LIANE WÖRNER*

The German „Abortion Law"

A Right to terminate pregnancy in the law of the old Federal Republic of Germany taking a contemporary historical perspective realizing challenges and trends

Wherever pregnancies occur, they are also terminated. Abortion has always been the subject of controversial discussions in society, depending on the medical status of pregnancy determination, the legal and social position of women and the determining values in society, including the protection of unborn, prenatal or future life, which is disputed in this respect. In German law, the termination of a pregnancy is still generally prohibited, Section 218 German Criminal Code (StGB[1]), but is not prosecuted under penalty up to the 12th week of pregnancy if a compulsory counselling procedure is followed (Section 219 StGB) (Section 218a para. 1 StGB) and is permitted up to birth in cases of medical-social conflict, and up to the 12th week in cases of criminological conflict (Section 218a para. 2 and para. 3 StGB). Until 2022, a ban on advertising (Section 219a StGB, old version) safeguarded the protection of life guaranteed by the Basic Law. Criticism of this German regulatory compromise is that the number of abortions without punishment after compulsory counselling in the first twelve weeks of pregnancy remains high at an average of 100,000 abortions per year and displaces the basic punishability to the point of non-existence.

---

* The author Prof. Dr. Liane Wörner, LL.M. (UW-Madison) is director of the Centre for Human | Data | Society at the University of Konstanz and professor of Criminal Law, Criminal Procedure Law, Comparative Criminal Law, Medical Criminal Law and Legal Theory at the University of Konstanz. This article will be published in a longer and enlarged version in original German language in Germany with the title „Der Schwangerschaftsabbruch im Recht der alten Bundesrepublik (1949–1990) in zeitgeschichtlicher Perspektive unter Berücksichtigung der Umbruchsphase (1990–1995)" In: STEINBERG, GEORG – KOCH, ARNDT – POPP, ANDREAS (ED.): Das Strafrecht in der alten Bundesrepublik 1949-1990, Special Part. Baden-Baden, 2023. I am very thankful to the comments and help with translating the footnotes to stud. iur. Jane Zoll and ass. iur. Belgin Aktas.

[1] German Criminal Code, further cited as StGB, in the version promulgated on 13 November 1998 (Federal Law Gazette I p. 3322), as last amended by Article 1 of the Act of 26 July 2023 (Federal Law Gazette 2023 I No. 203).

The concept negotiated in the course of two Federal Constitutional Court decisions on abortion, one at the end of the early phase of the old Federal Republic (1975) and one in the course of reunification to compromise with the law of the former German Democratic Republic (1993), has recently again come under scrutiny. The extensive interpretation of the punishable ban on advertising up to a ban on information about abortions in § 219a StGB (old version) was no longer acceptable to those affected. The provision was finally deleted and the dispute about the punishability of abortions reignited. Ultimately, there are two extreme positions: the demand for an absolute, punishable ban and that of the unrestricted validity of the woman's right to self-determination. If this is pursued, it is not only necessary to verify the overall concept, but at the same time to demand its general overhaul, if not its realignment. At present, the law does not (or no longer) reflect reality.

I. Introducing to the theme

If in the following I am to focus on the regulations on abortion in the criminal law of the old Federal Republic of Germany from 1949-1990, on their development, and critical analysis, I cannot do without a (brief) historical outline and at the same time – observing methodically by means of culturally related historical (criminal) law comparison – I look beyond the „edge of my nose".[2] Both serve to sharpen the perspective and allow statements on the regulatory requirements for abortion up to the present day. I do not intend to comprehensively review and present the legal situation – this has already been done more than comprehensively for abortion in various places[3] – but to sharpen specific perspectives from the perspective of criminal law with reference to contemporary history

[2] In the following article, the multitude of non-criminal regulations, which would otherwise only be mentioned superficially, but could not be discussed, remain hidden. The present article brings together thoughts from a contemporary historical perspective, which already appear in parts and abbreviated form in WÖRNER, LIANE & TEEUWEN, JANA: *Woher kommt eigentlich…? Das aktuelle Schwangerschaftsabbruchsstrafrecht*. Ad Legendum 2020. p. 58. and GROPP, WALTER & WÖRNER, LIANE: Münchener Kommentar zum Strafgesetzbuch (Munich Commentary on the criminal code), 4th ed. 2021, StGB preface §§ 218, and §§ 218, 218a.

[3] See BELLING, CLAUS: *Ist die Rechtfertigungsthese zu § 218a StGB haltbar?* Berlin, 1986.; ESER, ALBIN: *Reform der Schwangerschaftsunterbrechung*. Med. Welt 1971, p. 721.; ID.: *G. Radbruchs Vorstellungen zum Schwangerschaftsabbruch*. In: Seebode, Manfred (ed.): Festschrift für Günter Spendel zum 70. Geburtstag am 11. Juli 1992. Berlin, 1992. 475.; ID.: *Neuregelung des Schwangerschaftsabbruchs vor dem Hintergrund des Embryonenschutzgesetzes*. In: Bielefeldt, Heiner – Brugger, Winfried – Dicke, Klaus (Ed.): Würde und Recht des Menschen, Festschrift für Johannes Schwartländer zum 70. Geburtstag. Berlin, 1992. p. 183.; ID.: *Das neue Schwangerschaftsabbruchsstrafrecht auf dem Prüfstand*. NJW 1992. p. 2913.; ID.: *Zur Rechtsnatur der „Allg. Notlagenindikation" zum Schwangerschaftsabbruch*. In: Geppert, Klaus – Bohnert, Joachim – Rengier, Rudolf (ed.): Festschrift für Rudolf Schmitt zum 70. Geburtstag. Tübingen, 1992. p. 171.; ID.: *Schwangerschaftsabbruch: Auf dem verfassungsgerichtlichen Prüfstand, Rechtsgutachten im Normenkontrollverfahren zum SFHG*. Baden-Baden, 1994.; ID.: *Schwangerschaftsabbruch: Reformversuche in Umsetzung des BVerfG-Urteils*. JZ 1994. p. 503.; ID.: *Wertebewußtsein schaffen*. Herder–Korrespondenz 1998. p. 178.; ID.: *Auf der Suche nach dem mittleren Weg*. In: Langer, Michael – Laschet, Armin (ed.), Unterwegs mit Visionen, Festschrift für Rita Süssmuth. Freiburg, 2002. p. 117.; ID.: *Schwangerschaftsabbruch zwischen Lebensschutz und Selbstbestimmung*. Freiburg, 2007.; ESER, ALBIN – KOCH, HANS-GEORG: *Schwangerschaftsabbruch im intern. Vergleich, Teil 1: Europa*. Baden-Baden, 1988.; Teil 2: Außereuropa. Baden-Baden, 1989; Teil 3.: Rechtsvergleich. Querschnitt – Rechtspol. Schlussbetrachtungen. Baden-Baden, 2000.;

and to trace socio-political contexts. This makes it possible to look at undesirable developments, dead ends and missed opportunities.

By – first – looking at the period between 1949 and 1990 in German law, I am cutting a piece out of the entire development, one that we owe decisively to the foundations of our current understanding of abortion, better of the right to terminate pregnancy. As a „zone child" of the East, in *Jana Hensel's* words, I did not experience this old Federal Republic and can only trace it today from the outset. Symbolic for the old republic is the magazine „Stern" campaign in 1971[4] and the „Mein Bauch gehört mir"[5] (my womb belongs to me) actions of those times.

Comparatively, I trace my own past in the East German „planned society": the two-child family and the woman as a substitute worker.[6] Against the backdrop of various social developments, particular conspicuous features emerge. I dare to say that if we were to take them seriously, a socially sustainable compromise on the abortion issue would be conceivable without a renewed breakdown of the debates.

However, a permanent solution is out of the question. In the words of Friedrich-Christian Schroeder, the punishability of abortion „has been subject to fluctuations and disputes like hardly any other offence at all times and in most cultural circles".[7] This is still true today and must continue to be so. A non-functioning pregnancy, an unwanted pregnancy, a pregnancy that cannot be carried out for other reasons, is in each case a very serious human conflict that requires support, comprehensive care, help and finally aftercare in the initiation, before, during and after a conflict resolution – no matter what it looks like:

ID., *Schwangerschaftsabbruch und Recht. Vom internationalen Vergleich zur Rechtspolitik*. Baden-Baden, 2003.; GROPP, WALTER: *Der straflose Schwangerschaftsabbruch*. Tübingen, 1981.; JEROUSCHEK, GÜNTER: *Lebensschutz und Lebensbeginn. Kulturgeschichte des Abtreibungsverbots.* Stuttgart, 1988.; ID., *Lebensschutz und Lebensbeginn. Die Geschichte des Abtreibungsverbots*. Tübingen, 2002.; KOCH, CHRISTINA: *Schwangerschaftsabbruch: Reformdiskussion und Gesetzgebung von 1870 bis 1945*. Münster, 2004.; SCHROEDER, FRIEDRICH-CHRISTIAN: *Abtreibung Reform des § 218 StGB*. Berlin, 1972.; VON BEHREN, DIRK: *Die Geschichte des § 218 StGB*. Gießen, 2004. (unchanged reissue 2020).

[4] „Wir haben abgetrieben!", Stern issue 24/1971.

[5] The expression became known as the fight slogan of the 1970s, see TAZ issue No. 8135 of 25 November 2006.; „Bei einer Demonstration am 1. Juni 1971 in Berlin fordern Frauen die Abschaffung des Abtreibungsparagraphen 218" with this slogan, source: dpa; see ZDF Hintergrund, „50 Jahre. Wir haben abgetrieben!", https://www.zdf.de/nachrichten/panorama/abtreibung-50-jahre-alice-schwarzer-stern-100.html (last accessed: 8 March 2023).

[6] WOLF, CHRISTA*: Berührung*, in the foreword (p. 11.) of WANDER, MAXIE: Guten Morgen, du Schöne. Berlin, 1981; HIRDINA, KARIN: Gute Nacht, Ihr Schönen, Das Frauenbild in den Bildern von Frauen, In: MELIS, DOROTHEA (ED.): *Sibylle, Modefotografie aus drei Jahrzehnten DDR*. Berlin, 1998. p. 20. (p. 24.); FUHRER, ARMIN: *„Es ging nicht darum, Frauen etwas Gutes zu tun": Gleichberechtigung als Nebenprodukt*, Focus-Online, 9 November 2019, https://www.focus.de/wissen/mensch/geschichte/ddr-zeit-frauen-gleichberechtigung-war-nur-ein-kollateralschaden_id_6271017.html (last accessed: 8 March 2023); KAMINSKY, ANNA*: (Verordnete) Emanzipation? – Frauen im geteilten Deutschland*, 5 March 2019, Deutschland Archiv, Bundeszentrale für politische Bildung, https://www.bpb.de/geschichte/zeitgeschichte/deutschlandarchiv/286988/verordnete-emanzipation-frauen-im-geteilten-deutschland (last accessed: 8 March 2023); HÜBNER, PETER: *Konsens, Konflikt und Kompromiss. Soziale Arbeiterinteressen und Sozialpolitik in der SBZ/DDR 1945-1970*, HSozKult 1998. p. 18. (Consolidating the labour force); p. 125., p. 141., p. 166. with clear signs of gender differentiation, the task of providing a significant part-time job for the wife by growing vegetables and increasing part-time employment of women due to overload; p. 201. on the introduction of the so-called Haushaltstag (budget day); p. 220 on the purchase of food during working hours as a practised customary law.

[7] SCHROEDER, FRIEDRICH-CHRISTIAN: *Abtreibung Reform des § 218 StGB*. Tübingen, 1972. introduction p. 1.

by means of abortion or by means of continuation of the pregnancy. This is all the more the case the sooner the continuation of pregnancy is impossible for medical or medical-social reasons. Without a medical cure, we have to solve medical and medico-social (pregnancy) conflicts by negotiating socially sustainable compromises only. Solutions are thus inevitably subject to social change, and their viability is dependent on this.

The criminal law regulation of abortion in the old Federal Republic of Germany in this respect proves to be a prototype in three respects in its contemporary historical shape: in the form of the transitional criminal law developed pre-constitutionally and now embedded in constitutional law (II.), in the development of gender roles in law and society (III.) and in the development of criminal law against the social background, meaning the position of criminal law as a peacemaking law (as a conflict resolution mechanism) dependent on socio-political guidelines (IV.). How quickly criminal law can change in the conflict – here on abortion – and against the background of new socio-political guidelines can be excellently observed again in current times – and not only in Germany, but in Spain, Mexico, the U.S., and in Poland. I am interested in the „long-term consequences", so to speak, of contemporary history (V.).

II. Pre-constitutionally developed Criminal law embedded in constitutional law at the example of abortion

Indeed, wherever pregnancies occur, they are terminated. The legal assessment, however, has changed considerably in the course of medical history with the determination of pregnancy and the methods used to perform abortions: In 1749 the gynaecologist *Storch*, in his reports on „women's diseases", determined the beginning of a pregnancy to be the (so called) „drawing" of women, meaning the first perceptible movements of the child around the 19th week of pregnancy, so that all treatments before this time were considered to be those for the resumption of menstrual bleeding, but not an abortion.[8] A little more than 200 years later the embryo in the womb was made visible by means of ultrasound, in 1958.[9] Visible quickly became measurable and pregnancy became a certain state with nidation;[10] any of its conflicts a dilemma protecting either mother or child.

Let me for the following – and to explain the nowadays challenges and chances – differentiate into five historically decisive periods, which determine German law: Milestones before 1949 (1.), the early Federal Republic until 1970 (2.), processes of upheaval in 1970/71 until the 1st decision of the German Federal Constitutional Court (BVerfG) of

[8] STORCH, JOHANN: *Weiber-Krankheiten, Volume IV*. 1749. Part I, p. 21.; DUDEN, BARBARA*: Zwischen ‚wahrem Wissen' und Prophetie: Konzeption des Ungeborenen.* In: Duden, Barbara/Schlumbohm, Jürgen/Veit, Patrice (eds.), Geschichte des Ungeborenen – Zur Erfahrungs- und Wissensgeschichte der Schwangerschaft. 2. ed. Paderborn, 2002. p. 11., p. 39.

[9] DONALD, IAN/MCVICAR, JOHN/BROWN, TOM: *Investigation of abdominal masses by pulsed ultrasound*. In: Lancet I (1958). pp. 1188–1195.

[10] DUDEN, BARBARA 2002 (supra note 8). p. 11.; likewise WÖRNER, LIANE – TEEUWEN, JANA 2020 (supra note 2), p. 58.

1975 (so called 1st abortion verdict)[11] (3.), the formation of compromises within the late Federal Republic (4.), until finally the all-German compromise with the second decision of the Federal Constitutional Court (BVerfG) on the abortion conflict (so called 2nd abortion verdict) in 1993[12] (5.). Only then can I critically examine gender roles and the changing role of criminal law (III. and IV.).

1. Milestones before 1949 in three spotlights

An important precursor of today's understanding of abortion, in view of its key role and exceptional position in the development of German criminal law over more than 300 years, is the probably first independent criminal provision of Art. 133 of the Constitutio Criminalis Carolina (CCC), also known as Charlemagne's Penal Court Rules (PGO)[13] (going back to Art. 157 Bambergensis, which was the Code for Bamberg)[14]. The provision differentiated between „abortion" by external force or by ingestion. Only the intentional commission was punishable by death. Those whose act referred to a „living child" were punished as „todtschläger" or comparable to infanticide (Art. 131 PGO). However, one searches in vain for what was considered alive.[15] Thus, to this day, it is mostly assumed that 'alive' in the sense of abortion, was, according to the canonical teachings, the animate male fruit from the 40th day and the female fruit from the 80th day.[16] The PGO is significant in two respects:

(1) Whereas until the Enlightenment, „abortions" generally resulted in torture, wheeling, the red-hot tong crack and the sword, the PGO for the first time standardized concrete conditions for such threats of punishment.[17]

(2) Abortion regulations, that previously often served to protect one's own offspring[18], population-political interests or the soul of the unborn,[19] show for the first time clear lines of a homicide offence (protecting life).

---

[11] Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court], judgment of 25 Februrary 1975 – 1 BvF 1 – 6/74 = BVerfGE 39, 1 = NJW 1975, 573.

[12] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], judgment of 28 May 1993 – 2 BvF 2/90, 2 BvF 4/92, 2 BvF 5/92 = BVerfGE 88, 203 = NJW 1993, 1751.

[13] Peinliche Gerichtsordnung Kaiser Karl V. (*Carolina*), also referred as Constitutio Criminalis Carolina (CCC) of 1532, http://ra.smixx.de/media/files/Constitutio-Criminalis-Carolina-1532.pdf (last accessed: 1 October 2023).

[14] Bambergische Peinliche Halsgerichtsordnung, also reffered as Bambergensis, of 1507, https://mateo.uni-mannheim.de/desbillons/bambi.html (last accessed: 8 March 2023).

[15] Already WÖRNER, LIANE – TEEUWEN, JANA 2020 (supra note 2), p. 58.

[16] Scientifically this was no longer convincing in the 19th century: USBORNE, CORNELIE: *Gestocktes Blut oder verfallen?, Widersprüchliche Redeweisen über unerwünschte Schwangerschaften und deren Abbruch zur Zeit der Weimarer Republik.* In: Duden, Barbara – Schlumbohm, Jürgen – Veit, Patrice (eds.), Geschichte des Ungeborenen. 2. ed. Paderborn, 2002. p. 293., p. 298.; VON BEHREN, DIRK 2004 (supra note 3), p. 30.

[17] Likewise JEROUSCHEK, GÜNTER 1988 (supra note 3), p. 2. Later the „Preußisches Allgemeines Landrecht" (Prussian General Land Law) of 1794 replaced the death penalty with the prison sentence.

[18] ESER, ALBIN: *Reform des Schwangerschaftsabbruchs im Strafrecht der Bundesrepublik Deutschland: Entwicklung und gegenwärtiger Stand*. Freiburg, 1986. pp. 123–151 (126 with further references).

[19] Also JEROUSCHEK, GÜNTER 1988 (supra note 3), p. 6.

A little more than 300 years later in 1871, the crime of abortion (in §§ 218 ff.) was introduced in the Imperial Penal Code (RStGB). Section 218 punished a woman „who intentionally aborts her child or kills it in the womb" with up to five years in prison. Subsec. 3 punished abortion by a third party. Section 219 punished assistance by a third party in return for payment (the forerunner of the later ban on advertising[20]). However, Section 218 Subec. 2 recognized mitigating circumstances, but there was no exception to the punishable prohibition. „Abortions" were not prevented by the regulations, but countless women were driven into illegality.[21] Destitute women were at the mercy of „cure-makers".[22]

The Reichstag dealt with the liberalization of the law several times since 1920, also in response to demands of the women's movement, especially the Federation for Maternity Protection and Sexual Reform (BfMS), which was founded in 1905.[23] In 1926, however, only the threat of punishment was reduced from penitentiary to prison.[24] Yet, there was no legal recognition of distress until the Reichsgericht (Imperial Court) in its ruling of 11 March 1927 declared medically indicated abortions performed by a doctor to be permissible on the basis of the principle of the weighing of interests and thus recognized women's distress.[25] Since then, this has been regarded in principle as a supra-legal state of emergency[26]: the termination of pregnancy carried out by a doctor is lawful if only this eliminates the danger of death or serious damage to the health of the pregnant woman. The life of the mother was allowed to be favored over the unborn life.[27]

In the following race and population policy of the Nazi era that overshadowed everything, no further development took place.[28] Here, unborn life no longer played a decisive role as a protected good. Rather, the regulations served to preserve the German „race" and hereditary property[29] and were systematically reclassified as such in the drafts for a new National Socialist penal code.[30]

2. Constituent phase of the early Federal Republic until 1970

Without a legal regulation of indications, the case law of the Reichsgericht (Imperial Court), which was open to interpretation, continued to be authoritative, even in the young

[20] WÖRNER, LIANE – TEEUWEN, JANA 2020 (supra note 2), p. 59.
[21] After the First World War, between 200,000 and 1,000,000 abortions are said to have taken place annually. USBORNE, CORNELIE 2002 (supra note 16), p. 293, 297; VON BEHREN, DIRK 2004 (supra note 3), p. 53.
[22] VON BEHREN, DIRK 2004 (supra note 3), p. 65.
[23] VON BEHREN, DIRK 2004 (supra note 3), p. 120., p. 238., p. 255. The amendment to the law of 18 May 1926 (RGBl. I 1926, p. 239.) merged Sections 218, 219 and 220 into Section 218 of the RStGB into one provision.
[24] RGBl. I 1926, p. 239.
[25] RGSt (Imperial Court Decision) 61, 242.
[26] RGSt 61, 242, 256, 248.
[27] RGSt 61, 242, 255.
[28] VON BEHREN, DIRK 2004 (supra note 3), p. 326.
[29] GROPP, WALTER & WÖRNER, LIANE: Münchener Kommentar zum Strafgesetzbuch (Munich Commentary on the criminal code), 4th ed. 2021, StGB preface § 218 margin number 1: Thus § 218 III 2 StGB threatened with the death penalty anyone who continued to impair the vitality of the German people by killing the fruit of the body.
[30] GÜRTNER, FRANZ (ED.): Das kommende deutsche Strafrecht, Besonderer Teil. Berlin, 1936. p. 113.

Federal Republic after 1949. For their part, however, the medical profession exerted considerable influence on the interpretation of the medically necessary indication.[31] Initially, only a strictly medical indication was considered sufficient, but the medical profession also discussed the admission of psychiatric, criminological, and social indications.

There was quick agreement on the necessary impunity of criminologically indicated abortions. The doctors relied on the less scientific, more moral point of view that the obligation to carry the child to term in this case was „incomprehensible cruelty".[32] The, since then recognized, criminological indication, is convincing in this form to the extent that abortion regulations are part of the prenatal protection of life. Then, the pregnant woman must at the same time accept a restriction of her right to self-determination[33] and decide early (within 12 weeks p.c.) for or against having the child in the emergency situation resulting from a sexual offence.[34]

Despite this liberalization, medical profession at no time advocated the unrestricted permissibility of abortion but continued to regard the killing of the foetus as the destruction of a human life.[35] Abortion remained clearly assigned to the offenses of homicide. It remains to be noted that abortion has been decisively perceived through its – usually punishable – prohibition over the centuries of legal and statutory development.

3. Processes of upheaval 1970 to 1975

With the women's movements at the beginning of the 1970s, movement finally came into the discussion about the abortion law. The crime of abortion in § 218 StGB was again criticized, as in the first wave of discussion around 1910,[36] and called a „class paragraph"[37]. The campaign initiated by *Alice Schwarzer* in the German magazine „Stern" of 6 June 1971, in which 374 women publicly declared their support for abortion under „We have had an abortion" and „My belly belongs to me", caused a sensation.[38] However, the demand for complete liberalization of abortion was not considered by any party in the Bundestag during the reform efforts that began in 1969.[39]

In 1970, 16 liberal scholars of criminal law presented an „alternative draft" for the reform of „abortion law" and set essential impulses for later legislation.[40] However, not even the small group of 16 scholars had been able to reach an agreement at that time. Instead, they came up with two proposals:

---

[31] GANTE, MICHAEL: *§ 218 in der Diskussion, Meinungs- und Willensbildung 1945 bis 1976*. Düsseldorf, 1991. p. 34.
[32] GANTE, MICHAEL 1991 (supra note 31), p. 36.
[33] Later in this sense: BVerfGE p. 39., p. 1.; BVerfGE p. 88., p. 203.
[34] See WÖRNER, LIANE: *Zwischen strafbarem Schwangerschaftsabbruch und „Abbruchsnötigung"*. In: Beck, Susanne (ed.): Gehört mein Körper noch mir? Baden-Baden, 2012. p. 315.
[35] GANTE, MICHAEL 1991 (supra note 31), p. 36., p. 73.
[36] VON LISZT, EDUARD: *Die kriminelle Fruchtabtreibung*. Volume 1. 1910. p. 110.
[37] See VON BEHREN, DIRK 2004 (supra note 3), p. 76.
[38] „Wir haben abgetrieben!", Stern issue 24/1971.
[39] Briefly summarizing already: WÖRNER, LIANE – TEEUWEN, JANA 2020 (supra note 2), p. 60.
[40] Printed by SCHROEDER, FRIEDRICH-CHRISTIAN: *Abtreibung. Reform des § 218 (documentation)*, Berlin–New York. 1972. p. 46.

– a majority proposal for a legally accepted right to terminate pregnancy within a three-month time limit *and*
– a minority proposal allowing abortion only with a broad indication regulation.

Between the discussed[41] time-limited release of abortion and an exemption from punishability limited only to proven indications, the time-limited solution finally prevailed in the Bundestag and was introduced as a law with the 5th StrRG[42] of 18 June 1974:

§ 218 Subsec. (1) established a penalty-free early phase up to 13 days after conception. Afterwards, abortion was generally punishable. Subsec. 3 privileged the pregnant woman; the woman's attempt was exempt from punishment. § 218a, finally, provided for the general impunity of abortion in the first 12 weeks (so called: period solution), without the need for counselling or the like. § 218b contained a medical and an embryo-pathic indication for abortion for the period after the expiry of the 12 weeks.[43] § 218c obliged social and medical counselling. §§ 219a, b made it a punishable offence to advertise[44] illegal abortion and to market abortifacients.

That law was never enforced, however. The state government of Baden-Württemberg blocked the law by a motion of the subsequent order of the German Federal Constitutional Court (BVerfG).[45] With its so-called 1st abortion verdict of 25 February 1975, the Federal Constitutional Court (BVerfG) declared the time limit regulation unconstitutional and prevented its entry into force[46]: Unborn life is comprehensively protected by Article 2 Subsec. (2) sentence 1 of the Constitution and may not be subjected to any time limit, for the state is obliged to protect life (Art. 2 GG).[47] If prenatal life is recognized as life, this

[41] On the discussion and parliamentary resolution in detail GANTE, MICHAEL 1991 (supra note 31), p. 129. On the discussion of pros and cons within the medical profession WOHLHÜTER, SVEN BASTIAN: Die Diskussion um den Schwangerschaftsabbruch im Deutschen Ärzteblatt von 1973 bis 1995. Tübingen, 2019. p. 7., pp. 17–27.

[42] BGBl. I 1974, 1297 (No. 63).

[43] On the development of the concept of indication by the Imperial Court and the subsequent handling in „abortion law" RICHTER, ISABELL: *Indikation und nicht-indizierte Eingriffe als Gegenstand des Medizinrechts*. Berlin, 2018. pp. 48–52., p. 61., p. 67.

[44] The advertising ban, initially (and until then) aimed solely at the prevention of illegal abortions, was thus finally extended for the first time with the introduction of a (real) deadline solution in the 5th StrRG to a punishable ban on advertising for then legal abortions according to § 218a StGB in the version of the 5th StrRG. This was, of course, unintentionally in so far as the concept of legal abortion seemed unthinkable up to that point. In any case, § 219a StGB in the version of the 5th StrRG did not differentiate according to legal or illegal termination. Identified by BT-Drs. 7/1981 (of 24 April 1974) was intended to: „It wants to prevent abortion from being presented as something normal and commercialized in public." This applies, of course, to legal and illegal abortions. With the non-entry into force of § 218a StGB as amended by the 5th StrRG on the basis of the first decision of the BVerfG on abortion (BVerfGE 39, 1 [supra note 11]), the first extension of the advertising ban did not enter into force at that time; but history repeated itself to the extent, see WÖRNER, LIANE: *Streichen statt Hände reichen! – Zu dem Reformentwurf des Bundesministeriums der Justiz vom 17.1.2022 sowie zum Regierungsentwurf der Bundesregierung vom 9.3.2022 zur Aufhebung des Verbots der Werbung für den Schwangerschaftsabbruch (§ 219a StGB)*, NK 34 (2/2022). p. 121 (123) with references there in supra note 9.

[45] BGBl. I 1974 p. 1309. To trace as here GROPP, WALTER & WÖRNER, LIANE: Münchener Kommentar zum Strafgesetzbuch (Munich Commentary on the criminal code), 4th ed. 2021, StGB preface § 218 margin number 3.

[46] BVerfGE 39, 1 (supra note 11).

[47] BVerfGE 39, 1 (supra note 11), 36. In the debate on the protection of life before birth, the Constitutional Judges thus opted for the most far-reaching protection in terminology, if „life" is not classified as prenatal or in any form, but as unborn life is comprehensively subject to the protection of the constitution, see instead of many

duty also fully exists here. How the state acts to protect life is, in principle, at the legislator's discretion. And there is no entitlement for the state to act in a certain way. Due to the continuant development of life (continuity argument[48]), the beginning of the duty to protect has been disputed ever since.[49] However, if one does not want to „throw the baby out with the bathwater", i.e. to cancel out the problematic „how" with the „that" of protection,[50] the careful weighing of the competing constitutionally protected positions requires that preference be given to the foetus in each case.[51] As a result, abortion always remains the killing of the unborn human being.[52] While it is true that the penal norm is the ultima ratio in the legislature's toolbox, such law remains necessary if effective protection of (preborn) life cannot be achieved otherwise.[53]

---

others BECKMANN, RAINER: *Das ungeborene Kind – Rechtssubjekt ohne Rechtsschutz?*. In: Beckmann, Rainer – Duttge, Gunnar – Gärditz, Klaus Ferdinand – Hillgruber, Christian – Windhöfel, Thomas (eds.): Gedächtnisschrift für Herbert Tröndle. Berlin, 2019. p. 679.; DUTTGE, GUNNAR: *Der Schwangerschaftsabbruch: eine „normale" ärztliche Dienstleistung?*. In: Beckmann, Rainer – Duttge, Gunnar – Gärditz, Klaus Ferdinand – Hillgruber, Christian – Windhöfel, Thomas (eds.): Gedächtnisschrift für Herbert Tröndle. Berlin, 2019. p. 711.; On the discussion and importance of constitutional law in particular GÄRDITZ, KLAUS FERDINAND: *Kompromissloses Strafrecht? Zur verfassungsrechtlichen Rolle des Gesetzgebers bei der Entscheidung existenzieller Fragen*. In: Beckmann, Rainer – Duttge, Gunnar – Gärditz, Klaus Ferdinand – Hillgruber, Christian – Windhöfel, Thomas (eds.): Gedächtnisschrift für Herbert Tröndle. Berlin, 2019. p. 729.

[48] To the continuity argument see (selection): DREIER, HORST: *Stufungen des vorgeburtlichen Lebensschutzes*, ZRP 2002, pp. 377–383.; ID., *Grenzen des Tötungsverbots – Teil 1*. JZ 2007. pp. 261–270. (267); DUTTGE, GUNNAR: Die Präimplantationsdiagnostik zwischen Skylla und Charybdis. GA 2002. p. 241. (252); MÜLLER-DIETZ, RALF: *Der Schutz des pränatalen Lebens*. Tübingen, 2007. p. 131., p. 290.; *HOERSTER,* NORBERT: *Ethik des Embryonenschutzes. Ein rechtsphilosophischer Essay*. Stuttgart, 2002. p. 34.; SACKSOFSKY, UTE: *Präimplantationsdiagnostik und Grundgesetz.* KritJ 2003. p. 274. (278); SCHLINK, BERNHARD: *Aktuelle Fragen des pränatalen Lebensschutzes.* Berlin, 2002. p. 6., p. 10.; Critical of the content of statements associated with possible break points in election decisions: MERKEL, REINHARD: *Forschungsobjekt Embryo, Verfassungsrechtliche und ethische Grundlagen der Forschung an menschlichen embryonalen Stammzellen*. München, 2002. p. 128–183. (especially 157–160.); HILGENDORF, ERIC: *Scheinargumente in der Abtreibungsdiskussion – am Beispiel des Erlanger Schwangerschaftsfalls*. NJW 1996. p. 758.; ID.: *Lebensschutz zwischen Begriffsjurisprudenz und „Rationalismus"*. NJW 1997. p. 3074.; ID., *Stufungen des vorgeburtlichen Lebens- und Würdeschutzes*. In: Gethman-Siefert, Carl Friedrich – Huster, Stefan (eds.): Recht und Ethik in der Präimplantationsdiagnostik. Bad Neuenahr-Ahrweiler, 2005. p. 115.

[49] See ibidem (supra note 48) with demands (also here a selection) from increasing protection before birth (according to Dreier, Hilgendorf), to protection before birth weakened due to the lack of subjective law (according to Merkel) to the argumentation of full protection (according to Hoerster). For delimiting discussions see e.g. DUTTGE, GUNNAR: *Quo Vadis?*. In SCHUMANN, EVA (ED.): Verantwortungsvolle Konfliktlösungen bei embryopathischem Befund. Göttingen, 2008. p. 95.; BECK, SUSANNE: *Stammzellforschung und Strafrecht*. Berlin, 2006, p. 183.; GROPP, WALTER: *Der Embryo als Mensch: Überlegungen zum pränatalen Schutz des Lebens und der körperlichen Unversehrtheit*. GA 2000. p. 1. (7 p.); SCHLINK, BERNHARD: *Aktuelle Fragen des pränatalen Lebensschutzes*. Berlin, 2002; WÖRNER, LIANE, 2012 (supra note 34), p. 315. (p. 319.); ID., *Widersprüche beim strafrechtlichen Lebensschutz? – Überlegungen zu einem konsistenten strafrechtlichen Schutz des Lebens vorgeburtlich in vitro, vorgeburtlich in utero, bei Sterbehilfe und bei der Hilfe zur Selbsttötung*. Tübingen, 2023 (in print).

[50] STARCK, CHRISTIAN: *Verfassungsauslegung I*. Baden-Baden, 1994, p. 103: „Those who are serious about the protection of unborn life and do not override the „That" of protection with the defective „how", and those who read the verdict calmly and try to understand the arguments, will have to take note of the remarks of the Federal Constitutional Court with respect."

[51] BVerfGE 39, 1, 43.

[52] BVerfGE 39, 1, 47; BVerfGE 88, 203, 255.

[53] BVerfGE 39, 1, 47; BVerfGE 88, 203, 253 f.

Although the woman's fundamental rights positions exist vis-à-vis the foetus, they do not go so far that the legal obligation to carry the child to term can be generally abolished by reason of fundamental rights – even for a certain period of time.[54] The discretion is reduced to zero, because only the punishment of abortion fulfils the duty to protect (prohibition of inadequacy).[55] This was initially the basic consequence of the recognition of prenatal protection of life, while never accepted neutrally.[56]

Another important achievement of the 5th Criminal Law Reform Act, which has received too little attention in the debate to date, is that the term „abortion", with its consistently negative connotations, was replaced by the more neutral formulation „termination of pregnancy" to describe the offence.[57] The change in terminology remained the case even with the changes required in the wake of the Federal Constitutional Court decision (BVerfG) in the course of the 15th StrÄndG 1976: One reason here may have been precisely that it was recognized that the killing of the unborn cannot always and not to the full extent be blamed on the acting persons as a criminal wrong.[58]

4. Compromise formation after 1975 until the late Federal Republic of Germany

In the following, coalition and parliamentary groups submitted new draft laws. The final version of which advocated a broad socio-medical indication, as had been practiced by the medical profession since the Reichsgericht (Imperial Court) decision in 1927 and repeatedly called for since then, most recently with the 76th German Medical Congress in 1973.[59] On 21 June 1976, the 15th StrÄndG came into force with far-reaching regulations on indications.[60]

An abortion was then legal with the emphasis on a „social-emergency" indication (in Subsec. 1), an embryopathic, a criminological and a general medical-emergency indication (in Subsec. 2). Penal provisions to ensure proper counselling and proper determination of indications were found in §§ 218b and 219a.[61] Under certain conditions advertisements on abortion were made punishable (§ 219b). Women were largely disenfranchised

[54] BVerfGE 39, 1, 42 f.; BVerfGE 88, 203., 253., 255.

[55] WÖRNER, LIANE 2023 (supra note 49), § 12.

[56] On the current debate about the establishment of the Federal Government Commission for the Regulation of Reproductive Self-Determination and thus for the new regulation of abortion outside the StGB see SCHULZE, LEA: *Kommission prüft § 218. Sind Schwangerschaftsabbrüche bald straffrei?*, Tagesspiegel of 9 March 2023.

[57] Cf. 5. StrRG 18.6.1974, BGBl. I p. 1297 Art. I; 15. StÄG 18.5.1976 BGBl. I S. 1213 Art. I p. 2.

[58] Already GROPP, WALTER & WÖRNER, LIANE: Münchener Kommentar zum Strafgesetzbuch (Munich Commentary on the criminal code), 4th ed. 2021, StGB preface § 218 margin number 11.

[59] Cf. on the discussions on the occassion of the Medical Congress only EICHNER, HARALD: *Die große sachlich-fachliche Enttäuschung: Deutscher Ärztetag in München für Reformen zum eigenen Nutzen*. Sozialer Fortschritt 1973, p. 284–286 (p. 286 above).

[60] 15th StrÄndG 18 May 1976 BGBl. I p. 1213.

[61] § 218b Abs. 1 StGB in the version of the 15th StrÄndG read as follows (original German language): „Abbruch der Schwangerschaft ohne Beratung der Schwangeren. (1) [1]Wer eine Schwangerschaft abbricht, ohne daß die Schwangere 1. sich mindestens drei Tage vor dem Eingriff wegen der Frage des Abbruchs ihrer Schwangerschaft an einen Berater (Absatz 2) gewandt hat und dort über die zur Verfügung stehenden öffentlichen und privaten Hilfen für Schwangere, Mütter und Kinder beraten worden ist, insbesondere über solche

in this regulatory package. The doctors were left with the desired control and filtering function that they had claimed for themselves since the imperial era.[62]

The negotiation of the compromise, however, initially seemed to bring calm.[63] But since 1982 and with the newly elected CDU/CSU/FDP government[64] under *Helmut Kohl*, so-called anti-feminist movements against the abortion laws (§§ 218 ff. StGB) have increasingly intensified;[65] a situation similar to the one in the US today. Supported by the then CDU Family Minister *Heiner Geißler* and the Catholic Church, they were directed in particular against the authorization of the „social emergency" indication, including demands for an aid fund for pregnant women in material need.[66]

Pro Familia[67] consistently countered with the statement: „Relief for life with children: yes – handouts and birth premiums: no." In 1986, even a manifesto by *Alice Schwarzer* for a constitutional complaint against the German abortion law (§§ 218 ff. StGB-1976) was circulated, which was unsuccessful in itself.[68]

After all, in 1988/89, the again highly debated abortion regulations became the subject of public discussion when the gynaecologist *Horst Theissen* had to defend himself against

---

Hilfen, die die Fortsetzung der Schwangerschaft und die Lage von Mutter und Kind erleichtern, und 2. von einem Arzt über die ärztlich bedeutsamen Gesichtspunkte beraten worden ist, wird mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bestraft, wenn die Tat nicht in § 218 mit Strafe bedroht ist. [2]Die Schwangere ist nicht nach Satz 1 strafbar."

§ 219a StGB in the version of the 15th StrÄndG read as follows: "Unrichtige ärztliche Feststellung. (1) Wer als Arzt wider besseres Wissen eine unrichtige Feststellung über die Voraussetzungen des § 218a Abs. 1 Nr. 2, Abs. 2, 3 zur Vorlage nach § 219 Abs. 1 trifft, wird mit Freiheitsstrafe bis zu zwei Jahren oder mit Geldstrafe bestraft, wenn die Tat nicht in § 218 mit Strafe bedroht ist. (2) Die Schwangere ist nicht nach Absatz 1 strafbar."

[62] Clearly with this mind VON BEHREN, DIRK: *Kurze Geschichte des § 218 StGB*. APuZ 20/2019. p. 16. (18).

[63] The legal literature was initially concerned with the processing of legislative amendments, cf. only LACKNER, KARL: *Die Neuregelung des Schwangerschaftsabbruchs – Das 15. Strafrechtsänderungsgesetz*. NJW 1976. pp. 1233–1244; MÜLLER-DIETZ, HEINZ: *Zur Problematik verfassungsrechtlicher Pönalisierungsverbote*. In: Jescheck, Hans-Heinrich – Lüttger, Hans (eds.): Festschrift für Eduard Dreher zum 70. Geburtstag am 29. April 1977. Berlin, 1977. p. 97, p. 108.; GROPP, WALTER: *Der straflose Schwangerschaftsabbruch – Die rechtliche Einordnung der Straffreiheit zu § 218 StGB.* Tübingen, 1981.

[64] CDU (Christian Democratic Union), CSU (Christian Social Union), FDP (Liberal Democratic Party).

[65] Cf.: „Abtreibung. Ja zum Kind", Der Spiegel 8/1984, https://www.spiegel.de/politik/ja-zum-kind-a-324ce9b7-0002-0001-0000-000013509221 (last accessed: 8 March 2023); Kritische Medizin München (ed.), Eine kleine Geschichte des § 218 StGB, 11 March 2021, https://kritischemedizinmuenchen.de/eine-kleine-geschichte-des-§218/ (last accessed: 8 March 2023).

[66] With a campaign against the so-called „social indication", the CSU wanted to limit the financing of health insurance and only financially support the socially and economically needy. In October 1983, the government of Rhineland Palatinate asked the CDU for the first time to set up an „assistance fund" for pregnant women in material need. On 15 July 1984 the „Bundesstiftung Mutter und Kind zum Schutz des ungeborenen Lebens" (Federal Foundation mother and child for the protection of the unborn life) was founded against the votes of the SPD and Die Grünen, cf. „30 Jahre Bundesstiftung Mutter und Kind", Berlin BFSFJ 2014 (ed.), p. 32.; heute: https://www.bundesstiftung-mutter-und-kind.de (last accessed: 8 March 2023). The aim of the foundation was to counteract the current section 218 regulation by discouraging pregnant women in special emergency situations from having an abortion by means of low financial support.

[67] Pro Familia (ed.), 60 Jahre Pro Familia, Pro Familia Magazin 2012, No. 1.

[68] SCHWARZER, ALICE: *Weg mit dem § 218*. Köln, 1986.

accusations of illegal abortions in the so called, „Memminger Trial"[69] and hundreds of his patients were questioned about this under public scrutiny. In 1989, *Theissen* was sentenced to two and a half years in prison and banned from practicing for three years.[70] Numerous demonstrators from all over Germany demonstrated against the trial itself and the abortion laws.[71]

5. The all-German compromise formation with the 2nd abortion verdict 1993[72]

In the outlook of the old Federal Republic of Bonn, it is – given the fact of the renewed counter-movements against the abortion law and the public discourse in Memmingen – not surprising, that the transfer of this „West German" model of indications in the course of the reunification with „East Germany" did not succeed. Of course, the former democratic republic had settled a much more liberal regulation of a genuine solution to the problem of abortion already been in force since 1972.[73] So, since June 1990, women in Germany demonstrated nationwide against introducing the West-German abortion law anywhere in Germany.[74]

Affected women have increasingly traveled to the „new" federal states to have abortions in those times.[75] That was possible since the treaty between the Federal Republic of Germany and the German Democratic Republic on the establishment of German unity initially allowed to continue the regulation of abortion in the East – in short, a „time-limit" regulation – and alongside the „indication model" of 1976 (StGB as of 15th StrÄndG) in the West.[76]

---

[69] See FROMMEL, MONIKA: *§ 218; Memmingen und die Folgen.* NK 1 (1/1990), p. 5 f.; On the Memminger trials cf. for example LG Memmingen, judgment of 6 December 1988 – 3 Ns 23 Js 3746/87 = NStZ 1989, 227. The proceedings against Horst Theissen cf. Bundesgerichtshof [BGH] [Federal Court of Justice], judgment of 3 December 1991 – 1 StR 120/90 (LG Memmingen) = BGHSt 38, 144 = NStZ 1992, 328 with note LACKNER, KARL = JR 1992, 210 with note OTTO, HARRO = JZ 1992, 533 with note KLUTH, WINFIRED = StV 1992, 114 with note FROMMEL, STEFAN N.

[70] BGH NStZ 1992, p. 328.

[71] FRIEDRICHSEN, GISELA: *Abtreibung. Der Kreuzzug von Memmingen*. Frankfurt aM, 1991, p. 287.

[72] BVerfGE 88, 203 (supra note 12).

[73] See immediately II.5.(a).

[74] See the call „Grenzenloses Unbehagen, Demo gegen § 218", Sonntag, 22. April 1990, Treffpunkt um 14:30 Uhr, Volkskammer. Bürgerinnen fordern: Keine Einschränkung des Rechts auf Schwangerschaftsabbruch, Vertreterinnen von: Demokratie jetzt, Initiative Frieden und Menschenrechte, Neues Forum, Grüne Partei, Grüne Liga, Unabhängiger Frauenverband, Bauernverband e.V. DDR, Gewerkschaften, DFD, PDS, SPD, Vereinigte Linke", Kopie aus dem Bundearchiv, BArch, DY 53/869, https://deutsche-einheit-1990.de/wp-content/uploads/BArch-DY53-869_Flugblatt.pdf (last accessed: 9 March 2023).
Quote from the leaflet: „For us women, paragraph 218 does not only mean guardianship and alienation and thus an attack on the freedom to decide about one's own body – illegal abortions with all their humiliations and dangers would result. We will insist on our right to abortion!".

[75] On the practice of having abortions performed „in the East" and on the question, among other things, of the assumption of costs by health insurance companies, see STADLMAYER, TINA: *Abtreibungstourismus mit Nachspiel,* TAZ issue No. 3162 of 20 July 1990, https://taz.de/Abtreibungs--tourismus-mit-Nachspiel/!1759047/ (last accessed: 8 March 2023).

[76] The joint coalition agreement Bundesarchiv, BArch, DA 1/19101, p. 22, https://deutsche-einheit-1990.de/wp-content/uploads/BArch-DA1-19101.pdf (last accessed: 9 March 2023) therefore also provided

(a) New regulatory compromise

While §§ 153-155 of the (East German) GDR Criminal Code contained a tiered system of standards for justifying punishment, the GDR Law on the Interruption of Pregnancy of 9 March 1972 provided, outside the Criminal Code, in its § 1 para. 1 for the right of the pregnant woman to decide on the termination of pregnancy on her own responsibility. The pregnant woman was entitled to have the pregnancy terminated by a medical intervention in an obstetric-gynaecological institution within twelve weeks of the beginning of the pregnancy.[77,78] After the expiry of the 12-week period (§ 1), an indication model applied (§ 2

for the „4th Youth, Women and Family Policy" to „include the protection of the unborn life through comprehensive counselling, education and support services as well as the free provision of contraceptives for women if the time-limits for abortion are maintained" (Keyword 10).
On the other hand, in order to reconcile the time-limits applicable in the accession regions with the constitutional requirements and the case law of the Federal Constitutional Court in BVerfGE 39, 1 (supra note 11), the Federal Government called for the rapid establishment of a comprehensive advisory network in the accession regions in order to advise and clarify the constitutional requirements; from the outset, the advisory service should therefore be mandatory as far as possible: „A duty of counselling does not contradict the dignity or the right to self-determination of pregnant women. The responsibility of pregnant women must be strengthened in a way that is consistent with the value order of the Basic Law. Anyone who is unwilling to seek detailed and expert advice in a matter involving the life and death of an unborn child can hardly be recognized as having fulfilled his or her responsibility.", writes SÜSSMUTH, RITA on 8 August 1990, BArch, DA 1/17538, p. 9.
The idea of compulsory counselling therefore served to minimise the number of abortions and to provide information deemed necessary in the context of the joint search for regulations around 1990.

[77] §§ 153-155 des Strafgesetzbuchs der Deutschen Demokratischen Republik vom 12.1.1968 (§§ 153-155 of the Criminal Code of the German Democratic Republic of 12 January 1968), GBl. I p. 1, documented at: https://www.gvoon.de/strafgesetzbuch-stgb-ddr-gesetze-bestimmungen-1968/seite-84-411456.html (last accessed: 9 March 2023): Unzulässige Schwangerschaftsunterbrechung StGB1968, p. 84 (original German language):
§ 153. (1) Wer entgegen der gesetzlichen Vorschriften die Schwangerschaft einer Frau unterbricht, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Verurteilung auf Bewährung bestraft.
(2) Ebenso wird bestraft, wer eine Frau dazu veranlaßt oder sie dabei unterstützt, ihre Schwangerschaft selbst zu unterbrechen oder eine ungesetzliche Schwangerschaftsunterbrechung vornehmen zu lassen. Die Strafverfolgung verjährt in drei Jahren.
§ 154. (1) Wer die Tat ohne Einwilligung der Schwangeren vornimmt, oder wer gewerbsmäßig oder sonst seines Vorteils wegen handelt, wird mit Freiheitsstrafe von einem Jahr bis zu fünf Jahren bestraft.
(2) Ebenso wird bestraft, wer durch Mißhandlung, Gewalt oder Drohung mit einem schweren Nachteil auf eine Schwangere einwirkt, um sie zur Schwangerschaftsunterbrechung zu veranlassen.
§ 155. Schwere Fälle. Wer durch eine Straftat nach den §§ 153 oder 154 eine schwere Gesundheitsschädigung oder den Tod der Schwangeren fahrlässig verursacht, wird mit Freiheitsstrafe von zwei bis zu zehn Jahren bestraft.

[78] Gesetz über die Unterbrechung der Schwangerschaft vom 9.3.1972 (Act on the termination of pregnancy of 9 March 1972), Gesetzblatt der Deutschen Demokratischen Republik (GBl.), Teil I No. 5 of 15 March 1972, p. 89. The introduction to the enacted law is intended to give a clear signal of equality to the outside world „The equality of women in education and employment, in marriage and in the family, requires that women be able to decide for themselves whether or not to carry out their pregnancy."
§ 1. (1) Zur Bestimmung der Anzahl, des Zeitpunktes und der zeitlichen Aufeinanderfolge von Geburten wird der Frau zusätzlich zu den bestehenden Möglichkeiten der Empfängnisverhütung das Recht übertragen, über die Unterbrechung einer Schwangerschaft in eigener Verantwortung zu entscheiden.
(2) Die Schwangere ist berechtigt, die Schwangerschaft innerhalb von 12 Wochen nach deren Beginn durch einen ärztlichen Eingriff in einer geburtshilflich-gynäkologischen Einrichtung unterbrechen zu lassen.

(para 1)), which allowed „other serious circumstances" to suffice as grounds for abortion in addition to medical reasons.[79]

The obvious irritations about the current law – in East and West – that arose in the course of the opening of the borders were soon to be remedied by the „Law for the Protection of Pre-natal Life, for the Promotion of a Child-Friendly Society, for Assistance in Pregnancy Conflicts and for the Regulation of Abortion".[80]

In any case, the law already bore the correct title. But its entry into force was in turn suspended – as it had been in 1975 – by interim orders of the Federal Constitutional Court (BVerfG) of 4 August 1992 and 25 January 1993, and various provisions were finally declared null and void by a judgement of the Federal Constitutional Court (BVerfG) of 28 May 1993 (the so-called *2nd abortion verdict*).[81],[82],[83]

Again, the abortion „not unlawful" after counselling the pregnant woman in a situation of distress and conflict within twelve weeks of conception§ 218a (1) StGB) was particularly affected.[84] The unlawfulness (merely) of „counseled" abortions within the first twelve

(3) Der Arzt, der die Unterbrechung der Schwangerschaft vornimmt, ist verpflichtet, die Frau über die medizinische Bedeutung des Eingriffs aufzuklären und über die künftige Anwendung schwangerschaftsverhütender Methoden und Mittel zu beraten.

[79] G. v. 9.3.1972 (Act on the termination of pregnancy of 9 March 1972), GBl. I, S. 89: § 2. (1) Die. Unterbrechung einer länger als 12 Wochen bestehenden Schwangerschaft darf nur vorgenommen werden, wenn zu erwarten ist, daß die Fortdauer der Schwangerschaft das Leben der Frau gefährdet, oder wenn andere schwerwiegende Umstände vorliegen.
(2) Die Entscheidung über die Zulässigkeit einer später als 12 Wochen nach Schwangerschaftsbeginn durchzuführenden Unterbrechung trifft eine Fachärztekommission.
The act on the termination of pregnancy was seen as a supplement to the GDR-StGB: „§ 1 (4) Die Unterbrechung einer Schwangerschaft ist auf Ersuchen der Schwangeren und nur nach den Bestimmungen dieses Gesetzes und der zu seiner Durchführung erlassenen Rechtsvorschriften zulässig. Im übrigen gelten die §§ 153 bis 155 des Strafgesetzbuchs vom 12.1.1968" (supra note 77). By the joint coalition agreement of 31 August 1990 § 1 para. 1 and § 4 para. 2 (free supply of medically prescribed contraceptives to women in social security) has been repealed, Einigungsvertrag vom 31. August 1990 (BGBl. II. S. 889), Anlage II, Kapitel III, Sachgebiet C, Abschnitt I, Nr. 4, insgesamt aufgehoben durch SFHG vom 27.7.1992 (BGBl. I. S. 1398), Art. 16, abrufbar unter: https://www.verfassungen.de/ddr/schwangerschaftsunterbrechung72.htm (last accessed: 1 October 2023).

[80] Also called „Schwangeren- und Familienhilfegesetz (SFHG)" (Pregnancy and Family Welfare Act) of 27 July 1992, BGBl. I p. 1398.

[81] Above BVerfGE 39, 1 (supra note 11).

[82] BVerfG [Federal Constitutional Court], judgment of 4 August 1992 – 2 BvQ 16, 17/92 = BVerfGE 86, 390 = NJW 1992, 2343; BVerfG [Federal Constitutional Court], decision of 25 January 1993 – 2 BvQ 16/92 = BVerfGE 88, 83.

[83] BVerfGE 88, 203 (supra note 12).

[84] BGBl. I S. 1398 (1402): „§ 218a […] (1) Termination of pregnancy shall not be unlawful if: […]". The other conditions laid down in No. 1-3 were the woman's request for advice, including a three-day waiting period (No. 1), the procedure by a doctor (No. 2) within 12 weeks of conception (No. 3). Discussed in detail by ESER, ALBIN: NJW 1992 (supra note 3), p. 2913 (2914, 2919), who examines in particular the extent to which the proposed legal provision – at this point in time already stopped in implementation – differs from the 1974 proposal situation and what scope the BVerfG had for a new decision. One agree with him, that the 1992 version in no way departed from the fundamental primacy of the right to life of the unborn in 1975 in favor of the one-sided and ungrounded right of self-determination of the pregnant woman, since the requirement for advice formed the very core of the provision.

weeks, which was finally pronounced by the Constitutional Court in 1993 in its 2nd *abortion verdict*, ultimately primarily concealed the opportunity to exclude the reimbursement of costs.[85] The court sought to mitigate all further consequences of illegality. Despite the unlawfulness of the abortion for reasons of protection of life,[86] doctor and hospital contracts were to be lawful, social welfare benefits possible, emergency assistance in favor of the unborn excluded.[87]

(b) consultation readjustment

The counselling regulation of the suggested 1992-Pregnancy and Family Welfare Act (SFHG[88]) did not stand up to scrutiny by the Federal Constitutional Court (BVerfG) either:[89] In the interest of the protection of life, the Constitutional Court considered it necessary to have counselling that was open-ended but aimed at the continuation of the pregnancy.[90] Only then could counselling for the protection of life lead further than punishment and allow for regulation outside the Criminal Code.[91] In terms of contemporary history, the counselling regulation of 1993/95 was considerably influenced by the fact that counselling of pregnant women in the former East of Germany did not exist and that the expansion of counselling networks was considered urgently necessary.[92] The Court also stated that counselling needed to be reviewed regularly at „not too long intervals" and to „ascertain whether the requirements for counselling were being met",[93] accountability reports that are to be required should also be able to „provide a basis for review of the protection concept."[94] Still, as recently as 2017, the Bundestag's Scientific Service concluded that the German „design" of abortion laws „may appear strange at first glance", „but that the legislature has deliberately used a differentiated regulatory system in order to comply with constitutional requirements".[95] However, actual verification of the counselling regulation is still largely lacking.[96]

---

[85] So GROPP, WALTER & WÖRNER, LIANE: Münchener Kommentar zum Strafgesetzbuch (Munich Commentary on the criminal code), 4th ed. 2021, StGB preface § 218 margin number 6 (as in the pre-edition). With ESER, ALBIN NJW 1992 (supra note 3), p. 2913 (2925) however, the „legal disapproval" of early abortions was not questioned by its legality with the SFHG 1992 (supra note 80), because abortion is not a „normal means" of birth control, but an exception to be avoided as far as possible, a wide range of family policy support measures must be used, increased financial expenditure must be made and „never placed in the „free will" of the pregnant women, but rather from a situation of distress and conflict is dependent on advice," the law made clear to all.

[86] Thus, in consequence of the first judgment, BVerfGE 39, 1. (supra note 11).

[87] Clearly BVerfGE 88, 203 (supra note 12), 295, 205, 317, 32.

[88] See supra note 80.

[89] In contrast ESER, ALBIN NJW 1992 (supra note 3), p. 2913, in particular in its conclusions p. 2924.

[90] BVerfGE 88, 203 (supra note 12), Tenor No. 1, 2, pp. 210, 301.

[91] GROPP, WALTER & WÖRNER, LIANE: Münchener Kommentar zum Strafgesetzbuch (Munich Commentary on the criminal code), 4th ed. 2021, StGB preface § 218 margin numbers 5-7.

[92] Already above in supra note 76 and supra note 78; cf. in particular SÜSSMUTH, RITA, at 8 August 1990, BArch, DA 1/17538 Brief 0808, p. 9, and in her response, SEPT-HUBRICH, GISELA, at 12 Sept. 1990, BArch, DA 1/17538 Brief 1209.

[93] BVerfGE 88, 203 (supra note 12), 253 = NJW 1993, 1751 (1762).

[94] Ibidem.

[95] Wissenschaftliche Dienste Sachstand §§ 218. StGB, WD 7 – 3000 – 161/17.

[96] Counting abortions in statistics does not constitute a verification of the effectiveness of the counselling scheme.

(c) Special case of embryopathic indication

Finally, special care must be taken with regard to embryopathic indications. The German Criminal Code (StGB) of 1976 contained an offence of permission if there were „urgent reasons for assuming [...] that the child would suffer from irremediable damage to its state of health as a result of a hereditary predisposition or harmful influences before birth, which is so serious that the pregnant woman cannot be expected to continue the pregnancy".[97] The indication was limited to the 22nd week since conception until the assumed independent viability of the child. It must be clearly emphasized that the possible severe damage of the child was not the decisive reason for the abortion, but that the pregnant woman could not be committed to carry to term, when severe suffering associated with it.[98] However, after the child's independent viability, abortion remained only lawful, „in order to avert a danger to life or the danger of a serious impairment of the pregnant woman's physical or mental state of health, and the danger could not be averted in any other way that was reasonable for her".[99]

The law was held unconstitutional violating rights of equality (Article 3 (para 3) sentence 2 of the Constitution).[100] The former embryopathic indication was, as part of the new laws, incorporated into the then broad medical-social indication. Lawful reason for abortion since is the unreasonableness of continuing pregnancy in connection with the woman's current or future suffering that had been brought forward and established. Not limited to

---

[97] 15. StrÄndG of 18 May 1976 BGBl. I S. 1213 (already above supra notes 60 f.). To § 218a Abs. 2 and 3: p. 1214.

[98] Clearly with this mind GROPP, WALTER: *Strafrechtlicher Schutz des Lebens vor und nach der „Geburt"*. In: SCHUMANN, EVA (ED.): Verantwortungsbewusste Konfliktlösungen bei embryopathischem Befund. Göttingen, 2008. p. 19 (25). That is why it is also said that the embryopathic indication is now „hidden" in the medical indication, cf. only SCHUMANN, EVA: *Verantwortung für das ungeborene Leben im Kontext von Pränataldiagnostik und Schwangerschaftsspätabbruch.* In SCHUMANN, EVA (ED.): Verantwortungsbewusste Konfliktlösung bei embryopathischem Befund. Göttingen, 2008, p. 1 (3); HEPP, HERMANN: *Pränatalmedizin und Embryonenschutz – ein Widerspruch der Werte,* ZfmE 49 (4/2003). p. 343, 345. speaks of „deception package"; MATTISSECK-NEEF, MARIA: Schwangerschaftsabbrüche kranker/geschädigter Föten und Neugeboreneneuthanasie. Bern, 2006. p. 192 speaks of „legislative concealment"; see DREIER, HORST: *Stufungen des vorgeburtlichen Lebensschutzes.* ZRP 2002. p. 377 (p. 380.).

[99] 15. StrÄndG of 18 May 1976 BGBl. I S. 1213 (supra note 60). To § 218a Abs. 1 Nr. 2: p. 1214. The scope of application of the narrow medical (social) indication was then limited to the embryopathic indication only where, from the pregnancy itself, the risk of a serious impairment of the physical or mental state of health of the pregnant woman arises, with GROPP, WALTER 2008 (supra note 98), p. 19 (26). In classical form, it was also regulated by the SFHG 1992 (supra note 80) in its § 218a Abs. 2, clearly: LACKNER, KARL: *Strafgesetzbuch*. 21. ed. 1995. preface § 218a margin number 1. It is a guideline for all indications, the pregnant woman cannot be required to carry out the pregnancy at the expense of her own life; in any case, this is consensual in this respect, even if we add today the strongly increasing importance of the social component (already Prot. 6. Wahlp. p. 2595., p. 2202., VII 1438) as a co-consideration of the present and future living conditions of pregnant women, BVerfGE 88, 203 (supra note 12), 256 = NJW 1993, 1751 (1754); Horstkotte Prot. 7. Wahlp. p. 1470; WEIßER, BETTINA: Schönke/Schröder-StGB, § 218a margin number 26; *RICHTER,* ISABELL 2018 (supra note 43), p. 155.; reinforced: WÖRNER, LIANE 2023 (supra note 49), § 13 B.

[100] The mistake in the past was therefore that it was concluded from the expected serious disability *alone* that an unreasonableness for the pregnant woman was justified. This violates art. 3 para. 3 GG and was misunderstood in the sense that justification meant a lower appreciation of the life of disabled people, BT-Drs. (1995) 13/1850, p. 25. right side f.

the 22nd week, the former embryopathic indication has now been extended to birth.[101] This made it necessary to carry out so-called fetocides[102] to kill the child in the womb in order to be able to lawfully terminate the pregnancy if the unborn child was already viable, which has been ignored by the law until today.[103], [104] The „concealment"[105] of criminal law prevents ethical reflection, the understandable desire for a healthy child threatens to be misunderstood as an entitlement.[106]

III. Gender roles in law and society, observations conveyed on the basis of the law on abortion

Now, making initial cautious observations based on the examination of legal developments and legislative situations, it becomes apparent: In the early phase of the old Federal

---

[101] Also clearly speaking of a deterioration GROPP, WALTER 2000 (supra note 49), p. 1 (2); ID. 2008 (supra note 98), p. 19 (26); likewise SCHUMANN, EVA 2008 (supra note 98), p. 1. (3).

[102] The method of foetocide means that the unborn child is killed in the womb by intracardial injection of potassium chloride, followed by measures to initiate a stillbirth, *Bundesärztekammer,* Deutsches Ärzteblatt 95 (1998), issue 47, A-3013 (= MedR 1999, p. 32 f.). The risk of survival of the already viable extrauterine child (despite „immaturity") when performing an abortion using the so-called prostaglandin method (administering contraceptives to induce childbirth) is thus avoided, so happened in the so-called case Tim (1997), AG Oldenburg ZfL 2004, 117. with note WIEBE, ANDREAS. Cf. also LG Görlitz ZfL 2003, p. 87., p. 94.; MATTISSECK-NEEF, MARIA 2006 (supra note 98), p. 159., p. 171. Because the abortion requires the production of a non-living foetus. Since Bundesgerichtshof [BGH] [Federal Court of Justice], decision of 2 November 2007 – 2 StR 336/07 (LG Frankfurt a.M.) = NStZ 2008, 393 = JuS 2008, 370 (with note JAHN, MATTHIAS) = JR 2008, 250 (with note SCHROEDER, FRIEDRICH-CHRISTIAN) = BGH HRRS 2008 No. 73 margin number 19 it is sufficient for the viable unborn child to be born alive, but to be so injured that it „does not survive the injuries it had suffered as a result of the actions aimed at premature departure"; for discussion in particular KOCH, HANS-GEORG: *Zur Reichweite des Strafschutzes bei Versäumnissen im Bereich der Schwangerschaftsüberwachung und Geburtshilfe* (Anmerkung zum Beschluß des OLG Karlsruhe v. 25.4.1984 WS 261/83). MedR 1986. p. 81.

[103] In 2008, SCHUMANN, EVA 2008 (supra note 98), p. 1 (6) already spoke of „the fact that for more than ten years the legislature has refused to take note of the practice of foetocide at all.", starting with the parliamentary question 1996 (BT-Drs. 13/5364, p. 13., p. 16.) on the chronicle of efforts only up to 2008, cf. there with note 26.

[104] GROPP, WALTER 2008 (supra note 98), p. 19. (27) rightly speaks of foetocide as „collateral damage" after the „legal reference" of the embryopathic indication to the medico-social indication permitted up to birth, deepening DOLDERER, ANJA BEATRICE: *Menschenwürde und Spätabbruch*. Berlin, 2012. In particular p. 118, p. 152., which in the result audibly suggests the reintroduction of a temporary embryopathic indication and considers this to be more compatible with constitutional law (p. 226.). For an application of §§ 211. StGB from extrauterine viability already GROPP, WALTER 2000 (supra note 49), p. 1. Admittedly, the latter risked, because of the ensuing surrender of the pregnant women (and third parties) to the criminal law, to force the situation associated with the dual nature of the particular situation of pregnancy to dissolve in order to avoid any risk of criminality arising from misconduct.

[105] Term according to SCHUMANN, EVA 2008 (supra note 98), p. 1. (16).

[106] Clearly warning the lack of ethical and legal solutions DUTTGE, GUNNAR: 2008 (supra note 49), p. 95.; ID., *Gutachterliche Stellungnahme zum Entwurf eines Gesetzes zur Änderung des Schwangerschaftskonfliktgesetzes v. 26.11.2008 (BT-Drucks. 16/11106) anlässlich einer Informationsveranstaltung der CDU/CSU-Fraktion zum Generalthema „Gesetzesinitiative Spätabbruch"* (9 February 2009); lately: Criminalization of delayed „selective foetocide" – preparation of the verdict of the LG Berlin, judgment of 19 November 2019 – (523) 234 Js 87/14 (7/16), MedR 2020, 844 (with note DUTTGE, GUNNAR).

Republic following the National Socialist phase, no reform discussions could be established under mostly economic and social hardship with elementary needs for housing, clothing and food. Only the medical profession, with its interpretation of the law as a broadly understood social-medical indication, developed a pioneering position for the reform discussions that finally began in 1969.[107] While the number of abortions had been declining since 1949, along with a marked improvement in living conditions,[108] the anti-reform political climate of the 1950s and 1960s remained characterized by „classic" sexual and family policy ideas. Family policy perpetuated the model of the housewife and mother and again linked the abortion referenda to population policy goals of protecting the multiple-child family as a „source of strength for the state" and against its liberalization.[109]

The time-limit regulation on abortion of 1974 did not intend to grant women a right to abortion. Rather, it served to curb the (high) number of abortions in the interest of protecting the lives and especially the health of those affected.[110] Thus, the law differed fundamentally from the purely emancipatory motives of the extra-parliamentary mass movements at that times, which rather goaled at self-determination (of women), free sexuality (and a right to it in each case) and, based on both, a right to abortion.[111]

---

[107] Cf. GANTE, MICHAEL 1991 (supra note 31), p. 34.

[108] GANTE, MICHAEL 1991 (supra note 31), p. 66 with further references. To this day, too little attention is paid to the fact that the numbers decreased also because abortions that were first criminally indicated in the course of the war were legalized after „mass rapes by Soviet soldiers"; abortions after rape by Western Allied soldiers continued to be punished, Erlass des Reichsministeriums des Innern of 14 March 1945 No. B b 1067/18,8,II; see SCHÄFER, KLAUS: Daten aus Umfragen unter Frauen, die einen Schwangerschaftsabbruch durchführen ließen, Volume 1 Die großen Datenmengen. Regensburg, 2020. p. 38.
HOFMANN, DIETRICH: *Ärztliche Überlegungen zur Reform des § 218*. In: ID. (ED.): Schwangerschaftsunterbrechung. Frankfurt aM, 1974. p. 9 (37) speaks of 200,000 to 500,000 criminal abortions (number of unreported cases) for West Germany per year and 500 deaths of pregnant women per year, despite the difficulty of medical diagnosis of criminal abortions. In the polizeiliche Kriminalstatistik (police criminal statistics) (PKS) abortion is first recorded as „abortion" in 1953 with 6,555 newly reported cases in 1953 in total (Federal Republic), yearbook 1953, p. 35, https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/PolizeilicheKriminalstatistik/pksJahrbuecherBis2011/pks1953.html (last accessed: 8 March 2023). The figures for PKS (only criminal cases) for the following years are as follows: 1954: 5,646, 1955: 5,971, 1956: 5,400, 1957: 4,772, 1958: 4,521, 1959: 4,537, 1960: 4,195, 1961: 3,842, 1962: 2,842, 1963: 2,784, 1964: 2,388, 1965: 2,165, 1966: 1,773, 1967: 2,369, 1968: 1,687, 1969: 1,005.

[109] Cf. DE NUYS-HENKELMANN, CHRISTIAN: *„Wenn die rote Sonne abends im Meer versinkt …" Die Sexualmoral der fünfziger Jahre.* In: BAGEL- BOHLAN, ANJA – SALEWSKI, MICHAEL (EDS.): Sexualmoral und Zeitgeist im 19. und 20. Jahrhundert. Opladen, 1990. p. 107.

[110] Cf. TALLEN, HERMANN: *Die Auseinandersetzung über § 218 StGB. Zu einem Konflikt zwischen SPD und katholischer Kirche.* Paderborn, 1977. p. 56. Already above; on the parliamentary debate in particular GANTE, MICHAEL 1991 (supra note 31), p. 129.

[111] Already above at II.3. with supra notes 37-41. The only aim of the legislation was to reduce the high number of abortions, cf. BT-Drs. 7/1981, v. 24.4.1974, p. 8. with reference to ROLINSKI AP VI p. 2219, 2225; SCHULTE AP VI p. 2200; BROCHER AP VI p. 2209; on the highly controversial debate on legislative proposals see Deutscher Bundestag 7. Wp., 95. Sitzung, StenBer. p. 6443; and in particular 7. Wp., 96. Sitzung vom 26.4.1974, pp. 6470–6505. (6470., 6482.), http://dipbt.bundestag.de/dip21/btp/07/07096.pdf (last accessed: 1 October 2023), according to which a solution aimed solely at the self-determination of women is explicitly rejected as merely emancipatory. See also VON BEHREN, DIRK 2004 (supra note 3), p. 423.; ID. 2019 (supra note 62). On the other hand, the non-parliamentary movement against § 218 StGB was concerned with purely emancipatory reasons, cf. KROLZIK-MATTHEI, KATJA: *§ 218 – Feministische Perspek-*

After the Constitutional Court had denied constitutionality to the time-limit regulation in 1975 and a far-reaching solution of indications corresponding to the aspirations of medical profession had prevailed, it is – by all – not surprising that those affected – the women – remained subordinate to the control and filter function of the medical profession. Women remained more of a procedural object and limited in their rights of disposal over their own bodies. In „abortion-medicine", which was ultimately prescribed solely to protect unborn life, pregnant women and doctors are therefore possible „side effects", only.[112] The German regulations following the 2nd abortion verdict of the Federal Constitutional Court (BVerfG) in 1993 even placed the state's duty to protect (unborn) life at the center of the regulations, and therefore have not changed this.

Quite the opposite seems to be the case: Today's comprehensive examination possibilities in vitro, in utero, before, at the onset of, and up to late pregnancy, genomolecularly, prenidatively, prenatally (also by means of ultrasound) have made the embryo comprehensively available, the dangers associated with pregnancy for the embryo and their realization demonstrable, and fully turned the woman the growth-promoting environment of unborn life.[113] In addition, the increasingly comprehensive social discussions, and the increased explicit clarification of the multitude of obligations,[114] responsibilities and long-term tasks associated with pregnancy for the woman concerned have individually increased the requirements for entering into the „other circumstances".

IV. Abortion and socio-political guidelines, contemporary (criminal) law comparative observations

When I now briefly return to a (vertical) historical comparison with the law of the former East German Democratic Republic (GDR), it is because this forms an area example. By looking at the development of legal regulations against the background of other political convictions, it illustrates the significance of technical innovations in relation to the distribution of roles in society:

---

tiven auf die Abtreibungsdebatte in Deutschland. Münster, 2015; ID.: *Abtreibungen in der Debatte in Deutschland und Europa*. APuZ 20/2019. p. 4 (5, 9); On the discussions and „fights" in the West German women's movement cf. FrauenMediaTurm, Die Abtreibungsdebatte in der Neuen Frauenbewegung, in: Digitales Deutsches Frauenarchiv 2019, https://www.digitales-deutsches-frauenarchiv.de/themen/die-abtreibungsdebatte-der-neuen-frauenbewegung (last accessed: 1 October 2023); KRAIKER, GERHARD: *§ 218 Zwei Schritte vorwärts, einen Schritt zurück*. Frankfurt aM, 1983. p. 67.; Pro Familia Bremen (ed.), Wir wollen nicht mehr nach Holland fahren. Nach der Reform des § 218 StGB – Betroffene Frauen ziehen Bilanz, Hamburg, 1978; Begründung mit Widersprüchen: wenig überzeugende Verfassungsklage der CDU/CSU Fraktion gegen § 218 StGB, Frankfurter Rundschau of 17 July 1994 (zitiert aus der Pressedokumentation zur Chronologie des § 218 StGB, FMT, PD-SE.11.12).

[112] Already WÖRNER, LIANE 2012 (supra note 34), p. 315 (339).

[113] So DUDEN, BARBARA 2002 (supra note 8), p. 11.: „an environment in need of supervision, advice and decision-making of a largely autonomous process taking place within it".

[114] See e.g. GROPP, WALTER 2000 (supra note 49), p. 1. (3-5); MAURACH, REINHART – SCHROEDER, FRIEDRICH-CHRISTIAN – MAIWALD, MANFRED – HOYER, ANDREAS – MOMSEN, CARSTEN: Strafrecht Besonderer Teil, subband 1. 11. ed. Heidelberg, 2019. § 5 margin number 28; discussion based on: BGHSt 31, 348 (353); OLG Karlsruhe, NStZ 1985, 314 (315) with note JUNG, HEIKE; EGMR 2005, p. 727.; GROH, THOMAS – LANGE-BERTALOT, NILS: *Der Schutz des Lebens Ungeborener nach der EMRK*. NJW 2005. p. 713.

Thesis is that with the development of birth control methods – such as the „pill"[115] – and comprehensive prenatal diagnostic methods – such as non-invasive ultrasound since 1958[116] and invasive amniocentesis since 1966[117] – pregnancy has become more comprehensively ascertainable as a condition, thus controllable and plannable for society and those affected. The possibility of planning is accompanied by the desire to comprehensively control its implementation and existence. Without appropriate attention to the distribution of roles, the pregnancy conflict comes to a head. The comparison to the law in the former East, now, is so fascinating because it shows that the debate on equal rights for women, even though it was ostensibly conducted in the GDR, did not lead to any equality at all.

In brief: In the planned society of the German Democratic Republic,[118] equal rights for men and women with the right to equal pay for equal work were explicitly laid down as early as 1949.[119] At the same time, the wage gap in practice was 30%; as early as 1952, the monthly „household-day" for women was introduced; women were (only) integrated

[115] First approved on 18 August 1960 under the name 'ENOVID' by the Food and Drug Administration (FDA) in the US, ROCK, JOHN: *Geburtenkontrolle. Vorschläge eines katholischen Arztes*. Olten/Freiburg, 1964. p. p. 166.; ID., *Let's be honest about the pill*. In: J.Amer.med.Ass. 192(1965)5, pp. 141–142. On 1 June 1961, the firm Schering introduced it in the Federal Republic of Germany under the name „Anovlar" with a non-identical composition, cf. UFER, JOCHEN: *Wie entstand das erste hormonale Kontrazeptivum Europas „Anovlar"?*. In: Schering Pharma Deutschland, 1981. p. 4.1.–4.2.; merging DOSE, RALF: *Die Durchsetzung der chemisch-hormonellen Kontrazeption in der Bundesrepublik Deutschland.* Berlin, 1989. p. 13.; see: „Mit Tabletten", Der Spiegel 12/1961, pp. 92–93.; „Eine Pille reguliert die Fruchtbarkeit", Der Stern 14/1961, p. 26. It took five years to spread knowledge of the possibilities of hormonal contraception, see DOSE, RALF: 1989, p. 24, and varied widely by level of education, social class and region, ibidem p. 36., p. 81. The „pill" was widely distributed in the Federal Republic of Germany as an „anti-baby pill", was regarded as a danger to women, sexuality and sexual morality and only slowly became established as a sign of „new femininity", comprehensive: SILIES, EVA-MARIA*: Liebe, Lust und Last, Die Pille als weibliche Generationserfahrung in der Bundesrepublik 1960-1980.* Göttingen, 2011. Particularly p. 101., p. 349. In the German Democratic Republic Jenapharm presented its own product under the name „Ovosiston" at the spring trade fair in Leipzig in 1965 and won the gold medal of the model trade fair. Subsequently introduced as the „desired child pill", the pill became the basis of East German family planning and promoted to reconcile family and career, cf. https://www.digitales-deutsches-frauenarchiv.de/themen/die-wunschkindpille (last accessed: 8 March 2023), Sammlung historisches deutsches Museum, https://www.dhm.de/archiv/sammlungen/alltag1/ak940007.html (last accessed: 1 October 2023).

[116] Above DONALD, IAN – MCVICAR, JOHN – BROWN, TOM (supra note 9).

[117] STEELE, MARK W. – BREG JR., WILLIAM ROY: *Chromosome Analysis of Human Amniotic-Fluid Cells*. The Lancet 1966. p. 383. On invasive prenatal therapy as a focus of endoscopic prenatal medicine since the 1990s: STRAUSS, ALEXANDER – HEPP, HERMANN: *Invasive Pränataltherapie.* Der Gynäkologe 1999. p. 821. GROPP, WALTER 2008 (supra note 98), p. 19 (21), is right to point out that pre- and perinatal medicine have developed in the 20th century since 1958 in an „epochal" way, while in particular the criminal (insofar life-protecting!) components of the regulations on abortion are still in line with the Prussian Criminal Code of 1851.

[118] See HÜBNER, PETER: *Die Zukunft war gestern: Soziale und mentale Trends in der DDR-Industriearbeiterschaft.* In: Kaelble, Hartmut – Kocka, Jürgen – Zwahr, Hartmut (eds.): Sozialgeschichte der DDR. Stuttgart, 1994. p. 171.

[119] Above with references in supra note 6. See again in the introduction of the Gesetz zur Schwangerschaftsunterbrechung (Act on the termination of pregnancy, GBl. I I No. 5 of 15 March 1972, p., p. 89. See e.g. MERKEL, INA: *Leitbilder und Lebensweisen von Frauen in der DDR*. In: Kaelble, Hartmut – Kocka, Jürgen – Zwahr, Hartmut (eds.): Sozialgeschichte der DDR. Stuttgart, 1994. p. 359.; GERHARD, UTE: *Die staatlich institutionalisierte „Lösung" der Frauenfrage: Zur Geschichte der Geschlechterverhältnisse in der DDR*. In: Kaelble, Hartmut – Kocka, Jürgen – Zwahr, Hartmut (eds.): Sozialgeschichte der DDR. Stuttgart, 1994. p. 383.

into the plan specifications as so-called labor-reserves (Ersatzarbeitskräfte).[120] Under the self-image of an emancipated society,[121] men remained head of the family, even if they were not the sole breadwinners. In 1968, 80% of all women worked.[122] In distinction to the so-called industrial mass society (of the West), the traditional mother role in the East was to disappear as far as possible.[123] In reality, emancipation was perceived by many women as a constraint, the parallel management of career and family formed a double burden mostly alone for the woman.[124]

Against this background, a women's commission of the SED politburo dealt with the self-realization and equal rights of women, also with the aim of curbing illegal and costly abortions.[125] The Maternity Protection Act of 27 February 1950[126] initially allowed abortions only under strict medical supervision and limited to hereditary diseases.[127] Politics (in the GDR) reacted to the growing dissatisfaction of women and the increasing abortion tourism in neighboring countries with two instruments, instrumentalizing the women's movement itself:[128]

Firstly, birth control with the pill „Ovosistone", marketed by VEB Jenapharm since 1965, was released free of charge from 1972 and advertised as „desired child pill" for

---

[120] GERHARD, UTE 1994 (supra note 119), p. 383.; FUHRER, ARMIN 2019 (supra note 6); KAMINSKY, ANNA 2019 (supra note 6).

[121] BAUER, BABETT: *Kontrolle und Repression, Individuelle Erfahrungen in der DDR 1971–1989. Historische Studie und methodologischer Beitrag zur Oral History.* Göttingen, 2006. p. 53.; MERKEL, INA 1994 (supra note 119), p. 359 (376); GERHARD, UTE 1994 (supra note 119), p. 383., p. 393.

[122] Cf. Frauenbeschäftigungsgrad, in: WINKLER, GUNNAR (ED.): Lexikon der Sozialpolitik. Berlin (Ost), 1987. p. 166, proportion of the female population of working age in permanent employment, including apprentices and students; HELWIG, GISELA: *Frau und Familie in beiden deutschen Staaten*. Köln, 1982. p. 33. (33): „around 87% of all female GDR citizens between the ages of 15 and 60 are either in education or working". According to HOCKERTS, HANS GÜNTER: *Grundlinien und soziale Folgen der Sozialpolitik in der DDR.* In: KAELBLE, HARTMUT – KOCKA, JÜRGEN – ZWAHR, HARTMUT (EDS.): Sozialgeschichte der DDR. Stuttgart, 1994. p. 519. (532), „working mothers [have become] the main target of social policy since the early 1970s'; two conflicting objectives should be reconciled, namely the maximum increase in the female employment rate and the increase in the birth rate".

[123] See MÜHLBERG, DIETRICH: *Haute Couture für Alle? – Über Mode und Kulturverständnis*. In: MELIS, DOROTHEA (ED.): Sibylle, Modefotografie aus drei Jahrzehnten DDR. Berlin, 1998. p. 8 (10); HELWIG, GISELA 1982 (supra note 122), p. 71, describes the pressure on women to participate appropriately in „reproductive behaviour", while at the same time over 70% of domestic work was left to women (p. 49.). It was therefore necessary in 1972 to draw up a catalogue of measures to prevent the birth rate from falling further (p. 71. with table 16, p. 64.).

[124] KAMINSKY, ANNA 2019 (supra note 6).

[125] Cf. Sozialreport 1990 (WZB), p. 35. Also HOCKERTS, HANS GÜNTER 1994 (supra note 122), p. 519 (532), who especially notes that the Central Committee (ZK) of the SED did not place this area with family, but always in the area of „women", i.e. did not regard family as „the intersection of various social life and problems". Moreover, women remained under-represented in politics and were considered unsuitable for leadership positions. In 1970, 29.7% of the Members of Parliament were women.

[126] GBl. I 1950, p. 1037.

[127] Cf. ARESIN, LYKKE: *Schwangerschaftsabbruch in der DDR*. In: STAUPE, GISELA – VIETH, LISA (EDS.): Unter anderen Umständen. Zur Geschichte der Abtreibung. Dresden, 1993. pp. 86–95., p. 91.

[128] BOUILLOT, CORINNE: *Auferstanden aus Ruinen, Die Frauenbewegung in der DDR*, 8.9.2008, Dossier Frauenbewegung, BpB, https://www.bpb.de/gesellschaft/gender/frauenbewegung/35279/neuanfang-im-osten?p=all (last accessed: 8 March 2023).

birth planning and regulation.[129] In direct comparison: in the West, the pill was introduced almost at the same time, but only sold individually as the „birth control pill" without any advertising.[130]

Secondly, the Democratic Republic released a law on the interruption of pregnancy in 1972.[131] It remained the first and only law passed by the East German parliament with votes against it.[132] According to this law, every woman had the right to have her pregnancy terminated by a doctor up to the 12th week after conception and without having to make a formal application or disclose her motives, and despite any penal provisions (§§ 153-155)[133]. In pursuit of over-individual political-ideological goals, the regulation aimed to grant women a right to abortion in the sense of freedom of disposition over their bodies in order to realize the equality proclaimed in socialist society.[134] The pressure on women to plan – when I started school, more than half of our mothers were either still pregnant or just had their second child – was and still is largely ignored.[135] The fact that a women's movement had also formed in the former East in the 1980s, consisting of about 100 women's groups, partly in and with Protestant churches, which stood up for freedom and independence from conservative images of family and women, is still too little discussed and only breaks out in the politically so conclusively explainable far-reaching demonstrations against the adoption of the West German indication model in 1990 to reunification (at all).[136]

---

[129] ECKART, WOLFGANG: *Schutzwall gegen die Abtreibung*, 23.8.2015, Süddeutsche Zeitung Online, https://www.sueddeutsche.de/kultur/geschichte-der-sexualitaet-schutzwall-gegen-die-abtreibung-1.2618020 (last accessed: 8 March 2023); LEO, ANNETTE: *Die ‚Wunschkindpille'*, 09/2018, Digitales Deutsches Frauenarchiv, https://www.digitales-deutsches-frauenarchiv.de/themen/die-wunschkindpille (last accessed: 8 March 2023).

[130] KAMINSKY, ANNA 2019 (supra note 6).

[131] GBl. I 1972 (No. 5), p. 82.; see above supra note 79; also printed at WEIßER, BETTINA: Schönke/Schröder-StGB, 24. ed. 1991, preface § 218 margin numbers 47.

[132] On the public debate of the East German parliament on 9 March 1972 (historical recording, 52min), cf.: LEMKE, GRIT: *Sensation in der Volkskammer. Selbstbestimmung der DDR-Frau: Als die Abtreibung legal wurde*, mdr-Zeitgeschichte vom 9.3.2023, https://www.mdr.de/geschichte/ddr/politik-gesellschaft/gesundheit/schwangerschaftsabbruch-ddr-100.html (last accessed: 9 March 2023). Also see ARESIN, LYKKE 1993 (supra note 127), p. 92; see VON BEHREN, DIRK 2019 (supra note 62), p. 16.

[133] §§ 153–155 GDR-StGB of 12 January 1968, GBl. I p. 1.

[134] See above with references in supra notes p. 74.; cf. ARESIN, LYKKE 1993 (supra note 127), p. 92.

[135] HELWIG, GISELA 1982 (supra note 122), p. 71, speaks of an increase in the birth rate of around 30 percent only between 1974 and 1979, already above in supra notes 122 f.

[136] Art. 31 Abs. 4 des Einigungsvertrages zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands vom 31. August 1990 (Art. 31 para. 4 of the Treaty of Unification between the Federal Republic of Germany and the German Democratic Republic concerning the unification of Germany of 31 August 1990) (BGBl. II p. 889): „to adopt, by 31 December 1992 at the latest, a regulation which better guarantees the protection of prenatal life and the constitutional resolution of conflict situations of pregnant women, in particular through legally guaranteed rights for women, in particular to counselling and social assistance, than is currently the case in both parts of Germany." To this see ESER, ALBIN: FS Schwartländer 1992 (supra note 3), p. 183 (183 f.) with further references, and ID. – KOCH, HANS-GEORG: *Plädoyer für ein „notlagenorientiertes Diskursmodell"*. In: BAUMANN, JÜRGEN – GÜNTHER, HANS L. – KELLER, ROLF – LENCKNER, THEODOR (EDS.): § 218 StGB im vereinten Deutschland. Tübingen, 1992. pp. 21–79.

V. Long-term consequences in contemporary history

As a result, talking about the long-term consequences of contemporary history in a comparative way, it can be seen that regulations on abortion represent a seismograph for the protection of life and women rights in society.[137] Until now, women's rights have not been an issue, or at best a by-product. Until the end of the old Federal Republic of Germany, I dare say until today, what *Jerouschek* once said still applies: „As a birth control measure in the context of contraception and infanticide", abortion is historically essentially negative, i.e. tangible through its prohibition.[138] A look at the current discussions in the United States shows how clearly this applies.[139]

It even applies, that the conflict over abortion has been polarized (from the beginning) until today and at latest since the full recognition of the embryo as (unborn) life with the 1st abortion verdict in 1975 – and without the provisions of the 1972 East German Abortion Act having had any significant influence – to the positions of „pregnancy as a woman's intimate sphere" – „my womb belongs to me"[140] – and the „nasciturus as an independent human being"[141] – „sanctity of life from fertilization onwards"[142]. The orientation

§ 218a Abs. 1 StGB in der Fassung des Schwangeren- und Familienhilfegesetz vom 27. Juli 1992 (Act of the protection of Prenatal Life, for the Promotion of a Child-Friendly Society, for Assistance in Pregnancy Conflicts and for the Regulation of Abortion of 27 July 1992) (BGBl. I S. 1398): BVerfGE 88, 203 = NJW 1993, p. 1751.: The provision is incompatible with Art. 1 para. 1 in conjunction with Art. 2 para. 2 S. 1 GG because it declares an abortion performed under the conditions stated therein to be lawful and refers in No. 1 to a consultation which in turn meets the constitutional requirements of Art. 1 para. 1 in conjunction with Art. 2 para. 2 S. 1 GG is not sufficient. The provision is null and void as a whole.

137 Already GROPP, WALTER & WÖRNER, LIANE: Münchener Kommentar zum Strafgesetzbuch (Munich Commentary on the criminal code), 4th ed. 2021, StGB preface § 218 margin numbers 13-18.

138 JEROUSCHEK, GÜNTER: Die juristische Konstruktion des Abtreibungsverbots, in: GERHARD, UTE (ED.): Frauen in der Geschichte des Rechts. München, 1997. p. 248. The decree of abortion as a prohibition can be used until the turn of the millennium from the 3rd to the 2nd century BC, where a distinction was made between abortion against the will of the father and/or the pregnant woman and self-abortion by the pregnant woman, comprehensive JEROUSCHEK, GÜNTER 1988 (supra note 3), p. 24.

139 SHULMAN, THEODOR: *„Nicht hinreichend verwurzelt": Zur Entscheidung des U.S. Supreme Court, das bundesverfassungsrechtliche Grundrecht auf Abtreibung abzuschaffen*. EuGRZ 2022. p. 473*;* VASEL, JOHANN JUSTUS: *Liberalisierung und Deliberalisierung – Zeitenwenden im Abtreibungsrecht.* NJW 2022. p. 2378.

140 Cf. already above. „Wir haben abgetrieben!", Stern issue 24/1971.

141 BVerfGE 39, 1 (supra note 11).

142 SCHROM, MICHAEL: *Wann ist der Mensch Person?.* In: Christ in der Gegenwart 64 (2/2012), http://www.christ-in-der-gegenwart.de/aktuell/artikel_angebote_detail?k_beitrag=2725889 (20 Februrary 2012). See e.g. BECKMANN, RAINER: *„Selbstbestimmung" über das Leben Ungeborener?*. In: BÜCHNER, BERNWARD – KAMINSKI, CLAUDIA – LÖHR, MECHTHILD (EDS.): Abtreibung – Ein neues Menschenrecht?. Krefeld, 2012. p. 27.; in general on the debate about sanctity and protection of life: ESER, ALBIN: *Zwischen „Heiligkeit" und „Qualität" des Lebens. Zu Wandlungen im strafrechtlichen Lebensschutz*. In: GERNHUBER, JOACHIM (ED.): Festschrift gewidmet der Tübinger Juristenfakultät zu ihrem 500jährigen Bestehen 1977 von ihren gegenwärtigen Mitgliedern. Tübingen, 1977. p. 377–414 (p. 413.); ID*., Aspekte eines Strafrechtlers zur Abtreibungsreform.* In: HOFMANN, DIETER (ED.): Schwangerschaftsunterbrechung, Aktuelle Überlegungen zur Reform des § 218. Frankfurt aM, 1974. p. 117-177; ID.: *Zwischen „Heiligkeit" und „Qualität" des Lebens. Zu Wandlungen im strafrechtlichen Lebensschutz*. In: Stimmen der Zeit 200 (1982). p. 812, 826; ID.: *Auf der Suche nach dem mittleren Weg – Zwischen Fundamentalismus und Beliebigkeit.* In: LANGER, MICHAEL – LASCHET, ARMIN (EDS.): Unterwegs mit Visionen, Festschrift für Rita Süssmuth. Freiburg 2002. pp. 117–139.

of the criminal law on abortion as a right to the protection of life encounters in particular the problem that post-nidatively the fate of the unborn child is inseparably linked to the fate of the pregnant woman until it becomes viable and „factually" depends entirely on the pregnant woman's willingness to show consideration until birth.[143]

Compromises, negotiated so far, proved to be (in each case) a state priority. What is reasonable (for the person concerned) in terms of pregnancy is not asked, is asked too little or (especially) not verified. For a new start, it is not enough to win the „woman" (the person concerned) over to carrying out the pregnancy by means of result-oriented counselling and thus to „knit" regulations „with" her, or rather with the persons concerned. Rather, legal regulations are needed, starting from the woman, from the pregnant person.

In the necessary change of perspective, the complex sum of new regulations must contain that menstruation is a serious complaint and not an additional holiday, as German media had mistranslated from Spanish aspirations.[144] It must further contain that a ban on advertising is a regulatory mechanism to regulate counselling by way of the state's fulfilment of its duty to protect but must not be a paternalistic regulation of counselling periods to the detriment of those affected. [145]

There is no need to oblige the pregnant woman, no need for a three-day period after counselling. On the contrary, both counter-productively calls into question the free decision of those affected, costs time and resources and thus even shortens periods of reflection and risking increases in the number of abortions.[146] The cumbersome „procedure" of compulsory counselling and waiting time excessively restricts women's options.[147] Clearly, goal-oriented, compulsory counselling disenfranchises, discredits responsible

---

[143] Cf. already GROPP, WALTER & WÖRNER, LIANE: Münchener Kommentar zum Strafgesetzbuch (Munich Commentary on the criminal code), 4th ed. 2021, StGB preface § 218 margin number 11. This dependence seems to be eliminated only with a complete ectogenesis, which is probably why it is so exciting for research.

[144] Thus statements in 2022, especially medial in the Tagesschau under the title „Menstruationsurlaub": „Spanien beschließt Frauen- und Gendergesetze", https://www.tagesschau.de/ausland/europa/spanien-gesetze-trans-menstruationsurlaub-101.html (last accessed: 8 March 2023).

[145] Clearly with this mind too *Pro Familia* Bundesverband, https://www.profamilia.de/ueber-pro-familia/aktuelles/219a-stgb-informationen-zum-schwangerschaftsabbruch.html (8.3.2023), p. 16.

[146] Already WÖRNER, LIANE: *Stellungnahme zum Referentenentwurf des Bundesministeriums der Justiz [Entwurf eines Gesetzes zur Änderung des Strafgesetzbuchs – Aufhebung des Verbots der Werbung für den Schwangerschaftsabbruch (§ 219a StGB)]*, v. 17.2.2022, https://kripoz.de/wp-content/uploads/2022/02/0217_Stellungnahme_Prof_Woerner_Aufhebung_Paragraph_219a_StGB.pdf (last accessed: 8 March 2023), p. 4 f.; deepening ID. with further references, *Ein „Urteil als Ehrentitel im Kampf für ein besseres Gesetz"?*. In: SINN, ARNDT – HAUCK, PIERRE – NAGEL, MICHAEL – WÖRNER, LIANE (EDS.): Populismus und alternative Fakten, (Straf-) Rechtswissenschaft in der Krise? Abschiedskolloquium für Walter Gropp. Tübingen, 2020. pp. 353–381. (p. 370.). That this is not a singular German problem is shown instead of many by BRIEN, JOANNA – HALLGARTEN, LISA: *Support and counselling.* In: ROWLANDS, SAM (ED.): Abortion Care. Cambridge, 2014. pp. 42–51.

[147] Cf. already: Der Kriminalpolitische Kreis, Stellungnahme Dezember 2017, ZfL 2018, 31 together with a prohibition on illegal abortions and an irregularity amounting to a fine; ähnlich Deutscher Juristinnenbund e.V., Stellungnahme, https://www.djb.de/verein/Kom-u-AS/ASRep/st19-03/ (last accessed: 8 March 2023); HÖFFLER, KATRIN: *Pro und Contra*. RuP 54 (2018). p. 70 f.; clearly due to lack of sufficiently achieved criminal character MITSCH, WOLFGANG: *Bemerkungen zu § 219a StGB in seiner neuen Fassung*. KriPoZ 4/2019. pp. 214–220.

decision-making and, last but not least, contradicts a professional understanding of counselling.[148]

At the same time, however, it is important to warn against the politicization and cost-neutral simplification of counselling: Reducing procedures, deleting waiting periods and advertising bans in order to comprehensively realize the woman's right to self-determination (decisively), will alone not help the matter.

It is not that women and those affected cannot bear the responsibility but quite the opposite. Any reduction of rules or deletion of ban will not release the state from its duty to protect life and to protect from the pregnancy conflict. It is the state that is obliged to protect life. The state must create an environment in which the conflicts of carrying a child to term are reduced to the lowest possible level and that allow the circumstance of having a child to become a simple, widely desired and largely unproblematic upheaval of private life situations, without unduly restricting the free decision to terminate pregnancy, if the conflict cannot be resolved otherwise. It should be possible to reliably demand state assistance: financially, for care and support for all ages of children, but also for pregnancy prevention and contraception. What we need is a complete acceptance of life with and without children.

WÖRNER, LIANE

A NÉMET „ABORTUSZTÖRVÉNY"

A terhességmegszakításhoz való jog a régi Német Szövetségi Köztársaság jogában, kortárs történelmi perspektívából, a kihívások és tendenciák tükrében

(Összefoglalás)

Ahol terhesség van, ott van abortusz is. Az abortusz mindig is viták tárgya minden társadalomban, függően a terhesség megállapításának orvosi státuszától, a nők jogi és társadalmi helyzetétől és a társadalom meghatározó értékeitől, beleértve a meg nem született, a születés előtti vagy a jövőbeli élet védelmét. A német jogban a terhesség megszakítása továbbra is általánosan tilalmazott, a német büntető törvénykönyv (StGB) 218. §-a szerint, igaz, a terhesség 12. hetéig nem büntethető, ha kötelező tanácsadási eljárást követően történik a beavatkozás (StGB 219. §, (218a. §), ezen túlmenően pedig az egészségügyi indikáció esetén a születésig, büntetőjogi indikáció esetén pedig a 12. hétig megengedett (StGB 218a.§ (2) és (3) bek.).

[148] Cf. in essence, again with the contemporary historical perspective set out here, the correspondence between SÜSSMUTH, RITA am 8.8.1990, BArch, DA 1/17538 Brief 0808, p. 9, and replying SEPT-HUBRICH, GISELA, am 12.9.1990, BArch, DA 1/17538 Brief 1209. See above supra notes p. 76.; cf. supplementary *Pro Familia* Bundesverband, Hintergrund Schwangerschaftsabbruch, Berlin 2017, https://www.profamilia.de/fileadmin/ beratungsstellen/ schwaebisch-hall/Hintergrund-Schwangerschaftsabbruch.pdf (last accessed: 8 March 2023), p. 34.

Az abortuszról szóló két szövetségi alkotmánybírósági határozat alakította ki ezt a gyakorlatot – az egyik a régi szövetségi köztársaság korai szakaszának végén (1975), a másik pedig az újraegyesítés során a volt Német Demokratikus Köztársaság jogával való kompromisszum érdekében (1993) született. A koncepció a közelmúltban ismét vizsgálat tárgyává vált, mivel a StGB 219a §-ában (régi változat) szereplő büntethető reklámtilalomnak az abortuszról való tájékoztatás tilalmáig történő kiterjesztő értelmezése az érintettek számára már nem volt elfogadható. A rendelkezést végül törölték, és az abortuszok büntethetőségével kapcsolatos vita újra fellángolt. Két szélsőséges álláspont alakult ki: az abszolút tilalom és a nő önrendelkezési jogának korlátlan érvényesülése áll a vita horizontjának két szélén. Ha ezt követjük, akkor nem csak az átfogó koncepciót kell felülvizsgálni, hanem szükség esetén a koncepció átrendezését is követelni kell, mivel jelenleg a törvény nem (vagy már nem) tükrözi a valóságot. Az államnak olyan környezetet kell teremtenie, amelyben a gyermek kihordásával járó konfliktusok a lehető legalacsonyabb szintre csökkennek, és amely lehetővé teszi, hogy a gyermekvállalás körülménye a magánéleti élethelyzetek egyszerű, széles körben kívánatos és nagyrészt problémamentes változásává váljon, anélkül, hogy indokolatlanul korlátozná a terhesség megszakítására vonatkozó szabad döntést. Lehe
tővé kell tenni, hogy igényelni lehessen az állami segítséget: anyagi szempontból, a gyermekgondozáshoz és a gyermek minden korosztályának támogatása szempontjából, de a terhességmegelőzés és a fogamzásgátlás szempontjából is. Mind a gyermekes, mind a gyermek nélküli élet teljes elfogadására van szükségünk.