pregnancy.

The measures provided for in this article are less satisfactory than those contained in the alternative draft of the 16 experts in criminal law on which the conception of the 5th Criminal Law Reform Act is in other respects largely based. The advice bureaus provided for in this text (in Article 105 (1) No. 2) given the power themselves to provide financial, social and family assistance. Furthermore the intention was that by employing suitable staff they would provide pregnant women and their relations with moral support and earnestly endeavour to persuade them to continue their pregnancy (cf. in detail pp. 11 et seq).

There was all the more reason to set up counselling bureaus in accordance with these or similar proposals enabling them to provide direct assistance as according to the report of the Special Committee for Criminal Law Reform (BT-Drucks 7/1981 (neu) p.7 with references to the Anhörungsverfahren) the unsatisfactory housing position, the impossibility of looking after a child at the same time as pursuing one's education or holding down a job, poverty and other material reasons, as well as the fear of social sanctions in the case of unmarried women, were the most frequently mentioned causes and motives of a desire to terminate a pregnancy.

By way of contrast the advice bureaus under Art. 1 are to provide information "on the available forms of public and private assistance for pregnant women, mothers and children in particular such as facilitate the continuance of the pregnancy and tend to relieve the situation of mother and child." This could be interpreted to mean that the advice bureaus would only provide information without deleberately influencing the motives of the pregnant woman's decision. Whether the neutral

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description of the functions of the advice bureaus is due to the fact that in the Special Committee for criminal law reform the opinion was expressed that the pregnant woman should not be influenced in her decision by the advice received (opinion expressed by von Schöler, FDP 7 Wahlp. 25 Sitzung StenBer;, S. 1473) need not be decided here. At all events the exercise of such influence is a matter of decisive importance if the counselling is to help to protect the life of the unborn child. Art. 218 (c) Nos.(1) and (2) can, however, it is true be interpreted in the sense that the councelling and information are intended to persuade the pregnant woman to complete her pregnancy. It would seem that the report of the Special Committee (BT-Drucks 7/1981/n/neu/ S. 16) is to be understood in this sense; it states that the counselling should take account of the entire circumstances of the pregnant woman and be conducted on a personal and individual basis, not by telephone or by handing out printed material (cf the above mentioned Bundestag resolution BT - Drucks 7/ 2042).

Even though it may be thought conceivable that this type of counselling could exercise a certain effect in persuading a woman to give up her intention of terminating her pregnancy the actual detailed organisation contains such deficiencies that it cannot be expected that it will provide effective protection for the life of the unborn child.

(a) According to Art. 218 (c) (1) No. (1) the information on the available form of private and public assistance for pregnant women, mothers and children, may be provided by any doctor. However, it is difficult even for a trained specialist to be familiar with all the various details of welfare law and its administration. It can hardly be expected that a doctor would be in a position to provide reliable information on all the rights and possibilities that might be available in any individual case, particularly as a means test is frequently required (eg for rent allowance or social assistance). Doctors are not qualified by their professional training to give advice of this sort nor as a rule have they sufficient time at their disposal to provide individual counselling.

(b) It is particularly unsatisfactory that information about social assistance may be given by the same doctor who is to carry out the interruption of pregnancy. This also destroys the value of the medical counselling provided for in Art. 218c (1) No. (2) which in itself falls within the scope of a doctor's duties. As conceived by the Special Committee for Criminal Law Reform it would take the following form :

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"This refers firstly to advice concerning the type of operation and its possible effects on health. It must not however - and this is expressed by the conscious choice of the word 'ärztlich' (i.e. 'doctor's' advice rather than 'medical' advice) - be limited to the purely medical aspect of the case. On the contrary, it must, so far as is possible and fitting in the circumstances, extend to the whole present and future position of the pregnant woman so far as it may be affected by the termination of pregnancy, and at the same time in accordance with the doctor's other duty also include the protection of the life of the unborn child. The doctor must therefore explain to the pregnant woman that human life is destroyed by the operation and tell her what stage this life has reached. As confirmed in the public hearing eg by Pross (AP VI pp.2255, 2256) and Rolinski (AP VI p. 2224) experience shows that many women are completely ignorant in this respect and that when they learn of these facts it often causes them to suffer from serious doubts and remorse. The counselling must accordingly be planned to forestall conflict situations of this sort."

(BT Drucks 7/1981 (neu) p. 16)

The doctor whom the pregnant woman is visiting with the specific purpose of obtaining an abortion cannot be expected to provide information in the manner here contemplated with the purpose required by the Constitution of attempting to bring about a continuation of the pregnancy. Since, from the results of general inquiries to date and the positions adopted by representative medical bodies, it must be assumed that the majority of doctors will refuse to perform abortions not based on the approved grounds the doctors prepared to offer their services will usually be those who either consider termination of pregnancy a profitable business or are willing to comply with any desire by a woman to terminate pregnancy because they regard this measure either as a demonstration of the woman's right to self-determination or a means of emancipating woman. In both cases it is very unlikely that the doctor would exercise an influence to persuade the woman to continue her pregnancy.

This is confirmed by the experience in England. There the (very widely drafted) ground must be certified by any two doctors. The result is that almost every desired termination of pregnancy is carried out by specialised private doctors. The appearance of professional middlemen who direct women to these private clinics is a particularly unpleasant development but one that is difficult to avoid (cf Lane Report Volume 1 paras. 436 and 452).

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(c) Furthermore, the success of the information and counselling is lessened by the fact that the termination of pregnancy may be performed immediately thereafter. A serious consideration by the pregnant woman and her relations of the counter-arguments put to her during the counselling cannot be expected in these circumstances. The alternative version of Art. 218c submitted by the Federal Ministry of Justice to the Special Committee for Criminal Law Reform therefore provided that the termination of pregnancy could only be undertaken after the expiration of at least three days after she had been told about the various types of assistance available. (Art. 218 (1) No (1) (Sonderausschuss 7. Wahlp., 30. Sitzung, StenBer. p. 1659). Subsequently however, according to the report of the Special Committee "it was decided to drop this waiting period sanctioned by the criminal law as in certain cases depending on the pregnant woman's place of residence and her personal circumstances it might involve her in excessive difficulties with the result that she decided not to attend the consultation" (BT-Drucks 7/1981 (neu) p. 17). When a women therefore is determined to interrupt her pregnancy it is merely a question of finding a compliant doctor : as he may be responsible for both the welfare and the medical counselling and finally himself entitled to perform the operation, it cannot be expected that he will make a serious attempt to persuade the pregnant woman to change her mind.

III.

The Court's opinion on the constitutional position regarding the time-limit system in the Fifth Criminal Law Reform Act may be summarised as follows :

It is incompatible with the legislator's duty of preserving human life that terminations of pregnancy are not legally disapproved and subjected to punishment when they are undertaken on grounds which cannot be justified according to the system of values established in the Basic Law. There would admittedly be no constitutional objection to the limitation of the liability to punishment were it combined with other measures whose effect would at least compensate for the loss of the protection afforded by the criminal law. This however is - as has been explained - obviously not the case. The parliamentary discussion of the reform of the law relating to abortion has it is true made it better understood that the State's foremost duty is to prevent the destruction of the unborn child by providing information on preventive birth control, through effective welfare measures and a general change in the attitude of society. Nevertheless neither the assistance of this type at present available and in fact granted nor the counselling provided for in the Fifth Criminal Law Reform Act can replace the protection of the individual life

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which is in principle still provided today by the criminal law in those cases in which there exists no ground for termination of pregnancy which can be accepted under the system of values established by the Basic Law.

If the legislator is of the opinion that the hitherto undifferentiated liability to punishment for termination of a pregnancy is of questionable value as a means of protecting life, this does not relieve him from the duty at least to make an attempt to achieve better protection of life through more differentiated criminal provisions imposing a penalty in those cases in which the termination of pregnancy is contrary to the spirit of the Constitution. A clear distinction between this group of cases and the others in which a woman cannot reasonably be expected to continue her pregnancy would strengthen the power of the criminal law to create a feeling for what is right and wrong. Anyone who recognises the priority of protection of life over the woman's right to conduct her life as she pleases cannot deny the wrongness of the act in cases which are not covered by one of the approved grounds. If the State not only declares these cases to be punishable but also sees that they are in practice prosecuted and punished, the community as a whole will not consider such action unjust or antisocial.

The passionate discussion of the question of abortion may give reason to fear that the value of the life of the unborn child is no longer fully recognised in certain sections of the population. This, however, is no justification for the legislator to give up the struggle. On the contrary he must make a determined effort to achieve a more effective protection of life through differentiated criminal sanctions founded on the ordinary citizen's sense of right and wrong.

IV.

The attempt is sometimes made to defend the system adopted by the Fifth Criminal Law Reform Act by pointing out that in other democratic countries of the western world the criminal provisions relating to the termination of a pregnancy have been 'liberalised' or 'modernised' in a similar or even more radical manner; this was evidence that the new provisions did at any rate correspond with the general development of opinion in this field and were not incompatible with fundamental principles of law and social morality.

Such considerations cannot influence our decision in this Court. Apart from the fact that all these foreign systems are the object of intense controversy in the countries in question, the legal standards governing the acts of the legislature in those countries differ fundamentally from those in the Federal Republic of Germany.

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The Basic Law is founded on principles concerning the nature of the State, which can only be understood on the basis of our historical experience and the spiritual and moral reaction to the preceding national socialist system. As an answer to the omnipotence of the totalitarian State which claimed unlimited domination over all fields of social life and for which in the pursuit of its national goals the consideration even of the life of the individual was in principle of no importance the Basic Law has established an order based on a system of values which in all its provisions is centred on the worth and dignity of the individual human being. As the Federal Constitutional Court already stated at an early date (BVerfGE, 2, 1 /12/), this is based on the conception that man occupies a special independent place in the order of creation which calls for unconditional respect for the life of every individual human being even if the individual in question is apparently socially 'of no value' and which therefore makes it impossible to destroy such life without some ground of justification. This basic decision in the Constitution conditions the formation and interpretation of the whole legal system. Not even the legislator is free in relation to this requirement; considerations of what is expedient from the point of view of social policy, indeed even political necessities cannot get past this constitutional barrier (BVerfGE 1, 14 /36/). Even a general change in the opinion of the population on this matter - if indeed it were possible to ascertain such a change - would make no difference. The Federal Constitutional Court on which the Constitution has conferred the function of supervising and where necessary enforcing the observation of its fundamental principles by all State organs can only base its decisions on these principles to the development of which it has made a decisive contribution in its previous decisions. This does not imply a derogatory judgment on other legal systems 'which have not had the same experience with a system based on injustice and which on the basis of a different historical development, different political events and different basic political conceptions have not made the same decision for themselves' (BVerfGE 18, 112. /117/).

E.

It follows accordingly that Article 218a of the Criminal Code in the version contained in the Fifth Criminal Law Reform Act is incompatible with Art. 2 (2) first sentence in conjunction with Art. 1 (1) of the Basic Law insofar as it exempts terminations of pregnancy from liability to punishment even in such cases where there are no grounds which, according to what has been said above, can be justified according to the system of values contained in the Basic Law. To this extent it is necessary to find that the provision in

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question is void. It is for the legislator to make a clear distinction between the cases of permissible and non-permissble interruption of pregnancy. In the interests of maintaining the certainty of law until the new statutory provisions come into force, it appeared necessary to make an Order under Art. 35 of the Federal Constitutional Court Act as stated in the operative part of this judgment.

There was no cause to declare other provisions of the Fifth Criminal Law Reform Act void.

(signed) Dr. Benda

Ritterspach

Dr. Haager

Rupp-v. Brünneck

Dr. Böhmer

Dr. Faller

Dr. Brox

Dr. Simon

Dissenting Opinion
of the Judges Rupp-von Brünneck and Dr Simon

It goes without saying that the life of every individual human being constitutes a basic value in the legal system. It is undisputed that the constitutional duty to protect this life extends to the stage of development preceding birth. The discussions in Parliament and before the Federal Constitutional Court related not to whether but only to how it should be protected. The legislator is responsible for making the decision on this point. In no circumstances can there be deduced from the Constitution a duty on the part of the State to make abortion punishable at every stage of the pregnancy. The legislator was entitled to decide in favour of either the counselling and time-limit system or the approved grounds system.

The contrary interpretation of the Constitution is inconsistent with the emphasis on freedom immanent in the rules relating to fundamental rights and imports a transfer of powers of decision to the Federal Constitutional Court which could have serious consequences (A). In its assessment of the Fifth Criminal Law Reform Act the majority of the Court has not paid sufficient attention to the special nature of interruption of pregnancy as compared with other threats to life (B.I.1). It did not attach sufficient weight to the social problems confronting the legislator and the objects of this urgent reform (B.I.2). Just because every solution is bound to be fragmentary there can be no constitutional objection if the German legislator - as was the case with the reforms in other important civilised States (B.III) - gave social measures priority over the imposition of largely ineffective criminal sanctions (B.I.3.5). There is no provision of the Constitution requiring a legislative "disapproval" of behaviour which cannot be morally approved without reference to its actual preventive effect (B.II).

A. - I.

The Federal Constitutional Court's right to set aside legislation passed by Parliament must be used sparingly if a transfer of functions between the various organs established by the Constitution is to be avoided. The principle of judicial self-restraint, that has been described as the "life blood" of the decisions of the Federal Constitutional Court (1) applies above all when it is not a question of defending the citizen against improper use of the State's power but of

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(1) Leibholz, VVDStRL 20 (1963) 119.

using the judicial power to supervise the observance of the Constitution as a means of giving instructions to the legislator directly chosen by the people for the positive organisation of the social system. In such a case the Federal Constitutional Court must not allow itself to be tempted to take over the functions of the organ it is supervising, if in the long run the position of the Constitutional Court is not itself to be endangered.

1. The power of control the Court is being asked to use in these proceedings goes beyond the limits of that traditionally exercised by a Constituional Court. The fundamental rights which occupy a central position in our constitution are defensive rights which guarantee to the citizen in relation to the State a certain field in which he is free to organise his life on his own responsibility. Hence the traditional function of the Federal Constitutional Court is to provide a defence against any infringement of this area of freedom by the excessive exercise of State powers. In the scale of the various interferences which may be exercised by the State, the most drastic are the rules of criminal law; they command the citizen to follow a certain line of conduct and subject him to rigorous penalties in the form of imprisonment or fines if he fails to comply. Judicial examination of such provisions by the Constitutional Court therefore implies consideration of whether the interference with the area of freedom protected by the fundamental rights constituted by the enactment or application of a given rule of criminal law is permissible i.e. whether the State is entitled to impose a penalty of the type contemplated or at all.

In the present constitutional dispute we have exactly the opposite position. For the first time the court is being called upon to examine whether the State must impose a criminal penalty i.e. whether the abolition of the rule of criminal law punishing a termination of pregnancy in the first three months is compatible with the fundamental rights. It is however obvious that refraining from imposing a punishment is the opposite of State interference. As the partial repeal of the criminal law provision was not enacted in order to favour terminations of pregnancy but because, according to the assumption of the legislator, which was unrefuted and confirmed by experience, the previously existing liability to punishment had proved to a large extent ineffective, it is impossible even to construct an "interference" by the State with the life of the unborn child. Because this element was missing the Austrian Constitutional Court found that the time-limit system adopted in that country did not constitute a violation of the fundamental rights recognised by Austrian domestic law (2).

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(2) Cf the judgment of 11.10.1974 - G 8/74 -, II 2 b of the grounds, EuGRZ 1975, pp. 74(76).

2. As the fundamental rights qua defensive rights are by their nature unsuited to preventing the legislator from repealing provisions of criminal law, the majority of the Court seeks to find a basis for this purpose in a more extensive interpretation of the fundamental rights as objective value judgments.(1)According to this opinion the fundamental rights not only constitute defensive rights of the individual against the State but at the same time contain objective value judgments which it is the permanent function of the authorities of the State to put into effect by taking active measures. This doctrine was developed by the Federal Constitutional Court in a praiseworthy effort to make the fundamental rights more effective by developing their capacity to protect freedom and promote social justice.

However the majority of the Court does not pay sufficient regard to the differences which exist between these two aspects of the fundamental rights and which are of importance with respect to the judicial supervision of the Constitution.

As defensive rights the fundamental rights have a comparatively clearly recognisable content; in their interpretation and application, the courts have developed workable and generally recognised criteria for the control of acts of State interference - e.g. the principle of proportionality. By way of contrast it is as a rule a very complex question how a value judgment is to be put into practice by active measures on the part of the legislator.

The value judgments, which are of necessity general in their terms, might accordingly be characterised as requirements of the Constitution which admittedly lay down the direction to be followed by all State action but which have necessarily first to be transformed into binding statutory provisions. Depending on one's assessment of the factual situation, of the practical goals and their priority and of the suitability of the conceivable ways and means, a number of very different solutions are possible. The decision on this question which often involves compromises and is reached in a process of trial and error, belongs in accordance with the principle of democracy and that of the division of powers to the sphere of responsibility of the legislator directly chosen by the people.(2)

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(1) C I 3 and C III 3 b of the present Judgment . . .
(2) Cf for further detail on this point our dissenting judgment in the Universities case, BVerfGE 35, 79,148(150,153,155 et seq).

Admittedly, even in this field it is not possible to dispense with any form of control by the constitutional court, in particular owing to the increasing significance of measures of social support and assistance in connection with the implementation of the fundamental rights: the development of suitable instruments for this purpose which respect the legislator's freedom of action will possibly be one of the principal functions of the court in the coming decades. So long as this has not been done, there is a danger that the control by the Federal Constitutional Court will not be limited to reviewing the decision taken by the legislator but may amount to replacing it by a different decision which the court considers a better one. This danger exists in a special degree if, as in this case, in very controversial questions a decision taken by the majority in Parliament after prolonged discussions is attacked by the unsuccessful minority before the Federal Constitutional Court. Without prejudice to the legitimate right of the persons entitled to bring proceedings to have doubtful constitutional points clarified in this way, the Federal Constitutional Court finds itself in such cases suddenly placed in the position of being called upon to decide as a political arbitrator between two rival schemes of legislation.

The concept of fundamental rights as objective value judgments must not however be used as a means for transferring specifically legislative functions relating to the organisation of society to the Federal Constitutional Court. Otherwise the court would be forced into a role for which it is neither competent nor adequately equipped. The Federal Constitutional Court should therefore continue to exercise the restraint it observed until the judgment in the Universities case (cf. BVerfGE 4, 7 /18/; 27, 253 /283/ ; 33, 303 /333 et seq/ ; 35, 148 - dissent. op. - /152 et seq./ ; 36, 321 /330 et seq./. It may only oppose the legislator when he has completely failed to take account of a value judgment or the manner in which it is put into effect is manifestly erroneous. The majority of the Court on the other hand, although ostensibly recognising the legislator's freedom of action, in fact criticised him for failing to implement a recognised value judgment in what appears to them to be the best possible manner. If this were to be accepted as the authoritative criterion it would imply the abandonment of the principle of judicial self-restraint.

II.

1. What we find most disquieting is that, for the first time in the history of the Federal Constitutional Court, an objective value judgment is to be used in order to impose a duty on the legislator to enact rules of

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criminal law, i.e. the most drastic interference with the citizens' area of freedom that can be conceived. This is the converse of the normal function of fundamental rights. If the objective value judgment protecting a given legal interest immanent in a fundamental right is a sufficient basis from which to derive a duty to impose punishment, this would mean that the fundamental rights could imperceptibly cease to be a stronghold for the defence of freedom and provide the foundation for a mass of freedom-restricting regulations. What applies to the protection of life could apply equally to other high-ranking legal interests - for example, physical integrity, freedom, marriage and the family.

Obviously, the constitution assumes that the State may make use of its power of punishment to protect the orderly life of the community; the purpose of the fundamental rights is however not to call for such action, but to impose limits on it. For example, the Supreme Court of the United States has gone so far as to regard the punishment of terminations of pregnancy undertaken by a doctor with the consent of the pregnant woman in the first third of the pregnancy as a violation of a fundamental right (3). Admittedly, this would be going too far under German constitutional law. Nevertheless, the legislator requires constitutional justification for imposing punishment and not for refraining to impose punishment because in his opinion the threat of punishment would not produce a beneficial result or was for other reasons an imappropriate reaction (cf BVerfGE 22, 49/78?; 27, 18/28?; 32, 40/48?).

The contrary interpretation of the fundamental rights inevitably leads to a no less questionable extension of the control exercised by the Federal Constitutional Court: it must not merely consider whether a rule of criminal law constitutes too great an interference with the citizen's right to personal freedom, but also, conversely, whether the State is punishing too little. Contrary to the majority opinion, this would mean that the Federal Constitutional Court could not confine itself to the question whether the enactment of a criminal provision, whatever form it took, was called for, but would have to make clear what criminal sanction would be sufficient for the protection of the legal interest in question. In the last analysis, the court might even be forced to examine the question whether the application of a criminal sanction in an individual case was adequate for the purpose of protection.

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(3) Roe v. Wade, 410 U.S. 113 (1973) = 93 S.Ct. 705 = 41 U.S. Law Week 4213.

The perpetuation of criminal sanctions by means of constitutional law - as called for by the majority of the Court - is finally unacceptable because, to judge by the experience of the last decades and the probable developments in the field of social studies, the leading concepts of the criminal law are subject to rapid and radical changes. Not only is this obvious from a glance at the fundamental changes for example in the assessment of the sexual offences - e.g. homosexuality, procuring the prostitution of one's own wife, exhibitionism - but it may also be specifically demonstrated with respect to the provisions of the criminal law dealing with abortion. The non-liability to punishment of an abortion based on the ethical (criminological) ground which is today accepted as lawful by the great majority, was still the subject of intense controversy in the sixties (4). The Criminal Code Bills tabled by the Federal Government in 1960 and 1962 expressly rejected this ground (5); as regards the social and eugenic grounds, there was merely a reference stating that their rejection "went without saying" (6).

2. The history of the origin of the Basic Law is also against inferring a duty to punish from the provisions enacting fundamental rights. When the Parliamentary Council considered criminal sanctions necessary on constitutional grounds it said so expressly in the Basic Law, as in Art. 26 for preparing a war of agression and in the original version of Art. 143 for treason.

On the other hand, as the majority of the Court admits (7), there is no evidence in the materials from which Art. 2 (2) of the Basic Law was drafted of a duty to use criminal sanctions to protect the life of the unborn child.

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(4) Cf the debates in the Bundesrat and Bundestag (Niederschrift über die 254. Sitzung des Bundesratsrechtausschusses of 26.6.1962, pp. 30 et seq; Verhandlungen des Bundesrats 1962, pp. 140 et seq; 153, 154 et seq; Verhandlungen des Deutsche Bundestages, 4. Wahlp., StenBer. der 70, Sitzung of 28.3.1963 pp. 3188, 3208, 3210, 3217, 3221); see also the references in Lang-Hinrichsen, JZ 1963, 725 et seq.

(5) Cf Arts. 140 et seq, 157 and the explanatory memorandum, BT-Drucks III/215 , pp. 262, 274 et seq; BT-Drucks IV/650, pp. 278, 292 et seq.

(6) BT-Drucks III/2150, p. 262, IV/650, p. 278.

(7) C I 1 d ...

A closer analysis of the history of the origin of the article would moreover seem to indicate that the attitude of the criminal law to interruptions of pregnancy was deliberately left to the ordinary legislator to decide on his own responsibility. The relevant statements of the Members of Parliament, Heuss and Grewe, and the rejection of Mr Seebohm's motion (1) must be understood against their historical background. During the Weimar period, the punishment of abortion was extremely controversial; it was at that time a very much more serious problem because the now widespread and easily applicable methods of birth control did not then exist. This position remained unchanged at the time the Parliamentary Council was sitting. If under these circumstances the motion in favour of including an express provision relating to the protection of the unborn child was rejected, seen in conjunction with the statements we have mentioned this can only be understood to mean that the reform of the controversial Art. 218 of the Criminal Code should not be decided on in advance by the Constitution.

The opposite view cannot be based on the argument that the inclusion of Art. 2 (2) of the Basic Law indubitably derived from the reaction to the inhuman ideology and practice of the national socialist system.(2). The reaction in question was against the mass destruction of human life by the State in concentration camps and in the case of mental patients, against the sterilisations and enforced abortions ordered by the authorities, medical experiments with human beings against their will and countless other State measures showing a disregard of individual life and human dignity.

To draw a conclusion from this for the purpose of assessing the constitutional significance of the destruction of an unborn child, not by the State, but by the pregnant woman herself or by a third party with her consent is particularly out of place since the national socialist regime, in accordance with its ideological, biological and population policy, adopted a particularly rigorous position on this point. In addition to new provisions against advertising for abortion or means of procuring abortion, appropriate State measures were taken to ensure that, in contrast to the practice during the Weimar period, the criminal provisions were more strictly enforced (3).

The existing penalties, which were in themselves severe, were made considerably stricter in 1943. Whereas previously the pregnant woman and a non-professional assistant were liable to imprisonment, in future abortion

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(1) C I 1 d ... with references.
(2) But cf. C I 1 and D IV of this Judgment ...
(3) Cf on the increase of convictions in the 3rd Reich: Dotzauer, Abtreibung, in Handwörterbuch der Kriminologie (published by Sierverts), 2nd ed. Vol. I (1966), pp. 10 et seq.

committed by the woman herself was punishable with penal servitude in particularly serious cases. Abortion committed on others was, except in milder cases, always punishable with penal servitude; if the offender "had thereby continuously reduced the vital strength of the German people" it was even a capital offence. In view of these provisions which still remained unchanged at the time the Basic Law was passed and were merely mitigated in their application by the prohibition by the Allies of cruel and excessively severe punishments, the reasons for including Art. 2 (2) in the Basic Law can certainly not be adduced to support a constitutional duty to punish abortion. On the contrary the definite move away from the totalitarian, national-socialist State brought about by the enactment of the Basic Law called for restraint in the use of criminal sanctions whose misguided application has already caused infinite suffering in the history of mankind.

B.

Even if contrary to our opinion one were to agree with the majority that a constitutional duty to impose punishment is conceivable it cannot be said that the legislator has committed a breach of the Constitution in this case. Without its being necessary to deal with every detail, the arguments put forward by the majority of the Court are subject to the following objections:

I.

Even according to the opinion of the majority (1) a constitutional duty to punish can only be contemplated as an ultima ratio. If this is taken seriously it must be a precondition for the existence of such duty that suitable measures of a milder sort are not available or that they have been tried and proved ineffective; furthermore the criminal sanction must be suitable and necessary either in order to achieve the desired purpose or to achieve it better. Both these points must - if we are to follow previous decisions (cf e.g. BVerfGE 17, 306/313 et seq) - be proved beyond doubt. For, if the admissibility of an existing criminal provision depends on whether it is suitable and necessary for protection of the legal interest in question, it is still more essential that this should be proved when the legislator is actually to be compelled to impose penalties against his will. So far as the assessment of the factual position and of the effectiveness of the proposed measures is concerned, the Court must accept the legislator's opinion so long as this is not proved to be obviously incorrect (cf BVerfGE 7, 377/412; 24, 367/406; 35,148 - dissent. op. - /165).

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(1) C III 2 b ...

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The reasons for the judgment do not satisfy these requirements; they are repeatedly self-contradictory and end up by reversing the onus of proof when they state that the legislator may only refrain from imposing criminal sanctions if it is established beyond doubt that the milder measures which he prefers are "at least" as effective or more effective in fulfilling the duty of protection. The initially impressive statements on the indubitably high priority to be given to the protection of life neglect the special position of termination of pregnancy when compared with other threats to human life. We are not here dealing with the academic question of whether the use of the State's power of punishment as a protection against murderers and assassins, against whom no other kind of preventive action can be taken, is absolutely necessary. In the history of European law, which was influenced by the Church, a distinction has always been drawn between the life of a born and an unborn person. Again, the value judgment in the Constitution leaves room for such differentiated application of the necessary protective measures particularly as the fundamental right in Art. 2 (2) of the Basic Law is not, as the majority expresses (1), it "comprehensively" guaranteed but subject to restrictions by legislation. If this were not so it would be impossible to justify either the ethical or the eugenic and still less the social indication.

The majority of the Court does not doubt the justification of this distinction (1) but at the same time fails to distinguish between the different aspects of the provision enacting the fundamental right. So far as defence against State interference is concerned it is obvious that no distinction can be drawn between the stages of development preceding and following birth; to this extent the embryo as a potential person entitled to fundamental rights is to be protected in all respects in the same way as any person already born. This equality of legal treatment can only be applied to a limited extent, even as regards injury to the life of an unborn child by third persons against the will of the pregnant woman and certainly cannot be applied to the refusal of a woman to allow the full development of the embryo within her own body.

The special circumstance that the person of a pregnant woman confronts us with a unique combination of "offender" and "victim" (3) is of legal importance if for no other reason because - as opposed to the case of the persons to whom the provisions forbidding offences involving killing are directed - much more is required of her than a mere abstention from action; she is not merely required to accept the far-reaching changes in her health and physical well-being connected with the completion of pregnancy but

(1) C II 1 ... ./.
(2) C III 2 a ...
(3) Also observed by the majority under C II 2, C III 3 ...

also the infringements of her power to organise her life which result from pregnancy and birth, and in particular her responsibility as a mother for the further development of the child after birth. Otherwise than in the case of the above-mentioned offences involving killing the legislator can and must start from the assumption that the object to be protected - the unborn child - receives its best protection from the mother herself whose readiness to complete her pregnancy can be increased by all sorts of various measures. Since in the natural course of events no criminal provision is required to create and guarantee the protective relationship between mother and child one must ask oneself whether when this relationship is disordered as occurs in the case of abortion the most suitable way to remedy the position is to apply criminal sanctions. At all events the above-mentioned special features justify the legislator in reacting in a different manner than in the case of the destruction of human life by third persons.

In the opinion of the judge Mrs Rupp -v. Brünneck the refusal of a pregnant woman to allow the child within her body to come to birth is, not only according to the natural feelings of the woman, but also in law, something essentially different from the destruction of the life of a person with a separate existence. For this reason alone it is on principle unacceptable to place abortion during the initial stage of pregnancy on the same footing as murder or manslaughter. It is particularly mistaken, if not completely irrelevant, to compare the time-limit system with euthanasia or indeed with the "killing of those unfit to live" and then criticise it on this basis as has been done in the public discussion. The fact that only after a lengthy process of development there comes into existence a living being capable of independent existence separated from the mother's body suggests or at any rate permits the recognition in the legal assessment of the position of separate periods corresponding to the stages of this development (1).

The overall biological continuity of development up to birth - which begins if one is logical in applying the opinion of the majority not on nidation but on

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(1) Cf para. II 5 b of the grounds of the judgment of the Austrian Constitutional Court, EuGRZ 1975, 74(80); Lay, JZ 1970, pp.46 et seq.; Herzog (JR 1969, 441) goes still further and says that it is for the legislator to decide "from what stage of development on State protection for the unborn child shall become effective".

(2) See C I 1 b ...

conception - does not alter the fact that there corresponds to the various stages of development of the embryo a change in the attitude of the pregnant woman which takes the form of an increasing commitment of the mother to her child. Accordingly from the point of view of the mother's sense of right and wrong and indeed that of the community as a whole it is not the same thing if a pregnancy is interrupted in its earliest period or at a later stage. At all times both in German and foreign legal systems this has been reflected in the assessment of abortion by the criminal law which distinguishes according to its successive temporal stages as for example has been impressively demonstrated by the Supreme Court (1). As regards the territory covered by German law it should be pointed out that up to the end of the 19th Century Ecclesiastical Law following the theory that the soul is received by the embryo (animatio corporis) after a certain period of existence, treated abortion up to the 80th day as not liable to punishment. In the same way secular criminal law laid down different punishments according to the stages of pregnancy until the enactment of the 1871 Criminal Code (2).

The judge Dr. Simon is inclined to accord less significance to these further considerations on the relationship between the pregnant woman and her unborn child. If however there is no constitutional objection to the removal of the liability to punishment during the first three months of pregnancy on other grounds, already mentioned or to be discussed below, the legislator would not be acting on irrelevant considerations if he took account of such circumstances in the provisions he enacts.

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(1) 410 U.S. 113 (132 et seq, 160 et seq).
(2) Cf Dähn in: Das Abtreibungsverbot des Paragraphen 218 StGB (published by Baumann), 2nd ed. 1972 pp. 331 et seq; Supreme Court, loc cit, 134; Simson-Geerds, Straftaten gegen die Person und Sittlichkeitsdelikte in rechtsvergleichender Sicht, 1969, p. 87; Sonderausschuss für die Strafrechtsreform, 7. Wahlp., Anlage zur 15. Sitzung, StenBer. pp. 690 et seq, 697 et seq.

a fine is imposed. In a few cases where the sentence is a short period of imprisonment probation is usually granted (1). The failure to observe the rules of Criminal Law here apparent amounts not only to a depreciation of the life of the unborn child but has a corrupting effect on the authority of the law in general, particularly as in these circumstances a prosecution becomes a mere matter of chance.

Nor could the legislator be uninfluenced by the fact that illegal interruptions of pregnancy still have adverse effects on the patient's health even today - not only in the case of abortions by "quacks" and the so-called "angel-makers" but also to greater extent because where the operation is conducted by a doctor the illegality either reduces the possibility of making full use of modern facilities and employing the services of the necessary assistants or prevents the necessary post-operative treatment. A further evil is the commercial exploitation of women seeking abortion both at home and abroad and the social inequality that goes with it: women of higher social standing are better placed - particularly by being able to travel to a neighbouring country, to obtain an abortion by a doctor-than those who are poorer or less adroit. Finally we have the so-called consequential crimes: for example blackmail based on knowledge of an illegal abortion takes the third place among the crimes of this category (2).

(b) It was of particular significance for the legislator's decision as to how this state of affairs could best be reformed that the determination to terminate pregnancy is usually the product of a conflict situation the reasons for which vary greatly and depend in a large degree on the circumstances of the individual case. Firstly economic or material reasons - inadequate housing, insufficient or uncertain income of a family in which there are already several children, the need for both husband and wife to earn - and secondly personal grounds: the social discrimination of unmarried mothers which still exists, the pressure of the natural father or of the family, the fear of jeopardising the relationship with her partner or of a quarrel with her parents, the desire or necessity of completing one's professional training or continuing to exercise a profession, difficulties in the marriage, the feeling that one is physically or psychologically incapable of looking after more children,

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(1) Cf. Statistisches Bundesamt, Fachserie A."Bevölkerung und Kultur", Reihe 9 "Rechtspflege", 1972, p. 100 et seq., 144 et seq., 160 et seq.

(2) Geerds, Erpressung, in Handwörterbuch der Kriminologie, loc. cit. p. 182.

2. The examination of the question whether in spite of the special features mentioned above it is necessary to insist on a duty to impose punishment as an ultima ratio in the particular case of protecting the life of the unborn child must start from the social problem which caused the legislator to enact these provisions. In the reasons given by the majority of the Court there are only a few short references to the complexity of this problem and - in connection with the rules governing the approved grounds - some discussion of the social causes of abortion; on the whole however on account of the more dogmatic approach we must note the absence of a sufficient appraisal of the circumstances facing the legislator and the resulting difficulties connected with this reform which everyone agrees is necessary.

(a) These circumstances are primarily characterised by the enormous dark figure the importance of which must not be played down by referring to the fact that - very understandably - it is impossible to obtain exact information. According to the reports of the Special Committee for Criminal Law Reform it must be assumed from "what must be accepted as a serious investigation" that there are between 75,000 and 300,000 illegal abortions every year (1); the figures given by the experts at the public hearing before the Special Committee. are of the same order (2). Until recently, i.e. till the beginning of the discussions in Parliament much higher figures were generally cited (3).

Even if we base our conclusions on the lowest estimate the numbers remain frighteningly high. In comparison the number of abortions coming to official notice and the number of convictions is practically non-existent: for 1971 there were 584 reported offences and 184 convictions, for 1972 476 cases and 154 convictions (4). In nearly all the cases only

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(1) Cf. BT-Drucks 7/1981 (neu), 8.6; 7/1982, p .5; 7/1983, p. 5, with further references.

(2) Cf. Sonderausschuss für die Strafrechtsreform, 6. Wahlp., 74., 75. und 76. Sitzung, Sten.Ber. p . 2173, 2218, 2241.

(3) See the references in the answer given by the Federal Ministry of Justice to a parliamentary question by the CDU/CSU, BT-Drucks VI/2025, p. 3; see also E.-W. Böckenförde, who gives 200,000 to 400,000 illegal abortions (Stimmen der Zeit , Vol. 188 /1971/, pp. 147, 152).

(4) Statistisches Jahrbuch für die Bundesrepublik Deutschland, 1973, pp. 117, 121; 1974 pp . 116, 121.

and in the case of single women the refusal to accept the responsibility of having the child brought up in a home. The pregnant woman's fear that the unwanted pregnancy will cause irreperable damage to the organisation of her life or the living standard of the family, the feeling that if she completes the pregnancy she cannot rely on the effective help of others but that she alone must bear the consequences of conduct for which she was not alone responsible often make her feel that a termination of pregnancy is the only way out. Even in cases where her personal situation is such that unacceptable reasons based on convenience, egoism and in particular the desire to purchase luxuries are predominant - this cannot be blamed exclusively on the woman but is at the same time a reflection of the general materialistic attitude of the "affluent society" which is to a large extent hostile to children. Nor have the State and society so far succeeded in developing institutions and ways of life which enable a woman to combine her life as a mother and in the family with equality of opportunity for her personal development particularly in the professional field (1).

3. In this general situation "putting a stop to the abortion plague" is not merely a "socially desirable goal" but also imperative for improving protection of life and restoring of the credibility of the legal system. In his painstaking search for a solution of this very difficult problem the legislator has exhaustively examined all the relevant aspects of the problem. Even earlier the reform of Art. 218 of the Criminal Code had continuously occupied public opinion which was profoundly divided on this question. Against this background the discussions in Parliament were carried out with great seriousness and unusual thoroughness. In this connection express reference was made to the value judgments in the Constitution; in particular there was agreement on the State's duty to protect the life of the unborn child. In the investigation of the relevent factors and arguments with a view to reaching an objectively correct decision the procedure adopted by the legislative body was exactly that which the court's judgment in the Communist Party case considered to be characteristic of the proper method of arriving at a decision in a free democratic State (BVerfGE 5, 85/135, 197 et seq.)

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(1) Cf. on all these points for example the memorandum of the Bensberger Kreis on the reform of Art. 218 of the Criminal Code (Publik-Forum Sonderdruck) in para. I 1 and the statements of the experts and of the Government representative before the Special Committee for Criminal Law Reform, 6. Wahlp., 74., 75, und 76. Sitzung, Sten.Ber. p. 2219 with the schedule in Anlage 3, p. 2368 (Rolinski); p. 2233 (Dotzauer); p. 2251 et seq., (Pross); 7, Wahlp., 23 Sitzung, Sten.Ber.pp.1390 et seq.. See also the reports of the Special Committee for Criminal Law Reform, BT-Drucks 7/1981 (neu), p.7; 7/1982, p.7; 7/1983, p. 7; 7/1984 (neu) p.5.

In arriving at the solution chosen the legislator could assume that, in view of the failure of criminal sanctions, the best remedies lay in the welfare and social sphere. It was essential by the use of preventive psychological, welfare and social measures to assist the mother to complete her pregnancy and strengthen her own willingness to do so and on the other hand by making the possibilities of birth control better known to reduce the number of unwanted pregnancies. The majority of the Court too, obviously does not question that such measures, taken as a whole, are the most effective and the most suitable for implementing the fundamental rights in the form of more freedom and increased social justice. Assistance measures of this sort can naturally only be included in a criminal Act to limited extent on account of the distribution of jurisdiction between the various State organs concerned. The 5th Criminal Law Reform Act therefore only contains in this connection a duty to provide counselling. The legislator's idea was that the pregnant woman - free from fear of punishment - should be rescued from her isolation and helped to face her difficulties through open contacts with her surroundings and individual counselling aimed at solving her own personal conflict situation. That the prescribed counselling should serve to protect the life of the unborn child by awakening and strengthening the willingness to complete the pregnancy where this was not counter-indicated on serious grounds is already made clear by the preparatory materials for the Act cited in thegrounds of this Judgment and the there mentioned resolution of the majority in Parliament (2).

We do not deny that these provisions for counselling - as explained in the Judgment (3) - have their weak points. To the extent however that these could not have been remedied by interpreting the Act in accordance with the Constitution and the issue of appropriate implementing regulations by the Länder, the constitutional objections should have been limited to these deficiencies and not directed against the time-limit and counselling system as a whole. The success of a system based on counselling depends in a very high degree upon whether assistance can be offered or arranged for the woman being advised in such a manner as to provide her with a way out of her difficulties. If such help is not provided the criminal law merely serves as an alibi for the absence of effective assistance; the responsibility and burdens of the situation are shifted on to the shoulders of the weakest members of society. In this connection the majority of the Court - in consonance with its previous decisions - declares itself unable to limit the legislator's freedom of action or require him to extend the welfare and preventive measures.(4). If however judicial self-restraint applies in this respect the Constitutional Court can certainly not compel the legislator to make use of the strongest

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(1) C III 1, D II, D III ...

(2) See the statements of the Government Representatives and members of Parliament in the 2nd and 3rd readings(Mr de With, Mrs Funcke, Mrs Eilers, Dr Eppler, Mr Scheu, Federal Minister Dr Focke and the Federal Chancellor Mr Brandt) 95.Sitzung, Sten.Ber.S.6471/B/;6499;6500/B/

(3) D II 3 ...

(4) C III 1 ...

measures of State coercion i.e. the power of punishment in order to make up for the neglect of social duty (1) by the threat of punishment. This is certainly not the function of the criminal law in a State based on freedom and social justice.

The majority of the Court also recognises that the legislator's intention to preserve life through counselling is a "goal to be respected" (2) but - in agreement with the applicants - consider that the ordering of accessory criminal sanctions is essential because a complete absence of punishment in the cases in which termination of pregnancy is based on no acceptable grounds would constitute a "gap in the protective system" (3).

(a) The suitability of criminal sanctions for the intended purpose of protecting life appears however of doubtful value from the beginning. The majority concedes that this general liability to punishment of the termination of pregnancy hitherto in force did not in reality sufficiently protect the unborn child and possibly even contributed to the neglect of other effective protective measures (4) It believes - without being quite sure (5) - that this ineffectiveness of the protection afforded by the criminal law can be remedied by applying a system of differentiated penalties under which termination of pregnancy shall not be liable to punishment in the cases where the approved grounds discussed in the course of the legislative procedure exist. As regards the already recognised or practised medical, ethical and eugenic indications this approved grounds system admittedly brings no appreciable change in the unsatisfactory legal position which has existed hitherto. A true differentiation can only be found in the recognition of the social indication in so far as the legislator does not apply too strict a criterion in the distinction he is called upon to draw in this field and, here at least, respects the above-mentioned reciprocal relationship between the duty to provide social assistance and justifiable punishment: the less the State is in a position to provide assistance more questionable and at the same time the less effective is the threat of punishment upon women who do not feel themselves capable of complying with their duty of completing their pregnancies.

The considerations adduced by the majority in favour of the approved grounds system generally certainly deserve consideration from the point of view of legal policy. From the point of view of constitutional law however it is decisive that on a realistic view there is no effective method of attaining complete protection of the unborn child, not even with differentiated criminal sanctions and therefore no given solution can be "finally prescribed" by constitutional law. Indeed, the majority of the Court fails to discharge the onus of proof resting on it that in this era of "tourism for abortion" domestic criminal sanctions can be expected to exercise a

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(1) Cf Rudolphi, Straftaten gegen das werdende Leben, ZStrW 83(1971), pp.105/114 et seq., 128 et seq., 134/7.
(2) D II 2 b, D II 1 ...
(3) A II 2 c, C III 2 b, D II 2 ...
(4) D II ...
(5) Cf. D III ...

favourable influence specifically on those women who are determined to commit abortion without any acceptable ground. If at all this result can only be attained in a certain number of cases - in particular that of women belonging to the lower income groups. In the case of women in principle accessible to influence, the ambivalent effect of the threat of criminal sanctions is (inter alia) apparent from the fact that these may on the one hand provide a certain support against pressure from the father or the family to undertake an abortion but on the other hand may lead to an increase of abortions because they drive the pregnant woman into isolation and thereby in a high degree expose her to this type of pressure and cause her to make a panic decision.

(b) Whatever judgment be passed on the protective effect of criminal sanctions at all events their partial repeal is based on considerations that are of importance precisely from the point of view of the protection of life and which - at least if the counselling system is improved - can in no event be rejected as obviously erroneous.

In forming his conception the legislator had the whole range of problems connected with abortion under consideration in particular the large number of pregnant women who are accessible to influence. He could commence with the assumption that women do not normally subject themselves to such an operation lighheartedly and without good reason. In nearly all cases there is a conflict which must be taken seriously or is at least understandable; the decision to interrupt a pregnancy is "taken in the most intimate regions of the personality to which the summons of the criminal law does not penetrate" (1). It is in just these cases that in the legislator's opinion it is essential for the successful implementation of the counselling system that there should be no simultaneous threat of punishment; for women contemplating abortion will not go to the counselling centre if they have reason to fear that by so doing they will lose their freedom of decision and by revealing their pregnancy expose themselves to the risk of a prosecution if they later subject themselves to an illegal operation. This opinion which is based on the judgment of numerous experts and is furthermore in accordance with common experience was refuted neither by the applicants at the oral hearing nor by the majority of the Court.

The legislator therefore found himself in the dilemma that on his view of the situation preventive counselling and the imposition of punitive sanctions were to some extent mutually exclusive in their effectiveness in the protection

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(1) Rolinski, Sonderausschuss für die Strafrechtsreform, 6, Wahlp., 74. 75. und 76. Sitzung, Sten.Ber. p. 2219.

of life. His intention to sacrifice the possible preventive effect of criminal sanctions in what was probably a small number of cases in order possibly to save life in a larger number of cases cannot be dismissed by saying that this is a "wholesale weighing of life against life" which is incompatible with the constitutional duty of providing individual protection for every single unborn child. With this argument the majority of the Court refuses in a manner that it is difficult to understand to recognise that it is itself doing the very thing for which it criticises the legislator. For, in its turn, it forces the legislator, and this in the name of the Constitution, to strike a similar balance by requiring him, through its insistence on maintaining criminal sanctions, to leave those unborn children without protection who could have been saved by a repeal of the criminal sanctions and suitable counselling. The extreme rigour of the majority of the Court is moreover difficult to reconcile with the express acceptance of the balancing not only of life against life but even of life against interests of a lower standing in the case of terminations of pregnancy on the approved grounds. In so far as in the approved grounds system this balance of interests must be made by a State-authorised specialist agency the legislator must consider it one of the specific disadvantages of that solution that under it the killing of the embryo receives express official approval. The majority admittedly leaves it open with regard to the social indication whether the examination to confirm that the requirements have been fulfilled should be undertaken in advance by an expert agency or decided afterwards in criminal proceedings (1). The second solution would fail to achieve an essential purpose of the reform because it would lead to a from the point of view of the rule of law very questionable uncertainty for the women and doctors involved.

5. As it follows from all this that every solution is imperfect from the point of view of protecting life, the legislator was free to pay attention to other constitutional, health and criminal policy aspects - not taken into account by the majority of the Court - in favour of the time-limit system. In particular he might reasonably assume that this system paid the most regard to the individual responsibility of the woman and mother in a question affecting the course of her life and avoided the interference with her personality inevitably involved in the procedure before a specialist agency. He could also take into account that the protection of the unborn child is not merely a question of its physical existence and that the chances of survival are better for a child which has been accepted by its mother on her own responsibility after suitable counselling than when she merely continues her pregnancy through fear of punishment. Other relevant factors might also have been the disappearance of the injury to health connected with illegal abortions and the fact that the confidence in the law was no longer shaken by the threat of ineffective penalties or their minimal application.

(1) C III 3 ...

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Again it was not manifestly erroneous that the legislator acting on experience in other countries considered it a serious disadvantage of the approved grounds solution that it is apparently difficult if not impossible to find uniform objective criteria for the definition of the social indication which is the only one with regard to which the reform is of importance (1). The intense controversy during the discussion of the Bill has made it clear that particularly in this field there is no consensus on where the frontier of what is permissible lies. It is therefore foreseeable that the authorities' decisions on when a danger of serious social hardship exists and what other measures to avert this danger must be accepted by the pregnant woman will differ very considerably from region to region and according to the personal views of the expert or judge concerned. The result would be uncertainty and inequality before the law which would be hard for the women and doctors involved to bear and a continuance of the tendency to resort to illegal abortions.

For all these reasons, the legislator was justified in making an attempt to reform the present indefensible situation by adopting the counselling and time-limit solution even if it is not possible to predict future developments with certainty. Since the majority of the Court also rightly assumed that the available statistics allow no certain conclusion in one direction or the other(2) there is no need to go further into the critical remarks about the legislator's forecast (3).

II.

The majority of the Court expressly justifies the maintenance of differentiated penalties with the argument that the "disapproval" of terminations of pregnancy on other than the accepted grounds, which is required by the Constitution, must be clearly expressed(4). In so far as this is intended to refer to the general deterrent effect of the criminal law i.e. the attempt to show disapproval of an act by imposing adverse consequences and thus effectively influencing the conduct of those subject to the law it is not shown - as is explained above - that the approved grounds system itself provides effective protection for life. It is therefore perhaps not a coincidence that the majority of the Court puts forward a double line of argument; independently of the desired practical effect it also calls for disapproval as the expression

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(1) Cf. inter alia BT-Drucks 7/1981 (neu), p.12 and the Alternativ-Entwurf, loc cit p.27 quoted under A I 5 ...
(2) D II 2 c ...
(3) According to the latest reports from the GDR where the time-limit system has been in force since 1972, the number of terminations of pregnancy has considerably diminished in the last two years. This is ascribed to the vigorous State measures to support young families and the extension of advice in matrimonial and sexual matters (cf. MEHLAN, Das deutsche Gesundheitswesen 1974, pp. 2216 et seq.).
(4) C II 3, C III 2 b, C III 3, D II 1, D II 2, D III ...

of the negative assessment of the act from the point of view of social morality in order clearly to brand as wrong abortion not based on acceptable grounds.

1. It is not necessary to determine to what extent modern criminal doctrine agrees with this opinion on the function of the criminal law and its classification under ethics (1), and whether this is not after all making criminal law an end in itself. It goes without saying that terminations of pregnancy not based on acceptable grounds are morally reprehensible. In reply to the reasons given by the majority of the Court it should be taken into consideration that here as in other cases abstention from punishment does not force one to the conclusion that conduct no longer liable to punishment is approved of. In particular there is no place for this view in cases where the legislator repeals a criminal provision because in his opinion it is ineffective or even harmful or because the socially harmful and hitherto punishable conduct is to be dealt with in a different way. For instance no one could argue from the repeal or limitation of the criminal provisions against prostitution, misuse of drugs, adultery and procuring the prostitution of one's wife that the acts in question are now officially approved of as moral and lawful. The controversies over the reform of Article 218 of the Criminal Code provide no evidence for the assertion that the killing of the unborn child would seriously be regarded as a "normal social proceeding".

In so far as the majority of the Court includes in its consideration in this connection(1), for the purpose of forming an opinion on the counselling and time-limit system in the Fifth Criminal Law Reform Act, the Criminal Law Reform (Supplementary Provisions) Act, the parliamentary procedure with respect to which has not yet been completed(2), this cannot be considered relevant (inter alia) because even in the opinion of the majority (3) the two Acts are independent of each other as regards their content. Only after the Criminal Law Reform (Supplementary Provisions) Act was passed would it be necessary to examine separately whether the planned general reimbursement of expenses and continued payment of salary in the case of interruptions of pregnancy not liable to punishment constituted an inadmissible form of State assistance in the cases where there were no acceptable grounds or whether this should be accepted for certain weighty reasons e.g. in order to work against the dangers to health connected with illegal abortion, which had even caused the Supreme Court to pronounce a constitutional prohibition of punishment (4). In the

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(1) Cf. e.g. BAUMANN, Strafrecht, Allgemeiner Teil, 6th ed, 1974, pp. 7 et seq., 27 et seq. The same author in "Das Verhältnis von Moral und Recht", in Moral (published by Anselm Hertz, 1972) pp. 60 et seq.; Hanack, Verhandlungen des 47. DJT 1968, Vol. I, pp. A 29 et seq.; Sax, Die Grundrechte, Vol. III/2, 1959, pp. 930 et seq, 955 et seq.; Arthur Kaufmann, Recht und Sittlichkeit, 1964, pp. 42 et seq.

(2) D II 1 ...

(3) B 4.

(4) 410 U.S. 113 (148 et seq., 162 et seq.).

first case this defect could be corrected within the framework of the Criminal Law Reform (Supplementary Provision) Act e.g. by limiting the reimbursement of costs to the cases where acceptable grounds existed. The necessary examination of this question could moreover be undertaken after the termination of the pregnancy i.e. not under pressure of urgency. (This would incidentally have been a method of providing for the desired disapproval of abortions performed otherwise than on acceptable grounds.)

2. Our most essential objection concerns the fact that the majority has not stated on what constitutional basis the requirement of disapproval as an independent duty is founded. In our opinion the Constitution nowhere states that behaviour that is ethically reprehensible or deserves punishment must per se and regardless of the effect produced be disapproved of by means of legal enactments. In a pluralist, free democratic community which is neutral in philosophic and religious matters it is left to the forces of society to lay down canons in matters of moral conviction. The State should exercise restraint in this field; its task is to protect the legal interests recognised and guaranteed by the Constitution. From the point of view of constitutional law the only question to be decided is whether the provision imposing criminal penalties is absolutely essential in order to guarantee the effective protection of the life of the unborn child while having regard to the legitimate interests of the woman.

III.

That the decision taken by the German legislator in favour of the time-limit and counselling system was neither founded on a basic attitude which must be disapproved on moral or legal grounds nor on false assumptions in the assessment of the factual position is confirmed by the existence of identical or similar reforms in numerous foreign States. In Austria, France, Denmark and Sweden the termination of pregnancy undertaken by a doctor with the consent of the pregnant woman in the first twelve (in France ten) weeks of pregnancy is not liable to punishment; in the United Kingdom and the Netherlands we find an approved grounds-system which has the same effect in its practical application(1). Some of these States can look back on an impressive constitutional tradition and none of them takes second place to the Federal Republic in their unconditional respect for the life of every single individual; some of them too have historical experience with unjust systems of government with no regard for human life. Their decision required an assessment of the same legal and social problems as in the Federal Republic. In all these States moreover the European Convention on Human Rights is binding law. Art. 2 (1) of this Convention ("Everyone's right to life shall be protected by law") is similar to the constitutional provision of Art. 2 (2) of the Basic Law and is perhaps on the whole more extensive in its scope than the German

(1) For the United States cf. A II 1 above ...

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provisions. The Austrian Constitutional Court expressly found that the time-limit system adopted in that country was compatible with the Convention on Human Rights which has the status of constitutional law in Austria (1).

IV.

In short, in our opinion, the legislator was not prevented by the Constitution from deciding to dispense with what was in his unrefuted opinion a largely ineffective, inadequate and even harmful liability to punishment. It may well be that his attempt to find a remedy for the increasingly obvious powerlessness of the State and society by adopting socially more suitable measures in service of the protection of human life is not perfect; it is however closer to the spirit of the Basic Law than the call for punishment and disapproval.

(signed) Rupp-v. Brünneck

Dr. Simon

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(1) Loc. cit. para. II 3 b of the grounds of that judgment, EuGRZ 1975, pp. 74, 77 et seq. In France too the Convention takes priority over French domestic legislation, cf. Article 55 of the French Constitution, see also the decision of the Conseil constitutionnel of 15.1.1975, Journal Officiel of 16.1.1975, 671 = EuGRZ 1975, p. 54.

APPENDIX VII

THE LEGAL POSITION OF THE UNBORN CHILD IN CIVIL LAW

I. Austria

2. Art. 22 of the Civil Code (Allgemeines Bürgerliches Gesetzbuch) provides that unborn children are entitled to the protection of the law as from their conception. Insofar as their own rights are concerned, and not those of third persons, they are considered as born, but a still-born child is to be regarded as if it had never been conceived.

3. An unborn child may inherit, provided it is later born alive (Art. 22 in conjunction with Art. 538).

4. A guardian may be appointed to protect the interests of an unborn child (Art. 274).

5. Various acts on deaths and injuries caused by traffic accidents provide for compensation to persons who, at the time of the accident, were conceived but not yet born (1).

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(1) See Kapfer, Das Allgemeine Bürgerliche Gesetzbuch, 11th ed., 1975, pp. 559, 566 (railways and cars), 574 (aeroplanes); cf. also p. 597 (atomic plants).

II. Belgium

6. An unborn child may inherit and receive inter vivos subject to its being born viable (Arts. 725 and 906 of the Civil Code).

III. Denmark

7. Under the Succession Act (Arvelov) of 1963 an unborn child may inherit, provided it is later born alive (Art. 5(1)).

IV. France

8. An unborn child may inherit and receive inter vivos subject to its being born viable (Arts. 725 and 906 of the Civil Code).

V. Federal Republic of Germany

9. The unborn child has "practically a limited legal personality" (3), provided it is later born alive, in that:

- it may inherit (Art. 1923 of the Civil Code /Bürgerliches Gesetzbuch/);
- it may claim compensation in the law of tort for the death of a person obliged to pay its maintenance (Art. 844 (2) of the Civil Code); (4)
- a guardian may be appointed to safeguard its future rights (Art. 1912); (5)
- and it may claim compensation if born with a defect resulting from an injury sustained before birth (case-law of the Federal Court and the Federal Social Court).(6)

VI. Ireland

10. An unborn child is given certain contingent rights under the Succession Act, 1965. The Act provides in Sect. 3(2) that "descendants and relatives of a deceased person begotten before his death but born alive thereafter shall be regarded as having been born in the lifetime of the deceased and as having survived him". A posthumous child has, accordingly, equal rights under the Succession Act with his or her sisters and brothers living at the time of the death of the deceased. On an intestacy, he or she will share the estate equally with those in the same degree of relationship to the deceased. If the father, in disposing of his estate by will or otherwise, failed in his moral duty to make proper provision in accordance with his means for him, the Court may order that such provision shall be made for the child out of the estate as the Court thinks just (Sect. 117).

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(3) Palandt, Bürgerliches Gesetzbuch, 35th ed., 1976, p. 12 ("praktisch beschränkte Rechtsfähigkeit").
(4) Cf. also Art. 3(2)-in fine of the Liability Act (Reichshaftpflichtgesetz) of 1871.
(5) Cf. also Arts. 1615 o, 1963, 2141.
(6) Cf. Palandt loc. cit.

11. A legacy can be bequeathed to an unborn child.
An unborn child can be given a life interest in an estate.

12. The Civil Liability Act, 1961, Sect. 58 provides that the law relating to wrongs (tort) shall apply to an unborn child for his protection in like manner as if the child were born, provided the child is subsequently born alive. The provision enables damages to be recovered for injuries inflicted, wilfully or negligently, before birth.

13. In the land law an unborn child can be a "life" for the purpose of the "rule against perpetuities". This rule restricts the power of an owner disposing of an estate in land to control the future devolution of the estate beyond a certain period of time calculated by reference to "lives in being".

VII. Italy

14. Under Art. 462 (1) of the Civil Code, all who are born or conceived at the time of the opening of the succession are capable of succeeding. (6) Under Art. 1(2) of the Code the rights given by law to a conceived child are subject to the event of birth.

15. A guardian may be appointed for the unborn child (Art. 320 in fine).

VIII. Netherlands

16. Under Art. 2 of the Civil Code an unborn child is considered as born insofar as this is required by its own interests and provided it is later born alive. Accordingly, a conceived child may inherit (Arts. 883 and 946 in conjunction with Art. 2).

IX. Norway.

17. A conceived child may inherit (Art. 71 of the Succession Act of 1972).

X. Sweden

18. Under the Succession Act of 1958 a conceived child may inherit, provided it is born alive (Arts. 1 and 2 (1)).

XI. Switzerland

19. According to Art. 31 (2) of the Civil Code the unborn child has a legally recognised personality subject to its being born alive. It may inherit (Art. 544 of the Code) and partition of the estate shall be postponed until its birth (Art. 605(1)). A guardian may be appointed to safeguard its interests (Arts. 311 (1) and 393 (3)).

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(6) Cf. also Art. 687.

XII. United Kingdom

20. The Administration of Estates Act, 1925, as amended by the Intestates Estates Act, 1952, contains the law of intestate succession (7). Sect. 55(2) of the former Act provides that "references to a child or issue living at the death of any person include a child or issue en ventre sa mère at the death" (8).

21. As far as the construction of wills is concerned a child en ventre sa mère is, in principle, also treated as being born. It appears that a rule of construction has been adopted to give effect "to a presumed intention, that, in a gift or condition referring to persons of named relationship to the testator or other propositus who are born at or living at a particular time, the description includes a person who is then en ventre sa mère and is afterwards born alive, and would have come under the description if he had been then actually born or living, provided that this construction is for the benefit of the unborn person and, it seems, provided that there is no context in the will negativating the presumed intention" (9).

22. Where otherwise property interests of unborn children are concerned, a child en ventre sa mère is presumed to be born although there is no specific rule in English law to this effect (10).

23. Under the Fatal Accidents Acts, furthermore, a child en ventre sa mère can obtain compensation for the death of its parents. In such a case, however, the claim cannot be made on behalf of the child until it is born (11).

24. A child en ventre sa mère is also considered as a life in being for the purposes of the so-called rule against perpetuities (12).

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(7) These two Acts do not apply to Northern Ireland.

(8) An illegitimate child is not an "issue" within the meaning of the statutory provisions relating to succession on intestacy; see Halsbury's Laws of England, Vol. 16, 3rd ed. p. 395.

(9) See Halsbury's Laws of England, Vol. 39, 3rd ed., pp. 1075/1076.

(10) Lasok, The Rights of the Unborn Child, in: Fundamental Rights, ed. by J. W. Bridge, D. Lasok, R. O. Plender and D. L. Perrott, London 1973, p. 25.

(11) Cf. Phipps v. Cunard White Star Co., Ltd., /1951/ 1 T.L.R. 359 as quoted in Halsbury's Laws of England, Vol. 28, 3rd ed., p. 37.

(12) Cf. Halsbury's Laws of England, Vol. 29, 3rd ed., p. 283.

This rule implies a future limitation of a person to dispose of his real or personal property with a view to controlling in time the devolution of an estate. An executory device or other future limitation to be valid must, inter alia, vest, if at all, within a life or lives in being and twenty-one years and a possible period for gestation thereafter (13).

XIII. Turkey

26. Under the Civil Code an unborn child is in the following cases considered as a legal person and can acquire certain rights provided it is later born alive:

- Art. 524 of the Code provides that a conceived child may inherit subject to its being born alive; wills can be made in its favour;

- if an unborn child is among the heirs partition of the estate shall be postponed until its birth and a guardian may be appointed (Art. 377 (3));

- donations can be made to an unborn child.

(13) Cf. Halsbury's Laws of England, Vol. 29, 3rd ed., p. 281.