



Penalties for Physicians in German Abortion Law

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PENALTIES FOR PHYSICIANS IN GERMAN

ABORTION LAW

Summary of West German abortion law

This report describes the West German criminal provisions on abortion. Currently, these are in effect in former West Germany whereas East German legislation remains applicable in former East Germany. The ongoing efforts to unify German abortion law are described below.

The current West German provisions on abortion are contained in sections 218 through 219 (d) of the Criminal Code.¹ In summary, these permit abortions at various stages of pregnancy and for various reasons, provided that the woman has received counselling and that a physician has certified that the abortion is justifiable under the statutory provisions. Various sanctions are provided for abortions that do not live up to these requirements.

These criminal provisions were introduced in 1976.² They are very detailed, and their understanding may be enhanced by a brief description of the circumstances leading to their enactment.

In 1974, a reform law to the Criminal Code made abortions on demand permissible during the first trimester of pregnancy.³ This law was declared constitutionally invalid by the Federal Constitutional Court in 1975 on the grounds that the German Constitution protects the human fetus.⁴ In balancing the interests of the pregnant woman with the Constitutional mandate to protect all human life, the Court indicated that, while abortion is constitutionally justifiable under certain circumstances, the legislature nevertheless has a duty to protect prenatal life, and that this mandate may include the need for criminal sanctions. In principle, the Court stated, the state must consider abortions to be unlawful.

The ensuing legislation of 1976 liberalized abortion as much as possible⁵ while retaining some criminal sanctions to live up to the constitutional mandate. Legal and illegal abortions are defined through a differentiated system of sanctions. On the basis of these provisions, abortion is justifiable during the first twelve weeks of pregnancy if the pregnancy was caused by rape or a similar offense. During this twelve-week period, abortion is also justifiable for social reasons, such as family circumstances or economic burdens,⁶ if these make abortion advisable to protect the woman from the

¹ *Strafgesetzbuch* (StGB), repromulgated January 2, 1975, *Bundesgesetzblatt* (BGBl., official law gazette of the Federal Republic of Germany) I, p. 1, as amended, §§ 218-219 (d). A translation of these provisions as currently in effect and as contained in J.Darby, *The Penal Code of the Federal Republic of Germany* (Littleton, 1987) is included as an *Appendix*.

² Fünfzehntes Strafrechtsänderungsgesetz, May 18, 1976, BGBl. I, p. 1213.

³ Fünftes Gesetz zur Reform des Strafrecht, June 18, 1974, BGBl. I, p. 1297.

⁴ Decision of Bundesverfassungsgericht, February 25, 1975, 39 *Entscheidungen des Bundesverfassungsgerichts* 1 (1975). An English translation of this decision is contained in 9 *John Marshall Journal of Practice and Procedure* 609 (1976).

⁵ According to pro-life advocates, the legislation goes beyond what is constitutionally permissible, yet it has never been challenged in court [*Frankfurter Allgemeine Zeitung* (FAZ) April 23, 1992, p. 5].

⁶ A. Schönke and H. Schröder, *Strafgesetzbuch* 1462 (München, 1988).

danger of distress that is so serious that continuation of the pregnancy could not be reasonably expected, provided that this difficult situation cannot be averted through any other reasonable means.⁷ Until the twenty-second week of pregnancy, abortion is justifiable if there are substantial reasons to assume that the child would be seriously impaired. Abortion is justifiable at any stage of pregnancy to protect the life or health (mental or physical) of the mother.

In addition to these substantive criteria for lawful abortion, counselling and certification requirements must be met. The woman must have received social and medical counselling and a physician other than the one performing the abortion must have certified that the abortion is justifiable under the statutory criteria.

The purpose of social counselling is to inform the mother of the public and private assistance that is available to pregnant women, mothers and children, in particular the type of aid that might make it easier for her to continue the pregnancy. Social counselling can be provided either by a recognized counselling center or by a physician who is either recognized by a counselling center or at least familiar with the types of assistance that are available. The physician who performs the abortion is not qualified to counsel the woman on these social matters, and a three-day waiting period between social counselling and the abortion is mandatory.

Medical counselling is always required, except in medical emergencies. It can be provided by the physician who certifies that the abortion is justifiable as well as by a physician who provides the social counselling. According to some authorities, medical counselling can even be provided by the physician who performs the abortion.⁸ The purpose of medical counselling is to inform the mother of the medical aspects of abortion, the development of the fetus, and of the fact that abortion destroys human life.⁹ A waiting period is not required.

Criminal penalties for physicians

The system of sanctions aims more at penalizing the conduct of physicians than at punishing the woman. The woman who has an unlawful abortion is punishable under certain circumstances with up to one year's imprisonment or a fine, and the court can refrain from punishing the woman if she was under serious distress. Physicians, on the other hand, are criminally liable under a variety of circumstances, some of which apply to physicians only whereas others apply to non-physicians as well.

According to section 218 of the Criminal Code, anyone who performs an abortion that is not justifiable according to the statutory criteria is punishable with up to three years' imprisonment or a fine. Under aggravating circumstances, the deed is punishable with imprisonment from six months to five years. The higher punishment frame is applicable in particular if the woman has not given her consent or if the abortion recklessly endangered the health of the woman. Section 218 applies to physicians as well as to non-physicians. The aggravating circumstance of reckless endangerment is

⁷ Despite the seemingly stringent statutory language, 80% of all West German abortions are performed for socio-economic reasons [*Supra* note 5].

⁸ E. Dreher and H. Tröndle, *Strafgesetzbuch* 1124 (München, 1988).

⁹ *Id.* at 1128.

primarily aimed at non-physicians, but it also applies to a physician whose conduct is grossly negligent.¹⁰

According to section 218 b of the Criminal Code, a physician who performs an abortion on a woman who has not received medical and social counselling, or before the three day waiting period after social counselling has expired, is punishable with up to one years' imprisonment or a fine.¹¹ According to section 219, the same penalty also applies to a physician who performs an abortion without having seen the certification of another physician according to which the abortion is statutorily justifiable.¹²

The lower punishment frames for a violation of the counselling and certification requirements are applicable only if the abortion was nevertheless justifiable under the statutory criteria.¹³ If, on the other hand, a physician disregards these requirements and there was no justifying reason for the abortion, the higher penalties of section 218 are applicable.

A physician also commits a crime if he knowingly makes an untrue statement in his certificate that an abortion is indicated. The punishment is up to two years' imprisonment or a fine.¹⁴ However, a physician can be convicted of this offense only if the issuance of the certificate has not led to an abortion or attempted abortion. If the certificate results in a completed or attempted abortion, the physician is punishable for participation in an unlawful abortion according to section 218 (up to three year's imprisonment).¹⁵

The advertising of abortion services or of equipment or procedures used in connection with abortion is also prohibited. The penalty for physicians and non-physicians alike is up to two years' imprisonment or a fine. Exceptions are made for information provided within the medical community.

An administrative fine may be imposed on a physician who performs an abortion outside a hospital. To forestall the creation of abortion clinics, federal law requires that abortions be carried out in hospitals.¹⁶ This provision, however, is implemented by the *Länder (states)* and the practice varies. To some extent, physicians can obtain permits to carry out abortions in their practice.¹⁷

¹⁰ Schönke, *supra* note 6, at 1451.

¹¹ E. Schmidhäuser, *Strafrecht Besonderer Teil* 42 (Tübingen, 1983).

¹² Although § 218 (b) and § 219 are generally worded as applying to anyone who performs an abortion, they are nevertheless addressed primarily to the physician. If a non-physician performs an abortion, the higher penalties of § 218 are always applicable, except in emergencies. [Dreher, *supra* note 8, at 1125 and 1129].

¹³ A physician who performs an abortion in the absence of certification *and* counselling commits both offenses, but the penalties are not cumulative [Dreher, *supra*, note 8, at 1128; Schönke, *supra* note 6, at 1475].

¹⁴ StGB, § 219 (a).

¹⁵ Dreher, *supra* note 8, at 1131.

¹⁶ *Supra* note 2.

¹⁷ Schönke, *supra* note 6, at 1467.

Proposed unification of German abortion law

Although the German unification of October 3, 1990, led to the wholesale adoption of most West German law in East Germany, abortion law has for the time being remained divided. Abortion was one of the most hotly contested issues in the unification negotiations of the two Germanies. The East Germans did not want to give up the woman's right to have abortions on demand during the first trimester of pregnancy, which had been enacted in 1972.¹⁸ The West German abortion debate, which had never abated after the 1976 legislation, became again more intense. Pro-choice and pro-life advocates equally dislike the current provisions for their complexity and both sides were in favor of reform. However, a solution to the abortion issue could not be found within the time frame for unification. Instead, the Unification Treaty provided that East German abortion law should remain in effect in East Germany while mandating the enactment of new legislation for all of Germany by the end of 1992.

Several bills on abortion are currently pending in the Federal Diet, the representative chamber of the bicameral federal legislature, yet it appears doubtful whether any of them can be enacted or whether a compromise can be reached. While all these bills are more liberal than the current legislation, the need for criminal sanctions remains a contested issue. Some pro-choice proponents would like to replace criminal sanctions with mere policy statements on the undesirability of abortion and on the inviolability of human life, yet the pro-life advocates find this irreconcilable with the Constitution. Lately, there has been some speculation that the pro-life forces may be deliberately delaying the discussion so that no legislation will be enacted by the end of the year. Should this happen, East German abortion law would still remain in force in East Germany, but then it would be subject to judicial review.¹⁹

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¹⁸ Gesetz über die Unterbrechung der Schwangerschaft, March 9, 1972, *Gesetzblatt* (official gazette of the German Democratic Republic) I, p. 89.

¹⁹ FAZ, April 11, 1992, p. 3