German Abortion Law After the 1993 Constitutional Decision

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GERMAN ABORTION LAW AFTER THE 1993

CONSTITUTIONAL DECISION

Summary of abortion law as in effect since the 1993 decision of the Constitutional Court

On May 28, 1993, the Federal Constitutional Court has for the second time in its history barred a legalization of abortions on demand.[1] The Court invalidated portions of the Pregnant Women and Family Aid Law of 1992[2] and affirmed its 1975 decision that had established a constitutional right of life for the unborn.[3] Since June 15, and until new legislation is enacted, German abortion law is governed by the still-effective provisions of the 1992 legislation and a set of interim provisions that were enacted by the Court. In summary, this body of law prescribes the following:

> Abortions are unlawful except in case of rape, danger to the health of the pregnant woman, or risk of birth defects; yet, no criminal sanctions attach to first trimester abortions after appropriate counselling.
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> The purpose of counselling is to encourage the woman to have the child. During counselling, the woman must be asked about the reasons for wanting an abortion. The counsellor may also request the participation of the child's father and of close relatives, particularly if these persons exert an influence toward abortion. The woman must be informed on the various and generous forms of assistance that are available in case she carries the child to term. Information must also be provided on the legal situation and on how to obtain an abortion. Although counselling is designed to protect the life of the fetus, the decision on the abortion is ultimately the mother's. The mother can remain anonymous during counselling.
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> Counselling must have taken place three days before the abortion, and the physician performing the abortion must again counsel the woman.
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> Counselling facilities must be certified and supervised by the state. They must be separate and independent from facilities that provide abortions. The states must see to it that enough counselling facilities are available so that every woman in Germany has access. Likewise, abortion facilities must also be made available. Abortion and counselling services may not be provided under one roof.
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> Social health insurance coverage is provided only in case of rape, medical impairment of the mother or risk of birth defects. However, welfare assistance is provided to the needy. Sick leave is granted to all.

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[1] Decision of Bundesverfassungsgericht, May 28, 1993, reprinted in 20 *Europäische Grundrechte Zeitschrift* 229 (1993).

[2] Gesetz zum Schutz des vorgeburtlichen Lebens, July 27, 1992, *Bundesgesetzblatt* (BGBl., official law gazette of the Federal Republic of Germany) I, p. 1398.

[3] Decision of Bundesverfassungsgericht, Feb. 25, 1975, 39 *Entscheidungen des Bundesverfassungsgerichts* 1 (1975).

Civil damages cannot arise from the birth of a child.

History of the 1993 abortion decision

The recent abortion decision is the last milestone in a controversy that has spanned more than 30 years. It began in West Germany with a criminal reform law of 1974 that legalized first trimester abortions.[4] In 1975, the Federal Constitutional Court invalidated that law before it ever became applicable.[5] The Court found a constitutional right to life for the unborn which, albeit in balance with other protected values, mandates some positive steps by the government to protect the unborn. According to the Court, criminal laws are one way, but not necessarily the only way, in which the state can comply with this mandate.

The ensuing legislation of 1976[6] was very complicated and satisfied neither the pro-life nor the pro-choice segments of the population. The then enacted sections 218 through 219 of the Criminal Code remained in effect until June 15, 1993. Abortion was a criminal offense unless counselling had been obtained and it was certified that one of the following circumstances justified the abortion:

- the mother's health (at any time during the pregnancy);
- the risk of birth defects (the first 22 weeks of pregnancy);
- rape (first twelve weeks); or
- a situation of distress (first twelve weeks).

Lawful abortions (all of the above) were covered by social health insurance and sick leave was granted.

In most German states the law was applied quite liberally, particularly with regard to the distress clause. Yet in Bavaria and Baden-Württemberg the practice was more restrictive, even leading at times to convictions for unlawful abortions. In West Germany, some 90,000 legal abortions have been reported per year, whereas it is estimated that some 200,000 abortions were performed on German women each year,[7] some of them in the Netherlands or Austria.[8]

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[4] Fünftes Gesetz zur Reform des Strafrechts, June 18, 1974, BGBl. I, p. 1297.

[5] *Supra* note 3.

[6] Fünfzehntes Strafrechtsänderungsgesetz, May 18, 1976, BGBl. I, p. 1213.

[7] During the last decade, West Germany had a population of approximately 61.5 million.

[8] F. Fromme, "Rechtswidrig aber nicht strafbar," *Frankfurter Allgemeine Zeitung* (FAZ) (June 16, 1993), p. 3.

In East Germany, on the other hand, first trimester abortions were decriminalized in 1972, in order to grant women self-determination and equality in the work place.[9] Since 1972, first trimester abortions have been readily available in state-run health clinics, and abortion was treated like an illness by employers and social health insurers. East German women made frequent use of this opportunity. On the average, 90,000 abortions per year[10] were performed until the demise of the East German state.[11]

When Germany was unified in October 1990, most West German laws were adopted by East Germany. Yet, due to the disparity in abortion law and the strong feelings on the issue, the Unification Treaty of 1990[12] stipulated that new legislation should be written for all of Germany by the end of 1992. In the meantime, each part of Germany was to retain its own abortion laws.

By July 1992, the all-German legislature had complied with the requirement of the treaty. The new law[13] appeared to have reached a compromise between western constitutional requirements and the eastern expectations of unrestricted first trimester abortions. The stated goal of the new legislation was to protect the life of the unborn by social measures instead of criminal sanctions.

First trimester abortions were legal, provided that counselling was provided that "served to protect life by providing assistance and advice for the pregnant woman under recognition of the high value of the unborn life and the self-determination of the woman." The law also reaffirmed social security coverage and guaranteed a day care or nursery school place for pre-schoolers over the age of three.

The law was immediately challenged by the Bavarian government and by a large group of parliamentarians. The court joined these petitions with a request for judicial review of social insurance coverage for abortion that had been pending since 1990.[14] In August of 1992, the Court stayed the application of important portions of the new law until it decided on the merits.[15] Consequently, the former East and West German abortion laws continued to be applied until the court-ordered regime commenced on June 16, 1993, shortly after the issuance of the decision.

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

[10] The population numbered about 16.5 million.

[11] 35 *Statistisches Jahrbuch der Deutschen Demokratischen Republik* 378 (1990).

[12] Einigungsvertrag, Aug. 30, 1990, BGBl. II, p. 853.

[13] *Supra* note 2.

[14] Docket numbers 2BvF2/90; 2BvF4/92; 2BvF5/92.

[15] BGBl. 1992 I 1585; this decision was extended on Jan. 25, 1993 [BGBl., I,270].

Reasoning of the Court

The decision was issued by the second senate of the Court. The senate consists of eight justices, five of which signed the majority opinion. Two dissenting opinions were written, but only one of them disagrees with the result reached by the majority. In summary, the Court held that the Constitution protects the life of the unborn so that a pregnant woman is under a duty to bear the child and that abortion is, as a rule, unlawful.[16] Although there is a tension between the constitutional rights of the unborn and those of the mother, in particular her rights of human dignity and personality, the state may not balance these values in a manner that fails to protect the unborn.

The Court found it important to hold first trimester abortions unlawful even though criminal sanctions would not be applied. This categorization protects the unborn by increasing public awareness of the wrongfulness of abortion.

The Court also found that the 1992 law did not put enough emphasis on the life-saving function of counselling. Considering that counselling was to be a substitute for criminal prohibitions, the law needed to spell out how counselling should be organized and carried out in order to encourage the woman to have the child. The court seems quite hopeful that the number of abortions will be reduced under the new counselling requirements.

The prohibition of social insurance coverage was viewed as a consequence of the essential wrongfulness of abortion. In addition, the Court stated that the payment of abortions out of compulsory social insurance contributions violates the basic rights of the contributing members.

The dissenting opinion of Justices Mahrenholz and Sommer disagreed with the majority on almost all counts. They are of the opinion that the fetus does not have rights against the mother in the early phase of pregnancy and argue for a sphere of privacy for the woman. In particular, these justices find no value in a legal construction that holds abortion unlawful without the imposition of sanctions.

Impact of the decision

The abortion decision of 1993 was very unpopular with the pro-choice advocates. They object to the stigmatization of abortion, the disregard of privacy, and the extent of government interference through the counselling process. Also they were disappointed that a long fought-for legislative compromise could not be upheld. Disillusionment with the decision was particularly high in eastern Germany since the eastern Germans expected that legalized abortions would continue to be available. Yet, pro-life spokesmen in the West were also somewhat critical of the Court for permitting that criminal sanctions be abolished.[17]

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[16] As is explained in great length in the 1975 decision [*supra*, note 3], this right is implied in arts. 1 & 2 of the Bonn Constitution, i.e. Grundgesetz für die Bundesrepublik Deutschland, May 23, 1949, BGBl., p.1. These articles protect human dignity and the inviolability of human life.

[17] F. Fromme, "Rechtswidrig aber nicht strafbar," FAZ (June 16, 1993), p. 3; F. v. Westphalen, "Erfüllt Beratung die Staatspflicht des Lebensschutzes," FAZ (July 28, 1993), p. 9; F. Fromme, "Zurück an den Gesetzgeber," FAZ (May 29, 1993), p. 1.; H. Faller, "Beratung und Hilfe statt Strafe," FAZ (June 8, 1993), p. 12; H. Brätigam, "Geld oder Leben," *Die Zeit* (July 23, 1993), p. 7.

On the whole, it is difficult to predict whether abortions will decrease or increase after this ruling. Much will depend on the new legislation and how it is implemented in the states. Undoubtedly, abortion has become more difficult in eastern Germany, particularly since the cost of an abortion is more of a hardship in view of the high unemployment and the low wage level.

For West Germany, the new law does amount to a decriminalization of abortion. The counselling process may be unwelcome to most women seeking an abortion, yet the availability of counselling and abortion facilities will in all likelihood be assured. The cost of an abortion is not considered a major hurdle in West Germany, particularly since the poor will be given assistance.

Potential applicability of German abortion law to abortion services provided in U.S. military hospitals?

It is impossible to predict whether Germany would object to the application in Germany of a recent U.S. policy that calls for the providing of abortion services in U.S. military hospitals. It is also impossible to predict whether the German abortion decision of 1993 makes it more likely that Germany would voice any objections.

The NATO agreements and German law are susceptible of varying interpretations on this issue. It could be argued that the providing of abortions on demand on German soil in a U.S. hospital is in violation of German law. On the other hand, it could be argued that the providing of medical care in a U.S. military facility would fall within the prerogatives of the stationed force. In any event, such a dispute would be resolved by consultation between the NATO partners and not in the German courts.

The extent to which German criminal law on abortion is applicable to members of the U.S. Armed Forces stationed in Germany is governed by the NATO Status of Forces Agreement (SOFA),[18] the Supplemental Agreement with Respect to the Foreign Forces Stationed in Germany (hereafter: Supplemental Agreement),[19] and German provisions on criminal jurisdiction.[20]

German criminal law is generally applicable throughout the German territory, unless jurisdiction is derogated by international law. Thus, diplomats are exempted from the jurisdiction of the host country, and Continental-European legal doctrines has traditionally been in favor of granting immunity to stationed forces on the grounds that they are subject to the military law of the sending state.[21]

The NATO forces, on the other hand, are generally bound to observe the laws of the country in which they are stationed. This broad principle is expressed in Article II of SOFA as follows:

> It is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving State, and to abstain from any

[18] 4 UST 1792; TIAS 2846.

[19] Signed at Bonn Aug. 3, 1959, entered into force July 1, 1963; 14 UST 531; TIAS 5351.

[20] Strafgesetzbuch, repromulgated Jan. 1, 1975, BGBl. I, p. 1, §§ 4-7.

[21] D. Oehler, *Internationales Strafrecht* 402 (Köln, 1973).

> activity inconsistent with the spirit of the present agreement, and, in particular, from any political activity in the receiving state.

This provision establishes the principle of territorial sovereignty, and aims at providing a suitable climate for the adherence of the laws of the host country. Yet, the emphasis on political activity raises the question as to the overall scope of application of Article II. Moreover, SOFA contains numerous derogations from the applicability of the laws of the receiving state,[22] the most important of which are the rules on criminal jurisdiction of Article VII.

In dealing with criminal jurisdiction, SOFA establishes a regime that attempts to balance the interests of sending and receiving states: for conduct punishable only according to the laws of the sending state, SOFA allocates exclusive criminal jurisdiction to the sending state; for conduct punishable only by the laws of the receiving state, SOFA gives jurisdiction to the receiving state; for conduct punishable according to the laws of both countries (concurrent jurisdiction), SOFA gives the exercise of jurisdiction mostly to the receiving state while granting the sending state jurisdiction over offenses against its property, security, and personnel and for conduct set in the course of duty.

If one were to look merely at the wording of Article VII, it could be argued that German criminal provisions on abortions are applicable to members of the U.S. Armed Forces and their dependents; because these provisions do not exist in this form in the United States; and, therefore, the criminal jurisdiction of the receiving state is applicable. Such a view, however, would disregard a number of circumstances, among them the provisions of the Supplemental Agreement, the practice of cooperation and consultation between the U.S. and Germany, and the privileges of military bases as established in SOFA.

For Germany, the Supplemental Agreement amends the jurisdictional rules of SOFA by waiving Germany's exercise of jurisdiction in cases of concurrent jurisdiction. This general waiver is taken back only in exceptional cases, when the German authorities have a special interest in having a particular case adjudicated by the German courts. In practice, members of NATO forces stationed in Germany[23] have come close to enjoying immunity from German jurisdiction.[24]

The sending state's right to police its bases in the receiving state, according to Article IX, paragraph 10, also makes it less likely that German prosecutors would take actions against abortions in U.S. military hospitals. Article 53, paragraph 1, of the Supplementary Agreement expands on this theme by providing that:

> ...within accommodations made available for its exclusive use, a force or a civilian component may take all the measures necessary for the satisfactory fulfillment of its defense responsibilities. Within such accommodations, the force may apply its own

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[22] S. Lazareff, *Status of Military Forces Under Current International Law* 101 (Leyden, 1971).

[23] The supplemental agreement applies to its signatories. These are Belgium, Canada, France, the Netherlands, the United Kingdom and the United States.

[24] Lazareff, *supra* note 22, at 432; One of the rare cases in which the German courts found a German trial justified deals with an ex-service man who had returned to Germany after his discharge from the U.S. Armed Forces. He had been accused of drug-smuggling [Decision of Bundesgerichtshof of Aug. 8, 1978, *Juristische Rundschau* 125 (1980)].

> regulations in the field of public safety and order where such regulations prescribe standards equal to or higher than those prescribed in German law.

A duty to consult on measures taken on bases is also contained in article 53 of the Supplemental Agreement. Moreover, Article XVI of SOFA provides that all differences in the interpretation of SOFA should be settled by negotiations without recourse to the courts.

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