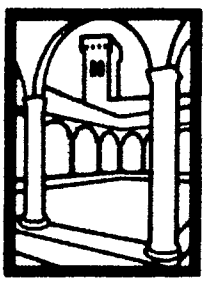
Machteld Nijsten

Abortion and Constitutional Law

A Comparative European-American Study



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Florence

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by

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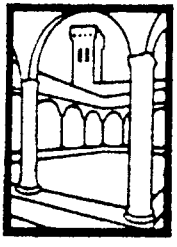

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Florence, April 1988

Introduction

Between January 1973 and February 1975 five major constitutional courts in the Western world ruled on the abortion issue. The constitutional decisions issued by the United States Supreme Court, the Austrian Constitutional Court, the French Constitutional Council, the German Federal Constitutional Court, and the Italian Constitutional Court are the point of departure of this study. In all five cases the question under review was if, and on what conditions, a pregnant woman is allowed under the Constitution to have an abortion. The answers given to this question by the respective constitutional courts differ on many basic points. Whereas the US Supreme Court declared the woman's fundamental right to have an abortion during the first three months of pregnancy and struck down almost all state abortion laws which prohibited abortion in some way, the German Constitutional Court, on the contrary, stated that the unborn's right to life is protected under the Constitution as from the 14th day after conception and declared the recently passed abortion reform unconstitutional. The Austrian, French and Italian Courts took a less radical position. The Austrian Constitutional Court upheld a liberal and the French Constitutional Council a moderate abortion reform. The Italian Constitutional Court struck down an old, restrictive abortion law, however in moderate terms.

In the light of these five constitutional decisions on abortion read in conjunction with the legislative acts in which they resulted, the focus of this study is on the *fundamental rights*-aspect of the abortion issue by means of a *comparative approach* to abortion adjudication. The central question is: can the abortion issue be phrased in constitutional terms, and if so, how? There has been a growing tendency in the abortion debate to phrase the abortion issue in constitutional terms. On the one extreme it is claimed that the fetus has a right to life and that therefore abortion should not be allowed. On the other extreme there is the conviction that the woman's right to self- determination gives her the right to abortion on demand throughout pregnancy. This tendency to 'constitutionalize' the abortion debate has led to a polariza-

tion in views on abortion and has paralyzed the discussion to a great extent, because of the impossibility to reconcile these two opposite views based on conflicting moral and social values.

What will be done in this study is to analyze closely the constitutional validity of the various arguments used in the abortion debate in the light of both constitutional theory and constitutional practice.

Whether a pregnant woman can claim a right to interrupt her pregnancy will depend on whether the fetus has a fundamental right to life, and if so, on how the balance is struck between the right to life of the fetus and the pregnant woman's right to self-determination in the context of abortion.

Once the right to abortion (in certain circumstances) is recognized, further questions arise as to the fundamental rights of others affected by the abortion decision of the pregnant woman. Can the husband or partner of the pregnant woman, or the parents of a pregnant minor, claim the right to have a say in the abortion decision on the basis of their right to family life? Can the doctor who is called to perform or assist at an abortion refuse collaboration or, in the opposite case, require freedom from government interference in the field of abortion, on the basis of his right to freedom of profession? And, finally, can the pregnant woman herself claim, on the basis of her right to equality, that she be treated in the same way, in terms of public funding, as pregnant women giving birth?

Any solution to the abortion issue requires an interpretation and balancing of these fundamental values.

The enquiry into the constitutional aspects of the abortion issue will proceed along the following lines:

– The first step will be to place the constitutional debate in its historical setting. An examination of the history of abortion reform – i.e. the social, religious and political factors which were significant in the evolving of the abortion issue – will enable us to find out what has been the role of the (concern with) the fundamental rights just mentioned in this historical process, and will therefore help us place the constitutional debate in a broader context.

– Next, the questions just raised as to the fundamental rights involved in the abortion decision will be dealt with at a theoretical level. Any analysis of the constitutional decisions on abortion requires first of all a clarification of the underlying concepts *in abstracto*, i.e. a definition of the content and limits of the relevant fundamental rights.

– The third step is to analyze the constitutional practice in the light of the preceding theoretical discussion. This means to 'test' the interpretation given to the relevant fundamental values by the five constitutional courts and legislators against the preceding theoretical analysis of these values. The theoretical framework together with the comparative method will allow a critical evaluation of the various constitutional solutions given to the question of abortion, an evaluation which is necessary for testing the constitutional soundness of the various national solutions adopted.
– The last step of this enquiry will be an attempt to formulate explanations for the national differences in the constitutional approach to the abortion issue, i.e. for the fact that the question of abortion which presented itself in very similar terms in these five countries was nevertheless dealt with in different ways. Explanations will be sought within the constitutional framework of each country, in the national features of constitutional thought and of constitutional decision making. The question of abortion is a transnational issue, transcending the borders of individual states (testified, for example, by the fact that women go abroad for obtaining an abortion). Constitutional law has a kind of 'unifying force' with respect to such a transnational issue, as it 'dictates, as a minimum, some common and relatively permanent standards binding for and superior to all the laws of the particular country involved'.[1]

The comparative approach seems therefore useful in two respects. The comparative method highlights, first of all, the trends or phenomena in the various countries, it shows the divergences and convergences in the constitutional approach to abortion – an issue which presented itself in very similar constitutional terms in these five countries belonging to the same Western liberal-democratic tradition. This close analysis of the different constitutional interpretations is indispensable in that it provides a 'basis of concrete data' upon which to found any possible solution.[2] Given the highly emotive content of the abortion issue and the ideologically opposing views involved, only a firm basis, i.e. a rigid comparative analysis of the constitutional decisions involved, can be convincing in dealing with this issue.

Furthermore, the comparative method enables us to shed light on the central question: is there a constitutional solution to the abortion issue? The 'data' provided by the comparative method can be 'evaluated' and can there-

1 Cappelletti, M., Seccombe, M., Weiler, J. (Eds), *Integration through Law*, Vol.I, Book I, de Gruyter, Berlin, 1986, Foreword, XVIII.

2 *Ibid*, Introduction, p. 5.

fore contribute to the solution of the problems posed.[3] In this case, the analysis of the constitutional decisions on abortion allows us to evaluate the various positions on abortion and to formulate a possible constitutional solution.

Comparative analysis contains by its very nature a dialectic tension. On the one hand, the subjects of comparison must have a point of identity or similarity so as to render analysis meaningful. On the other hand, conditions of total identity, or of total dissimilarity, render comparative analysis meaningless. It is the interplay between similarity and diversity, between convergence and divergence, which gives substance to a comparative analysis.[4] In the case of abortion, the common denominator of these five countries is the Western liberal-democratic tradition reflected in their constitutions. The dissimilarity is presented by the differences in constitutional interpretation of the abortion issue. An attempt has been made in this study to spell out these differences and similarities, and to point, through this process of unravelling the reasons for these dissimilarities, at the core or substance of the abortion issue.

There is no need to say that there exists an immense literature on the question of abortion. Extensive research has been done on the historical, religious, social, sociological, psychological, political and medical aspects of abortion. Legal writings have concentrated either on the philosophical/theoretical (i.e. abstract) aspects of the issue or on the national abortion reforms and/or constitutional decisions (i.e. the positivist aspects). What seems to be original about this study is that it links the theoretical debate to the legal/constitutional outcome. This approach enables us to test the theoretical analysis against the constitutional practice and, therefore, to weigh the validity of the latter. Another distinguishing feature of this study is that it is a comparative study of constitutional adjudication of abortion covering more than two or three countries in a comprehensive way. It does not merely describe the various national solutions but also tries to give explanations for the differences in outcome by going into the national background of constitutional decision making.

The purpose of this study is not to defend a certain viewpoint on abortion. The first and principal aim of this study is to raise questions and point at the incoherences in the solutions offered by legislatures and courts in order

3 *Ibid.*

4 *Ibid*, p. 9.

to show the complexity of the issue. Many of the points raised in this study are under discussion as well in the present debate on test-tube babies and surrogate motherhood, although obviously seen from a different angle. Pointing at the weaknesses of the various constitutional decisions only makes sense, however, if also a possible solution or a possible 'way out' is formulated. An attempt has therefore been made to 'extract' from these various convergent and divergent trends a possible constitutional solution to the abortion question.

It seems impossible to be 'neutral' on such a controversial issue as abortion. I have no intention of hiding my own personal liberal-pragmatist views on abortion. Nevertheless, because the objective of this study is to show the complexity of the issue, the problems involved in weighing conflicting values, the inconsistencies which easily arise, and ultimately the impossibility to come up with a clear-cut, principled, solution, I have attempted throughout this study to be unbiased and present the various arguments in the most objective possible way.

The discussion will evolve in the following way.
Chapter I sketches the general background against which the abortion issue emerged. The historical, religious, socio- political and medical reasons which led to the prohibitions existing up the the beginning of the 1970's, and subsequently to a demand for a relaxation of these restrictions, are briefly described. The purpose of this chapter is to place the constitutional debate in a broader perspective, i.e. to highlight all the factors which played a role in the emergence of the abortion issue, not only the concern with the protection of unborn life or the woman's claim to self-determination. This chapter does not add any new elements to the discussion on abortion; it is merely intended to clarify the significance of the present constitutional debate on abortion within the general historical evolution of abortion legislation.

Chapter II provides the theoretical basis for the constitutional debate following in chapter III. Before looking at how constitutional courts and legislators interpreted the fundamental rights involved in the abortion decision, it is necessary to clarify what these constitutional rights really mean, i.e. to discuss their content and limits. This means discussing the reasons for recognizing the absolute or relative right to life of the fetus or for not recognizing a fetus' right to life. It also entails a discussion of the reasons for granting the pregnant woman an absolute, relative or no right to decide on abortion, and for recognizing contingent rights of the father of the fetus, the parents of

a pregnant minor, and the doctor who is called to assist at an abortion. This discussion will show the underlying conflicting social and cultural values which render the abortion issue so complex. The purpose of this chapter is not to propose a new solution to the abortion issue, but on the contrary to show the difficulties in finding a solution and to allow a more profound understanding of the constitutional debate.

In the light of this theoretical discussion, *chapter III* will analyze the constitutional interpretation of the fundamental values involved in the abortion decision by constitutional courts and legislators. The questions to be answered are: what do these courts and legislators really say about the content of the various fundamental rights involved? What are the implications of their rulings in constitutional terms? What does the comparative analysis teach us about the substance of the abortion issue? And finally, is there a constitutional solution to the abortion question? An answer to these questions will require first of all an analysis of the interpretation given to the relevant fundamental rights (i.e. right to life of the fetus, woman's right to self-determination, the father's and parents' right to family life, the doctor's right to professional freedom etc.) by the respective courts and legislators. Such a comparative analysis will enable us to set out the convergences and divergences in the interpretation of these values, and to 'test' the constitutional soundness of the various arguments in the light of the theoretical discussion. Finally, this discussion will lead us to what could be a constitutional solution to the question of abortion.

Chapter IV will suggest some explanations for the different approaches taken by the various constitutional courts. Explanations are sought in the sphere of the general legal culture of each country (the jurisprudential tradition, the role of the respective courts in society), and in the specific context of abortion (the constitutional and legal history of abortion prohibitions, the prevailing social philosophy, the political and jurisdictional context). This comparative analysis will be limited to the legal sphere, thus excluding purely sociological and political considerations.

Recent developments

This study deals with the constitutional events up to April 1985. Two developments should be taken into consideration in order to complete the pic-

ture: the recent jurisprudence of the French Constitutional Council and the 1986 abortion decision of the American Supreme Court.

During the last few years, the French Constitutional Council has been at the center of attention. First of all, there has been an extensive debate among French scholars on the advantages and disadvantages and/or opportunity of the introduction of diffused constitutional review in France, following the American example[5]. Secondly, the Council has gained importance because of the increasing number of decisions issued, which go beyond the mere declaration of constitutionality or non-constitutionality of a law. Following in a way the example of the German Federal Constitutional Court and of the Italian Constitutional Court, the French Constitutional Council has made 'déclarations de non-contrariété sous réserve' and has given 'directives', thus forcing the legislature to respond to its rulings. Because practically all new laws are submitted to the Council for adjudication, the Council's decisions have a greater impact and are gaining wider acceptance.[6]

The most recent abortion decision not discussed in this study – issued by the American Supreme Court is *Thornburgh v. American college of Obstetricians*,[7] in which the Supreme Court struck down another state regulation as unconstitutional, the 1982 Pennsylvania Abortion Control Act.

The Pennsylvania Act required doctors to give every woman seeking abortion a list of information at least 24 hours before she gave her 'voluntary and informed consent', and to sign reports prepared by the abortion clinic or hospital giving detailed information about the patient. The Supreme Court struck down all these provisions of the Act holding that they intruded into the privacy of the physician-patient consultation by 'officially structuring... the dialogue between the woman and her physician', and that they went well beyond the state's legitimate interest in maternal health and failed to respect the 'patient's confidentiality and privacy'.[8] Finally, the Court invalidated provisions relating to the degree of care and choice of procedure for post-viability abortions and provisions requiring that a second physician be consulted before abortion of a viable fetus. The regulations struck down in this decision are very similar to the ones struck down in the *Akron* decision of

5 See *Commentaire*, 35, Autumn 1986, p. 413 ff., and *Commentaire*, 36, Winter 1986/87, p. 682ff.

6 C. Philip, *Revue du Droit Public*, 1987, pp. 198-214.

7 Thornburgh v. American College of Obstetricians, 106 *S.Ct.* 2169 (1986); to be found as well in The United States Law Week, 54*LW*4618 (1986).

8 106 *S.Ct.* 2180.

1983, even though it could be sustained that the *Akron* regulations were more coercive of a woman's abortion decision than the ones invalidated in *Thornburgh*.[9]

The significance of this decision does not seem to lie as much in its content as in the voting pattern. The four dissenters (Chief Justice Burger, Justices O'Connor, Rehnquist and White) expressed very outspokenly their dissatisfaction with the framework of *Roe v. Wade* (1973).[10] Given the narrow majority (5-4) and this growing discontent with the Roe-decision, another 'conservative' nomination might change the Court's jurisprudence on abortion altogether. There is no doubt that if Bork's nomination by President Reagan in October 1987 had been accepted by the Senate, this could have turned the dissenting minority in a majority.

These two developments just described – the more incisive role of the French Constitutional Council and the most recent abortion decision issued by the US Supreme Court – have not altered, however, the constitutional debate on abortion as reported in this study. The abortion issue continues to be a subject of public debate, especially in the United States where a change in the Supreme Court could, in fact, change the law on abortion. There are, however, no new positions; the constitutional debate evolves still around the positions presented in this study. Whereas the abortion issue is loosing emotional force – especially in Europe, not that much in the US for the reasons mentioned – the public attention is presently drawn to the question of artificial insemination, in-vitro fertilization and surrogate motherhood. Although these issue raise questions which are, on the one hand, the exact opposite of the question of abortions (i.e. 'how to have children' versus 'how to avoid having children'), the constitutional problems involved, on the other hand, are very similar to the ones emerging from the abortion issue. The dilemmas of how to define a person, of how to judge the value of human life, of how to set the limits of the union between mother and fetus, are equally at the core of this more recent issue.[11]

9 'The Supreme Court – heading Cases', *Harvard Law Review*, 100, 1986, pp. 206-208.

10 54*LW*4627 ff.; See also *Harvard Law Review*, *op. cit.* note 9, p. 209.

11 See A.E. Stumpf, 'Redefining mother: a legal matrix for new reproductive technologies', *The Yale Law Journal*, 96, 1986, pp. 187ff., for a discussion of the legal aspects of surrogate motherhood, which shows – from the 'opposite side' – the legal problems posed by the 'right to procreative freedom'.

Chapter I
The Emergence of the Abortion Issue

Introduction

This chapter traces very briefly the origins of the abortion restrictions as they existed in the US and in Europe up to the end of the 1960s, and, subsequently describes the social and political developments which led to a liberalization of abortion in the 1970s. This chapter will try to provide a rough outline of the historical, social and political background of the constitutional debate on abortion at the time abortion reforms were passed. Those elements will be indicated which led to the emergence of the abortion issue. What matters here is the choice of the various elements because of their relevance for the theoretical and constitutional debate dealt with in chapter II and chapter III of this study. The description of the various elements or aspects is certainly not complete, and is amplified by the footnotes.

Section A describes the teachings of the Roman Catholic Church on abortion. *Section B* deals with the legal history of abortion legislation in the common law world (US and Great Britain) and on the European continent, and analyzes the motives for the old abortion restrictions. The social changes which led to the emergence of the abortion issue will be discussed in *section C*. *Section D* will deal with the various elements which set in motion the public debate on abortion and, hence, turned abortion into a political issue. The process of legalization of abortion will be discussed in *section E*.

Section A The Teachings of the Roman Catholic Church

The purpose of this section is to give a brief summary of the most salient aspects of the Catholic doctrine on abortion. The reason why Protestant and Jewish teachings are not specifically dealt with is not because they are less

important. The Protestant condemnation of abortion was certainly as strong and based on similar arguments as the Catholic position up to the beginning of this century. The Catholic arguments against abortion, however, are the most developed, the most specific and the most unanimous.[1] The emphasis in this section is on the history of Catholic teachings. The present Catholic position is definitely more nuanced, less unanimous and in many ways much closer to contemporary Protestant views on abortion. The purpose of this section is to show, through a historical analysis of Catholic thought on abortion, that the Catholic condemnation of abortion was not merely based on a condemnation of the killing of human life. And that is what perhaps most distinguishes the Catholic view on abortion from the Protestant one. Another important reason why Catholic doctrine is dealt with exclusively is that the Catholic Church has had the strongest voice in the abortion debate.

In the Mediterranean world in which Christianity evolved, abortion was a normal practice. Abortion, contraception and infanticide were treated in the same manner during the Roman Empire. Abortion was proposed as a solution to prevent excess population, but given the considerable health risks involved, it was probably practised less than infanticide or abandonment of children. Although the law of the Roman Empire punished abortion in certain circumstances (as in the case where the father had not given his consent), the objective of the law was not to protect the embryo as a human person, for it was regarded as part of the mother. The parents' freedom to dispose of their young offspring was taken for granted. On the whole, Roman culture was marked by indifference to fetal and early life.[2]

It is in this climate that the Christian teaching on the sanctity of life developed. The historical source of the Catholic teaching on abortion was the conviction of the early Christian community that abortion was incompatible with the fundamental Christian norm of love, a norm which forbade the taking of life. Even in very early and authoritative sources of Christian law (80 A.D.), abortion was treated as a grievous sin and ranked in importance with

1 Noonan, J.T., 'An almost absolute value in history', in Noonan, J.T. ed., *The morality of abortion, legal and historical perspectives*, Harvard Un. Press, Cambridge, Mass., 1990, p. 101.

2 Noonan, J.T., *op. cit.* note 1, p. 3-6. Williams, G., *The sanctity of life and criminal law*, Faber and Faber, London, 1958, p. 148. Veyne, P., 'L'avortement à Rome', *l'Histoire*, 1979, p. 30-32. Connery, J., *Abortion: the development of the Roman Catholic perspectives*, Loyola Un. Press, Chicago, 1977, p. 26.

those acts forbidden by the Ten Commandments.[3] As the Church emerged as a legal religion and a social force in the 4th century, these sentiments on abortion took the form of legislation. In the course of this century the distinction between the formed and the unformed fetus became a focus for analysis. This goes back to an ancient speculation as to the time when life commences, based on the belief that the fetus did not begin to live until some time after conception. Aristotle held that the male fetus became animate at about 40 days, and the female at about 90 days after conception. This ancient distinction received renewed attention by the theologians of the Eastern Church. Augustine took part in this discussion but confessed that he was unable to make up his mind on the issue and he refused to participate in the moral disapprobation of homicide and abortion. Augustine condemned three kinds of acts: contraception, the killing of the fetus before it is formed or 'lives', and the killing of a live fetus. Each of these acts was treated as a sin against marriage. Although a number of Church councils condemned abortion in all circumstances between the 5th and the 12th centuries, the Aristotelian distinction between 'formed' and 'unformed' fetus had left its mark.[4]

Gratian in his *Decretum* (1140), the first fully systematic attempt to compile ecclesiastical legislation, accepted the distinction between the 'formed' and the 'unformed' fetus. Gratian announced that abortion is definitely not murder if the soul has not been infused into the fetus. The Decretals of Pope Gregory IX (1234) which were valid for the whole Church, sustained this distinction, although they are ambiguous on the point of abortion. The Decretals included Gratian's distinction, but also another canon in which all efforts to prevent conception or offspring are classified as homicide. This led to considerable controversy regarding the classification of abortion as homicide. Later commentaries on the Decretals maintained that all abortion is murder and thus gravely sinful, but that the canonical penalties should vary according to the stage of fetal life.[5]

Between 1200 and 1500 there began to appear broader based works called *Sententiae* in addition to the strictly legal collections. The most important of these Sentences, the one by Peter Lombard, repeated the distinction made

3 Callahan, D., *Abortion: law, choice and morality*, Macmillan, London, 1970, p. 410.

4 Noonan, *op. cit.* note 1, p. 16.

5 Williams, *op. cit.* note 2, p. 151. Connery, *op. cit.* note 2, p. 89-104. Noonan, *op. cit.* note 1, p. 20-22. Callahan, *op. cit.* note 3, p. 411-412.

by Gratian. In his commentary on the Sentences, Thomas Aquinas (1227-1274) accepted the theory of delayed animation and the Aristotelian distinction regarding the time of male and female animation.[6]

The commentators of the 15th century did not advance the debate in any noticeable way, except for the theological discussion in the work of Antoninus, a Dominican and archbishop of Florence. He brought into the main line of moral theology an opinion of another Dominican and follower of St. Thomas, who lived in the 14th century. Talking about the duty of the doctor, he stated that if a doctor gives medicine to cause an abortion to save the pregnant woman's life, he sinned when the fetus was ensouled, but when the fetus was not ensouled it was his duty to do so. In this way the concept of therapeutic abortion was introduced, which was going to be the center of discussion between 1500 and 1600. The idea of the abortion of the unanimated fetus to save the life of the mother won considerable support from theologians. The Spanish Jesuit Tomas Sanchez (1550-1610) added another element to the discussion, namely the distinction between 'direct' and 'indirect' killing, based on Thomas Aquinas' earlier efforts to distinguish between the lawful and the unlawful killing of man. He proposed that the killing of an unensouled fetus was lawful as long as there was no 'direct intention' to kill. The justification he gave was that the intention of the woman was to save her own life, an act which had the double effect of taking the life of the fetus and preserving the life of the woman. Hence the distinction was not based on the physical acts which were done, but on the dominant purpose of the mother.[7]

Whereas the tendency of moral theologians had been to question the absolute prohibition of abortion, an opposite trend can be discerned in the legislative activity of the papacy. Pope Sixtus V stated in his bull *Effraenatam* (1588) that the same penalties of both canon and secular law should apply to abortion as to homicide, regardless of the age of the fetus. No exception was made for therapeutic abortion. This penalty was, however, soon limited (1591) to abortion of the formed fetus.[8]

A stream of thought distinct from papal teachings began in the 17th century, without immediate effect but with a long term impact on the views on

6 Noonan, *op. cit.* note 1, p. 22-26. Connery, *op. cit.* note 2, p. 105-113.

7 Noonan, *op. cit.* note 1, p. 26-31. Connery, *op. cit.* note 2, p. 114-165. Callahan, *op. cit.* note 3, p. 412.

8 Callahan, *op. cit.* note 3, p. 413. Connery, *op. cit.* note 2, p. 166-167. Noonan, *op. cit.* note 1, p. 32-34.

abortion. A Roman physician, Paolo Zacchia, attacked the prevailing interpretation of Aristotle that the fetus progresses by stages from vegetal ensoulment to animal ensoulment to rational ensoulment. In his view the Thomistic view of the unity of man required that there be a single human soul from the beginning of the existence of the new fetus. According to Zacchia this meant that the rational soul was infused in the first moment of conception. Zacchia's thesis was well received although it had no immediate impact on the theological discussion.[9]

From the middle of the 18th century up to the middle of the 20th century, the teaching of the Church developed to an almost absolute prohibition of abortion. The central authority of the Church, which was far more prestigious in moral matters in the period 1880-1950 than ever before in its history, dominated the development. The concern of the Church to protect unborn life was particularly animated by the spread of abortion in Western Europe. Many Frenchmen practised birth control during the last quarter of the 18th century, and the general impression was that abortion often supplemented ineffective contraception. At the same time the Aristotelian analysis of gestation was gradually rejected by the scientific world. In 1827 Karl Ernest von Baer had discovered the ovum in the human female, and soon the joint action of spermatozoon and ovum was understood. In 1869, Pope Pius IX dropped the reference to the 'ensouled fetus' in the excommunication for abortion. Excommunication now seemed to be the penalty for the abortion of any embryo. The new Code of Canon Law of 1917 made a further extension. It had been affirmed that the excommunication did not extend to the woman herself, but only to the doctors or others assisting at the abortion. The new Code of Canon Law specifically included 'mothers' in those excommunicated for procuring abortion.[10]

From the beginning of the 19th century, the practice of performing such procedures as craniotomy or embryotomy on viable fetuses during the delivery in order to save the life of the mother became more and more frequent. In 1884 the Holy Office stated that this operation was morally wrong. In 1889 this condemnation was extended to any surgical procedure which was directly lethal to the fetus. Strong, uncompromising papal statements continued in the 20th century. The encyclical *Casti Connubii* (1930) issued by pope Pius XI contained a sharp condemnation of abortion. It denied that even extreme

9 Noonan, *op. cit.* note 1, p. 34-35.

10 *Ibid.*, p. 36-40. Callahan, *op. cit.* note 3, p. 413-414. Connery, *op. cit.* note 2, p. 225-291.

necessity could provide sufficient grounds for abortion, and it condemned abortion on social and eugenic grounds. The encyclical also showed considerable concern with the actions of public authority, i.e., legislation permitting abortion in some cases. The pope observed that public authority could not confer a right to dispose of innocent life.[11]

A few exceptional cases of therapeutic abortion were not fully settled, however, by *Casti Connubii*. Leading moral theologians contended that the encyclical had not condemned certain abortions necessary to save the mother from serious danger, if the direct intention of the doctor was to remove the pathological condition, and not to kill the fetus. Two cases were presented, namely the situation of an ectopic pregnancy and of a cancerous uterus. In both cases the physical intervention had the good effect of removing the pathological tube or the cancerous uterus, and the bad effect of killing the fetus. Neither effect considered in itself was more 'direct' than the other, but the intention of the doctor was said to be directed only to the good end, and was therefore justified. Pope Pius XII implicitly approved the rationale for these exceptions in 1951.[12]

The Second Vatican Council led by Pope John XXIII considered abortion specifically in relation to family planning. The Council made several doctrinal advances. The most important one was that for the first time contraception was treated differently from abortion, and it was considered that contraception might be allowed in some cases. Abortion, however, was condemned with the statement, 'life from its conception is to be guarded with the greatest care. Abortion and infanticide are horrible crimes'.[13] These views on abortion were repeated by Pope Paul VI in his encyclical *Humanae Vitae*. He declared that 'the direct interruption of the generative process already begun, and, above all, directly willed and procured abortion, even if for therapeutic reasons, are to be absolutely excluded as licit means of regulating birth'.[14]

It is essential to analyze the Roman Catholic doctrine on abortion for a full understanding of the abortion debate which took place in the second half of the 20th century. All Christian countries affected by these teachings introduced laws forbidding abortion. Furthermore, the Roman Catholic doc-

11 Connery, *op. cit.* note 2, p. 291-294. Callahan, *op. cit.* note 3, p. 414. Noonan, *op. cit.* note 1, p. 40-44.

12 Noonan, *op. cit.* note 1, p. 47-49. Callahan, *op. cit.* note 3, p. 415. Connery, *op cit.*, p. 295-302.

13 Noonan, *op. cit.* note 1, p. 45.

14 Callahan, *op. cit.* note 3, p. 415.

trine is the source of the most influential and rigorously developed arguments against abortion.[15]

The Catholic condemnation of abortion, however, is complex in that it has two sources. It is not only based on an ethic of killing, but also on an ethic of sex and distinguishes itself in this from Protestant teaching.[16] The Catholic teachings on contraception are illuminating in this respect. Traditionally Catholic doctrine condemned abortion and contraception in equal measure, as it sought to maintain a link between sexual activity and procreation. It forbade the separation of the unitive, i.e. love-fostering, aspect of sexuality from the procreative aspect. This principle dates back to the Augustinian view that the only fully lawful sexual act was intercourse performed solely with procreative intent. In this view, both the obstruction of procreation, i.e. contraception, and abortion violated the requirement of a procreative intent in intercourse. Both contraception and abortion were thus regarded as sexual sins.[17]

Only in the latter part of the 19th century was a relationship between love and sexual pleasure recognized and the expression and fostering of marital love as a legitimate purpose of intercourse accepted by Catholic theologians. This concept was developed in a substantial way after World War I, but was not officially recognized by the Church until the 1950s. *Casti Connubii* in 1930 still referred to contraception as the 'cruel lust of couples to avoid procreation'.[18] It was only in 1951 that Pope Pius XII accepted the rhythm method of contraception as an alternative to procreation open to all couples if there were serious reasons for avoiding procreation.[19] During the Second Vatican Council the separation between the unitive and the procreative aspect of sexuality was for the first time officially accepted. Although Scheme 13 'The Church and the modern world' declared that matrimony is essentially linked to procreation, it was recognized that 'the good of the offspring requires that the spouses truly love each other' and that conjugal love

15 Nicholson, S.T., *Abortion and the Roman Catholic Church*, Religious ethics, Knoxville, 1978, p. 4-12.

16 *Ibid.*, p. 3.

17 *Ibid.*, p. 4-12.

18 Noonan, J.T., *Contraception – a history of its treatment by the Catholic theologians and canonists*, Harvard Un. Press, Cambridge, Massachusetts, 1965, p. 427.

19 *Ibid.*, p. 445-446.

was 'perfected' in conjugal intercourse.[20] It was accepted that there might well be a conflict between the expression of love and responsible parenthood. In procreation the spouses were not to be bound by blind instinct, but to act with 'full and conscious responsibility'.[21] This did not imply, however, that all methods of contraception were accepted. On the contrary, the only method officially accepted up to the present day is the rhythm method.[22]

The fact that up to the second half of the 20th century abortion ,like contraception, was linked to sins of a sexual nature, has deeply conditioned the abortion debate. As the Catholic condemnation of abortion is not merely based on the principle of the sanctity of human life, it might be argued that part of the appeal of the Catholic case against abortion is anchored in a restrictive attitude towards sexual pleasure.[23] It is therefore misleading in the context of the present debate on abortion to maintain that the Catholic Church has always condemned abortion only on the basis of the killing of human life. Abortion as a sexual sin is constant in the history of the Roman Catholic Church. It is essential in the public debate over abortion to distinguish clearly between abortion as a sin of sex and abortion as a sin of killing. Abortion as a frustration of procreation is no longer considered as a legitimate subject of legislative concern, whereas abortion as the killing of a human being certainly is.[24]

Section B The Legal History

1. The Period up to 1900

The legal history of abortion prohibitions in the common law world is different from that in the civil law countries. The influence of Catholic teachings on abortion has been much stronger on the European continent than in the United Kingdom or in the US.

20 *Ibid.*, p. 503.

21 *Ibid.*

22 *Ibid.*, p. 508-509.

23 Nicholson, *op. cit.* note 15, p. 3-4.

24 *Ibid.*, p. 12.

UK. The rule of the common law, dating from the time of Bracton (13th century) adopted the distinction between the formed and the unformed fetus, as accepted by Gratian and later by the canonists. English common law also made a distinction between early and late abortion, drawing the dividing line at quickening.[25] According to Blackstone, 'life begins in contemplation of law as soon as the infant is able to stir in the mother's womb'.[26] Whereas Bracton considered abortion to be homicide after animation, the great Elizabethan lawyer Coke believed abortion after quickening was a 'great misprision' or 'misdemeanor', not a murder.[27]

The law remained this way in England until 1803, when the first statute on abortion was passed. For the first time abortion before quickening became a crime, but not punishable so severely as abortion after quickening. Both were felonies that qualified for the death penalty.[28] Further recodification took place in 1837. The penalties for abortion became milder. Abortion was one of the several crimes that ceased to be a capital offence. The distinction between abortion before and after quickening was lost, however. Prosecutions were relatively few and acquittals occurred frequently.[29]

The Offences against the Person Act of 1861 established a maximum punishment of imprisonment for life for abortion or attempted abortion. The Act passed without debate in the chamber of the Mother of Parliaments. Abortion was still a sufficiently dangerous medical intervention and was consequently limited to very urgent cases. There was a very imperfect knowledge of human reproduction at the time. Furthermore, the act was passed before the upsurge in abortion numbers registered in the 1870s. Public attention was engaged by other, more immediate problems.[30]

US. In the absence of any legislation on the subject of abortion in the US in 1800, the legal status of the practice was governed by the traditional British common law as interpreted by the local courts of the new American states. Hence, the termination of early pregnancy, i.e. before quickening,

25 Quickening refers to the moment at which fetal movements are felt by the pregnant woman. See chapter II, section A, par. 5.

26 Williams, *op. cit.* note 2, p. 152, note 7.

27 Potts, M., Diggory, P., Peel, J., *Abortion*, Cambridge Un. Press, New York, 1977, p. 277. Williams, *op. cit.* note 2, p. 152.

28 Potts, *op. cit.* note 27, p. 278-279. Williams, *op. cit.* note 2, p. 152.

29 Potts, *op. cit.* note 27, p. 279-280.

30 *Ibid.*, p. 282.

was not considered criminal under the common law in effect in the US. One practical argument for the quickening doctrine was that no reliable tests for pregnancy existed in the early 19th century. Quickening alone could confirm with absolute certainty that a woman was really pregnant. The practice of aborting unwanted pregnancies was almost certainly not rare in the US during the first decades of the 19th century. Abortion was resorted to mostly by unmarried women who wanted to avoid the disgrace of becoming unwed mothers. It was not yet thought to be a means of birth control, however. Writers on abortion regarded the health risks involved in abortion as not much worse than childbirth itself.[31]

In the period between 1821 and 1841, ten states enacted legislation which for the first time made certain kinds of abortion explicit statute offences. This first wave of abortion legislation emerged from the efforts of both legislators and doctors to control medical practice rather than from public pressure to deal with abortion *per se*. In the early part of the 19th century abortion was a dangerous operation. Legislative reform, like for example the revision of the New York criminal code, was more concerned with the protection of women against dangerous medical treatments than with outlawing the abortion practice itself.[32] Another reason why doctors pressed for abortion legislation was a desire to professionalize medicine. By pointing at the dangers and abuses connected with the abortion practice, the regular physicians could encourage the state to employ sanctions against the unqualified practitioners who became increasingly involved in the abortion practice. It was, in short, an attempt to upgrade the standards of the medical profession.[33] A clear indication that these early laws intended to control medical practice is the fact that they only punished the person who administered the abortifacient or performed the operation. None of them punished the woman herself in any way. On the whole, the US (in 1841) remained still committed to the common law tradition which was in effect in 16 of the 26 states.

The early 1840s constitute a turning point in the practice of abortion in the US. Firstly, abortion came out into the public view. Abortion services were advertized, many home medical manuals made allusions to abortifacient techniques, a flourishing business in abortifacient medicines developed, and

31 Mohr, J.C., *Abortion in America – the origins and evolution of national policy 1800-1900*, Oxford Un. Press, New York, 1979, p. 3-19.

32 *Ibid.*, p. 28-29.

33 *Ibid.*, p. 31-37. Francome, C., *Abortion freedom – a worldwide movement*, George Allen & Unwin, London, 1984, p. 31.

sexual matters were more openly discussed.[34] Secondly, the overall incidence of abortion began to rise sharply in the 1840s and remained at high levels through the 1870s. This was observed by doctors and confirmed by the nation's falling birth rates from the 1830s onwards. Abortion was no longer a marginal practice, but rather a widespread social phenomenon whose incidence probably approximated that of illegitimacy.[35] Thirdly, the social character of abortion changed. Whereas it used to be a recourse of the desperate and socially marginal, it was now increasingly used by white, married, Protestant, native-born women of the middle and upper classes who used it as a birth control device.[36]

Between 1840 and 1860 lawmakers in several states began to react to this increase in the use of abortion, but their response as a whole was limited and cautious. Only three states struck the immunities traditionally enjoyed by American women in cases of abortion. Only a few anti-advertizing laws were passed. The quickening doctrine remained an important principle in American courts, and 13 of the 33 states had yet to pass any statutes on the subject of abortion by 1860.[37]

Although regular physicians had been a major force in the creation of anti-abortion legislation since the 1820s, their support for such legislation had been largely *ad hoc*. The founding of the American Medical Association in 1847 provided the organizational framework for a concerted campaign against abortion. The anti-abortion campaign which was launched by the medical profession in the late 1850s was in part a manifestation of the already mentioned fact that many physicians wanted to promote a sense of professionalism. As any healer who wanted to practise medicine could do so, the only way to distinguish professional-minded physicians from the rest was through public sanctions imposed by anti-abortion laws. Apart from these professional motives, most physicians sincerely believed that abortion was morally wrong. Doctors knew that quickening had no special significance as a stage in gestation. The physicians' crusade had two primary objectives: to influence public opinion and to determine the passage of legislation.[38]

34 Mohr, *op cit.* note 31, p. 46-85.

35 *Ibid.*

36 *Ibid.*, p. 86-118.

37 *Ibid.*, p. 19-146.

38 *Ibid.*, p. 147-170.

Many articles appeared in the press between 1860 and 1880 which reported the dangerous results of abortion interventions. By 1870, however, the press had become indifferent towards the practice of abortion. The anti-abortion campaign did not receive either the support it had hoped for from the spokesmen of organized religion. The campaign won limited support from a few denominations, but it never became an alliance, not even with the Catholics. A major success was obtained, on the contrary, among the anti-obscenity crusaders. Anthony Cromstock, the leader of the New York Society for the Suppression of Vice, included abortion in the definition of obscenity and persuaded Congress to pass 'an Act for the suppression of Trade in and Circulation of, Obscene Literature and Articles of Immoral Use'.[39] Under this law, Cromstock became the country's best-known pursuer of abortionists between 1873 and 1877, usually through their advertisements. By the middle of the 1870s the commercial visibility of abortion practices was over.[40]

The campaign of the regular physicians against abortion produced the most important burst of legislation between 1860 and 1880. At least 40 anti-abortion statutes were passed, and most of them established that abortion at any stage of pregnancy was a crime. One of the reasons why doctors had a more effective influence on public policy was the scientific progress made in medicine which gave the profession more credibility. The insight gained in the nature of sepsis in 1865 and an increasing emphasis on bacteriology in checking disease provided the medical profession with the means to dominate and outdistance most of their rivals. Under the pressure of regular medical societies and of the the shifts in public opinion that were brought about, legislatures tied up the abortion restrictions. Quickening rules were dropped, immunities for women were revoked, advertizing and the definition of what was obscene was strictly controlled. The legislation that was brought about between 1860 and 1880 established the official abortion policies which would be valid up to the 1960s.[41]

In the period between 1880 and 1900 the transition to legal proscription of abortion was completed. The states that had not yet acted during the previous years passed unambiguous anti-abortion laws. The courts abandoned their historic tolerance towards those accused of performing abortions. The

39 *Ibid.*, p. 196.

40 *Ibid.*, p. 171-199.

41 *Ibid.*, p. 200-225.

physicians finally controlled the standards of medical practice which resulted in a reduced availability of abortion services to the general public. The women who had recourse to abortion were no longer middle-class Protestants, but the lower class and immigrants. In short, by 1900 abortion was prohibited all over the country and the law was enforced.[42]

Europe. The main difference between the European continent and the common law world is that the continent followed the teachings of the Roman Catholic Church much more closely. Abortion was never legal on the European mainland, whereas abortion prohibitions in the UK, and even more so in the US, are, as we have seen dating back to the beginning and the end of the 19th century respectively.[43] There were, of course, variations in the penal sanctions imposed and in the enforcement of the abortion prohibitions over time and in the individual countries. By the end of the 19th century capital punishment was replaced by imprisonment in the German states.[44] In France, England and Austria abortion laws were enforced quite marginally, in contrast to the German states, between 1870 and 1900.[45]

By the second half of the 19th century abortion was practised increasingly frequently. An important indication of the widescale use of abortion was the decline in the birth rate. This decline was primarily due to the use of contraceptives. However, while the public learned of the possibility of contraception they also discovered in their private lives about the defects of the available methods.[46] The result was a high rate of 'mistakes', or unwanted conceptions, and a consequent turning to abortion to erase them. That is what seemed to have happened in the late 19th century.[47]

42 *Ibid.*, p. 226-245.

43 National laws prohibiting abortion were passed in 1810 in France, in 1871 in the German Reich (based on the Prussian Penal Code of 1851), and in 1768 in Austria. See Francome, *op. cit.* note 33, p. 29; and Edlinger, G., *Dokumentation der politischen Geschichte zur Reform des par. 144 STG*, Ludwig Boltzmann – Institut für Kriminalsoziologie, Vienna, 1981, p. 3.

44 Soulas de Russel, D., 'L'interruption de grossesse en Republique Fédérale d'Allemagne', *Revue de Droit Pénal et de Criminologie*, 1976/77, p. 541.

45 Jochimsen, L. 'par. 218 (1871-1971), Hundert Jahre Elend mit einer tausendjährigen Tradition', in Jochimsen, L. ed., *Sektion 218 – Dokumentation eines 100-jährigen Elends*, Konkret Buch Verlag, Hamburg, 1971, p. 15. Potts, *op. cit.* note 27, p. 380.

46 The available methods were 'coitus interruptus', douching, spermicides, and poor-quality sheaths. See Potts, *op. cit.* note 27, p. 161.

47 Potts, *op. cit.* note 27, p. 161. Mohr, *op. cit.* note 31, p. 83-84.

The upsurge of abortion resulting in a decline in the birth rate started in the US in the 1840s, in the UK and on the European continent in the 1870s. The British medical profession organized several campaigns against abortion in the period up to the First World War.[48] As early as 1868 it was claimed that abortion in France had grown 'into a veritable industry', and by the end of the century several writers commented upon the explosive rise in hospital admissions for abortion.[49] There is also evidence of a considerable abortion practice in Italy before World War I. In a large trial in 1904 eight licensed midwives were convicted.[50]

In short, by the end of the 19th century the practice of induced abortion existed on a measurable scale and it was a social problem.[51]

2. The Period 1900-1970

World War I produced profound social changes. Women entered employment in unprecedented numbers, and in some countries they obtained the right to vote. The post-war liberalization of attitudes facilitated the spread of contraceptive knowledge. In 1918 Marie Stopes published her book *Married love* and in 1921 she opened the first birth control clinic in Britain and began her 'Campaign for constructive birth control'. In France Victor Margueritte wrote *La garçonne* telling women that 'their body was theirs'. Acceptance of abortion was unthinkable, but there was a growing awareness of the inadequacies of many existing abortion laws.[52]

The recognition of the fact that the old law was unworkable led to a decrease in the sentences of fines and imprisonment in France in 1923. The scarce enforcement of abortion legislation was a general trend in the developed countries, although not everywhere. In Italy several desperate efforts were made between the wars to make restrictive legislation work. Illegal abortions continued nevertheless. In 1926 Germany modified her 19th century abortion legislation into a simpler and less harsh law. The *Reichsgericht* recognized in its decision of 1927 that an abortion on a medical

48 Francome, *op. cit.* note 33, p. 32.

49 Potts, *op. cit.* note 27, p. 47.

50 Francome, *op. cit.* note 33, p. 34.

51 Potts gives qualitative evidence, see p. 162-169, *op. cit.* note 27.

52 Potts, *op. cit.* note 27, p. 380. Francome, *op. cit.* note 33, p. 56.

indication could be performed legally.[53] This change was the result of left-wing political pressure and the support of the medical profession which thought limited modification of the law desirable, as in Britain.[54]

After the Nazis and the Fascists came to power existing legislation was enforced more strictly. The Nazi penal code of 1936 made all propaganda in favor of birth control and abortion a criminal offense. In the ideology of promoting the 'master race', the criminal code was not applied to Jews, however. In 1943 the law was extended as to include the death penalty, as those guilty of abortion 'continually impaired the vitality of the German people by such deeds'.[55] In France, too, there was a trend of increasing restrictiveness prior to World War II which was continued and entrenched under the German domination. In 1939, the *Code de la famille* was enacted which imposed heavier penalties for abortionists. The Vichy government of France made the abortion law even more stringent, ranking abortion with treason and sabotage. Under this regime there was the last-known occasion in world history of an individual being executed for a crime relating to abortion.[56]

Whereas many European countries enacted more restrictive abortion policies in the 1930s, in Britain preparations were made for the setting up of an organization to fight the abortion law. The first person to call for a change of the British abortion provisions was Stella Browne in 1915. Although the Malthusians[57] were not prepared to endorse abortions, they were sympathetic to the writings of Stella Browne. Throughout the 1920s and 1930s, the Malthusian League was the only organization providing information on abortion on a regular basis. The women's groups, especially in the Labour

53 Wolff, U. *Schwangerschaftsabbruch aus medizinischer Sicht*, de Gruyter, Berlin, 1973, p. 115.

54 Potts, *op. cit.* note 27, p. 380-381. Francome, *op. cit.* note 33, p. 56.

55 Potts, *op. cit.* note 27, p. 382. Verordnung zur Durchführung der Verordnung zum Schutz von Ehe, Familie und Mutterschaft, 18-1943 (RGBlI at 1169). See Quaas, M., 'Abortion, law and public policy', *Comparative Law Yearbook*, 1983, p. 42. See for the Italian case, Bartole, S., 'Scelte di valore più o meno implicite in una laconica sentenza sull'aborto', *Giurisprudenza Costituzionale*, 1975, p. 2102 ff.

56 *Ibid.*, p. 381-383. Francome, *op. cit.* note 33, p. 59-60.

57 Malthus introduced his doctrine in the wake of the French Revolution. He believed that there was a natural tendency for population size to outstrip food supply and hoped that the poorer groups would engage in self-restraint in order to control their family size. Malthusianism received renewed attention after World War II, as there was a growing concern with the size of the population. The neo-Malthusian movement promoted the use of contraception to further their aims. See Francome, *op. cit.* note 33, p. 2-4.

Party, were the most forthright in the matter of birth control and were also prime movers in the pressure group for the reform of the abortion law. In 1936, the Abortion Law Reform Association (ALRA) was set up, which united all the activists working for a reform. Stella Browne was the most militant of the three principal organizers. By 1938 ALRA had 274 members, a reasonable size for the kind of organization it was.[58]

In the 1930s a liberalization of the 1861 British law was obtained through court actions. Justice McCardie publicly attacked the law and refused to apply the penal sanctions imposed by it in a number of cases of abortion. His attacks on the law were widely publicized and were influential in changing attitudes. At the same time the 1861 law was tested in the courts by the actions of Mr. Aleck Bourne. Bourne was a gynaecologist of great integrity who performed an abortion in 1938 on a 14 year old girl pregnant after rape. Bourne went for trial but was acquitted by the jury. Due to this trial the scope of the 1861 law was limited in such a way as to exclude rape and other factors related to the health of the woman from punishment.[59]

A similar liberalization of abortion as in Britain occurred in Sweden and Denmark. Abortion on medical grounds was in practice allowed (in Sweden) as from 1921. In 1938 an abortion law was passed which allowed for abortion on limited grounds. The abortion law reforms of 1946 and 1963 extended the grounds for abortion to include a socio-medical, an ethical and a fetal indication and laid down the condition that the abortion be approved by a special committee. The first abortion law in Denmark dates back to 1937, which had as its most important objective the suppression of the illegal abortion practice and the protection of women's health. This law was quite liberal for that time. It allowed for abortion on ethical grounds, and took into account the health of both the mother and the fetus. After 1945 a committee was set up to research the problem of the increasing number of illegal abortions. In response to this phenomenon abortion committees were set up, like in Sweden, to decide on the abortion requests of women. A further liberalization of the law took place in 1956 and then again in 1970. Nevertheless, the number of women that went abroad (to Poland, and after

58 Francome, *op. cit.* note 33, p. 68.

59 *Ibid.*, p. 65-70. Potts, *op. cit.* note 27, p. 286-289.

1968 to the United Kingdom) in order to obtain an abortion increased over the years.[60]

The first systematic proponent of the legalization of abortion in the US was William Robinson. In his book 'Sex, Love and Morality' (1928) he made a forthright call for legislation which would liberalize abortion during the first three months of pregnancy. Other doctors supported his call and there was also some pressure for reform from a women's group. This group, however, was not very strong, nothing in comparison to the British ALRA. William Robinson remained a lone organizer, and when he died in 1936 his efforts were not continued. One of the most important reasons for his failure was that the birth control movement had not yet succeeded in breaking down the Cromstock laws by 1936. Adoption of abortion as an issue before contraception was accepted would frustrate the main aim of the dissemination of contraceptive information. Such was the opinion of Planned Parenthood, the organization fighting for birth control in the US. Robinsons's efforts turned out to be premature.[61]

The campaign for the reform of the British law was a long one. ALRA met again after the Second World War but was fairly inactive for a long period before being invigorated by a dramatic change of leadership in 1963. In 1952, 1961 and 1963 bills were introduced in Parliament to extend the grounds for abortion, but without success. By the mid-1960s public opinion began to polarize and independent ballots established that there was already widespread support for liberalization of the law, not only among the lay public but also among general practitioners. The abortion campaign was dominated by ALRA and the passage of the law followed nearly two years of intense parliamentary and public debate. In 1967 the British Abortion Act establishing an indications solution was finally passed by both Houses of the British Parliament.[62] The English debate had wide repercussions abroad, especially in the US.[63]

A further liberalization of the already quite liberal abortion practice took place in the Scandinavian countries. Both Sweden and Denmark were faced with a situation in which an increasing number of women went abroad

60 Ketting, E., van Praag, P., *Abortus provocatus wet en praktijk*, Zeist, NISSO,1983, p. 18ff.

61 Francome, *op. cit.* note 33, p. 74-77.

62 *Ibid.*, p. 82-91.

63 Potts, *op. cit.* note 27, p. 290-292.

(Poland, UK) for an abortion. This pressed the respective governments to review their laws based on an indications solution and approval by an abortion committee. In Denmark the abortion practice had liberalized much more than intended by the law. The need was felt to adjust the law to the changed views on abortion. One of the main arguments in support of a general liberalization of abortion was that the privacy of pregnant women, intruded upon by the complicated procedure required by the law, should be protected. This led to the abortion reform of 1973 which established an unconditioned right to abortion for the first trimester of pregnancy (i.e. a time-phase rule). A similar development took place in Sweden. In 1971 a committee was set up to review the situation. Here too the result was a new law in 1975 which established abortion on request for the first 18 weeks of pregnancy. Thus both Sweden and Denmark abandoned at the beginning of the 1970s their indications solution combined with extensive procedural requirements (such as the approval by an abortion committee), and adopted a time-phase rule under which the woman's right to have an abortion during the early stage of pregnancy without having to give any reasons for her request was established.[64]

Rapid changes took place in the US in the 1960s and the 1970s. In the 1960s the Association for the Study of Abortion assumed national leadership. In 1962 the American Law Institute suggested a model penal code to legalize abortion on the basis of an indications solution.[65] 1967 was a turning point in the US as it was in the UK. Colorado passed a reform bill based on the ALI recommendations. While the ALI model code was receiving support, more radical arguments were put forward. The American Civil Liberties Union proposed the repeal of abortion legislation, that is, abortions (up to a certain time limit) should be performed by doctors and be governed by the same considerations as other medical practices.[66] Between 1967 and 1971, 17 states either reformed or repealed their laws, most of them based on the ALI recommendations. The influence of British legislation was also apparent, both in the timing of the state reforms and in the wording of the new laws.[67]

Reform laws were passed in California and North Carolina (1967), Georgia and Maryland (1968), Arkansas, Kansas, Delaware, Oregon and New

64 Ketting, *op. cit.* note 60, p. 18ff.

65 See chapter III, footnote 2.

66 Potts, *op. cit.* note 27, p. 332-337.

67 *Ibid.*, p. 337.

Mexico (1969). At the same time repeal laws were introduced in other states. Hawaii was the first state to repeal its law in February 1970, followed by Alaska and Maryland. The most spectacular events took place in New York. Under the strong pressure of Governor Rockefeller and after intense debate, a repeal bill was passed in 1970 by one vote in the State Assembly.[68]

The role of the courts in the liberalization of abortion has been crucial in the US. In 1969 two important court decisions were issued on abortion by state Supreme Courts. In the case *Belous v. California*, the California Supreme Court declared the state law unconstitutional, ruling that the woman has rights over her own procreation.[69] This was the first state Supreme Court decision in American history to declare an abortion statute unconstitutional. In *U.S. v. Vuitch*, in late 1969, the abortion law of Washington DC was declared unconstitutional.[70] Between 1970 and 1971 an avalanche of cases came before all levels of courts, some attempting to create a more liberal situation and others attempting to halt or reverse changes taking place. In Michigan, South Dakota, Georgia, Wisconsin and Texas, abortion laws were struck down by at least one level of jurisdiction. In Wisconsin the law was also found to infringe the right to privacy granted under the Ninth Amendment of the Constitution. By 1971, 17 cases relating to abortion had been referred to the Supreme Court.[71]

There is no doubt that the developments just described in the UK, Denmark, Sweden and the US have had an impact on the debate which preceded abortion legalization on the European Continent. The legal changes in these countries had gone through three phases. First, an indications solution was adopted (like in the Scandinavian countries), which allowed for abortion on a limited number of grounds and often required approval by a special committee. The next step was a liberalization of these indications solutions which now included not only a medical, ethical and fetal but also a socio-medical indication. The 1967 British Abortion Act is the best example of this trend. Practice showed, however, that this liberalized indications solution could easily be interpreted very widely, depending on the attitude of the doctor who had to decide on the abortion requests. Furthermore, the illegal abortion practice was not completely suppressed. This led some countries

68 *Ibid.*, p. 332-342.

69 *People v. Belous*, 458 P. 2d. 1941, 80 Cal. Rptr. 354 (1969).

70 *U.S. v. Vuitch*, 305 F.Supp. 1032 (D.C. D.C. Nov. 10, 1969).

71 *Ibid.*, p. 343-344. Francome, *op. cit.* note 33, p. 106- 107.

(Sweden, Denmark, some states in the US) to introduce a total liberalization of abortion. The third phase of abortion legalization was therefore the adoption of the time-phase rule, i.e. the recognition of the woman's rights to abortion up to a certain stage of pregnancy.

These various legal changes had an impact on the discussion that took place on the European Continent in the 1970s. This is not to say that this led to a greater consensus on how to deal with the abortion issue. On the contrary, the result of this liberalization of abortion in the UK, US, and in Scandinavia was definitely not considered in a positive way by all the parties taking part in the political debate. However, these developments abroad provided useful empirical information which played an important role in the abortion debate.[72]

In conclusion, we can learn several things from the history of legal abortion prohibitions. Although the concern with the protection of unborn life was an important reason for proscribing abortion, it was definitely not the only one. A very important motive for prohibiting abortion in the early 19th century was the medical risk involved in what was, at the time, a dangerous intervention. The American development illustrates this very well. Restrictive views on sexual morality have also led to a condemnation of abortion, in the same way as contraception was condemned. Campaigns for the liberalization of contraception were in many ways similar to the movements claiming freedom of abortion. This aspect is also illustrated in American legal history, where abortion was one of the major concerns of the Society for the Suppression of Vice, under Cromstock's leadership. A final aspect underlying abortion prohibitions in some countries was the preoccupation with underpopulation. The 1920 French abortion provisions, for example, were seen as a remedy against the population problem caused by World War I.[73] The same seems to have happened during the German empire after the Franco-German War.[74]

It is important to keep in mind these various motives for abortion restrictions, because this enables a deeper understanding not only of the old abor-

72 Potts, *op. cit.* note 27, p. 391. A special committee was formed in Germany before the parliamentary debates which travelled to London and New York to gather information on the experience of other nations with reform legislation. See Quaas, *op. cit.* note 55, p. 44.

73 Pingaud, B., *L'avortement – histoire d'un débat*, France, Flammanon, 1975, p. 34.

74 Jochimsen, *op. cit.* note 45, p. 15-16.

tion laws but also of the changes that led to more liberal abortion legislation, as will be shown in the next section.

Section C The Social Changes Leading up to the Abortion Debate

Several social changes occurred in the 1950s and 1960s which questioned the reasons for abortion prohibitions as set out in the previous section. Firstly, views on sexual morality changed, which led to a call for sexual freedom and for birth control. A second profound change regarded the position of women in society. The claim for equal treatment of men and women necessarily included women's demand for reproductive freedom. A third reason for relaxing abortion prohibitions was the problem of overpopulation as perceived in the 1960s. Fourthly, advances in medical technology rendered abortion a safe procedure. A fifth reason, connected to the previous one, was that doctors wanted to be left free to practise their profession and therefore be unhampered by abortion laws. These five factors led to a growing public awareness that the existing abortion laws needed reform. This in turn resulted in a public demand for abortion reforms as will be discussed in the next section.

The focus on birth control in the 1960s was due to a change in sexual morality whereby traditional ideas on marriage and sex only directed towards reproduction, lost ground. Birth control was primarily aimed at the planning of the size of the family. A second reason for and at the same time a consequence of the couple's demand for birth control was the separation of sexual freedom and procreation. This twofold development – family planning and sexuality independent of procreation – resulted in a new vision of family life. The values of the 'quality of life' and the 'wanted child' partially replaced the value of the 'sanctity of life'.[75] Couples and individuals claimed the right to effective planning of their future and, hence, effective methods of birth control. Originally, the birth control movement disapproved of abortion, and even regarded the quest for abortion as a threat to the credibility of the birth control cause.[76] There is no doubt, however, that within the ideology of family planning abortion would be demanded in those cases where the

75 Sarvis, B., Rodman, H., *The abortion controversy*, Columbia Un. Press, New York, 1974, p. 50 ff. See chapter II, section A, 3 and 4, for a discussion of the values of the 'sanctity of life' and of the 'quality of life'.

76 Sarvis, *op. cit.* note 75, p. 133 ff.

traditional methods of birth control had failed. So although the birth control movement initially disapproved of abortion as a method of family planning, it was the values on which the birth control movement was based – such as the 'quality of life' and the 'wanted child' – which resulted in the demand for abortion as a 'safety valve' in those cases where other methods of birth control failed. In this view, abortion was a complementary method of birth control.

Empirical data suggest that reduction in birth rates, providing that the motivation for fertility regulation exists, is most likely to occur when both contraceptive methods and abortion are widely available. Nations and social classes appear to pass through three stages in their demographic transition from high to low rates of fertility. In the first stage there is no birth prevention resulting in high birth rates. During the second stage there is a reduction in the birth rates accomplished primarily by abortion. The third stage is marked by low birth rates which are achieved mainly by effective contraception with some residual abortions to meet contraceptive failure.[77]

Some policymakers had hoped to alter the pattern. By promoting contraceptive methods as the sole means of controlling human fertility, it was thought that illegal abortions would be eliminated and the intervening period of increased abortions could be avoided. Accumulating evidence suggests, however, that this interim stage cannot easily be bypassed, but that timely liberalization and broad availability of abortion together with the provision of all methods of contraception can hasten the entry of developing countries into the third stage of the model.[78] The experience with legal abortion in the US and Europe has shown the validity of these findings.

Whereas abortion as a means of effective birth control is demanded by individuals and couples in general, it is claimed by the women's liberation movements in particular in the context of their demand for an equal position in society. Reproductive freedom is a necessary condition for the liberation of women from their traditional, maternal, and socially subordinate position.[79] If women really want to achieve the same social and economic position in society as men, their right to reproductive freedom including abortion must be guaranteed. In this view, restrictive abortion laws are the product of

77 Van der Tak, J., 'Impact of changing abortion legislation and practice on fertility trends', in David, H.P. ed., *Abortion research, international experience*, Lexington, Massachusetts, 1974, p. 39 ff.

78 *Ibid.*, p. 40.

79 Noonan, *op. cit.* note 1, Introduction, p. xv-xvi.

a male dominated society, and abortion on demand or the woman's right to self-determination are a necessary condition for the liberation of women. These arguments are well-known and therefore need no further explanation.

A third group interested in fertility control were policymakers in the field of the population problem. Whereas the demand for freedom of abortion from couples and women emphasized the individual freedom in matters of family planning, policymakers viewed abortion liberalization as a device to control the growth of the population 'from above'. The reason why governments were concerned with the size of the population in the 1960s was not only the absolute increase of the population after World War II, but also the economic implications of a relatively high increase in poor and underdeveloped areas. Fertility control was seen as a way of reducing the number of the poor in society and, hence, of solving the problem of poverty. The advocates of the extension of fertility control did not necessarily support the individual's right to choose.[80] There was a particular interest in the US in fertility control, which was probably due to the high birth rates among minority groups.[81] It soon became apparent that in order to achieve a reduction of population growth the known means of contraception were unsatisfactory and insufficient. Japan's spectacular success in this field was obtained through the massive spread of abortion in addition to contraceptive methods.[82]

The awareness of the social and economic consequences of population growth gradually led the United Nations member countries to agree on the desirability of greater involvement of the UN system in population matters. The Declaration on Population of December 1966, issued on Human Rights Day, state in its preamble that 'the size of the family should be the free

80 Francome, *op. cit.* note 33, p. 3-4. See for a general discussion of population policy Weintraub, P., 'Population and law: legal control of demographic processes', *European Demographic Information Bulletin*, 1974, p. 129 ff; Gould, K.H., 'Family planning and abortion policy in the United States', *Social Service Review*, 1979, p. 452 ff.

81 Noonan, *op. cit.* note 1, p. xiii. It has been argued that the American Supreme Court rulings on contraception and abortion (see chapter III) have nothing to do with sexual liberation, but that they are family planning cases in the sense that they seek to reestablish social stability which is threatened by excessive population growth. See Grey, T.C., 'Eros, civilization and the Burger Court', *Law and Contemporary Problems*, 43, 1980, p. 83 ff.

82 *Ibid.*, p. xiv.

choice of each individual family'.[83] This view was repeated in 1976 during the UN Conference on Human Rights. Although the UN system is providing increasing support for family planning services, training and research, it has refrained from adopting a formal position on abortion or any other method of fertility regulation. The work program of the UN Population Commission, however, made provisions from 1970 onwards for studies of social, demographic, and other aspects of abortion. National statistics on abortion have been included in the UN Demographic Yearbook since the 1971 edition.[84]

In July 1969, President Nixon appointed the Commission on Population Growth and the American Future, set up to further the national goal of providing adequate family planning services within the next five years 'to all those who want them but cannot afford them'.[85] In 1971 the Commission on Population Growth not only recommended that abortion laws should be liberalized, but held up the very liberal New York statute as the model legislation. President Nixon, however, replied to this suggestion in a public letter that he considered abortion as an unacceptable form of population control and that the Commission's recommendations were unacceptable.[86]

Although concern with problems of overpopulation did not necessarily lead to the acceptance of abortion as a remedy, as these two examples show, it is nevertheless important to take this debate into account as it did touch on the abortion issue and may have had a psychological impact.

A fourth element leading up to a call for abortion liberalization was the advances made in medical technology. Even in the early 1970s, the mortality rate associated with legal abortions performed in hospitals at an early stage of gestation was lower than the maternal mortality associated with pregnancy and childbirth. Furthermore, new abortion techniques, like the suction method, rendered abortion in the first months of pregnancy a quite simple intervention.[87]

83 David, H.P., 'Abortion research in transnational perspective: an overview', in David, *op. cit.* note 77, p. 7.

84 *Ibid.*, p. 8.

85 Sarvis, *op. cit.* note 75, p. 135-139.

86 *Ibid.*

87 Tietze, C., 'Mortality with contraception and induced abortion', in David, *op. cit.* note 77, p. 103 ff. See Tietze, C., Induced Abortion, a worldreview, 4th ed., The Population Council, New York, 1981, p. 71, for a description of this method.

A fifth factor to take into account, closely connected to the advances made in medical technology, is the attitude of the medical profession. Whereas the medical community used to be strongly opposed to abortion, this changed in the 1960s. The most marked change took place in the US where a survey done in 1969 showed that 51% of the US physicians wanted abortion to be available to any woman upon her request to a competent physician.[88] In the European countries, liberalization did not receive such massive support by the medical profession as in the US, but a considerable number pronounced in favor of abortion.[89] What all doctors had in common was their concern with the preservation of their freedom of profession. The British Royal College of Gynecologists produced a report in 1966 which it suggested a partial liberalization of the law, but it warned that legislators should be reasonably sure of their cooperation before changing the law.[90]

There is no doubt, in short, that given the technical possibilities to perform abortions safely, the medical profession had an interest in securing its freedom of action. And although important sectors of the medical profession were opposed to abortion, others supported abortion liberalization and would thus gain by freedom from government interference in the practice of abortion.

In conclusion, in the 1960s and early 1970s there was a growing demand for a lifting of the existing abortion prohibitions from various sectors of society. The traditional views on sexuality and family life began to break down and this led to a demand for effective birth control including abortion, both from couples and from the women's movements. A growing concern with population growth made governments consider a population policy. At the same time advances in medical technology rendered abortion a safe procedure during the initial stage of pregnancy, and part of the medical profession was willing to be involved in the abortion practice, provided they were unhampered by abortion restrictions.

88 Francome, *op. cit.* note 33, p. 107.

89 See for France, Francome, *op. cit.* note 33, p. 139; for Austria, Edlinger, *op. cit.* note 43, p. 108-109; and for Germany, Soulas de Russel, *op. cit.* note 44, p. 544.

90 Francome, *op. cit.* note 33, p. 95.

Section D Abortion as a Political Issue

Various factors can be indicated which turned abortion from a social into a political issue, that is, rendered a change of the law necessary to policy-makers.

The events which had a crucial impact on public opinion and set off the public debate on abortion were the Thalidomide affair and the German measles epidemic. Between 1961 and 1963, doctors discovered that the new drug Thalidomide, widely used by pregnant women for morning sickness, could cause fetal abnormalities. In 1962, Mrs. Sherri Finkbine, an American television announcer, focused attention on the drug when she was refused termination of her pregnancy in the US and had to fly to Sweden for an abortion. This became front-page news and received international publicity.[91]

Another Thalidomide affair took place in Belgium. In May 1962, a Belgian woman gave birth to a seriously deformed child and killed it soon after it was born. She had been taking the drug Softenon containing Thalidomide. Her trial received wide publicity. Whereas the public prosecutor had requested her condemnation, the jury acquitted her of all the charges.[92] The same dilemma came up in 1964, when a German measles epidemic hit the United States. This event, once again, provided an excellent opportunity to focus the attention of a mass audience on the problem of abortion.[93] The Thalidomide affair and the German measles epidemic were the first occasions on which wide publicity was given to, and people were made aware of, the insufficiencies of the existing abortion laws.[94]

The liberalization of abortion became the unifying issue of the feminist movement in Europe in the early 1970s, especially in countries with a strong Catholic tradition like Italy, France and Germany. In March 1971, 100 well known Frenchmen signed a declaration against the restrictive Abortion Act proposed by Peyret. A month later 343 women, among whom were famous personalities like Simone de Beauvoir, Jeanne Moreau and Margueritte Duras, signed a manifesto published in the left-wing magazine *Le Nouvel Observateur*, stating that they had had abortions and calling for

91 Francome, *op. cit.* note 33, p. 81. Sarvis, *op. cit.* note 75, p. 5-7.

92 De Bruyn, J., *Geschiedenis van de abortus in Nederland: een analyse van opvattingen en discussies, 1600-1979*, Van Gennep, 1979, Amsterdam, p. 178.

93 Sarvis, *op. cit.* note 75, p. 6.

94 Francome, *op. cit.* note 33, p. 81.

repeal of the law. Two months later, in June 1971, the German weekly *Stern* published a similar declaration by 374 German women, and the weekly *Spiegel* published a declaration signed by 329 doctors. At the same time the actress Romy Schneider was denounced, as having had an abortion, and this caused a national scandal. In Italy, hundreds of women's confessions were collected and published by feminists in order to provoke judicial action. In November 1972, a trial took place at Bobigny near Paris, against a girl aged 17 who had had an abortion after having been raped. She was acquitted, her mother received a fine, and the abortionist a suspended sentence.[95] A similar trial took place in Padova, Italy, in June 1973, against a 16 year old girl.[96] Owing to the women's mobilization and the interventions of well-known personalities, the abortion debate was speeded up within the feminist movement and gained greater public attention.

One of the tactics used by the feminist movement was the challenging of the existing abortion laws by referring women for illegal abortions. The Italian 'Centro Informazione Sterilizzazione e Aborto'(CISA) introduced suction abortion in Italy and accompanied women to cheap doctors in London. The inevitable arrest of the leader of this organization, in front of the press, television, and hundreds of supporters, gained the maximum publicity.[97] In a second incident an Italian gynaecologist, a member of the Radical Party, was imprisoned for two months without trial for performing abortions. Three MP's exercising their rights to visit any prison in Italy saw him and then refused to leave, saying they wished to be charged as 'accomplices' of the gynaecologist. This type of incident kept the issue in the news and challenged the legitimacy of the law.[98]

In this wave of judicial contest, clandestine abortions were performed on a large scale wherever a repressive law was in force. Abortion centers and clinics were opened and organizations founded which fought for the liberalization of abortion and which publicly advocated illegal abortions. Although some people involved in this practice were arrested (like in the Italian case), on the

95 *Ibid.*, p. 138.

96 Teodori, M., *Storia delle nuove sinistre in Europa (1956-1976)*, Il Mulino, Bologna, 1976, p. 585.

97 Francome, *op. cit.* note 33, p. 144.

98 *Ibid.*, p. 144.

whole, both in the US and in Europe, prosecutors enforced the laws haphazardly and courts were lenient.[99]

The split between law and practice became a salient feature of the abortion controversy in all the countries discussed here. On the one hand, the number of illegal abortions was very high, on the other hand, the number of prosecutions and condemnations was minimal. Although the estimate of the number of illegal abortions performed yearly varied widely according to the various sources, policymakers were convinced that this situation was intolerable.[100] Furthermore, the situation discriminated against poor women. Wealthy women had long obtained safe abortions in more liberal minded countries. By the beginning of the 1970s, many French, German and Italian women went to Britain or to Holland in order to have an abortion. The number of German women going to Britain for an abortion rose from 3.621 in 1970 to 17.531 in 1972. Even more women went to Holland, about 61.000 in 1975.[101] The number of French women obtaining an abortion in the UK went up from 2.300 in 1970 to 36.400 in 1974.[102] This phenomenon together with the fact that doctors performing illegal abortions were often making large profits was felt as a gross injustice, also by policymakers.[103]

A last, very important factor leading up to the political debate on abortion was the change in public opinion and the role of the press. Surveys show that there was a gradual increase of public support for abortion in the US during the 1960s with a more rapid increase between 1969 and 1972.[104] In 1968 a Gallup survey showed that 15% of the public approved of liberalized

99 Soutoul, J.H., *Conséquences d'une loi – avortement, AN II*, La Table Ronde, Paris, 1977, p. 21-31. Pingaud, *op. cit.* note 73, p. 38-39. Francome, *op. cit.* note 33, p. 138. Gerstein, H., LOWRY, D., 'Abortion, abstract norms, and social control: the decision of the West German Federal Constitutional Court', *Emory Law Journal*, 25, 1976, p. 850-853. Edlinger, *op. cit.* note 43, p. 19-23. Sarvis, *op. cit.* note 75, p. 27-40.

100 Edlinger, *op. cit.* note 43, p. 17-21 and 131-135. Francome, *op. cit.* note 33, p. 115, 138 and 144. Soulas de Russel, *op. cit.* note 44, p. 543.

101 Francome, *op. cit.* note 33, p. 141.

102 Tietze, C., *Induced abortion, a world review*, 1981, The Population Council, New York, 1981, p. 37, table 3.

103 Potts, *op. cit.* note 27, p. 395. Gerstein, *op. cit.* note 99, p. 853.

104 Sarvis, *op. cit.* note 75, p. 165 ff. Uslaner, E.M., Weber, R.E., 'Public support for pro-choice abortion policies: changes and stability after the Roe and Doe decisions', *Michigan Law Review*, 77, 1979, p. 1776-1778.

abortion laws. In November 1969 this had gone up to 40%, and in June 1972 64% of a 1574 sample of Americans over 18 years of age and drawn from 400 localities believed that the decision to have an abortion should be made solely by the women and her doctor.[105] The most dramatic increase in public support for liberal abortion policies took place in the West and North East of the US, and among white, non-Catholic, college educated men.[106]

On the European continent the percentage of supporters of abortion liberalization grew steadily in the period between 1970 and 1975. As in the US, there were differences of opinion according to sex, religion, age and education. More non-Catholics than Catholics, more men than women, more young people than old people supported the liberalization of abortion.[107] By the mid-1970s the abortion movements on the European Continent could point to the support they had from public opinion. The report of one poll in France taken in 1974 said that 60% of the population was in favor of abortion. In Germany, a poll (in 1975) showed that 59% of Germans had been in favor of the repeal law.[108] A survey of the Italian magazine *Panorama* surprised politicians in 1974 by showing that 75% of Italians favored legal abortion.[109] Also in Austria a majority of the population was in favor of liberalization of abortion in 1971.[110]

A key factor in the change of public opinion in the US and in Europe was the role of the press. First of all, the press reported the changes that were taking place by publishing the results of opinion polls. It is well-known that statistics can be used and interpreted in many ways according to one's personal purposes. Whether the interpretation given to the data obtained in opinion polls was always sound is questionable. There are clear indications, for example, that in some cases the press in the U.S. gave a more 'liberal' picture of public opinion than justified. The important aspect of these polls is, however, that whatever their scientific value, they did influence policy-makers.[111] Furthermore, the press also openly supported the abortion movement in many cases, which also had an impact on public opinion and

105 Potts, *op. cit.* note 27, p. 361. Francome, *op. cit.* note 33, p. 123.

106 Uslaner e.o., *op. cit.* note 104, p. 1778 ff.

107 De Boer, C., 'The polls: abortion', *Public Opinion Quarterly*, 1977/78, p. 553-564.

108 Francome, *op. cit.* note 33, p. 138-144.

109 Potts, *op. cit.* note 27, p. 401.

110 Edlinger, *op. cit.* note 43, p. 36.

111 Sarvis, *op. cit.* note 75, p. 9.

policymakers. In Italy the weekly *Espresso* played an active role in the abortion campaign.[112] The initiatives taken by the press in France and Germany have already been mentioned. There is no doubt that the press had a strong influence on policymakers.

The intensity of the abortion debate was not uniform in all countries. The women's movement in the US urged for very radical changes in a society where there was strong opposition to abortion.[113] In Italy too, the pro- and anti-abortion groups were particularly far apart and the debate went on much longer and was more intense than in France, Germany and Austria.[114] In spite of these differences, the debates on abortion followed the same lines in the US and on the European continent. The pressure exercised by the abortion movement, the massive number of illegal abortions, the judicial contestation, the change of public opinion and the role of the press were common features of the abortion debates in all these countries. These debates were not limited to the national level but had an international audience.

As the abortion movement gained momentum, anti-abortion forces were generated. Pro-life movements were set up which fought against the liberalization of abortion in the name of the protection of unborn life. This opposition to abortion was often largely supported by the Catholic Church and by conservative parties, in the US also by Fundamentalist groups.[115] Doctors, lawyers, scientists,and the various religious denominations were often split on the abortion issue. Some of them joined pro-life movements, others declared their sympathy with the abortion movement.[116] The pro-life forces focused the attention on the 'inhuman' aspects of abortion liberalization. Pictures were shown of fetuses and references were made to 'crying fetuses' in order to stress the human features of the unborn. They claimed the right to life of the fetus against the women's claim for self-determination. The clash between the two groups gave a strongly emotive-symbolic content to the abortion issue.

112 Teodori, M., *I nuovi radicali*, Mondadori, Milano, 1977, p. 158 ff.

113 Francome, *op. cit.* note 33, p. 100-114.

114 Potts, *op. cit.* note 27, p. 401-402. Francome, *op. cit.* note 33, p. 143-148.

115 Potts, *op. cit.* note 27, p. 362-363. Francome, *op. cit.* note 33, p. 111-113. See for a report of the position of the German religious denominations Jochimsen, *op. cit.* note 45, p. 75-169; Europäische Ärzteaktion (ed), *Alarm um die Abtreibung*, Hanssler Verlag, Neuhausen-Stuttgart, 1980, p. 14-204.

116 Pingaud, *op. cit.* note 73, p. 46-138. Edlinger, *op. cit.* note 43, p. 95-123. Soulas de Russel, *op. cit.* note 44, p. 544-546.

There is no doubt that by the mid-1970s the public pressure for abortion reforms forced governments to act. The nature of the issue, however, made a political solution very difficult. It has been pointed out in the literature that the emotive-symbolic content of the issue leads to feelings of competence among the public, that is to say, people have clear opinions on abortion and it is difficult for politicians to depoliticize the issue. Furthermore, the directly opposing 'fundamental' values involved in the abortion decision makes bargaining or compromising extremely difficult. Views on abortion often cut across party lines. In particular in countries with religiously based parties, the right-left division was not reflected in the views on abortion.[117] Although governments were forced to act, the type of issue did not lend itself to compromise. It was therefore foreseeable that whatever the political solution, the issue would not be 'solved', that is the debate on abortion would continue.

Section E The Legalization of Abortion

By the mid-1970s, abortion reform in Europe was no longer perceived as the political issue of certain political parties, but as a general problem of the state to be solved as soon as possible. As the president of the 'Social Section' of the French *Conseil d'Etat* stated: 'lorsque une législation est bafouée ou non appliquée de cette manière, il en résulte un discredit pour les institutions, pour le Parlement qui fait la loi, pour le gouvernement qui est chargé de l'appliquer, pour la Justice et, en définitive, une crise de l'Etat'.[118]

As a result reform bills are presented in Parliaments and are passed after long and difficult debates.

France. The first law proposal in France was presented in 1973 by the government and drafted by Taittinger, the Minister of Justice. This proposal provided for an indications solution , not including a social indication.[119] A working group was set up in which more than 50 MP's participated. From July to November 1973 there were 42 hearings of qualified persons and interest groups. The representatives of the different groups (religious, scien-

117 Outshoorn, J., *What's in a name? Abortion as a political issue*, paper presented at the ECPR Joint Sessions and Workshops in Salzburg, April 1984.

118 Soutoul, *op. cit.* note 99, p. 29.

119 See for a definition of indications solution chapter III, Section A.

tific, medical, women's) were divided, however. The working group pronounced itself against the Taittinger project, and the government was not convinced by this proposal either. A compromise between five other proposals was defeated in the working group by 31 votes against 30. The government decided to defend the Taittinger project but left the MP's free to vote either way.[120]

During the first day of the Parliamentary Debates on the Taittinger proposal in December 1973, a postponement of the debate was asked for and approved by Parliament. In April 1974 President Pompidou died. This changed the course of the abortion reform. The newly elected President Giscard d'Estaing appointed Simone Veil as Minister of Health and charged her with the task of drafting a new law. The President officially declared during a press conference in July 1974 that he hoped Parliament would adopt a liberal solution to the abortion question.[121]

The proposal drafted by Simone Veil was presented to the National Assembly in November 1974. Although this proposal was clearly more liberal than the one the National Assembly had set aside without discussion in December 1973, a certain number of Deputies belonging to the government majority now voted in favor of the reform. There are two reasons for this curious paradox. Firstly, Giscard d'Estaing was determined to obtain a reform, and secondly, he had had the insight to entrust the defense of the proposal to a woman.[122]

Veil's defense of the abortion reform was very pragmatic. The principles she put forward in defense of the law were that the law should be applied, that the law should dissuade women from having an abortion, and that it should protect the woman's health. Although numerous amendments were proposed in the course of the debate, few were adopted and they contained no real changes of the proposal. The abortion reform was adopted in December 1974 by a 284-189 vote in the National Assembly, and a 184-90 vote in the Senate. The parties of the Left voted unanimously for the reform.[123]

Germany. In January 1973 Bundeschancellor Brandt declared before the newly elected Parliament that the government would not reintroduce old proposals and would leave the abortion reform to the initiative of the parties. Between

120 Pingaud, *op. cit.* note 73, p. 143.

121 *Ibid.*, p. 144-146.

122 *Ibid.*, *op. cit.*, p. 166.

123 *Ibid.*, *op. cit.*, 167-210.

March and May 1973, four proposals were presented. A majority of the SPD/FDP proposed a time-phase rule combined with socio-political measures, a minority of the SPD an indications solution, a majority of the CDU/CSU a more stringent indications solution, and a minority of the CDU an indications solution with only a medical indication. During the Parliamentary Debates in April 1974, a 'free vote' did not result in a clear majority for any of the bills. An agreement was reached by which the minority proposals of both SPD and CDU were eliminated, as they had the smallest support. The CDU/CSU proposal was then introduced in the form of an amendment and was narrowly defeated. After a debate lasting two days the majority voted in the third reading for the time-phase rule by 247 votes against 233. This was a 51% majority of those 'present and voting', but not an absolute majority of all MP's. In the *Bundesrat* the proposal was rejected by a clear majority in May 1974. It was then referred to the Joint Arbitration Commission where, however, no consensus was reached. The proposal was then referred back to the *Bundestag*, which adopted the bill with an absolute majority of 260 votes.[124]

Austria. In November 1971, the government presented a Penal Code reform proposal to the National Assembly, including an abortion reform which was based on an indications solution. In April 1972, the Socialist Party changed its view and decided to support a time-phase rule. This position was officially adopted by the government, which now had the absolute majority in Parliament, in December of the same year. In spite of strong opposition by large sectors of society (doctors, lawyers, the Catholic Church), and of the parties in the opposition, the abortion reform was passed with 93 votes against 88 in the *Nationalrat* in November 1973, and with 29 votes against 28 in the *Bundesrat* in December of that year. This meant that this predominantly Catholic country which used to have one of the most restrictive abortion rules in Western Europe, now had one of the most liberal abortion laws.[125]

Italy. No abortion reform was enacted in Italy until 1978, in spite of the very active abortion campaign led by the feminist movement and the Radical Party. 1975 was a crucial year for the abortion reform. In February of that

[124] Gerstein, *op. cit.* note 99, p. 850-857. Stern, C., *Was haben die Parteien für die Frauen getan?*, Rowohlt, Hamburg, 1976, p. 36-56. Potts, *op. cit.* note 27, p. 395-396. Francome, *op. cit.* note 33, p. 141.

[125] Potts, *op. cit.* note 27, p. 396. Edlinger, *op. cit.* note 43, p. 31-94.

year the Constitutional Court declared the existing art. 54 of the Penal Code unconstitutional, forcing legislation to be introduced at least to permit abortion where the woman's health was greatly endangered. (see chapter III) The abortion reformers then set in motion a referendum in motion in order to abolish the existing abortion provisions. The threat of a referendum in turn led to more political activity, as both the Christian Democrats and the Communists wanted to avoid a referendum. By the end of 1975, a draft bill had progressed to the stage of a detailed discussion of the grounds on which abortion was to be permitted. Although such legislation did not meet the demands for abortion on request made by the Radical Party and the feminists, room for compromise was made. At that point the Church intervened. In December 1975, the bishops condemned 'the slaying of the innocents' in one of the most vehement outbursts the hierarchy had ever made. This further polarized the views on the subject. The fragile alliance between Right and Left was broken, and no compromise was agreed on. In 1976 the government fell as that was the only way to stop the referendum from taking place.[126] In January 1977, the Italian Parliament finally approved by 310 votes against 296 an abortion reform which was very similar to the French one, i.e. a time-phase rule with dissuasion requirements.(see chapter III, section A) On May 18th 1978, less than one month before the planned referendum set for the 15th of June, the Senate approved the bill by 160 votes against 148.[127]

U.S. Abortion legislation in the US belongs to the realm of the states. As has been described above (section B), at the end of the 1960s and the beginning of the 1970s reform laws and a few repeal laws were passed in about 20 of the states, whereas reforms were still being discussed in others. However, by 1973 a majority of the states still had traditional 19th century legislation.[128] At this point the US Supreme Court intervened with its sweeping *Roe v. Wade* decision of January 1973, by which most abortion laws, including most of the recent reforms, were declared unconstitutional. The Supreme Court declared that the woman was free to decide on abortion in consultation with her doctor within the first three months of pregnancy,

126 The Italian law only allows a referendum to occur between April 15th and June 15th and not within one year of an election.

127 Potts, *op. cit.* note 27, p. 402. Francome, *op. cit.* note 33, p. 145. Casini, C., Cieri, F., *La nuova disciplina dell'aborto*, Cedam, Padova, 1978, p. 3 ff.

128 Francome, *op. cit.* note 33, p. 127.

without any state interference. By this decision states were forced to adopt this rule in their legislation (see chapter III).

As has been pointed out in Section B, there is no doubt that individual national developments have influenced one another. The experience of countries with early abortion reforms, like the Scandinavian countries, the United Kingdom and several states in the U.S., were scrupulously analyzed and evaluated by the countries on the European Continent which passed abortion reforms only in the mid 1970's. The first constitutional decision on abortion delivered by the US Supreme Court in 1973 fuelled the debate even more. There are many references in the respective parliamentary debates to developments abroad.[129] One of the earlier abortion reform proposals in Italy was almost literally based on the British Abortion Act of 1967.[130] The French reform had an important impact on the Italian debate in a later stage.[131] The German debate also evolved around the experiences with abortion reforms abroad, in particular the English, American and Scandinavian situations.[132] Furthermore, a very important motive for policymakers to look beyond their national borders was that an increasing number of women went abroad in order to obtain an abortion. These phenomena gave an international character to the debate. Although the developments abroad certainly did not lead to a consensus at the national level on the abortion issue, they gave an extra dimension to the national debate.

The abortion issue was not settled by the respective reforms. The views on abortion were too far apart to allow for a satisfactory solution for all and in fact the defeated opposition to abortion reform looked for ways to challenge the new situation. Three political instruments were used in an attempt to reverse the situation: the introduction of Amendment bills, recourse to the constitutional court, and the referendum. In Britain by the end of 1982, eight bills had been introduced to restrict the working of the British Abortion Act of 1967. In Germany, France, Austria and Italy, the opposition resorted to

129 Edlinger, *op. cit.* note 43, p. 60. See chapter III, Section B, par. 1, notes 65 and 75.

130 Casini, *op. cit.* note 127, p. 4. This was the 'legge Fortuna'.

131 Francome, *op. cit.* note 33, p. 143.

132 Schroeder, F., *Abtreibung Reform des par. 218*, de Gruyter, Berlin, 1972, p. 127ff; Hanach, E.-W., 'Rechtsvergleichende Bemerkungen zur Strafbarkeit des Schwangerschaftsabbruch in der Westlichen Welt', in Baumann, J., (ed.), *Das Abtreibungsverbot des par. 218*, Luchterhand, Berlin, 1971, p. 235 ff.; Arndt, C., Erhard, B., Funcke, L., *Der par. 218 StGB vor dem Bundesverfassungsgericht*, Mueller, Heidelberg, 1979, p. 200 ff., p. 248, p. 261, p. 300.

the constitutional court for a judicial review of the new legislation. In Italy the instrument of the referendum was set in motion, this time to challenge the new law. In the US, constitutional litigation is part of the political process, as has been pointed out in Section B, and it is therefore no surprise that from 1973 to the present date the US Supreme Court issued about 15 rulings on abortion.[133]

The wave of abortion legislation in France, Germany, Austria and Italy was followed closely by constitutional court rulings on the constitutionality of the respective abortion reforms. In Italy a referendum was also held on the new abortion law. The French Constitutional Council, the Austrian and Italian Constitutional Courts rejected the challenges to the law and upheld the new legislation. In Germany, on the other hand, the Federal Constitutional Court declared the time-phase rule unconstitutional , and in consequence a more moderate indications solution was passed by the German Parliament. In the US there has been a continuous debate between state legislatures, the federal legislature and the Supreme Court on the scope and content of the woman's right to have an abortion as declared in *Roe v. Wade*. The focus of this study is on these constitutional debates in the US, Germany, France, Italy and Austria, which will be discussed in chapter III.

Conclusions

The constitutional debates on the abortion issue are mainly phrased in terms of the right to life of the fetus and the pregnant woman's right to self-determination, as will be shown in the next chapters. The purpose of this chapter has been to throw some light on all the aspects – religious, historical, social and political – which have led, first to abortion prohibitions, and then to a change of views on these prohibitions.

The protection of unborn life was an important motive for restricting abortion, but not the only one. Views on sexuality, the medical risks involved in the abortion intervention, and concerns with underpopulation also influenced these restrictions. In the same way, the woman's right to self-de-

133 There are clear indications that these constitutional court decisions have not contributed to a 'settling' of the abortion issue. In particular in the US, Germany and Austria these decisions have resulted in a greater polarization between pro- and anti-abortion forces. See for the US note 8 of chapter III; for Austria Mock, E., 'Abortion law and public policy', *Comparative Law Yearbook*, 1983, p. 33-34; for Germany Quaas, *op. cit.* note 55, p. 41 and 54 ff.

termination has not been the only basis for claiming freedom of abortion. A change in views on sexual and marital life, an advance in medical technology, and problems of population growth also had an impact on the abortion debate. The fact that according to Catholic teachings up to the Second Vatican Council, and in national legislations up to quite recent times, contraception and abortion were more or less treated alike is very significant in this respect.

It is important to keep all these considerations in mind when analyzing the constitutional arguments used for defending one or another solution to the abortion issue. Exactly because the tendency has been to 'constitutionalize' the abortion debate, it is important to distinguish between the constitutional and the non-constitutional considerations mentioned in this chapter which have played a role in the evolving of the abortion issue.

Chapter II The Fundamental Values Involved in the Abortion Decision

Introduction

The abortion decision involves a number of parties, all with their own legally protected interests or rights. These parties are the fetus, the pregnant woman, the doctor, the father of the fetus and the parents of the pregnant minor. The abortion decision becomes a dilemma when these interests are in conflict with each other, as when the pregnant woman claims her freedom of choice against the fetus' claim to have its life protected, or the doctor claims that he cannot perform an abortion because his conscience does not allow him to, or the father of the fetus disagrees with the pregnant woman's decision to have an abortion.

It is the duty of the state to protect these rights, but because of their conflicting nature, it has to place them in a hierarchical order. Traditionally, the state in the Western world has given an absolute priority to the right to life of the unborn and has therefore prohibited abortion in almost all circumstances. With the rise of the abortion movement and the growing public and political support for liberal abortion laws, however, the state had to change its position and come to grips with the changed values of today's society. This has resulted in new, more liberal abortion legislation.

In this chapter the fundamental values involved in the abortion dilemma will be discussed. There are moral and philosophical reasons for granting the unborn an absolute or relative right to life, or no right to life at all. There are arguments for giving the pregnant woman an absolute, relative or no right to decide on abortion. Furthermore, the rights of the parents, the husband, and the doctor of the pregnant woman, and of the pregnant woman herself will be discussed. The recognition of the right to abortion depends upon an assessment of these rights.

This philosophical analysis is necessary for an understanding and clarification of the abortion discussion in general. It is in particular indispensable in

order to understand the content given to these fundamental values in the various constitutional orders which are the subject of this analysis. The questions we would like to answer in the next chapter are how have legislators expressed and how have constitutional courts judged these fundamental values in the United States and in Europe; is there a common line of interpretation of these fundamental rights in the five countries discussed? The theoretical analysis presented here is, therefore, the basis for the legal analysis which follows in the next chapter.

Section A The Right to Life of the Fetus

1. The issues

The question central to the abortion debate is that of whether abortion can be considered the killing of a human being.

On the one extreme there are those who claim that every unborn child must be regarded as a person with all the rights of a person, from the moment of conception. The unborn's right to life makes abortion an act of murder, which must never be permitted.

On the other extreme there are those who do not regard the fetus as a person, at least not until the moment of viability. The fetus cannot claim any rights. The woman's right to control her own body requires abortion on demand.

In between these two extremes there is a wide range of middle positions. There are those who claim that the fetus is to be regarded as a person at some specific point in its development after the moment of conception. There are others who consider the fetus as a potential person having some claims against the mother, but these are less strong than the claims of full-fledged persons. From this viewpoint abortion is permissible in special circumstances and for serious moral reasons.

The rights claimed in the abortion debate, the right to life and the right to control one's body, raise philosophical problems requiring a degree of clarity about basic concepts.[1] What kind of entities have the rights ascribed to living human persons? How strong is the claim of the mother to control her own body versus the posited right to life of the fetus?

1 Feinberg, J., *The problem of abortion*, Wadsworth, Belmont, CA, 1973, p. 1.

The question of the moral justification for abortion is related to problems concerning the moral status of the unborn and the resolution of conflicts between the claims of the mother and the posited claims of the fetus.[2] Whether abortion is held to be morally justified depends on (a) how we conceive of the unborn being at the various stages of its development and on the moral significance we ascribe to the characteristics it is considered to possess. Secondly, having established the moral status of the fetus,(b) a balance has to be struck between the claims of the mother and the posited claims of the fetus.

In order to solve the dilemma of the moral status of the unborn, criteria are needed for determining what is meant by a 'human life'. Biological knowledge will help to understand the biological status of the unborn, hence it is important to ascertain, first of all, the biological facts, i.e. to describe the developmental process of the unborn in biological terms. However, the human individuality of the fetus has to be ascertained not for biological reasons but in order to determine the moral and legal status of the unborn. What rights should the unborn have and when is abortion unjust killing? We ask whether or not the fetus is human because we want to know what sort of entity has rights. This is a moral question. We have therefore to decide what are the morally relevant differences between the various biological stages in the development of the fetus. On that basis a distinction has to be made between entities that have rights and entities that do not, and if no rights can be ascribed there is still the question of our moral duties towards the unborn. A rationally defensible, morally relevant standard must be sought by which to establish the moral status of the unborn.[3]

2. Terminology

There is a great deal of terminological confusion in the literature. Some authors call entities that have rights 'persons',[4] others call them 'human beings'.[5] Some writers accord the status of personhood (in the sense of having rights) only to 'organisms that possess the concept of a self as a continuing subject of experiences and other mental states, and believes that it is itself a

2 *Ibid.*

3 Weiss, R., 'The perils of personhood', *Ethics*, 89, 1978, p. 67-68.

4 *Ibid.*, p. 68

5 Brody, B., *Abortion and the sanctity of human life* – a philosophical view, MIT Press, Cambridge, 1976, p. 3.

continuing entity'.[6] Others grant the status of personhood also to less developed members of the species *homo sapiens*.

In order to maintain a certain clarity and coherence in the discussion, we have chosen the following definitions of 'person', 'human life', and 'human being'.

A 'person' is a full-fledged member of a human community, someone who has moral rights as well as moral obligations; a person is responsible for his actions. The traits which are the most central to personhood and which distinguish persons from non-persons, are consciousness, reasoning, self-motivated activity, language and a developed concept of 'self'.[7] Under this definition, the fetus is not a person.

Every member of the biological species *homo sapiens* is a 'human life'. This is a purely biological criterion, it does not offer any solution to the problem of the moral status of the unborn. There is no doubt that the fetus is a 'human life' because it is conceived by human parents.

Some authors only consider these two categories, the moral category of persons being conscious of themselves as subjects of mental states, and that of all the other members of the species homo sapiens who are not yet persons.[8] The first have a right to life, the second have no rights. According to this division, however, young children would not be persons and therefore have no right to life, because they are not held responsible for their actions and they do not have moral obligations. Young children may not satisfy the self-consciousness requirement but that does not exclude them from having a right to life. Infanticide is therefore impermissible.[9] A second moral category is therefore needed here, which we can call 'human beings'.

6 Tooley, M., 'Abortion and infanticide', *Philosophy and Public Affairs*, 2, 1972, p. 49.

7 Werner, R., 'Hare on abortion', Analysis, 1975/76, p. 178; Werner, R., 'Abortion: the moral status of the unborn', *Social theory and practice*, p. 202; Warren, M.A., 'On the moral and legal status of abortion', in Wasserstrom, R.A. (ed), *Today's moral problems*, Macmillan, New York, 1979, p. 45.

8 See Tooley, *op. cit.* note 6, p. 37-65; Warren, *op. cit.* note 7; Narveson, J., 'Semantics, future generations and the abortion problem: comments on a fallacious case against the morality of abortion', *Social theory and practice*, 1974/75, p. 461-485; McLachlan, H.V., 'Must we accept either the conservative or the liberal view on abortion', *Analysis*, 1976/77, 37, p. 197- 204.

9 Annis, P., 'Self-consciousness and the right to life', *Southwestern Journal of Philosophy*, 1975, p. 125; see for the opposite position, Tooley, *op. cit.* note 6.

According to our definition, a 'human being' is a member of the biological species *homo sapiens* and has certain natural and inherent rights, such as the right to life, but no moral obligations. 'A human being has a right to life similar to the right to life had by you, me and so on'.[10] A human being can claim that its right to life should receive the same protection as the right to life of a person. Newborn babies and young children are definitely human beings in that they do not have moral duties but they do have the right to life.[11] The crucial question in the abortion debate is not whether the fetus is a person having rights and duties, but whether and from what moment the fetus can be called a human being, i.e., at what moment of their development the unborn have the same rights as newborn babies.

Before entering into the discussion of when the fetus is to be considered a human being it is useful to consider different opinions concerning the general values of society, or more specifically, concerning the value of human life. How can we define this value? In order to know whether the killing of unborn human life is wrong we must try to establish why and when the killing of born human beings is wrong. This means considering the principles of the 'sanctity of human life' and other theories attaching value to the 'quality of life'.

3. The Sanctity of Life

What does the 'sanctity of life' mean, and is there a moral consensus on this principle? Where does it come from and how can it be utilized? Daniel Callahan's standard work on abortion deals extensively with these questions and the main lines of his thought will be set out here.[12]

The principle of the sanctity of life is vague in its wording, analytically affirmed in practice but open to innumerable differences in interpretation. Some would also reject it because it has a religious connotation.

> Nonetheless, the frequency of the use of the principle in ethical discussions, even by the non-religious, testifies to its continuous utility, at least as a

10 Brody, *op. cit* note 5, p. 3.

11 It is not relevant to the abortion discussion to know when exactly children become persons, because they have, anyway, a right to life.

12 Callahan, D., *Abortion: law, choice and morality*, Macmillan, London, 1970, chapter 9, p. 307-348.

> point of departure. There seems, moreover, to be no other widely affirmed principle which presently serves so well.[13]

Catholic and Protestant thought have pushed the sanctity of life back to a divine origin. However, the Christian belief in the sanctity of life, it is contended, has been generated by the primordial experience of being alive, of experiencing the elemental sensation of vitality and the elemental fear of its extinction.[14] Although disagreeing on the source of the principle, religious and non-religious thinkers agree on its value as a first principle.

> Both are saying in effect, the same thing: if you want to make anything sacred, if you want any values honored, if you want to be able to defend any rights, then it is necessary to postulate the sanctity of life (or, presumably, a principle with the same general thrust).[15]

Many people, irrespective of their theological beliefs, experience a sense of abhorrence in the face of new or prospective capacities of geneticists, neurosurgeons, pharmacologists, psychiatrists, psychologists and electronic engineers, to intervene in what has always been regarded as man's 'natural' cognitive and moral powers. They are appalled by modern science's capacity to modify man's personality, his perception or imagination, or to intervene in his natural reproductive capacities. All such interventions are seen as dangers as they are a deviation from the 'normal' and the 'natural'.[16]

Although there seems to be a social consensus on this principle, it appears to be singularly abstract and ambiguous. It can be defined in many different ways, as the examples have indicated. One way to find out what is meant by the sanctity of life is to see how rules expressing the principle of the sanctity of life are related to one another. 'Our rules should form a coherent system, each rule consistent with and supporting the ultimate principle of the sanctity of life'.[17]

Callahan distinguishes the following rules and rule systems bearing on the 'sanctity of life'

13 *Ibid.*, p. 308.

14 *Ibid.*, p. 313; Shils, E., 'The sanctity of life', in Labby, D.H., *Life or death, ethics or options*, Un. of Washington Press, Seaule/London, 1968, p. 13.

15 Callahan, *op. cit.* note 12, p. 220-221.

16 Shils, *op. cit.* note 14, p. 7-10.

17 Callahan, *op. cit.* note 12, p. 326.

a. The survival and integrity of the human species. The sanctity of life requires moral rules designed to aid the survival of collective human life. An example of such a rule is that nations ought to act so as to ensure as far as possible a viable life for future generations. In the language of rights, this rule states that the human species has the right to exist. Nations, races and ethnic groups have the right to exist.[18] The atomic bomb is a clear threat to this right.

b. The survival and integrity of family lineages. The sanctity of life requires respect for voluntary procreative choice and family life. In terms of rights this means 'the rights of individual procreation, family planning and the preservation of the family lineage'.[19] Genetic engineering and obligatory sterilization could violate this principle.

c. The integrity of bodily life. The general rule is that 'the individual human being ought to be allowed to live and enjoy the protection of his fellow human beings'.[20] In the language of rights this means that there is a fundamental right to life. Neither the individual nor the state has the right to unjustly deprive human beings of their lives, or to permit or create those social, economic, medical and practical conditions which would have that effect. This general rule encompasses subsidiary rules relating to the conduct of war, capital punishment, social conditions, the prolongation of moribund life, euthanasia and abortion. In the case of abortion, there is the problem of when human life begins.[21]

d. The integrity of personal choice and self-determination, mental and emotional individuality. The key rule is that a person ought to be allowed to make for himself those choices which significantly affect his personal fate; people should be free to determine their own lives. In terms of rights this means that 'human beings have the right to self-determination; human beings have the right to their own complement of voluntarily chosen mental and emotional traits'.[22] A person has the right to himself. The sanctity of life requires respect for personal identity, choice, and self-determination. 'The

18 *Ibid.*, p. 328.

19 *Ibid.*, p. 330.

20 bid., p.331.

21 *Ibid.*

22 *Ibid.*, p. 333.

essential difference between persons and other creatures is to be found in the structure of the person's will'.[23] Human capacities, i.e. language, self-consciousness, memory, logical relations, intelligence, rational choice, enable persons to make independent decisions regarding what this life shall be. This requires respect for the capacity of the individual for rational autonomy, or the 'dignity of autonomy'.[24]

An essential element in this claim is the putative right of women to make their own decisions, uncoerced by the state or others, about whether they should have an abortion or not.

e. The integrity of bodily individuality. An individual ought not to have his or her body, including the organs therein, violated or imposed upon, in other words, the 'right to bodily individuality' should be guaranteed.[25] The sanctity of life will be violated if the moral rules governing behaviour toward human bodies involuntarily threaten the integrity of those bodies. In the case of abortion, this right might be invoked in a case where a refusal to grant a woman an abortion could threaten her physical health, or in the case of rape, where an abortion would rid her body of the effect of an earlier violation of her bodily individuality.

The integrity of personal choice (*d*) and the integrity of bodily individuality (*e*), are closely connected and taken together could be called the 'sanctity of individuality'.[26] Psychiatric, neurosurgical and psychological technology intrude on this 'sanctity of individuality', both physically and psychologically, whereas this principle prohibits the complete dominion of one human being by another,or the complete renunciation of control over one's self. The loss of all individual autonomy by the dominated person is the essential element.[27]

To summarize, each of the five rule systems operative in Western culture gives some measure of substantive content to the principle of the sanctity of life, but each from a different angle. The sanctity of life implies a spectrum of values ranging from the preservation of the species to the inviolability of

23 Richards, D.A.J., 'Constututional privacy, the right to die and the meaning of life: a moral analysis', *William and Mary Law Review*, 1981, 22, p. 340.

24 *Ibid.*, p. 341.

25 Callahan, *op. cit.* note 12, p. 333.

26 Shils, *op. cit.* note 14, p. 35.

27 *Ibid.*

human bodies, from man as a member of a collectivity to man as an individual, in the present and in the future. Each of the distinct rule systems overlaps another and together they form a whole. It is clear that the most difficult moral dilemmas are those which bring the different rule systems into apparent conflict with each other. One solution to such conflicts is to rank the different rule systems in some kind of hierarchical order. Ranking, however, is complicated and conditioned by changing historical circumstances. Callahan emphasizes the fact that the principle of the sanctity of life implies but does not entail these rules. What the principle does is to establish a strong bias in favour of firm rules protecting life (in all its respects).But the rules are not self-evident. They are not deductions from a single examination of the principle itself. In cases of conflict, there must be a certain degree of freedom to come to the most reasonable decision we can on the relative ordering of rules.[28] In other words, when the rules implied by the principle of the sanctity of life are in conflict with each other, there is more than one possible solution. The sanctity of life, for example, does not dictate that the fundamental right to life prevails in all circumstances over other rights implied by the principle, such as the right to bodily integrity or the right to self-determination.

The multiple meaning of the sanctity of life leads Callahan to observe, when discussing the abortion argument, that a major objection to a rigidly restrictive moral code on abortion is 'that it is prone to hold that an absolute prohibition of induced abortion is a logical entailment of an affirmation of the 'sanctity of life'. The logical route leading to this prohibition is that the 'sanctity of life' means and can only mean under all circumstances that bodily life is to be preserved, which in turn is taken to entail a prohibition of the taking of fetal life. No room is left, in this deductive chain, for a recognition of other corollaries of the principle. An analogous objection can be levelled at those abortion-on-request arguments which hold that a woman's right to self-determination entails the corresponding right to be the sole judge of whether she ought to bear a child once conceived. In this instance, one aspect only of the principle of the 'sanctity of life' is considered, to the exclusion of all others'.[29]

The strength of Callahan's argument is that he places the right to life and the right to self-determination in the same context, that of the 'sanctity of

28 Callahan, *op. cit.* note 12, p. 338.

29 *Ibid.*

life'. He also shows that one cannot infer an extreme position on abortion from the premise that life is sacred. This is not to say that the abortion issue is solved with his analysis.[30] If the fetus is regarded as a human being from the moment of conception, there are very few cases under Callahan's system of sanctity-of-life rules in which the obligation not to take a human being's life can be overridden. Only in the case of rape and of threat to the pregnant woman's health might abortion be justified. If the fetus is taken to be human being at a later stage of development, Callahan's theory is useful in a wider variety of circumstances. It leaves us nonetheless with the crucial question of when human life begins.

4. The Quality of Life

Can human value be defined merely by physical existence? It seems that humanity is not only determined by structure i.e. by the genetic code, but also by function i.e. by social interaction. Our definition of humanity must embrace both the structural and the functional values. To deny the importance of genetic structure in determining the 'human value' of the unborn would limit the criterion of humanity to social and technological functioning. On the other hand, to deny some potential for social functioning as an index of human value would involve *a priori* abstractions attaching the same human value to test-tube babies, genetic monsters, newborn babies and grown up persons.[31]

Both within and outside the abortion question, the societal value of promoting individual freedom and the overall quality of life has at times been deemed superior to the value of protecting all post-conception forms of life.[32] Certain serious problems would arise if the pre-viable fetus were to be treated in the same way as a child already born. Pregnant women would no longer have the liberty to smoke, drink alcohol, or take medication. Feticide would be treated like traditional murder. Such restrictions on parental and maternal autonomy are very much out of line with contemporary mores.[33] Hence, also outside the context of abortion, we have never treated the fetus

30 Brody, *op. cit.* note 5, p. 40.

31 Gerber, R.J., 'Abortion: parameters for decision', *Ethics*, 82, 1972, pp. 138-149.

32 Parness, J.A., 'Social commentary: values and legal personhood', *West Virginia Law Review*, 83, 1981, p. 494.

33 *Ibid.*, p. 500-501.

as a (full) human being deserving the same attention and protection as newborn babies.

Furthermore, today's society values the quality of life of each individual or group of individuals rather than the number of individuals living in the group. One of the arguments for liberalizing the use of contraceptives was that this would increase the welfare and happiness of the limited number of children to be born. The concern of modern society for the quality of life places emphasis on the social utility of every individual in asking what are the effects of denied abortions upon the development of the 'unwanted children', and what are the consequences for society? Phrased in utilitarian terms, the question is whether 'in the given circumstances in which we find ourselves, the damage likely to arise from general abortion on demand is likely to be greater or smaller than the damage involved when women have unwanted babies'.[34] Following this line of reasoning, abortion should be allowed 'if the total circumstances are such that the child born at a particular time and under particular circumstances will not receive a fair stake in life'.[35]

Richard Hare has developed a theory based on these premises. He appeals to the Christian and pre-Christian Golden Rule that we should do unto others as we wish them to do unto us, or, slightly changed, that 'we should do to others what we are glad was done to us'.[36] If we are glad that nobody terminated the pregnancy that resulted in our birth, then we are enjoined, *ceteris paribus*, to halt the termination of any pregnancy which will result in the birth of a person having a life like ours. Of course, we have to rely on relevant similarity, on those things about our life which make us glad that we were born. Therefore, according to this theory, the general rule for abortion is that abortion is prohibited if the fetus concerned will, if not aborted, turn into someone who will be glad to be alive.[37]

The advantage of these theories which value the quality of life is that they take account of the results or consequences of a pro- or anti-abortion policy for the children-to-be and for society. The risk of this approach is, first of all, that it prejudges for others (potential persons) what makes life worth-

34 Benn, S.I., 'Abortion, infanticide and respect for persons', in Feinberg, *op. cit.*, p. 103.

35 Gerber, *op. cit.* note 31, p. 153.

36 Hare, R., 'Abortion and the golden rule', *Philosophy and Public Affairs*, 1974/75, 4, p. 208-209.

37 *Ibid.*

while. How can we establish objective criteria for measuring the future quality of life of the child-to-be? Another argument against this way of reasoning is that we cannot know what human potential may achieve in the distant future. Society has always treated children as human beings of great value because of the untapped promise they hold for their social functioning in the future.[38] A third objection is that the fetus is without recourse and remedy whereas the mother has alternatives such as contraception and adoption. A fourth critical note on the quality-of-life arguments is that it is not always clear whose quality of life we are speaking about, that of the child to be born or that of the parents. It is interesting to note, for example, that many opponents of abortion who attack these quality-of-life arguments, and hence reject abortion on social grounds, implicitly adhere to quality-of-life principles when they allow for abortion on eugenic grounds. If there is a considerable risk that the pregnant woman will give birth to a deformed child, it is argued, the life of the deformed child is so much more miserable than the life of a normal child that an abortion is justified. One could add, in this case, that abortion is allowed because the birth of a deformed child would be too much of a burden for the parents. What this example shows is that there are often incoherences in the positions taken up by the pro- and anti-abortionists.

Undeniably, however, there has been universal acceptance of the 'social consequences' arguments[39], in that we have never treated the fetus in exactly the same way as a newborn baby. The question is: to what extent must we define the value of human life by its function? We accept the use of contraceptives in order to prevent 'unwanted children' being born. To what extent can we compare contraception to abortion? This brings us back to the question of when human life begins and to the 'sanctity-of-life' arguments, i.e. the two aspects of human life, structural and functional, are inseparable. 'A truly liberal law is one which seeks to enhance and preserve the most varied expression of life'.[40]

5. The Moral Status and the Legal Rights of the Unborn

There is a large number of possible opinions concerning the point at which the fetus becomes a human being. The following alternatives have been put

38 Gerber, *op. cit.* note 31, p. 149.

39 Callahan, *op. cit.* note 12, p. 392.

40 Gerber, *op. cit.* note 31, p. 150.

forward in the abortion debate as cut-off points at which the fetus can be considered as a human being.[41]

1. The Moment of Conception

The first argument for choosing this point is a genetic one. At the moment of conception, the biological characteristics of the fetus are determined by its genetic code. From that point onwards, it is a unique individual creature. As John Noonan, the leading advocate of this argument, expressed this view as follows:

> The positive argument for conception as the decisive moment of humanization is that at conception the new being receives the genetic code. It is this genetic information which determines his characteristics, which is the biological carrier of the possibilities of human wisdom, which makes him a self-evolving being. A being with a genetic code is a man.[42]

> Thereafter ... (conception) ... his subsequent development cannot be described as his becoming someone he now is not. It can only be described as a process of achieving, a process of becoming the one he already is. Genetics teaches that we were from the beginning what we essentially still are in every cell and in every human attribute and in every individual attribute.[43]

The second argument is one of 'potentiality'. Before conception, there is only a chance of less than 1 in 200 million that a spermatozoon will develop into a reasoning being. At the moment of conception there is a 80% chance that the zygote[44] will further develop into a baby.[45] 'The zygote is the first link in the spatiotemporal chain to identity we know as a human being'.[46]

The third argument is one of continuity. From the moment of conception the unborn goes through a continuous development. It acquires structures and new characteristics, but there is no one stage that is markedly different in

41 Brody, op. cit note 5, gives a very clear overview of the alternatives proposed in chapter 5, p. 80-85.

42 Noonan, J.T.,(ed), *The morality of abortion: legal and historical perspectives*, Harvard Un. Press, Cambridge Mass., 1970, p. 57.

43 Ramsey, P., in Noonan, *op. cit.* note 42, p. 66-67.

44 For a very short period after the moment of conception – appr. two weeks – the developing human life is called 'zygote'; up to three months after conception it is called 'embryo', and after three months 'fetus'. Usually, the term 'fetus' is meant to cover the whole gestational period.

45 Noonan, *op. cit.* note 42, p. 57.

46 Callahan, *op. cit.* note 12, p. 371.

quality from the previous or succeeding stages. Only the moment of conception introduces discontinuity. Therefore, only the moment of conception can be justified as being the moment at which the fetus becomes a human being.

2. The Moment of Implantation

By the sixth or seventh day after conception, the zygote begins the process of implantation into the wall of the uterus. By the eleventh day implantation is completed.[47] The argument for regarding implantation as decisive is one of probabilities. The probability that the *conceptus* will develop into a human being is higher than at conception because a considerable number of fertilized eggs is not implanted. The argument for implantation as a cut-off point has been used to justify some means of contraception which would otherwise be abortifacents.

3. Fetal Brain Activity

At about six weeks after conception, electroencephalographic waves are detectable and therefore the fetal brain must be functioning. The argument for regarding brain activity as a qualitative jump in fetal development is based on the anthropological philosophy which considers man as qualitatively distinct from the rest of nature because endowed with the capacity for 'symbolic activity'. Therefore man enjoys a particular *excellence humain*.[48] Because cerebral activity is a necessary condition for 'symbolic activity', we can assume the absence of symbolic activity until the moment that the embryo shows a complete and functioning brain.[49] As Joseph Fletcher has said:

> the neocortical function is the key to humanness, the essential trait, the human *sine qua non* ... To be truly *homo sapiens* we must be sapient, however minimally ... The brain is the singular focus of the embodiment of the mind, and in its absence man as a person is absent.[50]

Another reason for considering brain activity as a starting point for human life is that it is the mirror image of what happens at death. According to the 'brain death theory', for as long as there is not an irrevocable cessation of

47 Mori, M., 'Il diritto alla vita e il paradosso della posizione antiabortista', *Rivista Internazionale di Filosofia del Diritto*, 1979, p. 197.

48 *Ibid.*

49 *Ibid.*, p. 218.

50 Fletcher, J., 'Four indicators of humanhood: the enquiry matures', Hastings Center Report, 1974, p. 6. See also Blumenfeld, J.B., 'Abortion and the human brain', *Philosophical Studies*, 1977, p. 251-268.

brain function, a dying person continues to exist no matter what else has happened to him, only cessation of the cerebral function marks the end of life. If so, it seems that there is only one property, apart from those entailed by this one property, which is possessed by every human being, namely the possession of a functioning brain. Any other property (movement, heart function) is not essential because without it man has still not ceased to exist. Accordingly, it is held that when the fetus acquires this property it becomes a human being.[51]

Development of the brain in the human fetus is thought to recapitulate its changes during evolution. Although spontaneous electrical activity of the fetal brain can be detected from about the sixth week of gestation, such activity can also be recorded in the brains of many other animals. It is only in the 12th week of gestation that the human brain distinguishes itself from the brains of other animals. At that stage it attains its general structural features...[52] This argument supports the view that only in the 12th week after conception the fetus can be considered a human being.

4. Sentience

Sentience is the capacity for feeling or affect. In its most primitive form, it is the ability to experience sensations of pleasure and pain, the ability to enjoy and suffer. Sentience is more than consciousness. It is possible for beings to be conscious whilst lacking feelings. More rational beings are capable of finding either fulfillment or frustration in activities and circumstances to which less developed creatures are blind both cognitively and affectively. It is because of this broader and deeper sensibility that a higher being is capable of a richer, fuller and more varied existence.[53]

Biologically, sentience is marked by the emergence in the first vertebrates of the forebrain. As far as can be determined, even the simple capacity for pleasure and pain is not possessed by invertebrate animals. To accord more moral standing to higher animals than to lower ones seems to accord with the general feeling that the lower animals count for very little, higher animals like chimpanzees count for more, and human beings count for most of all.[54] Sentience seems therefore to be a distinctive feature of human beings.

51 This position is defended by Brody, *op. cit.* note 5, chapter 7, p. 100-114.

52 Blumenfeld, *op. cit.* note 50, p. 263-264.

53 Sumner, L.W., *Abortion and moral theory*, Princeton U.P., Princeton, New Jersey, 1981, p. 142-143.

54 *Ibid.*, p. 144.

Sentience as a cut-off point also allows for the full protection of the mentally abnormal. Even the grossly retarded or deranged will still be capable of some forms of enjoyment and suffering. There are some problems in determining at which stage of fetal development we can speak of a sentient being. There is no quantum leap into consciousness during fetal development. There is no sharp boundary between sentient and non-sentient beings. First trimester fetuses are clearly not yet sentient, third trimester fetuses possess some degree of sentience, however minimal, so that the threshold of sentience thus appears to fall in the second trimester.[55]

5. The Moment of Quickening

Sometime between the 13th and 16th week of pregnancy, the woman is likely to feel fetal movements, 'quickening' as the old phrase has it.[56] The argument for considering quickening as a decisive point in pregnancy is that fetal movement is the most obvious sign of quickening, and the ability to move is one of those characteristics that are essential to human beings. Secondly, only at the moment of quickening can the fetus be perceived by the mother and others by ordinary means.[57] When we discuss whether a fetus is a human being we do not only refer to necessary and sufficient conditions for being human. We also react by seeing the fetus at some stage as a human being. We imagine the fetus to be a human being if there is a complex set of possible interactions between ourselves and the fetus. Given these interactions between ourselves and the fetus, we see it as 'one of us', as a member of the human community.[58] The first of such interactions is when the pregnant woman feels the fetus moving inside her. There are thus two reasons, one biological and one functional, for regarding quickening as a relevant point.

55 *Ibid.*, p. 147-150.

56 Callahan, *op. cit.* note 12, p. 373. Originally, this is the Aristotelian notion of ensoulment.

57 Brody, *op. cit.* note 5, p. 83.

58 Zaitchik, A, 'Viability and the morality of abortion', *Philosophy and Public Affairs*, 10, 1981, p. 23.

6. The Moment of Viability

When we say that the fetus is viable we mean that it could be saved through artificial means given the 'current state of medical technology', i.e. the medical technology available in principle.[59] Viability is thus by its very nature a changing criterion. It might well be that x years from now a fetus will be viable at the 20th week of gestation, whereas today a fetus is considered viable at between the 24th and 28th week of pregnancy. There are various reasons for regarding the moment of viability as the decisive point at which a fetus becomes a human being.

One might argue that being capable of a separate and independent existence is essential to being human. Although the fetus has not yet reached a separate and independent existence at the moment of viability, it has the capacity for such an existence.[60] When a fetus has reached this stage, even though it is still in fact inside the mother, we can nonetheless easily imagine it already outside its mother's body doing well in an artificial incubator. It is only due to the fetus' 'bad luck', that it is still trapped in the body of a woman (who wants it destroyed, in case of abortion).[61]

What we said before about possible interactions between ourselves and the fetus at the moment of quickening applies *a fortiori* to the moment of viability. We can imagine the viable fetus as a human being, imagine handling it, feeding it, caring for it, talking to it, etc.[62]

Another argument in support of this view is that there is no essential difference between a viable fetus and a newborn infant, who is a human being. Therefore to make a morally relevant distinction between a viable fetus and a newborn infant would be unjustified.

Finally, viability is a changing criterion, but it is not morally arbitrary just because it is a shifting standard. It is certainly possible that medical technology may make it possible some day for the fetus to be capable of a separate and independent existence, so that we can interact with it at an ear-

59 *Ibid.*, p. 20. Medical technology 'in principle available', as opposed to 'actually available'. Whether a fetus is viable should not depend on the state of technology in a particular place, but on the state of technology in general; otherwise, a woman could have a pre-viable fetus in Calcutta and a viable fetus in a more advanced part of the world.

60 King, P.A., 'The juridical status of the fetus: a proposal for legal protection of the unborn', *Michigan Law Review*, 77, 1979, p. 1647-1687.

61 Zaitchik, *op. cit.* note 58, p. 21.

62 *Ibid.*, p. 26.

lier stage in its development. All sorts of things are logically possible, but we have no experience of the logical possibilities imagined. There is nothing we can do to realize these logical possibilities now. Historical contingencies shape the general framework of the possibilities that prompt our moral responses.[63] What prompts our moral response that the fetus is a human being at the moment of viability is that at that point it is capable of a separate and independent existence and that we can interact with it. If future medical technology can change the moment at which these two conditions are fulfilled, we will probably change our mind about the moment at which the fetus becomes a human being.

7. The Moment of Birth

Only at birth does the fetus acquire a separate and independent existence. It is no longer part of the mother. Although it has the capacity for a separate existence before that, it does not enter upon that independent existence until birth. Only after birth can the infant interact with others. Such interaction, not the mere possibility of it, is an essential characteristic of a human being.[64]

8. Discussing the Alternatives

The 'genetic school',[65] which proposes the moment of conception as the point at which the fetus becomes a human being, has quite a narrow view of 'potentiality' because it only considers the genetic potential of the fetus. An individual, however, is something more than his genetic potential. Who this being becomes will be determined not only by his genetic potential but also by his interaction with the environment, i.e. there is a distinction to be made between structure and function. Instead of trying to provide a broad definition of 'being human', this position takes only genetic individuality into consideration.[66]

Secondly, although it is true that one can easily show resemblances between consecutive stages of fetal development, it is equally easy to show differences between the various developmental stages.[67] What is, for example,

63 bid., p. 23-25.

64 Brody, *op. cit.* note 6, p. 84.

65 So called by Callahan.

66 Callahan, *op. cit.* note 12, p. 383.

67 Wertheimer, R., 'Understanding the abortion argument', *Philosophy and Public Affairs*, 1971, p. 85.

the resemblance between a zygote of two weeks and a viable fetus? This makes the 'continuity' argument seem rather weak.

Finally, although this position is clearly the 'safest' policy in the sense of protecting human life, it lacks the capacity to do justice to the nuances in the conflict of values found in abortion cases. It tends to lump all abortion cases together and to deal with them as a uniform category, thus losing sensitivity to the individual nature of each case. Why is a distinction made between a pregnancy resulting from rape and a pregnancy resulting from voluntary intercourse? Would it make any difference in the abortion debate if a woman were pregnant for nine years instead of nine months?[68] One cannot treat all cases in which abortions are performed as being morally on a par. A strict application of the genetic school position would not even allow abortion in all cases of a threat to the mother's life, because the self-defense argument would only be valid in exceptional cases.[69] The Catholic doctrine of the 'double effect' rules out abortion to save the mother's life, as we have seen, except in very particular circumstances.[70]

The argument for the moment of implantation as a decisive point in the development of the fetus does not seem persuasive. There is no qualitative difference whatsoever between the zygote at the moment of conception and a zygote at the moment of implantation. There is merely a greater chance that the developing organism will become a human being. But this argument can be applied to any point during pregnancy in relation to previous stages.

If we regard fetal brain activity, sentience, quickening, viability or birth, as decisive criteria, we move beyond sheer potentiality and require some actualization, in that different values are assigned to the different stages of human life according to the degree to which genetic potentiality is actually realized. Callahan calls those who defend this position the 'developmental school'. They maintain that while conception does establish the genetic basis for an individual human being, some degree of development is required

68 Thomson, J.J., 'A defense of abortion', *Philosophy and Public Affairs*, 1971, p. 49,57.

69 We will deal with this point later on in this chapter under B.3.

70 According to the Catholic principle of the 'double effect', abortion is only permitted if there is a threat to the mother's life and the only way to save her is a licit medical intervention which 'indirectly' kills the fetus. Two cases are accepted: a cancerous uterus and an ectopic pregnancy. The intention, in these two cases, is to remove the pathological condition (the 'direct' effect), which has as bad effect ('indirect' effect) the killing of the fetus. Any intervention which 'directly' kills the fetus is impermissible under Catholic doctrine. See Noonan, *op. cit.* note 42, p. 48-50.

before one can speak of the life in question as being that of an individual human being.[71] Within this 'school' there are differences of opinion concerning just how much development is required before the decisive point when the fetus can be called a human being.

The arguments for taking the start of fetal brain activity as a cut-off point seem quite persuasive in the sense that consciousness is central to the concept of personhood and the brain is the center of a person's individuality. This view is widely defended.[72] Fetal brain activity, however, represents only 'potential consciousness', a potential which is determined at the moment of conception by the genetic code. The brain waves do not in themselves actualize the potentiality of personhood, they signify only a more developed stage in potentiality. Reasoning along these lines, no one cut-off point (except viability and birth) can be said to be more than just 'a more developed stage of potentiality'.[73]

Secondly, the question is not whether the fetus belongs to the species *homo sapiens* or not. We all know that it will develop into a human being and we do not need to wait for fetal brain activity to prove that.

To take sentience as a decisive point is to propose an achieved ability and as such has a stronger claim than fetal brain activity. The weak point of this argument, however, is the hierarchy it establishes in the rights assigned to animals according to their level of development. This certainly does not correspond to reality. Examination of the rights of animals shows us in fact how arbitrary we are in according such rights. Although a chimpanzee is higher in the animal hierarchy than a dog, in many cases we assign a higher value to our house pet than to a chimpanzee out in the jungle. Much depends on our sentimental links with animals rather than on their biological ranking. It seems to be almost impossible to develop a moral category for according the right to life based on these scientific, i.e. biological considerations. However developed a chimpanzee may be, it will never have a higher moral status than a mentally handicapped person, although the chimpanzee may have a higher level of sentience. We have accorded the right to life to human beings because they are human beings, because they belong to our

71 Callahan, *op. cit.* note 12, p. 384.

72 See Fletcher, *op. cit.* note 50; Mori, *op. cit.* note 47; Pluhar, W.S., 'Abortion and simple consciousness', *The Journal of Philosophy*, p. 159-172; Warren, *op. cit.* note 6; Tooley, *op. cit.* note 7.

73 Callahan, *op. cit.* note 12, p. 389.

species. The biological or scientific explanations for the superiority of the human species seem to be mere justifications.

The reasons for granting the right to life to a sentient fetus seem, therefore, to be more emotionally than rationally founded. The idea that the fetus can feel may induce us to regard it as a 'living' being and therefore accord it the right to life. One of the emotive strengths of the anti-abortion movements is to refer to the 'feelings' of the fetus, to evoke the image of the 'crying' fetus.

The arguments for regarding the moment of quickening as the crucial moment are rather arbitrary. Because fetal movements make us aware of the existence of the fetus, we consider it as 'one of us', and therefore grant it the right to life. The basic weakness of this position, which can be considered part of the 'social consequences school'.[74] is that there is no underlying objective or scientific criterion here at all. It is based purely on our own and the outside world's perceptions.

Viability as a criterion for having a right to life is qualitatively different from the previously discussed criteria. On the premise that a newborn baby is a human being having a right to life, there is no reason why a viable fetus should be treated differently. The viable fetus is ready to have an independent existence, it has the actual possibility to live independently from the mother. The only difference between a viable fetus and a newborn infant is that the fetus lives inside instead of outside the mother's womb. Only at this point is the termination of pregnancy possible without killing the fetus.

The question which can be raised, however, is that if there is no difference between a viable fetus and a newborn baby, is there a difference between a viable fetus of, let us say, 28 weeks, and a pre-viable fetus of 24 weeks? After all, the fetal development is a continuous one. What we can establish with regard to the moment of viability is that by that stage the fetus should definitely be regarded as a human being, but that it may possibly be considered a human being even at an earlier stage. There is no reason for assuming that a fetus is not a human being, having the right to life, before the moment of viability. In conclusion, none of the proposed cut-off points provides a satisfactory solution. It seems to be impossible to decide on the moral and legal status of the unborn between the lower limit of conception and the upper limit of viability.

74 *Ibid.*, p. 392.

> When human beings are looked at in all their diversity, as individuals or as members of a species, it becomes extraordinarily difficult to single out one human attribute that can be counted as normative and decisive. Human beings are rational and irrational, individual and communal, biological and cultural. Any single definition, stressing one attribute, invariably fails to catch the full measure of man.[75]

There appears to be no rationally defensible definition of humanity which demarcates between human beings and potential human beings. An embryo of two weeks and a fetus of six months are both human life, both potential persons. There can be sentimental, emotional or practical reasons for calling the one more human than the other, but there is no rational reason for doing so.

Some have tried to solve the problem of cut-off points by the idea of the gradual development of personhood, of the rights of the fetus keeping pace with its biological development. As Jonathan Glover has pointed out, 'it seems more defensible to abandon the view that there is an abrupt transition to the status of a person and to replace it by the view that being a person is a matter of degree. A one-year old child is much more of a person than a newborn baby or a fetus just before birth, but each of these is much more of a person than the embryo'.[76]

It has been argued that fetuses are ... 'a class of persons ... who nevertheless need not be accorded equal protection of the laws, the extent of whose rights each state may determine legislatively (within limits)',[77] or that 'some legal prohibitions on abortion might be justified in the name of the fetus qua human fetus, just as we accord some legal protection to animals, not for the sake of the owners but for the benefit of the animals themselves'.[78]

What seems so attractive about this idea of gradually developing personhood is that it permits nuanced justice to be done in the conflict of values in particular cases. It provides flexibility, and forms the basis for a moderate position in the abortion debate. Instead of giving absolute solutions, it stresses the relative rightness or wrongness of certain solutions.

The problem remains, however, of how much actualization of potential personhood should prohibit abortion in specific cases. There has to be a gen-

75 *Ibid.*, p. 389.

76 Glover, J., Causing death and saving lives, Penguin books, 1977, p. 127.

77 Newton, L.H., 'Abortion in law – essay on absurdity', *Ethics*, 1977, p. 249.

78 Wertheimer, *op. cit.* note 67, p. 89; see also Pluhar, *op. cit.* note 72.

eral rule laying down the conditions under which abortion is not permissible. This implies that a decision has to be taken as to what is essential to being human. The central question of what is a relevant demarcation point presents itself again. Furthermore, the very idea that a fundamental right such as the right to life increases and decreases with, and depends in every specific case on variables such as the stage of development and the weight of the pregnant woman's counterclaims seems to make the substance of a right to life rather dubious.

In this light, it might be preferable to shift the emphasis from the rights of the fetus to the duties of moral agents like the mother.[79] We can also do wrong without violating a right. As H.L.A. Hart has pointed out, if X promises Y to look after Y's mother, then it is surely wrong for X not to look after Y's mother, in which case X has wronged both Y and Y's mother, i.e. he has broken a promise to Y and he has neglected Y's mother. Only one of these wrongs, however, involves the violation of a right, the other does not.[80] In terms of the abortion issue, our duties as moral agents (deriving from our special role as friends, parents, doctors etc.) must have an impact on the rightness and wrongness of abortion. The question of the 'humanity of the fetus' varies with our duties as moral agents. Our duties towards humans may be stronger than our duties to non-humans. Similarly, our duties towards non-innocents are probably not as great as towards the innocent fetus.[81]

In this light the issues in the abortion question are less antagonistic. It is no longer a question of the conflict between the rights claimed by the mother and the rights claimed by the fetus, but a question of the moral duties of the mother towards the developing child in her womb. Motherhood creates responsibilities for the pregnant woman because the unborn is totally dependent upon her. How far these moral duties go will depend on the circumstances. In certain, very burdensome situations she is allowed not to bring her pregnancy to term. This approach allows for a flexible and moderate position on abortion without all the problems of defining the rights of

79 Weiss, R., *op. cit.* note 3, p. 72-75, Narveson, *op. cit.* note 8, and McLachlan, *op. cit.* note 8, come to the same conclusion.

80 Hart, H.L.A., 'Are there any natural rights', in Quinton, A.,(ed) *Political philosophy, Oxford readings in philosophy*, Oxford, 1973 (reprint from the *Philosophical Review*, 1955), p. 57. Judith Jarvis Thomson uses similar arguments, *op. cit.* note 68, p. 59-62.

81 Weiss, *op. cit.* note 3, p. 72-75.

the fetus at each point in its development. It does not answer, however, the question of when an unborn human life can claim the fundamental right to life, a question which has to be faced by legislators and constitutional courts.

What emerges from this discussion is that there is no rationally defensible answer to the question of when the fetus becomes a human being and can therefore claim the right to life. Some solutions seem to have a better scientific basis, others seem to do more nuanced justice to the conflicting interests involved in the abortion decision, but to none can be ascribed an absolute value. The dilemma presented by the structural and functional aspects of humanity seems impossible to solve. The decision to allow abortion in certain circumstances is ultimately based on a compromise between different moral values, not on the right solution.

Section B. The Pregnant Woman's Rights

Introduction

Until now we have discussed the abortion decision from the point of view of the fetus. We shall now consider the possible claims of the pregnant woman with regard to the abortion decision. We have seen above that the 'sanctity of individuality' or the 'integrity of personal choice' is part of the principle of the sanctity of life. This fundamental value is invoked by the abortion movement in order to claim the woman's right to decide on abortion.

A second fundamental principle which has been invoked is the woman's right to freedom of religion. Abortion restrictions, it is contended, are based on religious thought and are therefore in violation of the principles of the secular state. The pregnant woman can also demand her right to have an abortion in special and particularly burdensome cases. In this case, the premise that abortion is generally wrong is accepted. When discussing the first two demands put forward by the pregnant woman, we have to bear in mind that these claims are based on the premise that the fetus is not a human being from the moment of conception. If the fetus were considered a human being from the moment of conception, abortion would be the killing of an innocent human being, which is permitted only in the very special circumstances of 'killing in self-defense'. We will discuss this aspect in par.3.

1. The Woman's Right to Self-Determination

Various fundamental rights have been invoked as the basis of the woman's right to abortion. It has been claimed that the right to abortion is part of the woman's right to privacy.[82]

The word 'privacy' has a very broad meaning and is used in quite different circumstances. The right to privacy has been called the 'right to selective disclosure'[83], i.e. the right to determine for oneself when, how, and to what extent information about oneself is communicated to others. This right to 'selective disclosure', or 'power of exclusion'[84], can refer to the physical concept of privacy, i.e. living and working out of sight or hearing of other people. This is privacy in the sense of seclusion (the right to be left alone) and can be invoked, for example, against wiretapping, bugging etc.[85] The right to privacy in the sense of 'selective disclosure' is also used in the sense of 'secrecy', i.e. the right to protection of private information about oneself. Privacy in this sense can be invoked, for example, against databanks.[86] Another meaning of privacy refers to the concept of intimacy, that is the right to take decisions for oneself within the sphere of personal intimacy. The right to free access to contraceptives or the right to marry the person of one's choice are such privacy rights.

What seems to be common to these different senses of privacy is the concept of 'autonomy' i.e. a sphere of decisions which each individual must be able to take without outside interference.[87] It is important to emphasize the

82 As in the U.S. Supreme Court decision of 1973, *Roe* v. *Wade*, 35 L Ed 2d.

83 Beardsley, E., 'Privacy: autonomy and selective disclosure', in Pennock, J.R., and Chapman, J.W. (eds), *Privacy*, Atherton Press, New York, 1971, p. 56-70, quoted in (note Baker, T.), 'Roe and Paris: does privacy have a principle?', *Stanford Law Review*, 26, 1973/74, p. 463; see also Wasserstrom, R.A., 'Privacy', in Wasserstrom (ed), *Today's moral problems*, MacMillan, New York, 1979, p. 393: he defines the right to privacy as the right to control over information about oneself, related to private situations and private information.

84 Gross, H., *Privacy – its legal protection*, Oceana, New York, 1976, p. xiii.

85 Posner, R.A., 'The uncertain protection of privacy by the Supreme Court', *Supreme Court Review*, 1979, p. 173-217. See also Rigaux, F., 'L'élaboration d'un 'right of privacy' par la jurisprudence américaine', *Revue Internationale de Droit Comparé*, 32, 1980, p. 708.

86 Posner, *op. cit.* note 85.

87 Rigaux, *op. cit.* note 85.

spiritual nature of privacy as opposed to the material nature of property.[88] The right to seclusion or secrecy is not a right against physical appropriation or theft. It is not the principle of private property, but that of inviolate personality. The secrecy of mail, for example, is not directed against its appropriation but against its publication. Ultimately, privacy is part of the more general right to immunity of the person, the right to one's personality. It is based on the supremacy of the individual conscience, the high value of the individual's interiority and autonomy.[89]

Privacy can be experienced only within a certain area from which all others can be excluded and only those of one's own choice admitted. The existence of a public space and the existence of a private space are, therefore,each necessary to the other.[90] Right-to-privacy cases typically arise in this grey area between the public and the private. The right to privacy is claimed when certain areas of conduct are no longer a proper object of public concern, for example when there is a strong conventional wisdom that certain conduct is morally wrong and where the justice of that wisdom is under fundamental attack. The reason why 'free access to contraceptives' is nowadays considered to be part of the right to privacy is that rigid moral rules prohibiting forms of non-procreational sex are no longer perceived as justified by moral considerations. The view that sexual experience is intrinsically degrading has ceased to exist. The idea that sexual needs are largely independent of the reproductive cycle has been established and accepted.[91]

The right to privacy in the sense of the right to contraceptive freedom can also be considered as part of the fundamental freedom to intimate association.[92] Intimate association means a close and familiar personal relationship with another that is in some significant way comparable to marriage or family relationship. The values that 'intimate association' embodies are society, caring and commitment, intimacy and self-identification.[93] The right to

88 Cranston, M., 'Is there a right to privacy', unpublished paper presented at the European University Institute, 1980, p. 4.

89 *Ibid.*

90 *Ibid.*

91 Richards, D.A.J., 'Sexual autonomy and the constitutional right to privacy: a case study in human rights and the unwritten constitution', *Hastings Law Journal*, 30, 1979, p. 980.

92 Karst, K.L., 'The freedom of intimate association', *Yale Law Journal*, 1980, 89, p. 624-692.

93 *Ibid.*, p. 629-636.

sexual intimacy is part of the freedom of intimate association. The decision to have a child involves, in particular, the values of caring and commitment, intimacy and self-identification. As the state is, in principle,not allowed to interfere with the decision to procreate, this being part of the freedom of intimate association, in the same way state interference with the choice not to procreate requires justification by reference to state interests of the highest order. Given today's contraceptive facilities, one chooses to be a parent, much as one chooses to marry. The right to contraceptive freedom, which is by now well established, defends these values of non-association. In particular it protects women against the enforced intimate society of unwanted children, against unchosen commitment, and against compelled identification with the social role of parent. Coerced intimate association in the sense of forced childbearing or parenthood is no less serious an invasion of the sense of self than is forced marriage or forced sexual intimacy.[94]

The right to contraceptive freedom can thus be ranked under the right to privacy in the sense of the right to individual autonomy,[95] the freedom of intimate association,[96] or the right to reproductive autonomy.[97] Could the woman's right to abortion be defined in the same way?

The reason why the right to contraceptive freedom has been discussed here is that the basic postulates for granting such freedom are the same as those for granting the right to abortion. The trend throughout the industrialized west has been towards a re-evaluation of women's place in society.[98] One of the basic conditions for guaranteeing equal chances for women in society is granting them the right to reproductive freedom. To forbid access to contraceptives nowadays would create a situation in which 'the people who get children are not the ones who want them most, but the ones who can least

94 *Ibid.*, p. 636-640.

95 Cranston, *op. cit.* note 88, Gross, H., 'Privacy and autonomy', in Pennock and Chapman, *op. cit.* note 83, p. 169-181; Gross signals the confusion being made (as in the U.S. Supreme Court decision Griswold v. Connecticut, 381 US 14 L Ed 2d 510) in the use of the word 'autonomy' as a synonym of 'privacy', ...'while an offense to privacy is an offense to autonomy, not every curtailment of autonomy is a compromise of privacy' (p. 181).

96 Karst, *op. cit.* note 92, p. 626.

97 Tribe, L.H., *American constitutional law*, Foundation Press, Mineola NY, 1978, p. 922.

98 Karst, *op. cit.* note 92, p. 626.

do without sex'.[99] In other words, by accepting contraceptive freedom, we have accepted the idea that sexual life and procreation are two distinct things. Reproductive freedom is only possible with effective methods of birth control. Abortion, in this view, is complementary to the other, not totally effective, methods of birth control. When we establish the principles which rule the abortion decision we have to make sure that they are consistent with the principles which rule other decisions in the same sphere, such as the use of contraceptives. It is important to point out, for example, that some of the anti-abortion arguments apply equally against the use of contraceptives. The argument that every life is a valuable life and that abortion will only increase the shortage of children available for adoption applies equally to 'failing to conceive'.[100] Hence, if the premise for contraceptive freedom has been the avoidance of the birth of unwanted children, we can see that this premise applies equally to abortion freedom.

This is not to say that there are no valid reasons for accepting contraceptive freedom and for rejecting abortion. What separates the two is, obviously, the question of the moral and legal status of the fetus. For those who accept that the fetus is a human being from the moment of conception, the right to reproductive freedom does not include the right to abortion. To take the 'right to reproductive freedom' or the 'freedom of intimate association' as the basis of the right to abortion would therefore be too broad. For the reasons mentioned above 'the right to privacy' also has too broad a meaning and insufficiently expresses the essence of the right to abortion. Another difference between contraceptive freedom and abortion freedom is that the first applies to couples or partners in general whereas the latter is more strictly linked to the pregnant woman. One of the basic claims of the abortion movement is that pregnant women should have the sole right of decision on abortion, without any outside intervention.[101] In order to express clearly what is essential about the right to abortion, and at the same time to distinguish between abortion freedom and contraceptive freedom, it is preferable to regard the 'right to self-determination' as the fundamental value underlying the right to abortion. This right implies that a person ought to be allowed to make for herself or himself those choices which significantly affect hers or

99 Radcliffe Richards, J., *The sceptical feminist*, Routledge & K Paul, London, 1980, p. 210.

100 *Ibid.*, p. 214.

101 Jagger, A., 'Abortion and a woman's right to decide', *Philosophical Forum*, 1973, p.36.

his personal fate.[102] This is basically the same as the above mentioned right to 'individual autonomy', which is part of the broader right to privacy. We have chosen the term 'self-determination' because it emphasizes the fact that a pregnant woman wants to decide 'on her own'. Furthermore, the right to self-determination is the most commonly used in support of a woman's right to abortion.

Countries who have adopted a time-phase rule have implicitly recognized the woman's right to self-determination, because up to the time limit set by the law the decision to have an abortion is left to the pregnant woman.

2. The Woman's Right to Freedom of Religion

Pro-abortionists have claimed that the state has no right to impose a certain religious belief on women who do not share that belief. The argument that abortion is the unjust killing of human life is founded on a specific religious belief of the Catholic and part of the Protestant Church. The decision to terminate a pregnancy is a matter of private conscience, protected by the free exercise of religion and outside the scope of government control and authority. As long as the question of when life begins is a matter of religious controversy and no choice can be rationalized on a purely secular premise it is claimed that by outlawing abortion people would be establishing one religious view, and thus inhibiting the free exercise of religion of others.[103]

The question is what does 'purely secular premise' mean? Is it possible to make a strict separation between moral and legal rules based on a secular premise and those based on a religious premise? Are all rules based on a Christian premise a 'violation of the freedom of religion'?

When we discussed the principle of the 'sanctity of life', we said that the rules implied by this principle are universally accepted, independently of religious beliefs. Both the right to life and the right to self-determination are part of the 'sanctity of life'. Secondly, the question of when the unborn can be considered as human beings is a difficult one, also from a secular point of view. Many of the origins of our beliefs with respect to the status of the unborn might derive from Christian principles, as do many of our moral principles. That does not mean, however, that they express only one religious belief. As we have seen, the controversy over the moral and legal sta-

102 Callahan, *op. cit* note 12, p. 331.

103 This is the opinion of the U.S. Commission on Civil Rights, Constitutional aspects of the right to limit childbearing, Washington, 1975, p. 31.

tus of the unborn is not (only) one between religious and non-religious principles, but between different sets of moral principles. Whatever the outcome of the balancing of the right to life against the right to self-determination, it would be just as objectionable – under the the 'sanctity of life' principle – to grant the fetus an absolute right to life as it would be to recognize the woman's absolute right to self-determination.

3. The Woman's Right to Limit Childbearing

The passive side of the woman's right to self-determination is her 'right to limit childbearing'.[104] It is a passive right because it sets limits to the general prohibition of abortion on the grounds that it is the moral duty of the pregnant woman to carry her pregnancy to term, because abortion is the killing of a human being. It is the right not to be forced to bear a child in circumstances which constitute a burden the pregnant woman cannot be expected to bear. The 'indications' solution[105]. is the statutory form of this right.

The right to limit childbearing could find a basis in the concept of 'killing in self-defence'. If the fetus has the right to life, then abortion can be justified only when either the fetus is not innocent or the killing is not direct. The latter justification for abortion rests on the Catholic doctrine of 'double effect' and this applies to a very few situations in which the pregnant woman is afflicted by a life-threatening disease.[106] We shall now consider the question of the innocence of the fetus.

If one contrasts innocence with guilt, emphasizing the *mens rea* of an act, and thus speaking of moral guilt, then it is certainly always wrong to kill a fetus, because a fetus can certainly not be considered 'guilty'. If one uses 'innocence' in a technical sense, however, the position of the unborn is different, in that a being is technically innocent if it is not at present threatening the life of some other being. Hence, being technically innocent is not the opposite of being guilty but of 'being a threat'. Beings incapable of moral agency may still be a threat. For example, if my life is being threatened by a gun wielding agent incapable of *mens rea* (a madman, or a child,

104 Term used by the U.S. Commission on Civil Rights, *op. cit.* note 103.

105 Under an indications solution, a woman is not allowed to have an abortion except in very special, well-defined circumstances, e.g. a medical, eugenic or ethical indication.

106 We have seen in Section A that this applies only to very rare circumstances, negligible in statistical terms. See also footnote 70.

or sleepwalker) my right of self-defence permits me to kill the attacker if that is the only means of protecting myself. Similarly abortion in self-defence may be allowable. It is clearly a case of self-defence when the pregnant woman will die if she continues her pregnancy, and if the pregnancy is due to rape. As we move further away from these clear-cut cases, the right to abort in self-defence is weakened. As the woman becomes more responsible for her pregnancy, as the threat to life becomes more remote, as the value threatened alters from life to some lesser good, etc., abortion in self-defence will be less justified. In situations other than abortion, the right to kill in self-defence has been extended to include some situations in which the defender has placed herself at risk, in which the threat to life is merely probable, or in which not life but liberty or bodily integrity were at stake. Whether abortion in self-defence is justified has to be decided on a case-by-case basis.[107]

A second reason for supporting a moderate abortion policy (indications solution) lies in the special relationship between mother and fetus. Even assuming that both parties (pregnant woman and the fetus) have full rights, an abortion might be justified because of this special relationship. A common feature of all pregnancies is that the relation of fetus to mother is parasitic. The fetus is dependent for life support on being physically connected to the body of the mother and the fetus makes no reciprocal contribution to the physical well-being of the mother.[108] Depending on the circumstances, the relationship can be burdensome to the mother. It can be inconvenient, unpleasant and even life-threatening. The relationship may be involuntary,if it was not consented to by the mother.[109]

If the relationship between mother and fetus displays these features, i.e. it is besides being parasitic burdensome and involuntary, one could contend that the mother has no moral duty to continue providing life support for the parasite despite the fact that the parasite has a right to life. In this view, the content of the right to life is defined by the duties it imposes on others, in this case, the mother. The right to life could be interpreted as the right to be given the necessities of life. This right is not unqualified, however, for

107 Sumner, *op. cit.* note 53, p. 114

108 Intending that the pregnancy is not desired. In the case that the mother wants to give birth, pregnancy might have a positive effect on the well-being of the mother. But in that case this discussion is not relevant as there is not the intention to have an abortion.

109 *Ibid.*, p. 65; Thomson, *op. cit.* note 68, p. 65.

others may sometimes have no duty to provide such necessities. As Judith Thomson has pointed out,

> having a right to life does not guarantee having either a right to be given the use of, or a right to be allowed continued use of, another person's body – even if one needs it for life itself.[110]

What this argument comes down to is that the right to life does not include the right to life support provided by someone else's body, if this relationship is burdensome and involuntary. If a pregnant woman wants an abortion in these circumstances it could be justified. A clear example would be 'a sick and desperately frightened fourteen-year-old schoolgirl, pregnant due to rape'.[111] Our assessment of a particular case will depend, firstly, on how the pregnancy came about (the extent to which it was agreed to or invited) and, secondly, on the burden pregnancy imposes on the woman (the extent of the threat to her life, liberty and well-being). Cases in which abortion could be allowed following this way of reasoning would be a pregnancy due to rape and a pregnancy which poses a substantial threat to the pregnant woman's life.[112] The two reasons discussed here for allowing abortion in some circumstances – the concept of killing in self-defence and the special relationship between mother and fetus – would, however, in practice apply in very few cases. The percentage of abortion requests because of a pregnancy due to rape or because of a pregnancy which is life-threatening, is very small.[113]

In practice, the following rights have been derived from the right to limit childbearing, within the legal framework of an indications solution.

a. The right to physical and mental well-being (medical indication).
One cannot possibly expect a pregnant woman to suffer a serious threat to her physical and mental health. This argument is a corollary of the above-mentioned right to integrity of personal bodily individuality, i.e. rules should not involuntarily threaten the integrity of the body.[114]

110 Thomson, *op. cit.* note 68, p. 56. Quoted also in Sumner, *op. cit.* note 53, p. 66.

111 Sumner, *op. cit.* note 53, p. 69. Thomson, *op. cit.* note 68, p. 65.

112 *Ibid.*

113 See par. 4 for a further discussion on this point.

114 See also the arguments on the moral duty of the mother, under Section A (supra) in this chapter.

b. The right not to bear a child which is the product of rape or incest (ethical indication).
The argument here is that a pregnant woman cannot be expected to give birth to a child which has been forced upon her. The pregnant woman has, in general, a special responsibility deriving from the fact that she is the mother of the fetus, which is dependent upon her. She can only be held responsible, however, if her pregnancy has resulted from a voluntary act.[115] In case of rape or incest, she cannot be held responsible for the resultant pregnancy, and therefore abortion is permitted. Another reason for allowing abortion in this case is that abortion would rid the pregnant woman's body of the effect of an earlier violation of her bodily integrity.

c. The right to avoid the birth of a deformed child (eugenic indication).
One argument for allowing abortion is a high probability that the pregnant woman will give birth to a deformed child who would be unlikely to have a worth-while life, or be glad to be alive.[116] Another argument for allowing abortion in such a case is that we cannot expect the woman and her family to bear the burden of the care and education of a deformed child, which would be so much more difficult than the upbringing of a normal child.

d. The woman's right to her well-being and to that of her family in terms of health and quality of life (social indication).
One cannot expect a woman to give birth to an additional child if the socio-economic conditions in which she lives do not permit her to give the child a reasonable life and future. This argument applies especially to poor women who can only overcome the situation in which they live if they can effectively limit the size of their family. The right to abortion on social grounds is subject to much criticism because the meaning of 'social indication' can be easily stretched to encompass all kinds of less urgent reasons for obtaining an abortion. It is clear that in less developed areas and countries social circumstances can be a valid reason for obtaining abortion within the context of the 'sanctity of life'. The question is what would be valid social reasons in a modern welfare state society.

115 Thomson, *op. cit.* note 68, p. 64-65.

116 See *supra* under A.

4. Discussing the Pregnant Woman's Claims

It is important to be coherent in the set of values we proclaim. If we want to be clear about what are the values underlying the abortion argument, we must come up with a genuine set of consistent principles. That is to say, if the principles we proclaim for or against abortion freedom are contradictory, the pro or contra abortion arguments themselves should be questioned. At any point where principles are inconsistent, there is no control over what is permissible.[117]

When we discuss the pregnant woman's claims we start from certain premises regarding the moral status of the fetus. The woman's right to self-determination is claimed by the abortion movement on the assumption that the fetus is not a human being, at least not until a certain stage of gestation. This claim as such does not, therefore, pose problems of consistency in that the interest of the fetus is simply considered to be non-existent. Hence no balancing of the interests of the pregnant woman and of the fetus is needed.

The woman's claim to limit childbearing in certain very burdensome circumstances, on the other hand, does pose problems of consistency, precisely because this claim is based on the premise that the fetus has the right to life and that therefore abortion is generally wrong. A balancing of two interests is needed, the fetus' claim to life against the woman's claim to self-defence or to bodily integrity. The problem is that the woman's justifications for having an abortion (self-defence, special relationship to the fetus), do not cover all the indications generally covered by an indications solution. The principle of killing in self-defence clearly justifies an abortion if there is a serious threat to the life of the pregnant woman (medical indication), and the principle of bodily integrity (special mother-fetus relationship), could justify an abortion in the case of rape. But even if we stretch the principle of self-defence beyond its conventional limits, it is difficult to see how it could cover an abortion if there is the risk of a deformed child being born. In this case it is clear that there is no threat to the pregnant woman. The only threat is that the child will have an unhappy life. The social indication takes us even further away from the principle of self-defence. What seems to have happened is that in these cases we have abandoned the idea that the fetus is a human being, and this is where the inconsistencies enter into the debate.

Among these inconsistencies in the commonly held views on abortion is, for example, the argument that abortion is generally wrong because it is the

[117] Radcliffe Richards, *op. cit.* note 99, p. 218.

killing of innocent human life; but yet, exceptionally, abortions are allowed on medical, ethical and eugenic grounds. It is claimed that these exceptions do not violate the basic premise that the unborn has the right to life from the moment of conception. When analyzed, however, the motives for allowing abortion in these cases, but for not allowing abortion in general, show us that the general prohibition of abortion may well be based on the idea of punishment rather than on that of the fundamental right to life of the unborn.

An example of this type of exception is abortion in the case of rape, in which the status of the fetus is no different from that of the fetus of a pregnant woman not subjected to rape. Abortion is permitted, as we have seen before, because the raped mother cannot be held responsible for her unwelcome position, whereas the non-violated mother can. The only thing which the woman who has conceived accidentally has done which differentiates her from the raped woman, is that she has indulged willingly in sex without being willing to bear a child. It might therefore be argued that behind the argument for not allowing abortion in general, but allowing it in the case of rape seems to be the wish to punish women who could have prevented conception, for having intercourse. If not, why is the raped woman, but not others, allowed to sacrifice the unborn child's life? The distinction made in the case of abortion due to rape is only explicable if the child is not considered a human being having a right to life but regarded as the instrument of punishment for the sexual activity of the mother. The logical conclusion seems to be that anyone who regards rape as a sufficient condition for abortion on request by the mother should be willing to allow abortion in all cases. Conversely, anyone who is not willing to allow abortion on demand should not regard rape as a sufficient condition for allowing abortion.[118]

One of the reasons for allowing abortion in the case of a deformed child is, generally, to prevent the suffering of the mother and other members of the family. The position seems also to be based on the idea that there is an intrinsic difference between deformed and undeformed children. The mentally abnormal child does not seem to count as fully human and therefore has to be spared a life of suffering. But why do the same considerations not apply to a mentally abnormal infant? 'It seems rather hard that you should be eligible to be spared a life of misery if you are lucky enough to be discovered in time, but not if you have the misfortune to have your disabilities unde-

[118] *Ibid.*, p. 222-226.

tected until birth'.[119] If these principles permit abortion, they should also permit infanticide. Here again, the justification for allowing abortion in this case seems to be determined by social attitudes towards mothers rather than by the desire to protect all unborn life. A woman who wants a child, but by misfortune is carrying one of the wrong sort which will bring her unhappiness by no fault of her own, is to be pitied and allowed to have an abortion. The real purpose behind this practice seems to be to protect 'innocent' women, while not providing a general escape route for the 'guilty'.[120]

What these examples show is that there are inconsistencies in the arguments of those who adhere to the sanctity of unborn life from the moment of conception and at the same time accept abortion on ethical and eugenic grounds. Consciously or unconsciously, some of the motives for prohibiting abortion seem to have something to do with a condemnation of non-procreational sexual love, with an underlying vindictive attitude towards the sexual freedom of women. Here contraceptive freedom and abortion freedom are closely linked in that the reasons for not allowing abortion in all circumstances are related to the reasons for not allowing contraceptive freedom,. i.e. for not accepting sexual freedom independent of procreation.

In short, once the premise is accepted that the unborn has the right to life from the moment of conception, very few cases of abortion will be justified. As there seems to be a trend to allow abortion in some circumstances, this implies that we have abandoned the idea that the unborn is a human being from the moment of conception, because there are very few situations in which it could be sustained that the right to life of a human being counts less than the right to self-determination or autonomy of another human being. Furthermore, in practice the circumstances under which the killing of a human being might be justified present themselves very rarely.

Section C Moral and Legal Claims Contingent upon the Right to Abortion

Whether the state will permit abortion in certain circumstances will depend on how the legally guaranteed claims of the fetus and of the pregnant woman

119 *Ibid.*, p. 227. This question is under discussion at the moment. Yet not all people who allow for abortion on an eugenic indication would allow for infanticide or euthanasia of deformed children.

120 Radcliffe Richards, *op. cit.* note 99, p. 229-230.

are weighed against each other. According to the priority given to certain claims rather than to others, the state will either adopt an indications solution, or a time-phase rule, or totally prohibit abortion. Once abortion is legal, additional questions arise such as whether the pregnant woman has the exclusive right to decide on abortion, or whether her parents, her physician, and the father of the fetus should also have a say in the decision. Could the pregnant woman seeking abortion claim from the state that her right to abortion should be guaranteed in the same way as the right of a pregnant woman to give birth, subsidized by the state? This raises the general question of the limits of the right to abortion.

1. The Father's Rights

What is the position of the father of the fetus in the abortion decision? He can claim his right to procreation,to family life, and to equal protection before the laws against the woman's claim to have the exclusive right to decision on abortion. Procreation requires the involvement of two individuals. It might be argued that excluding the father of the fetus from the abortion decision means that his right to procreation becomes illusory. If the woman is given the exclusive right to decide whether or not to terminate her pregnancy, she is free to choose or to reject motherhood, whereas the father is denied the equivalent right to choose or reject fatherhood.[121] There are several arguments, however, for not involving the father in the abortion decision. Firstly, although it may be true that a father can claim certain rights with respect to his offspring, to give him the right to block the decision of the pregnant woman would mean giving him the right to force the status of motherhood on her. Given the fact that in the case of disagreement only one of the two partners can decide, and given the fact that the mother is much more directly affected by the pregnancy and the birth of a child, it would be unfair not to give her the priority in the abortion decision. Another argument against the recognition of the father's rights is that in today's society a sexual relationship is no longer regarded as implying procreation, and since the decision to have a sexual relationship is separate from the decision to have a child, a man cannot claim to have the right to procreation on the basis of his sexual relation with a woman.

121 See Teo, W.D.H., 'Abortion – husband's constitutional rights', *Ethics*, 1975, p. 337-342; and see also the reaction of Purdy, L.M., 'Abortion and the husband's rights', *Ethics*, 1975/76, p. 247-251.

2. The Parents' Rights

If the pregnant woman is unmarried and has not yet reached majority age, her parents can claim a role in the abortion decision. They can claim the right to have a say in the decision because they have a right to family life. They have a right to decide in affairs that affect family relationships such as their pregnant daughter's decision to have an abortion. Secondly, they can claim that as legal representatives of their daughter they represent her interests and therefore must have a say in the abortion decision.

As for the rights claimed by the father of the fetus, here too counter arguments based on today's societal values can be put forward. To give the parents a right to veto the decision of their pregnant daughter would be to ignore the increasingly independent position of minors in today's society. If minors no longer need the consent of their parents in order to obtain contraceptives, and if minors live independently of their parents, it would be difficult to maintain that in the case of a pregnancy, which affects a minor so deeply, parental consent would nonetheless be required for an abortion in all cases. Furthermore, the view that parents 'act in the best interests of their child' is no longer accepted as a general rule.

Whether a minor is 'grown up' enough to decide alone on abortion or whether she should have the approval of her parents will depend on the particular circumstances of each case, on whether the minor is still dependent on her parents, on her level of maturity etc. It is, anyhow, difficult to treat all minors alike and to maintain that none of them is mature enough to decide alone on abortion.

3. The Doctor's Right to Freedom of Action

The doctor can claim his right to freedom of action. By virtue of his profession, he has the right to practise according to the norms valid for the medical profession. This means that he has the freedom to perform or not perform an abortion and to choose the way in which to perform it. Only in emergency cases where there is a threat to the woman's life is he obliged to perform an abortion in order to save her life.

The question is, however, whether abortion can be considered a normal medical act which falls within the competence of the medical profession. One of the central arguments in the abortion debate is that the decision to have an abortion requires a moral judgment and, therefore, cannot be left ex-

clusively to the doctor. In this view, the doctor can only act when certain conditions, set by law, are fulfilled. The doctor's right to professional freedom is in this case guaranteed by granting him the right to refuse to conduct an abortion on grounds of conscience. He can claim that he has been trained to save human life under all circumstances and that abortion, therefore, goes against the principles of his profession.

It seems clear that whether one adopts the first or the second position, the medical profession has a very powerful role. In the first case, it is the doctor who decides whether an abortion will be performed. In the second case, although a doctor has to respect the legal requirements, he can nevertheless refuse to collaborate. Whether a woman's right to abortion is effective will ultimately depend on the attitude of the doctor she resorts to. Even under a time-phase rule a pregnant woman still has to find a doctor who is willing to perform an abortion.

4. The Woman's Right to Subsidized Abortion

The principle of equality requires that like cases be treated alike and different cases differently, and that there is an objective justification for treating like cases differently. Pregnant women seeking abortion could claim that they should not be discriminated against because they want an abortion, if abortion in the particular case is legally permitted. They can claim that there should be no discrimination between women seeking abortion and women preferring childbirth. Thus pregnant women seeking abortion should have the same public financial assistance as women opting for childbirth.

The decisive element is whether abortion and childbirth or abortion and other health care differ in a significant way. One could say, for example, that abortions and appendectomies differ in a significant way and that this is a valid reason for a government to fund one and not the other. Secondly, non-therapeutic abortions are not aimed primarily at improving health in the narrow sense, which might be a good reason for not funding them.[122]

The same, however, can be said about childbirth. In the present days of contraceptive freedom, childbirth is no longer something that 'inflicts' women like an appendicitis. Given the availability of contraceptives, to have a child is a conscious choice. In this view, there is just as little reason to fund childbirth as there is to fund contact lenses. Secondly, childbirth is not

122 Sher, G., 'Subsidized abortion: moral rights and moral compromise', *Philosophy and Public Affairs*, 10, 1981, p. 362-363.

aimed at improving health care in the narrow sense. Both abortion and childbirth are aimed at improving health care in the broader sense.

Subsidized abortion could be claimed as a generalized welfare right, i.e. a right to have one's basic needs met by society if one cannot meet them oneself.[123] Abortion is often as necessary for a poor woman as access to general medical care, education, food, and clothing. An abortion can in many cases alleviate the economic problems of a family unit, as an extra child brings with it extra costs, and prevents the mother from working etc.

Against the recognition of subsidized abortion as a welfare right one could argue that the welfare of poor women would be served equally well by providing them with enough additional money and ancillary services to support their unaborted children.[124] Another argument against subsidized abortion is that abortion is such a divisive issue that one cannot require people who have moral objections to abortion to contribute taxes to permit abortion subsidies.[125] The subsidizing of abortion, according to this argument, should be left to private initiatives.

The first argument against subsidized abortion only holds if the government actually provides poor women with enough ancillary services to make abortion superfluous. A welfare state which provides its citizens with all their basic needs could in this way decide not to subsidize abortion. How many states would fulfil this requirement, however?

The second argument against the funding of abortion seems quite convincing at first, but does not hold if we apply it to other similar issues. A good example is defence policy. Do all citizens agree with the defence policy of their country and on the use of their tax money for employing nuclear weapons? The answer is clearly 'no', yet we do not leave the funding of nuclear weapons to the sphere of private initiative. Although there is strong opposition to the use of certain weapons, citizens are forced to contribute their tax money to the decisions their government takes in the field of defence policy. Reasoning along the same lines, there is no way citizens could refuse their tax contributions for the public funding of abortion.

123 *Ibid.*, p. 363.

124 *Ibid.*, p. 364.

125 *Ibid.*, p. 368.

Section D The Role of the Law

Depending on the stance a government adopts in respect of the moral status of the unborn, the claims of the pregnant woman, and the balance between the two; it will draft certain legal provisions with regard to abortion. These legal provisions can have multiple aims transcending the principal moral issues at stake. We can distinguish, roughly, between three types of abortion regulations in the five countries discussed in this study, i.e. the time-phase rule, the time-phase rule with dissuasion and counselling provisions, and the indications solution. The time-phase rule allows for abortion in all circumstances up to a certain time limit. The time-phase rule with counselling provisions allows for abortion within a certain time limit on the condition that state agencies try to dissuade the pregnant woman from having an abortion and provide her with all the means to continue her pregnancy and prevent an unwanted pregnancy in the future. The indications solution allows for abortion in certain strictly defined circumstances, e.g. medical, eugenic, ethical and/or social indications.

As we have already noted, government purposes vary according to the type of abortion legislation. At the two extremes we have the liberal and the conservative viewpoint. A liberal viewpoint will result in a time-phase rule in order to promote the view that abortion is a matter for private autonomy, and that abortion is necessary to give women an equal position in society. The conservative viewpoint, represented by an indications solution, is that the law should protect every unborn life except in very special circumstances. An indications solution can also have an ethical goal, in that the function of the law is to educate society, to show citizens what is right and what is wrong.

In between these two views, the law can have a more pragmatic function independent of the basic issues at stake. One of the principal aims of most abortion laws is to prevent illegal and unskilled abortions. Another more pragmatic aim of abortion legislation can be to reduce the total number of abortions. By making abortion legal and at the same time providing all the means (contraceptive education etc.) of preventing unwanted pregnancies, a government can hope to reduce the total number of abortions in the long run. Another function of abortion legislation can be to follow societal changes. If public opinion is largely in favour of abortion freedom (in certain circumstances), it can be argued that the law should keep pace with these developments in order to be effective. We will see in the next chapter

which legal systems have taken a stand on principle, and which have taken a more pragmatic view on abortion.

Conclusions

What we have done in this chapter is to set out all the arguments and counter arguments for recognizing the right to life of the fetus, the pregnant woman's right to self-determination and to limit child bearing, the father's and parents' rights to decide on abortion, the doctor's right to refuse co-operation, and the woman's right to subsidized abortion. An attempt has been made to analyze the underlying motives for supporting or opposing liberal abortion laws, and to point at inconsistencies in the abortion debate. The purpose of this 'exposé' was not to find solutions to the abortion dilemma. In fact, to discuss the various standpoints shows the full extend of the confusion in the abortion debate. Ultimately, the intention of this chapter is to clarify the underlying issues in order to understand better how legislators and constitutional courts have treated the abortion issue, the central theme of this thesis. We shall see in the next chapter that many elements of this theoretical discussion can be traced back in the arguments and modes of reasoning of courts and legislators.

Chapter III The Constitutional Protection of the Fundamental Values Involved in the Abortion Decision

Introduction

The purpose of this chapter is to see how far the theoretical questions discussed in chapter II are reflected in abortion law reforms and constitutional decisions on abortion. How have legislators and constitutional courts solved the issue of the legal status of the unborn? Have they expressed themselves in a principled way on the legal status of the fetus, or on the woman's right to decide, or have they adopted a compromise solution, striking a balance between the right to life of the fetus and the woman's right to self-determination? What role has been assigned to the doctor in the abortion procedure? And what arguments have been used to establish the role of the parents in the decision of an under-age daughter, and of the partner of the pregnant woman? Has the public funding of abortion been accepted? These questions, which were discussed at a theoretical level in chapter II, will now be examined in the constitutional context, that is, in the context of legislation in combination with constitutional court rulings.

Section A will briefly outline the content of the abortion law reforms in the five countries discussed: the US, West Germany, France, Italy and Austria. It is clear that these reforms were partly the result of the intervention by the constitutional courts. How the fundamental values identified in chapter II have been reflected constitutionally will be discussed in *Section B* in the following order: the legal status of the unborn (sub 1), the pregnant woman's right to self-determination and to limit childbearing (sub 2), the rights of the father of the fetus (sub 3), the rights of the pregnant minor's parents (sub 4), the doctor's rights (sub 5), and the pregnant woman's right to subsidized abortion (sub 6). In par. 7 there will be a more general discussion on the role of the law in the abortion issue, i.e., the aims of the various laws in relation to the means they provide. Par. 8 will deal with the role

of the European Convention on Human Rights, as there have been two decisions on abortion by the European Commission of Human Rights. The conclusions of this chapter will attempt to indicate convergences and divergences in the interpretation of these fundamental rights in the five constitutional orders.

Section A. The Content of the Abortion Law Reforms

In the relatively short stretch of time between 1973 and 1978, abortion laws were liberalized in the United States, Austria, France, West Germany and Italy. Although legislators certainly looked at each other's work, this did not lead to the same degree of liberalization of abortion in all of these countries. In this section, the substance of the abortion law reforms in these five jurisdictions will be briefly reviewed.

Abortion regulations permitting abortion are usually divided into two categories: the time-phase rule and the indications solution. Under a *time-phase rule* the only limitation on the woman's right to abortion is a time limitation: up to a certain number of weeks or months of gestation she is free to have an abortion without having to give a reason for her abortion request. As the pregnant woman can decide alone on abortion, her right to self-determination is recognized by the time-phase rule. Under an *indications solution*, abortion is generally prohibited except in certain clearly defined circumstances (indications) which are verified by a doctor (or other agent). Whereas the time-phase rule leaves the justification of abortion to the (moral) responsibility of the pregnant woman, the indications solution sets out the legitimate justifications for abortion.

There is a third category of abortion regulations which is very close to the time-phase rule, but in practice much more burdensome. We will call this category a '*time-phase rule with dissuasion requirements*'. What distinguishes this type of abortion regulation from a time-phase rule is that the woman has to go through a procedure which is meant to make her reflect seriously on her decision, to help her in finding alternatives to abortion, and ultimately, to dissuade her from her decision to have an abortion. The procedure the pregnant woman has to follow in this case usually includes a medical and a social counselling session, and a waiting or reflection period. The medical and social counsellors have the task of pointing out the alternatives open to her, and have to try and persuade her to continue her pregnancy. The

final decision, however, is left to the pregnant woman, the determinant element of a time-phase rule.

Of the five countries here discussed, two have a time-phase rule (US, Austria), one has an indications solution (West Germany), and two have a time-phase rule with dissuasion requirements (France, Italy).

1. U.S.

The first and most radical step in the field of abortion liberalization was made by the U.S. Supreme Court. Abortion legislation falls under the jurisdiction of the individual states. Up until 1973, when the Supreme Court delivered the *Roe v. Wade* decision,[1] abortion laws varied widely from state to state. At the end of the 1960's the first reform laws were passed which extended the grounds for legal abortion along the lines of the American Law Institute's Model Penal Code.[2] All these reforms included a threat to life or health, and either rape or incest or both as justifiable grounds for abortion, but the statutes were not uniform. Some states, e.g. New York, Hawaii and Alaska, went even further and did not require any justification/ground for abortion. They passed the so-called repeal bills, which set out only procedural requirements for abortion.[3]

In 1973, the U.S. Supreme Court issued its first decision on abortion, *Roe v. Wade*,[4] under which the majority of the state abortion laws were struck off, including the laws drafted on the basis of the Model Penal Code.[5] This and subsequent decisions on abortion by the Supreme Court resulted in a uniformity of state abortion legislation on many basic points. Very few

1 *Roe v. Wade*, 410 US 113, 35 *LEd* 2d, 147 (1973); reported in Cappelletti, M., Cohen, W., eds. *Comparative Constitutional Law: cases and materials* (hereafter cited as *Comp. Const. L.*), 1979, p. 563 ff.

2 Model Penal Code, Proposed Official Draft, American Law Institute, 1962, Section 230.3 sub (2), Justifiable abortion: 'A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest or other felonious intercourse'.

3 Sarvis, B., Rodman, H., *The abortion controversy*, Columbia Un. Press, New York, 1974, chapter 3. See chapter I, section B, par. 2. *supra*.

4 See *supra* note 1.

5 i.e., establishing an indications solution, see *supra* note 2.

aspects of the abortion procedure are by now left to the discretion of the individual states.

In *Roe v. Wade*, the Supreme Court declared that the pregnant woman has the right to decide on abortion during the first three months of pregnancy, on the basis of her constitutional right to privacy implicit in the Due Process Clause of the 14th Amendment to the Constitution.[6] During that period,

> the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated.[7]

For the period between three and six months of pregnancy, a state is only allowed to limit abortion freedom in order to protect the health of the pregnant woman. This might imply regulations as to who can perform abortions, the place where abortion interventions have to take place and other technical requirements. Only from the moment of viability of the fetus, described as at about the end of the 2nd trimester, can the state claim a compelling interest in the protection of the life of the unborn and therefore limit and prohibit abortions.

By this ruling, women throughout the U.S. obtained the right to have an abortion on request within the first three months of pregnancy.
This sweeping decision by the Supreme Court, which had a profound effect on state abortion laws, certainly did not calm down the abortion controversy. On the contrary, it had a polarizing effect, and the debate is still going on today.[8] State legislatures have tried to regain some of their legislative power in the field of abortion, but with very little success. In subsequent decisions the Supreme Court has maintained a firm stand on freedom of abortion as stated in *Roe v. Wade*. State laws which required the approval of the abor-

6 The 14th Amendment to the US Constitution: '... nor shall any State deprive any person of life, liberty or property, without Due Process of Law'.

7 *Comp. Const. L., op. cit.* note 1, p. 570; 35 *LEd* 2d, p. 183.

8 It is well known that President Reagan was fiercely opposed to abortion and made a restriction of the abortion practice an important item of his policy. He supported a constitutional amendment banning abortion, which does not seem to make much chance, however. See *Newsweek*, June 27, 1983 and February 6, 1984; *Time-magazine*, 6 April 1981, 'The battle over abortion'; *Spiegel*, 30 Aug. 1982, pp. 146-148; Donovan, P., 'Half a loaf: a new anti-abortion strategy', *Family Planning Perspectives*, 13, 1981, p. 262 ff. One more conservative appointment could change the balance in the Court and could reverse the trend in the Court's jurisprudence. If the Senate had accepted in October 1987 the nomination of Justice Bork by President Reagan, such a shift would have most likely occurred.

tion request by an abortion committee or by two other doctors were declared unconstitutional.[9] The Court also struck down state provisions which required the consent of the pregnant woman's husband, or which fixed the viability point,[10] or required a 24 hour waiting period and a counselling session,[11] or prescribed certain abortion techniques.[12] A residence requirement was also held unconstitutional.[13] Only with respect to the public funding of abortion and, to a certain extent, parental authority over minors, has the Supreme Court given the states some legislative freedom (see section B).

The *Roe v. Wade* decision has had a great impact in Europe in that it has conditioned the abortion debate, be it in the negative or in the positive sense.(see *supra* chapter I). Legislators had an example before them with which to compare their own ideas on abortion. The *Roe* line was certainly not accepted by all, but the Supreme Court decision was an important point of reference both for supporters and opponents of liberal abortion proposals. Simone Veil used arguments similar to those used in the *Roe* decision to gain support for her abortion law proposal in the French Parliament.[14] A representative of the German Bundestag pleading before the Federal Constitutional Court referred to *Roe* in his defense of the recently passed liberal abortion law.[15] In the same way, the opposition to abortion freedom used the American experience as a deterrent for abortion liberalization.

2. Austria

The Austrian abortion law reform was part of the general Penal Code reform which was passed in 1974. As the governing Socialist Party had the absolute majority in Parliament, there was no need for a thorough defense of the reform. The parliamentary debates on the abortion reform were, therefore, mere formalities. The discussion was characterized by the stating of opposite

9 *Doe v. Bolton*, 35 *LEd* 2d, 201 (1973); 93 *S.Ct.* 739.

10 *Planned Parenthood of Central Missouri v. Danforth*, 49 *LEd* 2d; 96 *S.Ct.* 2831 (1976).

11 *City of Akron v. Akron Center for Reproductive Health*, 103 *S.Ct.* 2481 (1983).

12 *Colautti v. Franklin*, 99 *S.Ct.* 675 (1979).

13 *Doe v. Bolton*, *op. cit.* note 9.

14 See *infra* section B, par. 1.

15 *Ibid.*

views, rather than by reaching compromises, and throughout the socialists were blamed by the opposition for making no concessions.[16]

Paragraphs 96 and 97 of the Penal Code concern abortion. Par. 96 states the general prohibition of abortion and the penal sanctions imposed. Par. 97 gives three exceptions to the general prohibition. Abortion is not punishable when performed by a doctor after medical consultation within the first three months of gestation. (par. 97(1).1) Pregnancy is considered to begin at the moment of nidation (i.e. the implantation of the fertilized ovum in the wall of the uterus).[17]

A second case in which abortion is allowed (par. 97(1).2) is when there is a serious and unavoidable risk to the life or to the physical or mental health of the pregnant woman (medical indication), or if there is a serious danger that the child may be mentally or physically deformed (fetal indication), or if the woman was under 18 years of age or under guardianship at the time of conception (partial ethical indication). In this case too, the abortion has to be performed by a doctor.

Abortion is not punishable (par. 97(1).3) when the pregnancy is terminated in order to save the woman's life from an immediate and unavoidable danger and medical help was not available in time. In this case, abortion does not need to be performed by a doctor.

In short, the Austrian abortion reform establishes a time-phase rule for the first three months of pregnancy, and an indications solution for the period after three months of gestation. The law is very short and simple: it does not provide details on the counselling requirements, nor does it require hospital treatment or any formal procedure such as a written request, a waiting period, etc.

The abortion reform was challenged by the Salzburg provincial government, which claimed that it was a violation of the right to life and of the right to equality laid down in the European Convention on Human Rights and the *Staatsgrundgesetz* of 1867. The reform was, however, upheld by the Constitutional Court in its decision of 11 October 1974.[18]

16 See the Parliamentary Debates, Nationalrat XII GP- Sitzung 84-27 November 1973.

17 Strafgesetzbuch, kommentiert von Foregger, E., and Serini, E., Wien, 1975. See Parliamentary Debates, *op. cit.* note 16, p. 8174.

18 Translated in *Comp. Const. L., op. cit.* note 1, p. 615 ff.

3. France

The French Abortion Act, Law no 75-17 of 17 January 1975, was drafted for the government by Simone Veil as Minister of Health and was passed after long debates with a few minor changes. In contrast to what happened in Austria, the French bill was definitely a compromise between opposing views in Parliament. The 1975 law was of a provisional nature, but was adopted in a definite form in 1979 with some changes, mainly aimed at a better application of the law.[19] The abortion provisions were incorporated in the Public Health Act (*Code de la Santé Publique*).
Art. 1 of the Abortion Act

> guarantees the respecting of every human being from the beginning of life; this principle will not be violated except in case of necessity and subject to the conditions of the present law.[20]

The wording of this article has merely a symbolic, not a substantive meaning, because the law in fact establishes a time-phase rule with dissuasion requirements for the first ten weeks of pregnancy, and an indications solution for the period after ten weeks' gestation. Art. 162-1 of the *Code de la Santé Publique* states that

> a pregnant woman whose condition places her in a situation of distress can request a doctor to terminate her pregnancy. This interruption can only take place within the first ten weeks of pregnancy.[21]

Before the intervention can take place the pregnant woman has to go through a number of formalities, but the judgment whether there is a 'situation of distress' is left to her. There are only penal sanctions on the requirements that the abortion has to take place within the first ten weeks of pregnancy, that it be performed by a doctor, and that it take place in a hospital or recognized clinic (art. 2 Abortion Act). The existence of a 'situation of distress' is not subject to penal sanctions, i.e. the ultimate validity of a woman's claim

19 See the additions to the articles 162-3, 162-5, and 162-8 of the Public Health Act made by Law no 79-1204 of 31 Dec. 1979.

20 Original text: 'La loi garantit le respect de tout être humain dès le commencement de la vie. Il ne saurait être porté atteinte à ce principe qu'en cas de nécessité et selon les conditions définies par la présente loi'.

21 Original text: 'La femme enceinte que son état place dans une situation de détresse peut demander à un médecin l'interruption de sa grossesse. Cette interruption ne peut être pratiquée qu'avant la fin de la dixième semaine de grossesse'.

to be *in extremis* cannot be decided by any outsider, be it a doctor, judge etc. Therefore, it is the woman who ultimately decides. A woman who wants an abortion has to obtain medical and social counselling. The doctor she makes her request to must inform her of the medical risks and must give her a *dossier-guide* which contains information on the rights a pregnant woman has, and an address list of all the organizations which provide social counselling and of the places where abortions are performed (art. 162-3 CSP) The social counsellor has to give her all the social assistance she needs and has to help her to solve her social problems, and especially to continue her pregnancy (art. 162-4). After the counselling sessions, the pregnant woman has to give written confirmation of her abortion request and is thus enabled to have an abortion after a waiting period of seven days from the moment of her first request. If there is the risk that the ten weeks time limit will be overstepped, the doctor can decide to reduce the waiting period.(art. 162-5)The intervention must be performed by a doctor in a public hospital or in a recognized private institution. (art. 162-1, 162-2) Abortion is possible at any time during the pregnancy, if two doctors certify

> that the continuation of pregnancy would seriously endanger the woman's health, or that there is a high probability that the fetus is affected by a serious disease acknowledged as incurable at the moment of the diagnosis.[22]

In case of such a medical and fetal indication, the woman has also to go through the counselling formalities and the waiting period of seven days.[23] Pregnant minors need the approval of one of their parents or of their legal representative (art. 162-7 *CSP*). Foreign women can only have an abortion if they have been resident in France for at least three months (art. 162-11, and Décret no 75-354, 13 May 1975). This is in order to avoid abortion tourism and the commercialization of abortion.[24] The legislator was opposed to the establishment of 'abortion clinics'[25] and therefore enacted art. 178-1 which states that no more than one quarter of all surgical and obstetrical interventions in a hospital unit may be abortions. Propaganda or publicity for abortion is a criminal offence (art. 647 *CSP*), as is the sale of abortifacients, unless on a medical prescription (art. 645 *CSP*). Both these activities carry

22 Art. 162-12, *Code de la Santé Publique*.

23 Art. 162-13, *Code de la Santé Publique*.

24 See the Parliamentary Debates, Assemblée Nationale, 27, 28, and 29 November 1974, *Journal Officiel*, 1974, p. 7224.

25 Simone Veil, Minister of Health, Parliamentary Debates, *op. cit.* note 24, p. 7000.

the threat of penal sanctions. The fees for an abortion intervention are fixed by *decret* (art. 8 Abortion Act) and are adjusted regularly. Since 1 January 1983, 75% of the fees are paid for out of public funds.

The members of the French National Assembly who had voted against the 'loi Veil', appealed to the Constitutional Council before the new law came into force and claimed that the time-phase rule laid down by the Abortion Act was incompatible with the Preamble of the French Constitution and with art. 2 of the European Convention on Human Rights which protects the right to life. In its decision of 15 January 1975, the Constitutional Council upheld the Abortion Act.[26]

4. Germany

On 26 April 1974, the German *Bundestag* adopted the Fifth Criminal Law Reform Act. The Act was promulgated on 21 June 1974 and contained a reform of the abortion provisions. A time-phase rule was adopted for the first twelve weeks of pregnancy, and an indications solution for the whole duration of pregnancy. Par. 218a of the Penal Code stated that abortion was not punishable if performed by a doctor, with the pregnant woman's consent, and if no more than twelve weeks had elapsed from the moment of conception. Par. 218b established that abortion was not punishable after twelve weeks of pregnancy if there existed a medical, fetal or ethical indication in the eyes of the medical profession and if the abortion was certified by the competent authority. In both cases pregnant women had to consult a doctor – under the threat of a penal sanction – in order to be informed about the assistance available. This applied particularly to those women who wanted to continue their pregnancy (art. 218c)

On 20 June 1974, the government of the *Land* of Baden-Würtemberg requested the Federal Constitutional Court to suspend, by provisional ruling, the coming into force of the Fifth Criminal Law Reform Act. On 21 June 1974, the Federal Constitutional Court issued a provisional ruling by which the coming into force of par. 218a (time-phase rule) of the new Penal Code was suspended, and it declared that the indications solution would also be applicable to abortions performed within the first twelve weeks of pregnancy. In short, it established an ethical indication for abortion during the first twelve weeks of pregnancy.

26 *Journal Officiel*, 1975, p. 671. Translated in *Comp. Const. L., op. cit.* note 1, p. 577 ff.

On 21 June 1974, 193 members of the *Bundestag* and the governments of five *Länder* (Baden-Württemberg, Saarland, Bavaria, Schleswig-Holstein and Rheinland-Palatinate) instituted proceedings for a review of par. 218a as to its conformity with the Constitution. They invoked in particular art. 2(2) in conjunction with art. 1(1) and art. 1(4) of the Constitution which protect the right to life and to dignity.[27] In its judgment of 25 February 1975, the Constitutional Court declared par. 218a unconstitutional insofar as it exempted abortion from punishment even if no reasons were given for the abortion which could be justified under the system of values incorporated in the Constitution.[28] The Court ruled that art. 2(2) of the Constitution ('everyone shall have the right to life') also protected developing life as an independent legal interest from the 14th day after conception. The Court attacked the abortion reform for the fact that it did not include a legal condemnation of abortion and that it did not provide for penal sanctions in cases in which abortion was not justified. The Court gave clear guidelines to the legislature as to how to modify the reform. It indicated that the legislature should make a differentiated penal regulation which clearly distinguished cases of legal abortion from cases in which abortion was illegal.[29]

The Federal Constitutional Court's decision was followed by the Fifteenth Criminal Law Amendment Act of 12-2-1976 which established an indications solution. The new art. 218a stated that an abortion performed by a doctor and with the pregnant woman's consent was not punishable if medical evidence showed that:

> (1) in view of her present and future living conditions the termination of pregnancy is advisable in order to avert a danger to her life, or the danger of a serious injury to her physical or mental health, provided that the danger cannot be averted in any other way she can reasonably be expected to bear;
> (2) there are strong reasons to suggest that, as a result of a genetic trait or harmful influence prior to birth, the child would suffer from an incurable in-

27 Art. 2(2) of the Basic Law: 'Everyone shall have the right to life and to the inviolability of his person. The liberty of the individual shall be inviolable. These rights may only be encroached upon pursuant to a law'. Art. 1(1): 'The dignity of man shall be inviolable. To respect and promote it shall be the duty of all state authority.' Translation by Finer, S., *Five Constitutions*, Harvester Press, Sussex, 1979.

28 Urteil vom 25.2.1975, *Entscheidungen des Bundesverfassungsgerichts*, 39, 1975, pp. 1-95. Also published in *Juristenzeitung*, 1975, pp. 205-222. Translated in *Comp. Const. L., op. cit.* note 1, p. 586 ff, and in Gorby, J.D., Jonas, R.E., 'West German abortion decision: a contrast to Roe. v. Wade', *John Marshall Journal of Practice and Procedure*, 9, 1976, n.3, p. 605 ff.

29 *Comp. Const. L., op. cit.* note 1, pp. 594-597.

jury to its health which is so serious that the pregnant woman cannot be required to continue her pregnancy;
(3) an unlawful act (rape, incest) has been committed and there are strong reasons to suggest that the pregnancy is a result of that offense;
(4) the termination of pregnancy is otherwise advisable in order to avert the danger of a distress which is so serious that the pregnant woman cannot be required to continue her pregnancy, and which cannot be averted in any other way she can reasonably be expected to bear.[30]

In short, abortion on a medical (1) or fetal (2) indication is under the present law allowed up to 22 weeks of pregnancy, and on an ethical (3) or social(4) indication up to 12 weeks of pregnancy.(art. 218a.3) In order to have an abortion, the pregnant woman has to receive medical and social counselling, and delay her decision for three days. She also needs the approval of two doctors, and failure to seek this carries the threat of penal sanctions.(arts. 218b and 219) The counsellor has to inform her 'of the public and private assistance available to pregnant women, mothers and children, in particular such assistance as facilitates the continuance of pregnancy and alleviates the situation of mother and child', and 'of the medically significant aspects' (art. 218b (1)). A written certificate has to be submitted by a doctor to the doctor who performs the abortion, testifying that an indication exists. Failure to do so means the threat of a penal sanction (art. 219). Par. 219b and 219c impose a penal sanction on the advertizing of abortion services, and on the use and sale of abortifacients.[31]

5. Italy

The history of the Italian Abortion Act, law no 194 of 22 May 1978, dates back to 1971 when the first drafts for an abortion bill were presented. In 1975 the Constitutional Court examined whether the Fascist Penal Code provisions which prohibited abortion in all circumstances were constitu-

30 Translation by the Council of Europe in the *Brüggeman and Scheuten* case, report of the European Commission of Human Rights adopted on 12 July 1977, pp. 9-10. There is, however, no sanction on the existence of an indication for women. According to par. 218.3.2., the pregnant woman is not punishable when the abortion has been performed by a doctor, after counselling, within the first 22 weeks of pregnancy. See Schmitt, R., 'von der Aufgabe, Gesetze zu machen. Ein Beitrag zur Geschichte der Reform unseres Abtreibungsstrafrechts', *Zeitschrift für das gesamte Familienrecht*, 1976, p. 595 ff.

31 *Ibid.* See for an evaluation of the law in the light of the Constitutional Court decision, Beulke, W., 'Zur Reform des Schwangerschaftsabbruchs durch das 15. Strafrechtänderungsgesetz', *Zeitschrift für das gesamte Familienrecht*, 1976, p. 596 ff.

tional, and ruled that although the Constitution protects unborn life, the right to life and to health of the pregnant woman have priority over the claim to life of the unborn during the early stages of pregnancy.[32] In its decision the Court invited the legislature to draft new abortion provisions which would allow for abortion

> when further development of the gestation could imply injury or danger which is grave, medically ascertained and not otherwise avoidable, for the health of the mother.

It is the legislature's obligation, says the Court, to

> forbid the procuring of an abortion without careful ascertainment of the reality and gravity of injury or danger which might happen to the mother as a result of the continuation of pregnancy.[33]

This wording seems to suggest that the Constitutional Court had an indications solution in mind as the constitutional basis for abortion.
The 1978 Abortion Act, however, is definitely more liberal than the Court intended. Under the threat of a referendum, a unified proposal for the liberalization of abortion was finally passed by the Chamber of Deputies and by the Senate at the beginning of 1978. The Italian Abortion Act is, both in its wording and in its ideological foundation, quite similar to the French abortion provisions.

> Art. 1 declares that
> the state guarantees the right to conscious and responsible procreation, that it recognizes the social value of motherhood and that it protects human life from the beginning.[34]

Abortion is not a means of birth control (art. 1.2), and public health services will be promoted to that effect (art. 1.3). 50 Billion lire will be made available by the Treasury for family planning services (*consultori familiari*).

These 'restrictive' statements have no substantive meaning, however, because art. 4 establishes a time-phase rule with dissuasion requirements for the first 90 days of pregnancy.

32 *Corte Costituzionale*, decision of 18 Feb. 1975, no. 27, 20 *Giurisprudenza Costituzionale*, 1975, p. 117 ff. Translation in *Comp. Const. L., op. cit.* note 1, p. 612 ff.

33 *Comp. Const. L.*, p. 614. *Giurisprudenza Costituzionale*, 1975, p. 120.

34 Art. 1.1 of the Law of 22 May 1978, n. 194: 'Lo stato garantisce il diritto alla procreazione cosciente e responsabile, riconosce il valore sociale della maternità e tutela la vita umana dal suo inizio'.

> For an interruption of pregnancy, within the first 90 days, a woman who claims circumstances under which the continuation of her pregnancy, delivery, or the state of motherhood, would be a serious threat to her physical or psychological health, with respect to her health, her economic, social, or family situation, to the circumstances under which she became pregnant, or the possibility of a deformed child, can make an abortion request to a doctor or a family planning service (art. 4).[35]

The doctor or family planning service has to give her medical and social counselling in order to help her solve her problems and to try to persuade her to continue her pregnancy. The pregnant woman has to sign a document confirming her abortion request and after a seven day waiting period (art. 5) she can obtain an abortion by presenting this document to a doctor in an obstetrical or gynaecological department of a public hospital (art. 8). Abortions during the first 90 days of pregnancy can also be performed in public polyclinics or in private clinics authorized by the regional health authorities (art. 8). An upper limit to the number of abortions in private clinics is to be fixed in order to avoid the phenomenon of 'abortion clinics'.(art. 8) Whereas the language of art. 4 seems to point to indications, there are no penal sanctions on the existence of the 'circumstances' mentioned under art. 4. Arts. 17-20 of the Abortion Act imposing penal sanctions on the non-fulfillment of the procedural requirements (like counselling, waiting period, approval given by the woman). Abortions must be performed by a doctor in a public hospital or recognized private clinic, and after 90 days of pregnancy can only be performed if there is a medical indication. Again, like in the French case,

35 Original text: 'Per l'interruzione volontaria della gravidanza entro i primi novanta giorni, la donna che accusi circostanze per le quali la prosecuzione della gravidanza, il parto o la maternità comporterebbero un serio pericolo per la sua salute fisica o psichica, in relazione o al suo stato di salute, o alle sue condizioni economiche, o sociali o familiari, o alle circostanze in cui è avvenuto il concepimento, o a previsioni di anomalie o malformazioni del concepito...' For comments on the contradiction between art. 1 and art. 4 of the Italian law see Busnelli, F.D., e.o., 'Legge 22 maggio 1978, n. 194', *Le nuove leggi civili commentati*, 1978, p. 1593-1608.See also the 'lavori preparatori' reported in Galli, G., Italia, V., Realmonte, F., Spina, M., Traverso, C.E., *L'interruzione volontaria della gravidanza*, commento alla legge 22 maggio 1978, n. 194, Giuffrè, Milano, 1978, p. 402, in which the pragmatic position of the law is emphasized. According to Bognetti, G., 'Abortion law and public policy', *Comparative Law Yearbook*, 1983, p. 88, art. 1 has been included in order to pay lip-service to the 'dicta' of the Constitutional Court and in order to sooth and propitiate the conservative side of public opinion: 'The protection the statute accorded to the life of the unborn is therefore, to speak frankly, so weak as to be practically illusory'.

the ultimate validity of a woman's claim to be *in extremis* cannot be checked by an outsider (doctor, judge etc). This provision can therefore be classified as a time-phase rule with dissuasion requirements, like in the French case.

Abortion is possible after 90 days of pregnancy when there is a serious threat to the life of the woman or when there is the possibility of a deformed child, which would constitute a serious risk to the physical or psychological health of the woman (art. 6). The existence of an indication has to be certified by a doctor belonging to an obstetrical-gynaecological department (art. 7). Only in the case of a serious threat to the life of the woman, an abortion can be performed after the moment of viability, and in that case the doctor performing the operation has to use all possible means to save the life of the fetus. (art. 7) If the pregnant woman has not yet reached the age of 18, she needs the approval of one of her parents or of a legal representative. If this causes serious problems, the Juvenile Court can authorize the abortion if it is performed within the first 90 days of pregnancy (art. 12). For abortions after the first 90 days, minors do not need parental authorization.

On the 17th of May 1981, two referenda were held on the validity of the Abortion Act, which aimed at attacking it from the left (Radical Party) and from the right (Pro-Life movement). The Radical Party's proposal was to abolish all the articles of the Abortion Act which limit the woman's right to choose (counselling, waiting period, penal sanctions). The Right's proposal was to abolish all the provisions which permitted abortion except for therapeutic reasons. Both proposals were defeated by a clear majority, and the 1978 law remained unchanged.[36]

In June 1981, the Constitutional Court published its decisions taken in January of that year, upholding the 1978 Abortion Act.[37] The Court rejected claims which challenged the pregnant woman's right to decide and the pregnant minor's position. The Court ruled that an intervention by the Court into the choices made by the legislator, as demanded by the appellants, would result in new penal norms. As the creation of new criminal provisions belongs to the exclusive competence of the legislature (art. 15.2 of the

36 The pro-life amendment was opposed by 67.9% of the voters, the Radical Party's proposal by 88.5%.

37 Decision of 25 June 1981, no 108 and 109, *Giurisprudenza Costituzionale*, 1981, pp. 909-967. According to Bognetti, G., *op. cit.* note 35, p. 92, these decisions can be regarded as a careful adjustment of the Court's jurisprudence to the development that had meanwhile occurred in the legal system, and above all, in public opinion.

Constitution), the Court refused to enter into this argument. (decision no 108) As far as the minor's position was concerned, the Court decided that the choice of the legislator was justified by the intention to prevent clandestine abortions. (decision no 109)

Section B. The Fundamental Values Recognized by the Constitutional Order

This section will discuss how legislatures and constitutional courts dealt with the definition of the fundamental values involved in the abortion decision and contingent upon the right to abortion.[38]

1. The Legal Status of the Unborn

U.S.

The 14th Amendment to the US Constitution declares: '...nor shall any State deprive any person of life, liberty or property, without Due Process of Law'. In the *Roe v. Wade* decision of 1973,[39] the US Supreme Court dealt with the question whether the unborn can claim a right to life under the 'Due Process Clause' of the 14th Amendment. The answer was negative on the basis of two arguments.

First of all, the Court discussed whether the fetus is a 'person' as defined by the 14th Amendment. The Constitution does not define 'person' in so many words, but the Court claimed that in nearly all instances in which the word 'person' is used in the Constitution it has a postnatal application only. Furthermore the Court argued that this view was supported by the history of abortion prohibitions. Under common law, abortion performed before quickening was not an indictable offense. It now appeared doubtful that 'abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus'.[40] Until the middle of the 19th century, the law in effect in all but a few states was the pre-existing English common law. Only in the middle and late 19th century did the quickening distinction dis-

38 An English translation of the respective Constitutional Court decisions can be found in Cappelletti, *Comp. Const. L., op. cit.* note 1.

39 See *supra* note 1.

40 35 *LEd* 2d, p. 167.

appear and were the degree of offence and the penalties increased. This brings the Court to the observation that

> at common law, at the time of adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect.[41]

The Court therefore concluded that the word 'person' as used in the 14th Amendment does not include the unborn.

Secondly, the Court tackled the question of when human life begins. It gave a survey of the 'wide divergence of thinking on this most sensitive and difficult question': the Stoics held that life does not begin before birth, which is also the predominant attitude of the Jewish faith; common law found a greater significance in quickening; physicians and scientists focused upon conception, live birth, or the interim point of viability; the Aristotelian theory of 'mediate animation' was the official Catholic Doctrine until the 19th century, and current data indicate that conception is a 'process' over a period of time.[42] On the basis of this 'divergence of views', the Court decided that there was no need to resolve this difficult question:

> When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[43]

The Court accepted that the state had certain interests in regulating or prohibiting abortion. One important and legitimate state interest was the preservation and protection of the health of the pregnant woman. Another was the protection of the potentiality of human life. These valid state interests grew 'in substantiality as the woman approaches term', but they only become 'compelling' at a certain stage in pregnancy.[44]

> With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of the present medical knowledge, is at approximately the end of the first trimester. This is so because of the now established medical fact ... that until the end of the first

41 *Ibid.*, p. 170.

42 *Ibid.*, p. 181.

43 *bid.*; *Comp. Const. L., op. cit.* note 1, p. 569.

44 35 *LEd* 2d, p. 182; *Comp. Const. L., op. cit.* note 1, p. 569.

> trimester mortality in abortion may be less than mortality in normal childbirth.[45]

From this point onwards the state may, therefore, regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. This refers to who is going to perform the abortion, the facilities where abortion interventions can take place etc.

> With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulations protective of fetal life after viability thus have both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.[46]

The Court defines 'viable' as 'potentially able to live outside the mother's womb, albeit with artificial aid'. It adds that viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.[47]

This division of the pregnancy into trimesters elaborated by the Court implies that there is no compelling state interest during the first trimester of pregnancy which can proscribe or regulate abortion. The woman's right to privacy, which is according to the Court 'broad enough to encompass the woman's decision whether or not to terminate her pregnancy'[48] (see under 2.) can, therefore, not be interfered with during the first three months of pregnancy. Therefore the Court states:

> ... for the period prior to this 'compelling' point (end of the first trimester), the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated.[49]

It is interesting to see the leap in the Court's way of reasoning. Although it declares that there is no need to decide on the question of when human life begins, it then rules that the value of unborn life is only sufficiently important as to outlaw abortion from the moment of viability. In this way the

45 *Comp. Const. L., op. cit.* note 1, p. 569. 35 *LEd* 2d, p. 182.

46 *Comp. Const. L., op. cit.* note 1, p. 570.35 *LEd* 2d, p. 183.

47 35 *LEd* 2d, p. 181.

48 *Comp. Const. L., op. cit.* note 1, p. 567. 35 *LEd* 2d, p. 177.

49 Comp. Const, L., *op. cit.* note 1, p. 570. 35 *LEd* 2d, p. 183.

Court imposes the view on the state legislatures that the unborn can only be considered a human being at the moment of viability. Thus it has already reached a decision on the question of when human life begins. Secondly, apart from the fact that it decides on a question which did not initially concern it, it does not give any arguments for considering viability as a cut-off point. Although there are sound reasons for granting the same rights to the fetus at the moment of viability as to the newborn child, some justifications are needed for not doing the same for pre-viable fetuses.[50] Given the fact that this question is so difficult to answer, one might have expected some flexibility from the Court, in the sense that it left at least some freedom to the states to decide this question. It is interesting to note at this point that the Court is flexible with respect to the protection of the fetus after viability: 'If the State is interested in protecting fetal life after viability, it *may* go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother'.[51] This implies that states are allowed to permit abortion of viable fetuses up to the moment of birth.

In short, the Supreme Court is quite contradictory in its statements in *Roe v. Wade*. After having recognized that the question of when the fetus can be considered a human being is very difficult, and that no clear answer is possible, it then makes a very rigid division of the pregnancy into three trimesters, and rules that the fetus cannot be considered a human being before the end of the second trimester. This view is imposed on the states. The statement that the state's interest in protecting the potentiality of human life 'grows in substantiality as the woman approaches term'[52] implies that the Court has adopted a developmental criterion of 'humanness'. Furthermore, the Court ruled that only from the moment of viability is human life worth protection. The Court has thus given some answers to the 'difficult question of when life begins'.

Germany

The German abortion discussion has evolved around the opposite premise, that is that unborn human life needs protection from the beginning. The

50 See chapter II, section A, par. 5.7 and 5.8. See also Tribe, L.H., 'Toward a model of roles in the due process of life and law', *Harvard Law Review*, 87, 1973, p. 4-5. See also Dellapenna, J.W., 'Nor piety nor wit: the Supreme Court on abortion', *Columbia Human Rights Review*, 1975, p. 379 ff.

51 *Ibid.*

52 *Comp. Const. L., op. cit.* note 1, p. 569. 35 *LEd* 2d, p. 182.

question was not if but how unborn life had to be protected. The time-phase rule adopted by the Bundestag (par. 218 of the Penal Code) was struck down by the Federal Constitutional Court in its decision of 25 February 1975.[53] We will give a brief description of that decision and subsequently the analytical basis of this ruling will be discussed.

The Constitutional Court ruled that art. 2(2) of the Constitution ('everyone shall have the right to life')[54] also protects developing life as an independent legal interest from the 14th day after conception. The following reasons are given for this viewpoint. Firstly, art. 2(2) of the Constitution is a reaction against the experience of National Socialism. Secondly, according to established biological and physiological findings, life begins at the 14th day after conception. The Court refers here to a legal expert's statement. Thirdly, the sense and purpose of art. 2(2) require that the term 'everyone'(69) should also refer to developing life. Fourthly, the legislative history of art. 2(2) suggests that it includes nascent life. The Court adds that the process of the development of human life is a continuous one, in that no distinction can be made between the various stages, and that the 'everyone' referred to in art. 2(2) covers all stages of life.[55]

This right to life is not merely a subjective, defensive right. The constitutional norms represent an objective order of values providing guidelines and impetus to the legislature, judiciary and administration. Therefore, the state has to safeguard unborn life also from illegal encroachments by others.[56]

The Court recognizes that the woman's right to freedom of her personality, protected by art. 2(1) of the Constitution,[57] comprises the woman's responsibility to decide against parenthood. However,

> a compromise which guarantees the protection of the life of the one to be born and permits the pregnant woman the freedom of abortion is not possible since the interruption of pregnancy always means the destruction of unborn life ... A decision oriented on Art. 1, Par. 1, of the Basic Law must come down in favor of the precedence of the protection of life of the child *en ventre de sa mère* over the right of the pregnant woman to self-determination ... This

53 See *supra* note 28.

54 See *supra* note 27.

55 *Comp. Const. L., op. cit.* note 1, p. 586-587. *Juristenzeitung*, 1975, p. 207-208.

56 *Comp. Const. L., op. cit.* note 1, p. 588. *Juristenzeitung*, 1975, p. 208.

57 Art. 2(1) of the Basic Law: 'Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.' Translation in Finer, *op. cit* note 27.

> precedence exists as a matter of principle for the entire duration of pregnancy and may not be placed in question for any particular time.[58]

Therefore, the state must view abortion as an injustice and the condemnation of abortion must be clearly expressed in the legal order.[59]
How the state fulfils its obligation to provide an effective protection of developing life is, according to the Court, in the first instance, to be decided by the legislature. The legislature is not obliged to employ the same penal measures for the protection of unborn life as those it considers appropriate for those already born. The use of penal law in order to protect developing life against action taken by the mother may give rise to special problems which result from the unique situation of the pregnant woman. In individual cases difficult, even life-threatening situations of conflict may arise. The question is what the pregnant woman may be reasonable expected to endure. Indeed, very serious circumstances must exist which make it so difficult for the woman to fulfil her duty that she cannot be expected to carry her pregnancy to term. It is not necessary to continue the pregnancy, especially if abortion is necessary in order to avert a danger to the life of the pregnant woman or the danger of a grave injury to her health. In this case, her own 'right to life and bodily inviolability' (protected by art. 2(2) of the Constitution) is at stake, which she cannot be expected to sacrifice for the unborn. In the case of other extraordinary burdens for the pregnant woman, continuation of pregnancy cannot be forced. Cases of fetal, ethical, social indications for abortion can be included in this category. The decisive point is that

> in all these cases another interest equally worthy of protection by the Constitution asserts itself with such urgency that the state's legal order cannot demand here that the pregnant woman under all circumstances concede pre-eminence to the right of the unborn ... Also the indication of a general necessity (social indication) may be included here. For the general social situation of the pregnant woman and of her family may bring forth conflicts of such gravity that sacrifices in favor of the pre-natal life exceeding a certain measure cannot be exacted by the instrumentalities of criminal law.[60]

58 Gorby, *op. cit.* note 28, p. 643. See also *Comp. Const. L., op. cit.* note 1, p. 589. For the original text see *Juristenzeitung*, 1975, p. 208.

59 *Comp. Const. L., op. cit.* note 1, p. 590.

60 *Comp. Const. L., op. cit.* note 1, p. 592. *Juristenzeitung*, 1975, p. 210.

In all other cases, abortion remains a wrong deserving of punishment. The legislator was only allowed to dispense with the criminal sanction if there was another equally effective legal sanction at his disposal which clearly recognized abortion as wrong and prevented abortions as effectively as a penal provision.

The state is also expected to offer counselling and assistance 'for the purpose of admonishing the pregnant woman as to her fundamental duty to respect the life of the unborn' and to encourage her to continue her pregnancy.[61]

The Court condemned par. 218 of the Penal Code on the following grounds.

1. The legal condemnation of abortion must clearly appear in the legal order. With the time-phase rule it is unclear whether an abortion which is not indicated is legal or illegal. Also the fact that abortion is funded in all circumstances by social security gives the impression that all abortions are legal.

2. By the repeal of penal sanctions, par. 218a hands the unborn over to the completely unrestricted power of disposition of the woman.

a. A penal norm has a general preventive function.

> The mere existence of such a penal sanction exercises an influence upon the value concepts and the manner of conduct of the population.[62]
> A repeal of punishability ... must confuse the concepts of 'right' and 'wrong' dominant in the populace ... The impression that abortion is legally permitted will raise the impression that, therefore, abortion is even from a socio-ethical point of view no longer to be condemned. This is the dangerous inference of moral permissibility from a legal absence of sanction.[63]

b. The concept, central to the time-phase rule, that the developing life is better protected by individual counselling of the pregnant woman than by a penal sanction which has proved to be ineffective, is unconstitutional. The policy of taking into account total numbers of abortions which leads to the 'decriminalization of the destruction of a supposedly smaller number of lives in the ... interest of the preservation of an allegedly higher number is incompatible with the obligation of giving individual protection to every single

61 *Comp. Const. L., op. cit.* note 1, p. 593.

62 *Ibid.*, p. 595. *Juristenzeitung*, p. 212.

63 Gorby, *op. cit.* note 28, p. 654. *Juristenzeitung*, 1975, p. 212.

actual life'.[64] The socio-political goal of the 'containing of the abortion epidemic',[65] however worthy of pursuit, cannot take priority over fundamental legal protection in individual cases.

c. There is insufficient basis for the conclusion that the number of abortions in the future will be lower than under the previous penal provisions.

3. The counselling and instruction under par. 218c are not suitable for effecting a continuation of pregnancy. There should be special counselling centers, which aim at dissuading the pregnant woman from having an abortion. The physician is not the right person to provide these counselling services. There should also be a waiting period of at least two days before the abortion is performed.

The Constitutional Court concludes that the legislature should attempt to achieve a differentiated penal regulation by subjecting those cases to punishment in which abortion is to be condemned on constitutional grounds. There should be a clear distinction between legal and illegal cases of abortion. The Court adds that the fact that this type of regulation (i.e. time-phase rule) is defended in other countries, cannot influence its decision, because 'the legal standards which apply to the actions of the legislator there differ substantially from those of the Federal Republic of Germany'.[66] The principles underlying the Constitution can only be explained

> by reference to the historical experience and the intellectual and moral settling of accounts with the preceding system of National Socialism. As a bulwark against the omnipotence of the totalitarian State, which arrogated unlimited dominion over all areas of social life and for which consideration for the life of the individual fundamentally amounted to nothing in the pursuit of its governmental objectives, the Basic Law has erected a value-oriented order which places the individual human being and his dignity at the center of all its determinations...[67]
>
> Even a general change of the viewpoints dominant in the populace on this subject – if such a change could be established at all – would change nothing.[68]

64 *Comp. Const. L., op. cit.* note 1, p. 596. *Juristenzeitung*, 1975, p. 212.

65 Gorby, *op. cit.* note 28, p. 656. *Juristenzeitung*, 1975, p. 212.

66 *Comp. Const. L., op. cit.* note 1, p. 597. *Juristenzeitung*, 1975, p. 214.

67 *Ibid.*

68 Gorby, *op. cit.* note 28, p. 662. *Juristenzeitung*, 1975, p. 214.

The question of the legal status of the unborn was the object of lengthy debates during the proceedings before the Constitutional Court. The representatives of the *Bundestag* and the government defending the time-phase rule agreed that the unborn are protected by art. 2(2) of the Constitution. However, they contested that this right had absolute priority. The representative of the *Bundestag* stated that the question of when human life begins cannot be answered with religious or philosophical arguments, nor can the legal status of the unborn be decided by biological or medical science (an argument similar to the one put forward in *Roe v. Wade*).[69] The legal status of the unborn can only be decided by social and legal reasoning, it was argued. The unborn have always been less protected than those already born. The fact that even the opponents of this law considered indications other than medical as constitutional demonstrated, in the eyes of the defendant of the time-phase rule, that the two are not equal.[70] According to the representative of the *Bundestag* it was rational to consider the unborn in an early stage of development as being different from life in later stages of development.[71]

The Constitutional Court, however, did not accept these arguments. As we have seen, it ruled that unborn life is an independent legal interest protected by art. 2(2) of the Constitution from the 14th day of conception. It based this decision on a historical and systematic interpretation of the Constitution (see above). It is not merely a subjective, defensive right but an objective value for which state action is imperative. The protection of the unborn has in principle priority over the pregnant woman's right to free development of her personality protected by art. 2(1) of the Constitution. A compromise between the two rights is not possible (see *supra*).

The Court's viewpoint and way of reasoning require some comment. Some of the reasons for giving the unborn the right to life are especially questionable. The Court states that according to definite biological and physiological knowledge, life exists from the 14th day after conception. As has been pointed out in chapter II, biological findings alone do not determine the moral and legal status of the unborn.[72] And irrespective of the legal implica-

69 Arndt, C., Erhard, B., Funcke, L., *Der par. 218 StGB vor dem Bundesverfassungsgericht*, C.F. Muller, Heidelberg, Karlsruhe, 1979, p. 184.

70 He is referring here to the CDU/CSU proposal which allows for abortion on a fetal or ethical indication and in case of distress.

71 Arndt, *op. cit.* note 69, p. 190-196.

72 See Chapter II, Section A.1.

tions of scientific facts, what are the reasons for indicating the moment of nidation as the beginning of human life? The Court merely refers to a legal expert without giving any further explanation for this choice. The arguments for considering conception as the beginning of human life are probably much stronger (see *supra* chapter II section A, under 5.). This would mean that the Court's motivation for choosing nidation as the decisive point is a pragmatic one, namely aimed at excluding certain means of birth control (morning-after-pill, I.U.D.) which could be considered abortifacients under the abortion law.[73] The use of the legislative history of art. 2(2) is also questionable. The defenders of the time-phase rule contended that the parliamentary discussion on this article of the Constitution did not result in a consensus concerning the status of unborn life.[74] Finally, it seems strange that the Court quotes the Nazi experience for determining the legal status of the unborn. Quite apart from the fact that under the Nazi regime abortion was in principle strictly forbidden for German women,[75] it is difficult to argue that that period was marked by inhuman treatment of the unborn in particular. The reasons why the Nazi experience is referred to might be deeper and not directly related to the abortion issue.(see *infra* chapter IV section B)

However, irrespective of these points which have less bearing on the issue, the Court's basic arguments seem incoherent. The Court states that the fetus has the right to life under the Constitution at every stage of its development, and that abortion is always an illegal act. However, if there are genuine cases of conflict recognizable under the Constitution the legislature may remove these cases from the protection of penal law without violating its duty to protect human life. The Court thus makes a distinction between constitutional acts and criminal acts, i.e. abortion is always illegal (in constitutional terms) but in circumstances which are exceptionally burdensome for the pregnant woman it is not a criminal act. The Court seems to give the impression by reasoning in this way, that is by accepting only cases of conflict in which 'another interest equally worthy of protection by the Constitution' is involved, that the criminality or non-criminality of abortion

73 Naujoks, 'Verbesserte Fristenlösung oder befristete Lösung', *Europäische Grundrechte Zeitschrift*, 1975, p. 959. See par. 219.d, which explicitly excludes abortifacients, taken before the moment of nidation from the realm of the law.

74 See Kriele, M., *Juristenzeitung*, 1975, p. 225; Ortino, S., 'La riforma del par. 218 CP della Repubblica Federale Tedesco sull'aborto', *Giurisprudenza Costituzionale*, 23, 1978, p. 381. This will be discussed in chapter IV, section B, *infra*.

75 See chapter I, section B, *supra*.

depends on the situation of the mother and has nothing to do with the status of the unborn. However, would the Court really accept these same 'constitutionally-based' reasons for considering the killing of newborn babies as a non-criminal act? A newborn baby could create a very burdensome situation for the mother. A medically-indicated abortion could be interpreted in terms of 'self-defence' as has been shown in chapter II section B, independent of the status of the unborn. But the fetal and social indications are not so much related to the state of pregnancy as to the state of motherhood and could not be described as a form of 'self-defence'. Would the Court accept that the killing of a newborn baby for fetal or social reasons could be a non-criminal act?[76]

Although the Court tries to give the impression that it is only concerned with the situation of the woman irrespective of the stage of development of the fetus, it is contradicting its own statement that no distinction can be made between individual stages of developing human life (i.e. between unborn and born). The fact that the Court allows for a fetal and a social indication, indicates that the fetus has not been granted a right to life protected by art. 2(2) of the Constitution equal to the right to life of human beings already born. The Court seems to have been affected by *Fetusschizofrenie*,[77] instead of being guided by constitutional principles. The indications solution suggested by the Court in reality violates that 'inviolability of unborn human life' which it proclaims.
As Giselher Rüpke has put it:

> Das letztlich trotz allem das individuelle Leben des Nasciturus als ein durch diese Gesetzesmodelle geschütztes Rechtsgut zu gelten habe, darin liegt ein Protest gegen das eigene gesetzgeberische Handeln.[78]

The differentiated time-limit adopted in the amended abortion law (22 weeks for a fetal indication, 12 weeks for a social or ethical indication), also shows that the fetus is treated differently according to its stage of development. In a

[76] At the 6th of November 1981, a British doctor who let a handicapped baby (Down's syndrom) die was acquitted of the charge of attempted murder.

[77] Rüpke, G., *Schwangerschaftsabbruch und Grundgesetz*, Suhrkamp Verlag, Frankfurt, 1976, p. 38. See also Ortino, *op. cit.* note 74, p. 379.

[78] Rüpke, *op. cit.* note 77, p. 44. Translation (my own): 'That in the end, in spite of everything, the individual life of the nasciturus should be considered as protected by this legislative model, shows a protest against the legislative action itself'.

later stage, more serious reasons for abortion are required than in earlier stages.

In conclusion, the German Federal Constitutional Court has been caught in the same trap as the US Supreme Court. It has not succeeded in being coherent in the defence of its viewpoint on the constitutional protection of unborn life. The German Court claims that unborn human life is inviolable from the 14th day after conception, but in its ruling it implicitly adheres to the view that the right to life of the unborn can be overridden by a fetal and a social indication. Secondly, in spite of the Court's statement that 'no distinction can be made between individual stages of the developing life before birth or between prenatal and postnatal life', the German legislator has recognized differences between these stages by allowing less serious indications for abortion during the initial stage of pregnancy than during the later stages. This solution was adopted in the Court's provisional ruling. (see *supra* section A, under 4.)

In conclusion, the two constitutional courts which took a principled attitude versus the abortion issue, proclaiming – in the American case – the woman's right to abortion and – in the German case – the fetus' right to life, have been only partially successful in the defence of their principles. Furthermore, what emerges is that although the two courts seem to take two extreme positions on the the abortion issue, their stand is in fact more moderate than the one proclaimed. The US Supreme Court states the woman's right to decide on abortion. By ruling that states are not obliged to prohibit abortion from the moment of viability it implicitly recognizes a right to life only from the moment of birth. This position, however, is mitigated by its more moderate statements. It claims that the states have an interest in the protection of the potentiality of human life, which grows in substantiality during pregnancy, and that the states have a compelling interest in the protection of human life from the moment of viability. Thus the Court seems to adhere to a developmental criterion of humanness.

The German Court too takes, in fact, a more moderate stand than the one declared. Although it defends the right to life from the moment of conception, it also seems to recognize a developmental criterion by allowing for abortion in certain circumstances depending on the stage of development. Furthermore, if the right to life of the unborn were really protected by the German decision, abortion could only be permitted on a strictly medical (i.e. vital) indication, and not on the social, fetal and ethical grounds also foreseen by the Court. Such a strict indications solution would mean a step

backwards in respect to the existing abortion practice, which was obviously not desirable and would have been impossible to apply in practice.

What these two rulings show is that the extreme positions on abortion seem to be untenable. The German Court was unable to defend the right to life from the moment of conception in a realistic way. The American Court, on the other hand, was not able to follow through its position that the pregnant woman should have the right to self-determination throughout pregnancy. These constitutional rulings on abortion therefore reflect the dilemmas pointed out in the theoretical discussion (chapter II). It appears to be impossible to define the right to life in a principled and consistent way. The tendency to take an intermediate position, to seek a compromise between the protection of unborn life and the respect for the woman's right to self-determination, has been reconfirmed by these constitutional rulings.

The constitutional value of the broad indications solution adopted by the German abortion law deserves further comment. A major objection against this indications solution is that it does not respect the right to life of the unborn as claimed by the German Court. It also gives the impression of being an *objective* standard, which in reality it is not. There is no way that the very flexible and vague standard of the social indication can be applied in practice in an objective manner. Its content will depend on the personal views of the individual doctor, on the way the pregnant woman is able to present her case and convince her doctor of the validity of her arguments, and other such subjective elements. In contrast to the medical, fetal and ethical indications, which can be objectively ascertained by a doctor, the rightness and validity of the social justifications for abortion claimed by the pregnant woman can certainly not be checked by one or even two doctors. The result of this is that the attitude of an individual doctor is crucial to a liberal abortion policy based on an indications solution. Most abortions in Germany are in fact performed on the basis of a social indication.[79] This creates an unfair situation in which women are able to obtain an abortion more or less easily depending on the attitude of their doctor and independently of the validity of their motives. One could argue that a fairer solution, which respects everybody's right to equality would be a time-phase rule. Thus the indications so-

79 See *Bericht der 'Kommission zur Auswertung der Erfahrungen mit dem reformierten par. 218 des Strafgesetzbuches*, Deutscher Bundestag, 8. Wahlperiode, Drucksache 8/3630, 31.01.1980, p. 37 ff., for the first years after the passing of the abortion reform. The figures on the % of abortions performed on a social indication nationally and by region are collected by the Statistisches Bundesamt, Wiesbaden, and are published yearly in *Wirtschaft und Statistik*.

lution adopted in the German case seems to lack a sound constitutional basis. The unsuitability of the indications solution for furthering the aims proclaimed by the German Constitutional Court is reconfirmed by the abortion practice. Abortion rates in Germany are not lower than abortion rates in countries with a more liberal legislation. Furthermore, there are great regional variations in abortion rates, which indicate the 'flexibility' of the indications solution, as argued above.[80]

One last question arising from the indications solution is: why should it be the doctor who decides on whether the reasons given by a pregnant woman justify an abortion? Again, in contrast to medical, fetal and ethical grounds for abortion, the social reasons for asking an abortion do not require a medical, but rather a moral judgment. Thus they do not fall exclusively within the competence of the medical profession.

France

The French Abortion Act does not give an answer to the question of the legal status of the unborn. Art. 1 declares the respect for unborn human life, but this is a general, introductory statement without specific application.[81] The significance of this provision is probably largely symbolic in the sense that it seeks to express the legislator's concern with the protection of the unborn. However, there is no commitment on the part of the legislators to the right to life of the fetus. One could argue that the protection of the unborn is implicitly guaranteed by the many procedural requirements set by the law, such as counselling, a reflection period, prohibition of publicity for and commercialization of abortion, and by the ten weeks time limit. The law in fact establishes a time-phase rule with dissuasion requirements. According to art. 2, abortion is not punishable if performed by a doctor in a hospital, and before the end of the tenth week of pregnancy. The 'situation of distress' which the woman has to claim (art. 162-1) is not checked by the doctor, and an amendment to that effect was not adopted.[82] The government expressed itself in terms similar to those used by the US Supreme Court in the *Roe* decision:

80 *Ibid.* See also Ketting, E., van Praag, P., *Abortus provocatus wet en praktijk*, Zeist, NISSO, 1983, p. 125, for an evaluation of these regional disparities.

81 This article was added by amendment. There was nothing to this respect in the original proposal.

82 Parliamentary Debates, *op. cit.* note 24, p. 7728.

> Je me refuse à entrer dans les discussions scientifiques et philosophiques dont les auditions de la Commission ont montré qu'elles posaient un problème insoluble.[83]

In contrast to the US Supreme Court, in this case the law leaves the question really open, and sets down a compromise between the two opposing views. The abortion decision is left to the woman, but she has to go through certain formalities in order to make sure that her decision is taken carefully and to dissuade her from that decision. The law implicitly recognizes a developmental criterion of humanness, in that during the first ten weeks of pregnancy the 'distress' of the pregnant woman is a sufficient reason for abortion. However, after ten weeks gestation more serious reasons have to be claimed and ascertained by her doctor.

The members of the French National Assembly who appealed to the Constitutional Council claimed that the time-phase rule laid down in the Abortion Act violated the Preamble of the Constitution and art. 2 of the European Convention on Human Rights which protects the right to life. In its decision of 15 January 1975, the Court denied the competence to judge the abortion provisions in the light of art. 2 of the European Convention.[84]

As to the Preamble of the French Constitution, which does not mention the right to life, the Court ruled that none of the provisions of the Abortion Act are a violation of the fundamental principles laid down in the Preamble. Art. 2 of the *Déclaration des droits de l'homme et du citoyen* of 1789 declares that 'le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression' The Constitutional Council ruled that the Abortion Act respects the liberty of persons who seek an abortion, and those who perform or attend at an abortion. Therefore the law does not infringe upon the 'liberty' referred to in the 1789 Declaration.

The Preamble of the 1946 Constitution states that 'Elle (la nation) garantit à tous, notamment à l'enfant, à la mère et aux vieux travailleurs, la protection de la santé, la sécurité materielle, le repos et les loisirs'. The Court

83 Simone Veil, Parliamentary Debates, *op. cit.* note 24, p. 7000.

84 See for a discussion of this aspect of the decision, Ruzie, D., 'La Constitution française et le droit international (à propos de la décision du Conseil Constitutionnel du 15 janvier 1975), *Journal du Droit International*, 1975, p. 249-268. See also Robert, J., 'La décision du Conseil Constitutionnel du 15 janvier 175 sur l'interruption volontaire de grossesse', *Revue Internationale de Droit Comparé*, 27, 1975, p. 873 ff.

said in this respect that the abortion law does not authorize any violation of the principle of respect for every human being from the beginning of life, as stated in art. 1 of the Abortion Act, except in cases of necessity and according to the conditions and limitations laid down by the law. Finally, the Court did not find any violation of the principle of the protection of children's health as laid down in the 1946 Preamble.

With this one page decision the Constitutional Council summarily rejected the objections raised by the opposition in Parliament. Like the government, the Court refrained from expressing a position on the legal status of the unborn. It simply declared that the limitations on the freedom of abortion as laid down in the law were sufficient guarantees of the protection of unborn life. The Court did not go beyond a mere repetition of the wording of the abortion law. It made it very clear that the legislature had the last word in this matter.

Italy

In its decision of 18 February 1975,[85] the Italian Constitutional Court, deciding on the validity of the Fascist Penal Code provisions on abortion, declared that the fetus does not have a right to life from the moment of conception. The Court declared that the protection of conception has a constitutional foundation, and the legal situation of the fetus is protected by art. 2 of the Constitution which imposes the protection of motherhood and guarantees the inviolable rights of man.[86] However,

> the interests of the fetus may conflict with other values which are themselves constitutionally protected...Consequently, the law cannot place a total and absolute priority on the first interest, denying adequate protection to others...There is no equivalence between the right not only to life but also to health of one who – like the pregnant woman – is already a person, and the safeguard of an embryo which has yet to become a person.[87]

85 See *supra*, note 32.

86 Art. 31.2: La Repubblica ...'protegge la maternità, l'infanzia e la gioventù, favorendo gli istituti necessari a tale scopo'. Art. 2: 'La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale'. This provision does not contain an explicit 'right to life'. See Bartole, S., 'Scelte di valore più o meno implicite in una laconica sentenza sull'aborto', *Giurisprudenza Costituzionale*, 1975, p. 2105 ff.

87 *Comp. Const. L.*, p. 613. *Giurisprudenza Costituzionale*, 1975, p. 120. It is not clear why the Court uses the word 'embryo' here and not 'fetus' like in the rest of the deci-

What the Court seems to be saying here is that although the Constitution protects unborn life, it does not grant the unborn – at least in the early stages of their development[88] – a right to life equal to that of human beings. Whatever the protection of the unborn implies, the right to life and to health of the pregnant woman has priority over the fetus' claim to life during the early stages of pregnancy.

In its decision the Court invites the legislature to draft a law which recognizes abortion

> when further development of the gestation could imply injury or danger which is grave, medically ascertained and not otherwise avoidable, for the health of the mother.

It is the legislator's obligation

> to forbid the procuring of an abortion without careful ascertainment of the reality and gravity of injury or danger which might happen to the mother as the result of the continuation of pregnancy.[89]

This last phrase seems to indicate that the legislature should draft an abortion law establishing an indications solution.[90]

As has been pointed out in Section A, the legislator adopted a more liberal solution than the one suggested by the Constitutional Court. The 1978 Abortion Act establishes, in fact, a time-phase rule with dissuasion requirements.

As in the French law, the beginning of life has not been specified in the Italian Abortion Act. Amendments which defined the beginning of life were rejected.[91] There was a conscious effort on the part of the drafters not to deal with this question. As was said in the report on the bill before the Senate,

sion. This could imply that the Court is suggesting that the embryo is certainly not a human being but that a fetus at some point is.

88 The use of the word 'embryo' points at the early stage of fetal development. See note 87.

89 *Comp. Const. L., op. cit.* note 1, p. 614. *Giurisprudenza Costituzionale*, 1975, p. 120.

90 In this way the Court issued a decision which could be read in different ways. Bognetti, *op. cit.* note 35, calls it a 'Salomonic decision'. See also D'Alessio, R., 'L'aborto nella prospettiva della Corte Costituzionale', *Giurisprudenza Costituzionale*, 1975, p. 538 ff; Bartole, *op. cit.* note 86, p. 2102.

91 Casini, C., Cieri, F., *La nuova disciplina dell'aborto*, Cedam, Padova, 1978, p. 45.

lo stato rimane neutrale nei confronti dei problemi di principio posti dalla interruzione della gravidanza.[92]

This position is constantly repeated in the preparatory works. The aims expressed in art. 1 (the right to procreation, the social value of motherhood and the protection of human life from the beginning) are general principles already protected by the Constitution and by law, they do not introduce anything new. Like in the French case, the meaning of art. 1 is largely symbolic, expressing a general concern with the protection of life – which is guaranteed by the procedural requirements and the 90 days time limit – without declaring a right to life. The only certainty the law gives as to the status of the unborn is that at the moment of viability the unborn life has to be saved at any cost. At that point it has to be treated like a human being.[93] During the period up to the moment of viability, the fetus receives increasing protection as the stage of development advances. After 90 days of gestation, the woman has to provide very serious reasons for obtaining an abortion.

Although the Constitutional Court had suggested a more restrictive solution in its 1975 decision, it upheld the 1978 Abortion Act in 1981, when it was asked its opinion on the new abortion rule. The claim that the abortion law violates art. 2 of the Constitution which states the sanctity of life[94] was rejected by the Court.

Austria

The most curious of all constitutional decisions on abortion is the Austrian one. When the Austrian Constitutional Court was asked to give its opinion on the fairly liberal Austrian abortion law, it upheld the law, employing a very formalistic, historical interpretation of the Constitution, which bore no relation to contemporary reality.

92 Quoted in Casini, *op. cit.* note 91, p. 14. Translation (my own): 'The State remains neutral with respect to the basic problems posed by an interruption of pregnancy.' See also the 'lavori preparatori' reported in Galli, e.o., *op. cit.* note 35, p. 402, in which the pragmatic position of the law is emphasized. See Busnelli, *op. cit.* note 35, p. 1593-1608, for a comment on the apparent contrast between principles and solutions adopted by the law.

93 See art. 7.3 of the Abortion Act which states that an abortion after the moment of viability can only be performed if there is a serious danger to the life of the mother; in such case the doctor has to try at any cost to save the life of the fetus.

94 See note 86.

The 1974 abortion provisions do not express any concern for the protection of unborn life. In the Parliamentary Debates the question of the beginning of human life was not answered by the governing Socialist Party. It could easily ignore this question, because with its absolute majority in Parliament, there was no need to defend the law. After the passing of the law the Salzburg provincial government appealed to the Constitutional Court and claimed that the new abortion provisions violated the right to life and the right to equality before the law under national constitutional law and under the European Convention on Human Rights, which has constitutional rank in Austria.

In its decision of 1974,[95] the Constitutional Court gave a very narrow interpretation of the right to life laid down in the Constitution of 1867.[96] The Court ruled that the Constitution only protects the individual against attacks on his life by the state, and that it does not, however, guarantee an individual's right to life against attacks by others. Thus the right to life is only a defensive right against the state. The Court stated that since the abortion provisions laid down in the Penal Code do not concern an interference with life by the state, there is no violation of the right to life under national law. In this way, the Court avoided the question of the legal status of the unborn.[97]

Secondly, the Court rejected the claim that art. 2 of the European Convention protects unborn life. Art. 2 states that

> everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

The Court ruled that neither the legal history, nor the interpretation by the European Commission and the European Court, nor the divergent opinions

95 See note 18.

96 The *Staatsgrundgesetz* of 1867 which has according to art. 149.1 of the Constitution constitutional force, does not mention the right to life, but the fundamental rights laid down in it presuppose also the right to life.

97 See for comments on this aspect of the decision, Groiss, W., Schantl, G., Welan, H., 'Der verfassungsrechtliche Schutz des menschlichen Lebens', *Österreichische Juristen-Zeitung*, 33, 1978, p. 1 ff.; Nowakowski, 'Die Grund- und Menschenrechte in Relation zur strafrechtlichen Gewalt', *Österreichische Juristen-Zeitung*, 1965, p. 281; Waldstein, *Das Menschenrecht zum Leben*, Berlin, 1982, p. 50 ff; Schambeck, 'Die Grundrechte im demokratischen Verfassungsstaat', *Ordnung im sozialen Wandel*, Festschrift für J. Messner, Berlin, 1976, p. 484, cited in MOCK, E., 'Abortion law and public policy', *Comparative Law Yearbook*, 1983, p. 31.

in the literature, nor the text of art. 2, gave any solution to the question of whether unborn life was protected by this article. Considering the whole context of art. 2 (art. 2.1 makes an exception for capital punishment but does not mention abortion), the Court came to the conclusion that art. 2 did not cover unborn life.

The fact that the Penal Code treats abortion differently depending on whether it takes place within the first three months of pregnancy or thereafter raised the question of the equal treatment of the 'fetus in the womb'. Concerning this equal-protection claim, the Court ruled that 'these various developmental phases of the biological entity 'fetus in the womb' do not necessarily represent one and the same thing in the meaning of the constitutional principle of equality'.[98] The legislator was therefore allowed to treat abortion differently depending on the stage of development of the embryo in the womb without infringing the equality principle.

> Just as the life of a born human being is evaluated more highly than that of an unborn embryo, so the value of the unborn fetus could not be set equal in each stage of development.[99]

The Court acknowledged that it would not be justifiable to leave the decision to abort to the woman at the moment of viability, but that since after three months' gestation the development of the fetus is still far away from the moment of viability, the three months' time limit of the time-phase rule was justifiable.

In conclusion, the Austrian constitutional order does not recognize the right to life of the unborn. The value of unborn human life increases as the pregnancy advances. Up to three months' gestation the fetus is not protected, but after the moment of viability the decision to abort cannot be left to the pregnant woman. As the abortion law does not set an upper time-limit for abortion, the Constitutional Court's decision implies that an abortion after the moment of viability might be justified if the necessity is certified by, for example, a doctor. It is quite clear that the Court did everything possible to remain out of the debate by applying a very formal, literal, and restrictive interpretation of the Constitution. The result was that a liberal law was upheld with very traditional arguments.

98 *Comp. Const. L.*, p. 621. *EuGRZ*, 1975, p. 80.

99 *Ibid.*

Conclusions

Legislatures and constitutional courts have struggled with the question of the legal status of the unborn. In both the United States and in Austria, the idea that the unborn has a right to life, protected by the Constitution, was rejected. In Austria, the question of the beginning of human life was not answered by the legislature, but a certain value was accorded to unborn human life which increases with the biological development of the fetus. Abortion is allowed during the first three months of pregnancy, thereafter it has to be indicated on medical or fetal grounds. A developmental criterion has thus been adopted. The US Supreme Court ruled that the question of the beginning of human life could not be answered, but instead of leaving the solution to that question to the discretion of the state legislatures, it imposed upon the states the view that only at the moment of viability the potentiality of human life is a sufficiently compelling reason for prohibiting abortion. In fact, the Supreme Court decided that unborn life *can* be treated as a human being from the moment of viability.

The French and Italian Abortion Acts declare respect for developing human life. However, neither the French nor the Italian legislature or judiciary have expressed a principled opinion on the question of when human life begins, nor have they arrived at a clearer definition of respect for human life. The value of human life is balanced against the woman's interests. The result of this balancing is that the abortion decision is left to the woman during the early stages of pregnancy, and that after approximately three months' gestation abortion is only allowed on certain indications (medical, fetal) which are defined by the law and certified by a doctor. The Italian law recognizes that at the moment of viability the unborn is a human being. From that moment onwards the doctor has to use all means in order to save the life of the unborn. In Italy and France a developmental criterion of humanness has thus been implicitly adopted.

The German situation offers quite a sharp contrast to the American, Austrian, French and Italian positions. Whereas the original abortion reform adopted the French/Italian approach to the status of the unborn, this was declared unconstitutional by the German Federal Constitutional Court. The Court ruled that human life begins at the fourteenth day after conception and that from that moment the unborn is an independent human being with a right to life protected by the Constitution. However, as we have already seen, the unborn's right to life recognized by the Court is not equal to the right to life of living human beings, because the Court allows for abortion

also in the case of a fetal and a social indication, and the fetus receives more protection as its development advances. The German Constitutional Court seems to have been affected by 'fetus-schizophrenia', and has, in fact, adopted a developmental criterion of humanness.

In conclusion, whereas the German Constitutional Court proclaims the unborn's *right* to life, in Italy and France the *protection* of unborn human life is regarded as a *duty* of the state. In the US and Austria, the protection of unborn human life is regarded as an *interest* of the state from a certain stage of development of the fetus (three months gestation in Austria, and the moment of viability in the US). In all cases a developmental criterion of human life has been adopted.

2. The Pregnant Woman's Rights

*U.S.*The Supreme Court ruled in *Roe v. Wade* that 'the woman's right to privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy'.[100] The Constitution does not mention any right to privacy, but the Court refers to a number of decisions in which the right to personal privacy has been recognized with respect to activities relating to marriage, procreation, contraception, family relationships, child-rearing and education.[101] The Court does not explain what 'privacy' means, except that it is to be found in the 14th Amendment's concept of personal liberty.[102] The Court justifies its decision to grant the pregnant woman the constitutional right to abortion in terms of the negative effects of abortion prohibitions.

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of un-

100 *Comp. Const. L.*, p. 567. 35 *LEd* 2d, p. 177.

101 *Griswold* v. *Connecticut* 381 US 479 (1965); *Eisenstadt v. Baird*, 405 US 438 (1972). See chapter IV, Section C.2, for a short discussion of these decisions.

102 The 14th Amendment to the US Constitution: '...nor shall any State deprive any person of life, liberty or property, without Due Process of Law'.

> wed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.[103]

The right to abortion is a fundamental right, says the Court, but it 'cannot be said to be absolute'.[104] This right must be weighed against important state interests in regulation. According to the Supreme Court's 'Due Process doctrine', a 'fundamental right' can only be limited by a 'compelling state interest'. The State has an important and legitimate interest in preserving and protecting the health of the pregnant woman, and also in protecting the potentiality of human life. As has been shown in section A, par. 1, the Court ruled that the State's interest in the protection of the woman's health becomes 'compelling' at the end of the first trimester, and in the protection of the potentiality of human life at the end of the second trimester. This means that

> for the period of pregnancy prior to this 'compelling point' (at the end of the first trimester), 'the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated.[105]

The result of this decision is that a pregnant woman can obtain an abortion without any limitations during the first three months of pregnancy if she finds a physician who is willing to co-operate. Her right to self-determination has been (implicitly) recognized by the Court. A liberal state policy will permit her to have an abortion until very late in her pregnancy, as the Supreme Court did not set an absolute limit to the right to abortion. A state can regulate abortion after the third month of pregnancy, and can regulate or proscribe abortion after the sixth month, but is not obliged to do so.

The foundation of the woman's right to abortion seems to be rather ambiguous. The Court calls the right to abortion a 'fundamental' right implicit in the right to privacy, but it does not define this right to privacy, except to say that it is 'founded in the Fourteenth Amendment's concept of personal liberty'.[106] The only motive or justification for granting the right to abortion seems to be the negative effects of abortion restrictions. The statement that

103 *Comp. Const. L.*, p. 567. 35 *LEd* 2d, p. 177.

104 *Ibid.*

105 *Comp. Const. L.*, p. 183. 35 *LEd* 2d, p. 183.

106 *Comp. Const. L.*, p. 567. 35 *LEd* 2d, p. 177.

> this right of privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy

is immediately followed by:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm, etc. (see *supra*).[107]

The main question that arises from the *Roe* decision is: what is the Court trying to vindicate? The Court is almost implying in the passage quoted here that the pregnant woman should have the right to abortion on medical, social and other grounds and that the physician must certify these grounds. Nothing in the language of this decision refers to the concept of the woman's right to self-determination or to arrive at autonomous decision. Not only that, the Court states that the abortion decision is

> inherently and primarily a medical decision... and the basic responsibility rests with the physician.[108]

The emphasis on the physician's role is repeated in most of the subsequent Court rulings (see *infra* under 5.). It almost seems as if the Court is trying to make its radical statement that the pregnant woman's right to abortion is a fundamental right more acceptable by referring to the negative social and other effects of enforced motherhood. In his concurring opinion Justice Douglas does refer to the right to self-determination. He says that the privacy right comes within the scope of 'liberty' as used in the Fourteenth Amendment, which includes the 'freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children'.[109] The majority opinion, however, is much vaguer. It merely states that the right to privacy 'has some extension to the activities relating to marriage, procreation, contraception, family relationships, and child-rearing and education'.[110] It does not say more than that the right to privacy is based on the concept of personal liberty.

[107] According to Kelso, C.D., and Kelso, R.R., 'Abortion law and public policy', *Comparative Law Yearbook*, 1983, p. 75, Justice Blackmun's opinion reflects a moderate instrumentalist and natural law position because of its concerns with individual liberty and with the social consequences of the ruling.

[108] 35 *LEd* 2d, p. 184.

[109] *Comp. Const. L., op. cit.* note 1, p. 574.

[110] *Comp. Const. L., op. cit.* note 1, p. 567.

The *Roe*-decision can therefore be criticized on two counts. Firstly, the Court proclaims the 'right to privacy', not mentioned in the Constitution, without defining the substance of that right.[111] Secondly, nothing in the language of the decision refers to the concept of privacy in the sense of 'autonomy' or 'self-determination'. One would have expected this right to be the foundation of the 'fundamental right to abortion'. Instead, the emphasis is put on the social and medical reasons for permitting abortion – as if to suggest an indications solution – and on the central role of the physician.

In the years after the 1973 decision, many questions left open by *Roe* were submitted to the Supreme Court. The Court struck off most of the state provisions regulating the abortion procedure during the first three months of pregnancy. Only record keeping and reporting requirements, and the provision that the pregnant woman has to give her 'informed written consent' were upheld in *Doe v. Bolton* (1973) and in *Planned Parenthood of Missouri v. Danforth* (1976) respectively[112] (see *infra* par. 5). Any other requirement during the first trimester, – such as the approval of an abortion committee or of two other physicians (*Doe v. Bolton*), a hospitalization requirement (*Doe*), a residence requirement (*Doe*), a spousal consent provision (*Danforth*), and a parental consent provision for all minors (*Danforth*) – was declared unconstitutional (see *infra* par. 3 and 4). The emphasis in these decisions taken between 1973 and 1976, is on the 'inviolability' of the decision taken by the physician in consultation with his patient during the first three months of pregnancy.

When the Court had to decide on the public funding of abortion, between 1977 and 1980, the tone of its rulings changed. The questions under review were 'Equal-Protection' cases, so a strict comparison with the previous

111 In *Griswold v. Connecticut* (1965, see note 101), the decision in which the Supreme Court mentioned for the first time the 'fundamental right to privacy', privacy was used in the sense of 'privacy of the home', i.e. a physical concept (see chapter II, section B, *supra*). This time privacy is used in the sense of 'autonomy', a completely different and very broad concept. See Ely, J.H., 'The wages of crying wolf', *Yale Law Journal*, 82, 1973, p. 929-932. See also Wellington, H., *Yale Law Journal*, 83, 1973, p. 303, stating that the Court's use of 'privacy' is 'Pickwickian' because abortions are performed not in marital beds but in hospitals. See also Tribe, L.H., 'Toward a model of roles in the due process of life and law', *Harvard Law Review*, 1973, p. 3 and 82; Henkin, L., 'Privacy and autonomy', *Columbia Law Review*, 74, 1974, p. 1424-1425; Vanderveeren, C., 'De ontwikkeling van het recht op privacy in de U.S.A.', *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 39, 1984, p. 251. See also chapter IV, section C.2.

112 See notes 9 and 10.

'Due-Process' cases is not possible. The language in which these cases are couched is, however, very different. The emphasis is no longer on the social needs of the pregnant woman and on her fundamental right to abortion, but on the legitimate state interest of promoting childbirth (see par. 6).

The most recent abortion decisions of 1983 show however, that the Court has taken up the arguments put forward in the *Roe* case again. Ten years after *Roe v. Wade*, the Supreme Court had to pass judgement on several state provisions which affected the woman's right to privacy and the physician's right to professional freedom (*City of Akron v. Akron Center of Reproductive Health*).[113] The Akron, Ohio, ordinance under review required all abortions performed after the first trimester of pregnancy to be performed in a hospital. The Supreme Court repeated its *Roe* ruling: the right of privacy is broad enough to encompass a woman's decision to have an abortion; this right is to be found in the Due Process Clause: one of the liberties protected in the Due Process Clause is an individual's freedom of personal choice in matters of marriage and family life and the *Roe* decision was 'based firmly on this long recognized and essential element of personal liberty'. The Court also repeated that the pregnant woman's physician should be given 'the room he needs to make his best medical judgment' (*Doe v. Bolton*).

> The physician's exercise of his medical judgment encompasses both assisting the woman in the decision-making process and implementing her decision should she choose abortion.[114]

The Court recognized the State's interest in the health of the pregnant woman from the end of the first trimester, but

> the State's discretion to regulate on this basis, does not, however, permit it to adopt abortion regulations that depart from accepted medical practice.[115]

The health standards adopted must be legitimately related to the objective the State seeks to accomplish. 'There can be no doubt', says the Court, that a 'second trimester hospitalization requirement places a significant obstacle on the path of women seeking abortion'.[116] A primary burden created by the requirement puts a large financial burden on the woman, because a second

113 103 *S.Ct.* 2481 (1983).

114 *Ibid.*, p. 2491.

115 *Ibid.*, p. 2493.

116 *Ibid.*, p. 2495.

trimester abortion costs more than twice as much in a hospital as in a clinic. Secondly, second trimester abortions were rarely performed in Akron hospitals, which implied that women had to travel to find available facilities. 'It is therefore apparent', continues the Court, 'that a second trimester hospitalization requirement may significantly limit a woman's ability to obtain an abortion'.[117]

Improved technology is also an important factor. The Court acknowledged that at the time of *Roe v. Wade*, hospitalization for second trimester abortions was recommended by the American Public Health Association but, 'since then the safety of second-trimester abortions has increased dramatically'.[118] 'The principal reason is that the D&E procedure is now widely and successfully used for second-trimester abortions'. This is also carried out on an outpatient basis between the 12th and 16th week of pregnancy.[119] The Court concluded that 'these developments and the professional commentary supporting them, constitute impressive evidence that – at least during the early weeks of the second trimester – D&E abortions may be performed as safely in an outpatient clinic as in a full-service hospital'.[120] Hence, 'present medical knowledge... convincingly undercuts Akron's justification for requiring that all second-trimester abortions be performed in a hospital'.[121] And finally, 'Akron has imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure'. The ordinance has the 'effect of inhibiting ... the vast majority of abortions after the first 12 weeks' ... 'and therefore unreasonably infringes upon a woman's constitutional right to obtain an abortion'.[122]

This decision sets out clearly the double constitutional basis of the right to abortion. The woman's right to personal liberty *together* with the physician's right to freedom of profession constitute the freedom to have an abortion. The two rights are closely interconnected. The statement that,

117 *Ibid.*

118 *Ibid.*, p. 2496.

119 D & E stands for 'dilatation and evacuation'. See for a description of this abortion method Tietze, Ch., *Induced abortion, a world review*, 4th ed., The Population Council, New York, 1981, p. 71.

120 *Ibid.*

121 *Ibid.*

122 *Ibid.*, p. 2497.

> the full vindication of the woman's fundamental right necessarily requires that her physician be given the room he needs to make his best medical judgment.[123]

actually suggests that the physician's right to freedom of practice is part of the woman's right to abortion.

Akron restates the importance of the woman's right to abortion and of the physician's right to professional discretion. The fact that a second-trimester abortion in a hospital costs twice as much as in a clinic together with the fact that women would have to travel to find a hospital, 'significantly limit a woman's ability to obtain an abortion', and are, therefore, an infringement of the woman's right to abortion. At the same time the Court gives a high priority to what it calls, 'accepted medical practice'. Even though, back in 1973, the Supreme Court accepted that second-trimester abortions could be required to take place in hospital, the state of present technology is a sufficient reason for 'adapting' its views. As there is medical evidence that second-trimester abortions can be performed safely in an outpatient clinic up to 16 weeks gestation, the hospitalization requirement is held invalid, even though such a condition would be justified for most of the second trimester. Although the Court does not say so, it has changed its trimester division given in *Roe*. By accepting the view that abortions up to 16 weeks can be performed as safely as abortions up to twelve weeks, it has done away with the rationale for adopting a first trimester limit on the woman's freedom to have an abortion. After *Akron* it will be very difficult for a state to come up with good reasons for regulating the abortion intervention up to 16 weeks of pregnancy in the name of the protection of the pregnant woman's health. In the future, the 16 weeks' limit might be extended even further.

The woman's right to abortion within the first three months of pregnancy seems to be firmly established in the American constitutional order. The Supreme Court has made it very clear, however, that the collaboration of the physician is an indispensable element of the woman's right to abortion. The woman's right to abortion is a right not to decide alone on abortion but in consultation with her physician. In practice, a woman is ultimately always dependent on a physician, because he is the one who has to perform the intervention. The Supreme Court has, however, explicitly recognized the physician's role in the decision making process and has given him ultimate

123 *Ibid.*, p. 2491.

control over the abortion decision. The doctor's role will be dealt with more specifically under 5.

Austria is the only other country with a time-phase rule. The Austrian Constitutional Court did not discuss the pregnant woman's rights as it had already rejected the claims put forward by the parliamentary opposition on the basis of the constitutional provisions protecting the right to life (see *supra*, par. 1). There is no doubt, however, that the defence of women's rights was a basic principle underlying the Austrian abortion reform. The drafters of the law put great emphasis on the conflict situation in which the pregnant woman finds herself, her right to an equal position in society, etc.[124]

As has already been demonstrated, the *French* and *Italian* abortion laws reflect a compromise between opposing views. Both the protection of unborn human life and the pregnant woman's freedom to decide on abortion are included in the respective laws. We have seen, however, that the 'right to life of the unborn from the beginning' proclaimed by both laws has no substantial meaning. In fact, the woman's right to decide is recognized, subject to the condition that she goes through a certain procedure (counselling, waiting period). This is where the compromise lies. It is sufficient for the pregnant woman to claim to be in a 'situation of distress' in the French case, or in the 'circumstances' summed up in art. 4 of the Italian Abortion Act. She does not have to prove that this is the case, nor does the doctor have to verify her claims. As both abortion laws leave the ultimate decision on abortion to the pregnant woman they therefore implicitly recognize the woman's right to self-determination up to the time-limit set by the law.[125] For the period after ten weeks' pregnancy (France) and 90 days' (Italy), the woman's right to limit child-bearing on medical and fetal grounds has been recognized.

The principle of self-determination was re-affirmed by the French Constitutional Council, which stated that the abortion law 'respecte la liberté des personnes appellées à recourir ... à une interruption de grossesse'.[126] In the preparatory works of the Italian abortion law, the right to self-determination is declared as one of the basic principles of the abortion

124 See the Parliamentary Debates, *op. cit.* note 16.

125 In the preparatory works of the Italian Abortion Act the woman's right to self-determination is declared to be one of the basic principles of the law. See Casini, *op. cit.* note 91, p. 63.

126 *Journal Officiel*, 1975, p. 671.

reform.(46) The Italian Constitutional Court rejected the challenges that were made to the woman's right to self-determination, as laid down in the Abortion Act, in its decision of 25 June 1981.[127]

Germany is the only country discussed here which has a constitutional provision that specificly protects the right to self-determination. Art. 2(1) of the Basic Law states:

> Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.[128]

The German Federal Constitutional Court is also the only court which discussed the content of this right in the context of abortion.
The representative of the *Bundestag* in the proceedings before the Constitutional Court defended the time-phase rule, amongst others, on the basis of the woman's right to self-determination. He argued that art. 1(1) and art. 2(1) of the Constitution,[129] which protect the dignity of man and the right to self-determination, not only protect against the threats to life and body but also against physical and psychological burdens connected with pregnancy and the duties related to motherhood.[130]

The Constitutional Court did not accept this interpretation, as has been pointed out in par. 1. The Court recognized that 'pregnancy belongs to the intimate sphere of the woman whose protection is constitutionally guaranteed by art. 2, par.1, in conjunction with art.1, par. 1 of the Constitution' ... 'but this right is not given without limitation'[131]... A compromise between the right to life of the nasciturus and the woman's freedom to have an abortion is not possible. The protection of the unborn has in principle precedence over a woman's right to self-determination for the entire duration of pregnancy. (see par. 1). The time-phase rule adopted by Parliament was therefore declared unconstitutional.

127 *Giurisprudenza Costituzionale*, 1981, no. 108.

128 Translation by Finer, *op. cit.* note 27.

129 Art. 1(1) of the Basic Law: 'The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.' Translation by Finer, *op. cit.* note 27. Art. 2(1), see note 53.

130 Arndt, *op. cit.* note 69, p. 202-204.

131 *Comp. Const. L.*, *op. cit.* note 1, p. 589.

The Constitutional Court decision was followed by an amendment of the Abortion Act in 1976 which established an indications solution for the whole duration of pregnancy. The present abortion provisions recognize the woman's right to limit childbearing on medical, ethical, fetal and social indications. Furthermore, it establishes the duty of the State to offer the pregnant woman counselling and assistance in order to remind her of her fundamental duty (par. 218b Penal Code).

A Woman's Right to Freedom of Religion

Although religious arguments have largely dominated the abortion debate, none of the Constitutional Courts or legislators have used or accepted religious beliefs or the right to freedom of religion for deciding one or the other way.

In *Roe v. Wade* the Supreme Court pointed at the various religious beliefs concerning abortion but rejected them all.[132] In *Harris v. McRae* the Court denied that the funding limitations violated the freedom of religion.[133] Also in the German case there is no indication that religious thinking influenced the decision taken by the Constitutional Court. The judges had different religious backgrounds, and in any case their way of reasoning was strictly juridical. There is not even an allusion to religious or Christian thought in the decision.[134] The reimbursement of socially indicated abortions by the German Health Insurance Program was recently attacked as a violation of the right to freedom of religion and of conscience of those who are opposed to abortion and contribute through tax payments to the public funding of abortion. The Constitutional Court rejected this complaint on formal grounds in June 1984.[135] The French Constitutional Council ignored the proposal to link the constitutionality of the abortion reform to the prin-

132 See *supra*, section B.1.

133 100 *S.Ct.* 267 (1980). See Biskin, J.C., 'The Hyde Amendment: an infringement upon the Free Exercise Clause?', *Rutgers Law Review*, 1981, 33, p. 1054 ff; Skahn, S.L., 'Abortion laws, religious beliefs and the First Amendment', *Valparaiso University Law Review*, 1980, p. 487 ff.

134 Gorby, *op. cit.* note 28, p. 278-279. Kommers, D.P., 'Abortion and Constitution: United States and West-Germany', *American Journal of Comparative Law*, 25, 1977, pp.278 ff.

135 This constitutional question was presented by the 'Sozialgericht Dortmund', Vorlagebeschluß 29.9.1981. See *Pro Familia Magazin*, 1981, n. 3, and Wendt, S., 'Abtreibung auf Krankenschein verfassungswidrig', *Kritische Justiz*, 1983, p. 198-208.

ciple of the secularity of the state.[136] Finally, in both the abortion cases before the European Commission of Human Rights, the Commission did not find the claims based on the right to freedom of religion (art. 9 of the European Convention) relevant.[137]

Conclusions

A woman's right to decide on abortion without limitations has been recognized for the first three months of pregnancy in the US and Austria, and in France and Italy on the condition that the woman follows a procedure which aims to dissuade her from her decision to have an abortion. In Germany, a woman's right to decide on abortion during the first three months of pregnancy was declared unconstitutional by the Federal Constitutional Court. A pregnant woman is only allowed to have an abortion in specific situations defined by the law and certified by two doctors. In France, Italy and Austria, a woman can have an abortion after three months gestation on a medical or fetal indication certified by a doctor. In the US, where the woman's right to abortion has been recognized for the entire period of pregnancy, the states are nevertheless free to limit abortion after three months of gestation. These limitations are aimed at serving the state interest of protecting the woman's health.

The overall picture is that the US, Austria, France and Italy have implicitly recognized a woman's right to self-determination for the early stage of pregnancy, whereas in Germany only her right to limit child-bearing was declared constitutional. However, none of the courts which recognized the woman's right to decide on abortion mentioned or referred to her right to self-determination explicitly. This is understandable in the case of the French and Italian laws as they are compromise solutions and do not represent a principled stand on the abortion problem. It is however remarkable in the American case, where the Supreme Court in its sweeping *Roe* decision declared almost all state abortion laws unconstitutional and proclaimed the woman's 'fundamental' right to abortion.

136 Rivero, J., note in *Comp. Const. L., op. cit.* note 1, p. 580.

137 Final decision of the Commission of 19 May 1976 as to the admissibility of application no 6959/75, the *Brüggeman and Scheuten* case, Council of Europe, European Commission of Human Rights, p.54. Application no 8416/78 by William Paton against the United Kingdom, Council of Europe, European Commission of Human Rights, 1978, p. 11.

Another remarkable fact is that none of the legislatures or constitutional courts, except the American Supreme Court, has ever mentioned the pregnant woman's *right* to abortion. The language of the European abortion laws is in negative or conditional terms and is characterized by phrases like 'abortion is not punishable if ...' or 'a woman can request an abortion if ...'[138] Even in the Austrian case where a time-phase rule was enacted, the language of the abortion provisions makes it clear that the circumstances under which abortion is permitted are an exception to the general rule that abortion is wrong.[139] Furthermore, abortion is definitely not treated like any other medical act in Europe. All European abortion laws include specific penal sanctions for the abortion procedure (time-limit, counselling, waiting period). In this sense there is a clear distinction between the US and Europe.(see *infra* under 5.) The US Supreme Court expressly declared that a woman has the right to abortion, and that the decision to have an abortion, taken by the doctor in consultation with the pregnant woman, cannot be interfered with in any way during the first three months of pregnancy. The Court also made it clear that the usual remedies applicable to medical acts are available in the case of abortion. The European legislators and courts, on the other hand, have cautiously defined the situations in which abortion is permitted and have set out rules to be followed by the doctor performing an abortion, avoiding 'radical' language and never mentioning a 'right' to abortion.

One last observation is that none of the constitutional courts or legislatures used religious arguments for defending a more restrictive law. Nor did they accept a more liberal abortion reform on the basis of the fundamental right to freedom of religion. This is a remarkable fact given the many religious arguments used in the abortion debate.

138 German Penal Code, par. 218a(1): 'Der Abbruch der Schwangerschaft durch einen Arzt ist nicht nach par. 218 strafbar, wenn...'. Art. 162-1 of the French Public Health Act: 'La femme enceinte que son état place dans une situation de détresse peut demander...'. The Italian provision (art. 4 of the Abortion Act) stating that 'la donna che accusi circostanze..., si rivolge al...', is in this respect the least 'conditional'.

139 Par. 97(1) of the Austrian Penal Code: 'Die Tat ist nach par. 96 nicht strafbar, wenn...'.

3. The Father's Rights

There is little divergence in the interpretation of the rights of the father of the fetus. None of the countries here discussed has recognized a father's right in the abortion decision.

In the 1976 decision *Planned Parenthood v. Danforth*, the US Supreme court dealt with the role of the pregnant woman's husband in the abortion decision.[140] The question for decision was whether a state regulation requiring prior written consent of the spouse of the woman seeking abortion was constitutional. This was one of the questions left open by the *Roe* decision. The Court recognized the importance of the marital relationship and agreed that ideally the abortion decision should be taken by both wife and husband.

> Neither has this Court failed to appreciate the importance of the marital relationship in our society ... We recognize that the decision whether to undergo or to forgo an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious.[141]

The fact, however, that partners disagree on such an issue, said the Court, shows that the marriage is not successful...

> it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto-power exercisable for any reason whatsoever or for no reason ar all.[142]

And, proceeded the Court,

> when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.[143]

The attribution of such a veto-power to the husband would not further the interests of the state in protecting the mutuality of decision vital to the marital relationship. The Court, therefore, declared any state provision which required the husband's consent for abortion as unconstitutional.

140 See *supra*, note 9.

141 49 *LEd* 2d, p. 805.

142 *Ibid.*, p. 806.

143 *Ibid.*

Art. 162-4 of the French Public Health Act states:

> Chaque fois que cela est possible, le couple participe à la consultation et à la décision à prendre.

According to the drafters of the law, the ideal situation would be for the father of the fetus to be involved in the abortion decision. But this is not, and cannot be, a legal obligation.[144] The French law expresses thus the same opinion as the US Supreme Court.

According to art. 5 of the Italian Abortion Act, the counselling session can involve the father if the woman agrees:

> Il consultorio e ... hanno il compito ... di esaminare con la donna e con il padre del concepito, ove la donna lo consenta,... le possibili soluzioni dei problemi proposti...

The decision to exclude, in principle, the father of the unborn from the abortion decision was a clear choice by the drafters of the law which was subject to intensive debate during the preparatory works.[145]

One of the objections raised by the opposition in the *Bundestag* to the original German abortion law was that the father's rights were not taken into consideration.[146] The Federal Constitutional Court ignored this claim and the amended abortion law has no provisions to that effect.

The Austrian abortion law does not mention anything about the role of the father of the unborn in the abortion decision.

In conclusion, the role of the father of the unborn in the abortion decision has not been a real point of discussion. In none of the abortion rules here discussed has the father's right to decide or to be consulted on abortion been recognized, although in some instances (France, Italy) the desirability of the involvement of the pregnant woman's partner has been expressed.

4. Parents' Rights

The role of parents in the abortion decision of an underage daughter raises the question of what role parents ought to have in the decisions of their children. Minors often need the consent of their parents for certain acts because they are considered not mature enough to take the right decision, and because

144 Simone Veil, Parliamentary Debates, *op. cit.* note 24, p.7209.

145 Casini, *op. cit.*, p. 91.

146 Arndt, *op. cit.*, p. 69.

parents are supposed to act in the best interests of their children. The position of parents is particularly difficult in the case of abortion, because the decision whether or not to have an abortion deeply affects the life of a woman, and this is even more true of a minor.Furthermore, not all minors under the age of 18 are as immature as the law presupposes. In some cases some 'guidance' can be considered necessary, whereas in other cases outside interference with the abortion decision seems inappropriate. We will see that the various abortion legislations and constitutional court decisions clearly express this dilemma.

In the German abortion law no specific provisions are included concerning the position of minors requesting an abortion. The *Bundestag* explicitly refused to settle this matter as the question of the minor's consent to medical interventions in general required a comprehensive regulation which ought not be prejudged by the specific case of an abortion intervention. The general rules and principles of the case law therefore apply to the abortion decision. Whether the pregnant minor has the capacity to give her consent to abortion depends on the *natürliche Einsichts- und Urteilsfähigkeit der Schwangeren*. 'Einer Minderjährigen kann das höchstpersönliche Einwilligungsrecht im Sinne von par. 218a, Abs. 1 nr. 1 ohne Rücksicht auf die Zustimmung der gesetzlichen Vertreter zustehen, wenn sie die erforderliche Reife und Urteilsfähigkeit hinsichtlich der Tragweite eines Schwangerschaftsabbruchs besitzt'.[147] The capacity to give consent is generally considered not to exist up to the age of 14. Between 14 and 16, this depends on the individual case and from the age of 16, the minor is considered capable of giving her consent.[148] These general guidelines are quite flexible and are, therefore, subject to personal interpretation. It will very much depend on the individual physician whether parental approval of the abortion request is required.

A similar principle operates in Austria. There is no specific provision for minors in the abortion law, but here too the general doctrine of the *natürliche Einsichts- und Urteilsfähigkeit* applies. If a pregnant minor shows that she is sufficiently 'mature' to take the abortion decision, no parental ap-

147 Bericht der 'Kommission zur Auswertung der Erfahrungen mit dem reformierten par. 218 des Strafgesetzbuches', Deutscher Bundestag, 8 Wahlperiode, Drucksache 8/3630, 31.01.1980, p. 22. Translation (my own):'A minor can give her personal consent without the approval of her legal representative, if she possesses the necessary maturity and decisional capacity with regards to the consequences of an abortion'.

148 *Ibid.*

proval is needed. If this is not the case, her legal representative has to decide. However, given the very personal character of the abortion decision, the legal guardian can only take a decision against the will of the pregnant minor on very specific grounds.[149] The Austrian rule is therefore slightly more in favor of the minor's independence than the German one. In both cases, however, the question whether this 'natural capacity to decide' exists is a very subjective judgment.

The French and Italian laws contain specific rules concerning the abortion decision of pregnant minors. Art. 162-7 of the French law states that a pregnant minor cannot decide on abortion without the approval of one of her parents or her legal representative. In Italy, a minor needs the approval of her legal representatives. However, if there are serious reasons for not consulting her legal representatives, or if they refuse to give their approval to the abortion decision of their daughter, the doctor can request the Juvenile Court to decide within five days (art. 12 Italian Abortion Act).

Both the French and Italian provisions have been subject to intensive debate as it has been ascertained that a considerable percentage of pregnant minors, probably because of these restrictions, resort to the clandestine market. There have been no changes in the abortion laws so far. In its decision of June 1981 the Italian Constitutional Court ruled that the relevant provisions rightly entrust the decision whether or not to inform the parents of a pregnant minor that their daughter desires an abortion to the careful assessment of the judge.[150] The Court responded to objections from two sides in this case. On the one hand, it was claimed that these provisions discriminated against pregnant women on the basis of their age, imposing the will of their parents upon women under the age of 18. On the other hand, these rules were accused of being too permissive as they did not give the decision-making power in all cases to the parents.

The position of minors was one of the questions left open by the US Supreme Court in its *Roe* decision of 1973. In the 1976 decision *Planned Parenthood v. Danforth*, the Court had to review a state law which required parental approval of a minor's abortion decision. The parents of a pregnant unmarried minor claimed they had to approve of their daughter's decision to have an abortion on the basis of their interest in the safeguarding of family unity and parental authority. The Supreme Court used almost the same ar-

149 See Strafgesetzbuch, *op. cit.* note 17.

150 Decision of 25 June 1981, *Giurisprudenza Costituzionale*, 1981, no. 109.

guments as it had used with respect to the husband's claims in the abortion decision of his wife. Providing a parent with the absolute power to overrule a decision made by the physician and his patient would not serve family unity. Such a veto-power would not enhance parental authority or control where the minor and the non-consenting parent were so fundamentally in conflict, and the very existence of the pregnancy had already fractured the family structure.

> Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right to privacy of the competent minor mature enough to have become pregnant.[151]

The Court added, however, that this

> does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy.[152]

In 1979, the Supreme Court was called to decide on a Massachusetts parental consent provision (*Bellotti v. Baird*).[153] The statute required parental consent before an abortion could be performed on an unmarried woman under the age of 18. If one of the parents refused, the abortion could be obtained by order of a judge of the Superior Court 'for good cause shown'. The Supreme Court argued that,

> as immature minors often lack the ability to make fully informed choices that take account of both immediate and long range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor.[154]

However, given the seriousness of the abortion decision and the consequences of a denial of abortion the Court stated that

> the State may not – as stated in Danforth, – impose a blanket provision requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy.[155]

151 49 *LEd* 2d, p. 808.

152 *Ibid.*

153 99 *S.Ct.* 3035 (1979).

154 *Ibid.*, p. 3046.

155 *bid.*, p. 3048.

The Court, therefore, concluded that

> if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.[156]
>
> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.[157]

The Court added that the procedure must take place with anonymity and sufficient speed.

The 1981 decision *H.L. v. Matheson* [158] dealt with a Utah statute which required a physician 'to notify, if possible' the parents or guardian of a pregnant minor before providing her with an abortion. The plaintiff was an unmarried, fifteen-year-old girl.

As the plaintiff depended financially upon her parents, resided at home, and had not demonstrated her maturity, the Court decided that she had the right to challenge the statute only as it applied to unemancipated and immature minors. The case under review was thus narrowed down to the question of whether a state can require the notification of the parents of an 'immature' minor. Recognizing the traditional authority of parents over the upbringing and welfare of their immature children, the Court upheld the challenged notification statute because it was 'reasonably calculated' to promote family integrity, encourage parental consultation, and allow parents the opportunity to supply essential medical and other information to the physician.

The key to the decision lies in the consideration of the role of the parents in the abortion decision of their *immature* daughter. To the extent that the right to decide presupposes the capacity to make a mature choice, parental notification statutes do not interfere with the constitutional right of immature minors to decide to have an abortion. That seems to be the rationale of this ruling. A parental notification requirement is justified because it allows for adult involvement in the abortion decision of a minor who cannot otherwise make a mature choice. This is in line with the tradition of Supreme Court rulings which have permitted states to control children more closely

156 *Ibid.*

157 *Ibid.*

158 101 *S.Ct.* 1164 (1981).

than adults, and follows the rationale of Bellotti that 'a state reasonably may determine that parental consultation often is desirable and in the best interests of the (immature) minor'.[159]

The Court makes a very clear distinction, in this decision, between 'mature' and 'immature' minors. One of the questions left open in this decision was whether a consent provision for 'mature' minors would be constitutional. Although the Court ruled in *Danforth* that a consent provision for minors was unconstitutional, this applied to all minors, irrespective of their level of maturity. In the *Matheson* case it is clear that there are no clear guidelines given concerning the criteria to adopt for deciding whether a minor is sufficiently mature to make the abortion decision independently.[160] The Court merely decided that in this particular case, which concerned a fifteen – year-old girl, not financially independent, and living at home – the minor had not demonstrated her maturity.

In *City of Akron v. Akron Center for Reproductive Health* (1983),[161] the Supreme court struck down a state provision which prohibited a physician from performing an abortion on a pregnant minor under the age of 15 unless he obtained 'the informed written consent of her parents or her legal guardian', or unless the minor obtained 'an order from a court having jurisdiction over her that the abortion be performed or induced'. The Court repeated its *Bellotti* statement that 'the state must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interest'.[162]

The provision under review was unconstitutional because it was

> a blanket determination that *all* minors under the age of 15 are too immature to make this decision or that an abortion never may be in the minor's best interest without parental approval.[163]

159 99 *S.Ct.* 3046 (1979).

160 'Parental notification prior to abortions for immature minors' (H.L. v. Matheson), *Harvard Law Review*, 95, 1981, p. 150.

161 103 *S.Ct.* 2481 (1983).

162 *Ibid.*, p. 2498.

163 *Ibid.*

Finally, in *Planned Parenthood, Kansas City, MO, v. Ashcroft* (1983),[164] the Court tackled the question of a parental consent provision for immature minors. The Court stated that

> a State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial.[165]

As the Missouri statute under review provided a judicial procedure in which it was ascertained whether the minor is sufficiently mature to decide on abortion, the provision was declared constitutional. The determining factor for accepting parental involvement in the form of consultation or consent was, therefore, that the minor had not demonstrated that she was mature enough to decide alone on abortion, or that an abortion would not be in her best interest. That seems to be the present position of the Supreme Court as concerns the minor's right to decide on abortion.

Some observations can be made on these Supreme Court rulings. First of all, the tone of the decisions seems to have changed over the years. Whereas Danforth emphasizes the independent position of minors and of the limits to parental authority, in *Matheson* the positive aspects of parental authority are highlighted. Secondly, the distinction introduced by the Court in *Bellotti* between consent and consultation of the parents is definitely abandoned in *Ashcroft*. From the distinction between consent and consultation, the Court moved to the distinction between 'immature' and 'mature' minors. Whereas a 'mature' minor is treated like an adult woman, an 'immature' minor needs a 'consent substitute' by parents or judge.

The Supreme Court rulings perhaps best illustrate the difficulties involved in the abortion requests of minors. By distinguishing between 'mature' and 'immature' minors, the Court has taken a 'middle position' which takes account of both the parental role and the independent position of 'mature' minors. It has thus abandoned the legal distinction between minority and majority age. This seems to be a very realistic position. It has been shown that the German and Austrian abortion laws have adopted a similar distinction, although the German one is somewhat more rigid. The Italian Abortion Act does not distinguish between mature and immature minors but allows for an 'escape route' via the Juvenile Court. France is the only coun-

164 103 *S.Ct.* 2517 (1983).

165 *Ibid.* p. 2525.

try where the possible maturity of minors is completely ignored by the abortion law.

5. The Doctor's Rights

The doctor's professional freedom has been largely respected in all jurisdictions. There are two aspects of professional freedom in the context of abortion. On the one hand it involves the right to perform or to refuse assistance in an abortion. On the other hand, it also involves the right to determine how the abortion is to be carried out. Whereas in Europe the first aspect of professional freedom has been emphasized most, in the US the discussion before the Supreme Court has centered on the second aspect.

The freedom of choice of a doctor with respect to an abortion request is expressed in abortion legislation by giving him the right to refuse abortion assistance (the right to give abortion assistance is taken for granted). In the four European abortion regulations a distinction can be made between 'refusal clauses' and 'conscience clauses'. Under a 'refusal clause', a doctor has the very general right to refuse collaboration in an abortion intervention. He can decide on a case-by-case basis whether he will give abortion assistance or not and he does not have to give reasons for his refusal. A 'conscience clause', on the other hand, limits the right to refuse abortion assistance to those who have conscientious objections to abortion. The distinction might seem trivial, but is quite significant in practice. A doctor can invoke a 'refusal clause' at any time and for any reason; he does not have to account for his refusal. A doctor who invokes a 'conscience clause', on the other hand, has to be consistent. He cannot accept abortion patients one day and refuse them the next, i.e. he must raise conscientious objections to all abortion requests or all similar abortion requests. He cannot switch position depending on the circumstances. In this sense, his right to freedom of profession is somewhat limited. Italy is the only country which has enacted a 'conscience clause' as opposed to the 'refusal clauses' in force in the German, Austrian and French abortion provisions.

Art. 162-8 of the French abortion law states that 'un médecin n'est jamais tenu de pratiquer une interruption volontaire de la grossesse, mais il doit informer, au plus tard lors de la première visite, l'intéressée de son refus'. No midwife, nurse or medical assistant is obliged to assist at an abortion (art. 162-8.2 *CSP*), and private hospitals can refuse to accept abortion patients unless they are part of the public health service (art. 162-8.3).Par. 5 of art.

162-8 states the obligation of public hospitals to provide abortion services.[166]

Under the Austrian abortion law no doctor is obliged to perform or to assist in an abortion except when it is necessary to save the woman's life. This also applies to nursing staff and persons employed in technical, medical or health assistance services.(par. 97.3(2)). In 1975 the Constitutional Court ruled that the legal representative (i.e. director) of a hospital was allowed to prohibit access to abortion patients.[167] With this decision the Court struck down a regional law which established that public or private hospitals could not refuse to accept abortion patients.

Art. 2 of the German 15 Str. AG contains a 'refusal clause'. Nobody is obliged to assist at an abortion (except in the case of a threat to the life or health of the woman), irrespective of the motives for this refusal.[168] This clause covers doctors, medical assistants and hospital administrators. The question of whether public hospitals have a right to refuse abortion patients has to be settled by administrative courts.[169]

Art. 9 of the Italian Abortion Act, in contrast to the other European provisions, contains a very elaborate 'conscience clause'. A doctor can only refuse to participate in, or perform an abortion if he has previously declared his conscientious objections to abortion to the provincial health authorities or to the director of the hospital he is employed by, within a month of the coming into force of the law, or within a month of the moment he started

166 The following additions have been made in 1979 to art. 162-8 of the Public Health Act. 162-8.5: 'Les catégories d'établissements publics qui sont tenus de disposer des moyens permettant la pratique des interruptions volontaires de la grossesse sont fixées par décret' 162-8.6: 'Dans les établissements hospitaliers appartenant aux catégories mentionnées à l'alinea précédent, le conseil d'administration désigne le service dans lequel les interruptions volontaires de la grossesse sont pratiquées.' 162-8.7: 'Lorsque le chef de service concerné refuse d'en assumer la responsabilité, le conseil d'administration doit créer une unité dotée des moyens permettant la pratique des interruptions volontaires de la grossesse.' See for a discussion of the scope and limits of professional freedom in the French case Clavel, E., 'La clause de conscience du médecin dans la loi du 17 janvier 1975 relative à l'interruption volontaire de grossesse', *La Semaine Juridique Juris-Classeur Periodique*, 52, 1978, p. 2915 ff.

167 See note 18.

168 Art. 2.1 15 Str.AG: 'Niemand ist verpflichtet, an einem Schwangerschaftsabbruch mitzuwirken.' 'Absatz 1 gilt nicht, wenn die Mitwirkung notwendig ist, um von der Frau eine anders nicht abwendbare Gefahr des Todes oder einer schweren Gesundheitsschädigung abzuwenden'.

169 See Horton, K.C., 'Abortion law reform: the German Federal Republic', *International and Comparative Law Quarterly*, 1979, p. 288.

his employment in a hospital (art. 9.1). A doctor can always revoke his objections, but this will only take effect one month after he has officially declared the revocation of his conscientious objections to abortion (art. 9.2). The 'conscience clause' only applies to procedures and activities directly related to the abortion intervention, not to the assistance given to the woman prior to and after the intervention (art. 9.3). Public hospitals and private clinics are obliged to guarantee the procedures related to abortion and the performance of abortion (art. 9.4), and in the case of a threat to the woman's life the conscience clause cannot be invoked (art. 9.5). Conscientious objections are considered to be cancelled with immediate effect for persons who in spite of what they officially declared take part in abortion procedures or interventions (art. 9.6). Finally, the penal sanctions on non-compliance with the provisions of the Abortion Act are higher for doctors who have declared their conscientious objections. With these very detailed and stringent provisions the Italian legislator seems to have made an effort to limit the use and abuse of the conscience clause by the medical profession.

In contrast to the European emphasis on the doctor's right to refuse abortion assistance, in the US the central role of the physician in the abortion decision of a pregnant woman is at the core of the US Supreme Court abortion decisions. As has been pointed out in par. 2, the woman's right to personal liberty *together* with the physician's right to professional freedom constitute the freedom to have an abortion. The question of whether a doctor has the right to refuse abortion assistance was not discussed specifically because it is implied in the view of the Supreme Court that 'the abortion decision is inherently and primarily a medical decision, and basic responsibility must rest with the physician' (see par. 1).[170] A hospital is free not to admit a patient for an abortion and a physician or any other employee has the right to refuse to perform or assist at an abortion. These freedoms are taken as a matter of course by the Supreme Court.[171] In almost all Supreme Court decisions it is clear that the physician is considered to be in the best position to judge the pregnant woman's situation. As the Court states in *Doe v. Bolton* (1973),

> ... the conscientious physician, particularly the obstetrician, whose professional activity is concerned with the physical and mental welfare, the woes, the emotions, and the concern of his female patients. He, perhaps more than

170 35 *LEd* 2d, p. 184.

171 See *Doe v. Bolton*, 35 *LEd* 2d, p. 216.

> anyone else, is knowledgeable in this area of patient care, and he is aware of human frailty, so-called 'error' and needs. The good physician ... will have sympathy and understanding for the pregnant patient that probably is not exceeded by those who participate in other areas of professional counseling.[172]

These words show that the Supreme Court has great confidence in the qualifications of the physician and leaves it to the physician to make the ultimate judgment on the question of whether abortion is appropriate or not. The Court seems to be saying that the abortion decision is 'safe' in the hands of the physician.[173]

In the US, the professional freedom of doctors has been interpreted more broadly than in Europe, because the Supreme Court extended professional freedom also to the abortion intervention. This approach was less commonly adopted in Europe. As we have seen in section A, the European abortion laws, with the exception of the Austrian, have regulated in detail the formalities a pregnant woman has to go through before she can obtain an abortion, e.g. counselling, waiting period, hospitalization etc. Although the French and Italian abortion laws respect the woman's right to decide up to approximately three months of pregnancy, and have guaranteed the physician's right to refuse abortion assistance, they have attached specific penal sanctions to the abortion procedure. The US Supreme Court, in contrast, has made sure that, within the limits outlined in *Roe v. Wade*, the physician has the freedom to determine the procedure to be followed. Furthermore, his discretion cannot be constrained by specific penal sanctions, as the Court made clear in *Roe*:

> If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.[174]

The Court has repeatedly emphasized that abortion has to be treated like any other medical or surgical procedure. State regulations which set more stringent conditions for abortion than for other (comparable) medical acts have been struck off,[175] except for the funding cases (see *infra* under 6.). In

172 35 *LEd* 2d, p. 215.

173 As Laurence Tribe has pointed out (*op. cit.* note 111, 1973, p. 37): 'There is much in the Court's opinions in *Roe v. Wade* and *Doe v. Bolton* that can be read to suggest a desire to make the ultimate decision that of a medical expert'.

174 *Ibid.*, p. 184.

175 *Doe v. Bolton*, 35 *LEd* 2d, p. 217.

Europe, on the other hand, abortion is not considered to be like any other medical act, as has been made clear by the legislators (see *supra* section A). If we were to describe the differences in emphasis in Europe and the US in greater detail, we could say that the prime concern of the European legislators and courts has been to grant the doctor the right to refuse abortion assistance, whereas the Supreme Court has taken pains to guarantee him the largest possible freedom in providing abortion assistance. The Supreme Court rulings illustrate this difference.

The requirement that two licensed physicians must concur in the abortion decision, or that an abortion committee must decide on the necessity of an abortion, was declared unconstitutional in *Doe v. Bolton* by the Supreme Court as being an infringement of the physician's right to practise.[176] The Court stated that the physician will be called upon to make a professional statement as to whether an abortion is necessary.

The medical judgment may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman's age relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.[177]

Doe v. Bolton therefore underscores the importance of affording the physician adequate discretion in the exercise of his medical judgment. In *Planned Parenthood v. Danforth* (1976), the Supreme Court had to decide whether a state statute can define the moment of viability.The Court again stresses the doctor's freedom of judgment in the abortion decision.
Viability is

> ... a matter of medical judgment, skill and technical ability, and we preserved (in *Roe*) the flexibility of the term.[178] In any event... it is not the proper function of the legislature or the courts to place viability, which is essentially a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.[179]

176 *Ibid.*, p. 214-217.

177 *Ibid.*, p. 212.

178 49 *LEd* 2d, p. 802. 96 *S.Ct.* 2839.

179 *Ibid.*

This principle is reaffirmed in *Colautti v. Franklin* (1979):

> Viability is reached when, in the judgment of the attending physician on the particular facts before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support.[180]

The Court answered the question, also raised in *Colautti v. Franklin*, whether a state can prescribe that for viable fetuses an abortion technique will be used which provides the best opportunity for the fetus to be aborted alive:

> The choice of an appropriate abortion technique,... is a complex medical judgment about which experts can – and do – disagree.[181]

State requirements which obliged the physician to give the pregnant woman medical and other information aimed, amongst others, at dissuading her (similar to the French and Italian provisions), were struck down by the Supreme Court in its 1983 *Akron* decision as being

> an intrusion upon the discretion of the pregnant woman's physician.[182] ... It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending upon her particular circumstances(2500) By insisting upon recitation of a lengthy and inflexible list of information, the statute has unreasonably placed obstacles on the path of the doctor upon whom (the woman) is entitled to rely for advice in connection with her decision.[183]

In the same decision, a mandatory waiting period of 24 hours after the pregnant woman had signed a consent form, was held invalid if the physician was to be afforded adequate discretion in the exercise of his medical judgment.[184]

Aspects of the abortion procedure – like the place of the intervention, the counselling rules, waiting period etc. – which European legislators have not hesitated to regulate, are left by the US Supreme Court to the discretion of the physician. This means that a physician is free to give extensive counselling, require a waiting period etc. The Court has not prohibited him from

180 99 *S Ct.* 683 (1979).

181 *Ibid.*, p. 688.

182 103 *S.Ct.* 2499.

183 *Ibid.*, p. 2501.

184 *Ibid.*, p. 2503.

applying a more lengthy procedure, it has only prevented the states from imposing any rules on the physician. At this point it is interesting to note that some of the provisions which were aimed by the legislator at making the abortion procedure more difficult for the woman (counselling, waiting period), are dealt with by the Supreme Court as if they were a burden on the professional freedom of the physician.

In very few instances has the Supreme Court upheld state laws which regulated the abortion procedure. A state law which required that the woman, prior to undergoing an abortion during the first twelve weeks of pregnancy, certify in writing that she consented to the procedure and 'that her consent is informed and freely given and is not the result of coercion', was held constitutional in *Planned Parenthood v. Danforth*.[185] The Court ruled that 'the decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences... her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent'.[186] As the more recent *Akron* decision of 1983 shows, the Court does not allow for more specific counselling requirements.

In the same *Danforth* decision, the Court held that 'record-keeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible'.[187] As these statistical requirements did not have a legally significant impact on the abortion decision or on the physician-patient relationship, they were declared constitutional by the Supreme Court.

In its most recent *Ashcroft* decision of 1983,[188] the Supreme Court upheld a provision which requires the attendance of a second physician at the abortion of a viable fetus. The Court gives the following explanation for its decision. As many of these late abortions are emergency operations to save the life or health of the mother, the first physician will be fully occupied with the woman and will need the assistance of another physician to take care of the fetus. This provision, therefore, does not interfere with the physi-

185 49 *LEd* 2d, p. 803.

186 *Ibid.*

187 49 *LEd* 2d, p. 811.

188 *Planned Parenthood, Kansas City, MO, v. Ashcroft*, 103 *S.Ct.* 2517 (1983).

cian's freedom of action because the 'second physician may be of assistance to the woman's physician in preserving the health and life of the child'.[189]

The same Missouri law required that 'all tissue surgically removed shall be examined by a pathologist'. This examination by a pathologist, which is important for the study of long-range complications and their effects on subsequent pregnancies, was considered 'accepted medical practice' by the Court.[190] This requirement was therefore judged constitutional because it was useful to the State's interest in protecting the health of its female citizens and because this examination was considered a relatively insignificant burden.[191]

The cases show that the states are only allowed to intervene in minor aspects of the abortion intervention. The Supreme Court has given ample scope to doctors to decide how to perform an abortion, and how to inform the pregnant woman. The central role of the physician has been expressed in almost all decisions, with a major emphasis in the most recent rulings (*Akron, Ashcroft*). Even the trimester approach adopted in *Roe* has been blurred in favor of the freedom of medical judgment, because the question when the moment of viability begins (*Danforth, Colautti*), and whether a second-trimester abortion can be treated in the same way as a first-trimester abortion (*Akron*), is left to medical discretion. The Supreme Court has taken pains to leave as much professional freedom to the physician in the case of abortion as in other medical acts.

Although in Europe abortion is not treated like a normal medical act, as has been pointed out, and although the doctor's role is, in principle, contingent on the right to abortion in that the conditions set out by the law have to be fulfilled before he can act, in some aspects, however, the doctor does take part in the abortion decision of the pregnant woman. In some cases the doctor has been given an additional task which goes beyond his professional freedom to give or refuse abortion assistance. Under the German indications solution, for example, it is the doctor who decides on abortion as he is the one who decides on the existence of an indication. This might seem natural in the case of a medical, fetal or ethical indication which require mainly medical knowledge. It is, however, curious that the physician should be the one who decides whether a social indication exists, as the evaluation of a

189 *Ibid.*, p. 2522.

190 *Ibid.*, p. 2523.

191 *bid.*, p. 2524-2525.

woman's social circumstances does not necessarily fall within the competence of a doctor (see the discussion under 1., *supra*). Given the fact that the bulk of abortion interventions are based on a social indication, the doctor's competence to certify the indication is an important one. In Italy and France the doctor is called upon to influence the decision of the pregnant woman in that he has to try and dissuade her, and to show her alternatives to the option of abortion. These tasks make his position – as with the refusal clause – less contingent, and make him take part in the abortion decision.

At this point we may conclude that the doctor's right to professional freedom has been largely respected both in Europe and in the US. The main distinction between the American and the European approach is that the US Supreme Court has taken pains to treat abortion like any other medical act and, therefore, not only to respect the doctor's right to refuse abortion assistance, but also to emphasize the doctor's central role in the abortion decision and in the determination of the abortion procedure. In Europe, on the other hand, abortion is not considered to be a regular medical intervention, and the doctor's right to professional freedom is contingent on the woman's right to abortion: he can only act once the legal conditions are fulfilled. There is a certain ambiguity, however, in the European treatment of the doctor's role. Although the detailed instructions of the European laws as to the abortion decision and the abortion procedure make clear that abortion is not just a medical act, in some aspects they give the doctor a role in the decision making process, suggesting that the decision on abortion falls within the competence of the medical profession. The German indications solution is the most striking example in this respect, but the Italian and French counselling rules and the French and Austrian refusal clauses also point in this direction. It is therefore fair to state that in Europe, too, the medical profession has a central role in the abortion procedure which goes beyond the mere performance or refusal to perform abortions.

6. The pregnant woman's right to subsidized abortion

It has been shown in chapter II, section C, under 4 that a pregnant woman who obtains an abortion may make two separate claims. She may demand to be treated in the same way as others who receive similar medical care. She may also claim that abortion should be a welfare right subsidized by the state.

In Italy, Germany, and to a certain extent France, abortion is funded like other medical care. Italy has a National Health Service and abortion is in-

cluded in general health care. The Italian Abortion Act in fact states that extra funds will be made available for the newly established family planning centers (*consultori familiari*) which should play a central role in the abortion procedure (arts. 2 and 3).

The German Health Insurance Program (*Krankenkassen*), in which almost 90% of the population participates, covers abortion comprehensively, including medical consultation, abortion intervention, drugs and medication, sickness benefits and sickness assistance. However, there has been a strong reaction recently in Germany against health insurance coverage of non-medically indicated abortions, in particular the *Notlage Indikation* (social indication). The *Sozialgericht Dortmund* presented this question for judicial review to the Federal Constitutional Court. The Constitutional Court issued its decision in June 1984. It did not deal with the question of whether the reimbursement of socially indicated abortions is compatible with the Constitution because it rejected the complaint on procedural grounds.[192] The present center-right government stated in June 1983 that an alteration of the Health Insurance Program with respect to abortion would be discussed as soon as the Constitutional Court announced its judgment. In February 1984, members of the CDU/CSU introduced a draft bill in Parliament to alter the Health Insurance Program (*Reichsversicherungsordnung*) in such a way as to exclude insurance cover for abortions performed on a social indication.[193] It seems, however, that there is no parliamentary majority for this proposal.[194]

The original 1975 French abortion law did not provide for health insurance cover of abortion interventions. Art. 8 of the Abortion Act, however, fixes the tariffs for abortion, which are adjusted regularly. In addition, the 'needy' can claim *Aide Médicale* as part of the Social Assistance Scheme (art. 182-2 Code de la Famille et de l'Aide Sociale). The 1975 law made a

192 See *Pro Familia Informationen*, 5, 1984, p. 14 ff. See for a discussion of the German Health Insurance Program and the coverage of abortion interventions Esser, A., Hirsch, H.A., *Sterilisation und Schwangerschaftsabbruch*, Enke Verlag, Stuttgart, 1980, p. 221-223; Eska, B. 'The social security system of the Federal Republic of Germany', *Social Service Review*, 1980, p. 113ff; Altenstetter, CH., Health Policy-making and administration in West Germany and the United States, Sage, Beverly Hills, 1974, p. 46ff.

193 Information given in 'Determinants of abortion policy in West-Germany', paper presented by Ursula Beer to the ECPR Joint Sessions of Workshops, Salzburg, April 1984.

194 See note 192.

clear distinction between necessary and unnecessary medical acts such as abortions, which had to be considered as exceptional, voluntary interventions.[195] The ideology behind this system was that it should not be financially impossible to have an abortion (therefore *Aide Médicale*). It was also felt, however, that funds should be withheld for medical interventions which were not strictly necessary.[196] Abuse of financial resources was prevented through the system of fixed tariffs. The Mitterrand government, which came into power in 1981, included the coverage of abortion interventions by social security in its program. Due to budgetary problems it took until 1983 for a new regulation to come into force. As from 1-1-1983, 75% of abortion costs (following the fixed tariffs) are funded out of public resources. The woman has to pay the remaining 25%.[197]

After the introduction of the time-phase rule in Austria, there was still no agreement about who was to pay for the costs of abortion. In practice, the Health Insurance Program pays only for abortions on a medical indication. In all other cases the pregnant woman has to pay the full amount.[198] Furthermore, there are no fixed tariffs for abortion interventions. It seems rather curious that a country with one of the most liberal abortion laws does not provide for public funding of abortion. The aura of taboo which still surrounds abortion in Austria probably provides the explanation for this. Apart from passing the law, the Socialist government has completely withdrawn from the abortion issue.

The US differs in one basic aspect from Europe in that there is no comprehensive public health insurance scheme for the majority of the population. Health insurance is considered as belonging to the private sphere. There is only Medicaid, which is a medical assistance program for the indigent. It is, therefore, inappropriate to compare Medicaid to any of the health insurance programs in Europe, because of its limited and 'social assistance' nature. It could probably be best compared to the French *Aide Médicale*. Since Medicaid only concerns the poor, the impact of restrictions in Medicaid funding on access to abortion is much stronger than would be restrictions in, for

195 Simone Veil, Parliamentary Debates, *op. cit.* note 24, p. 7001.

196 *Ibid.* She compares abortion to dental care, eyeglasses and voluntary vaccination which are not funded by Social Security.

197 Ketting, E., van Praag, P., *Abortus Provocatus wet en praktijk*, NISSO, Zeist, 1983, p. 191.

198 *Ibid.*

example, funding by the German Health Insurance Program, which is not limited to the poor.

In reaction to the US Supreme Court decisions *Roe v. Wade* (1973) and *Planned Parenthood v. Danforth* (1976), which proclaimed the woman's freedom to have an abortion without any outside interference during the first three months of pregnancy, attempts were made by the states and by Congress to limit the impact of these decisions as much as possible. In Congress, anti-abortion riders were attached to bills apparently not related to abortion,[199] the most conspicuous example of which has been the limiting of federal funds for abortion.

Medicaid is the federal system of medical assistance for the indigent, which was enacted in 1965 as Title XIX of the Social Security Act. Title XIX was passed by Congress in order to enable states to provide free medical service to persons who were unable to meet the cost of necessary treatment. Funded jointly by state and federal governments, Medicaid is a state-administered program. States are not required to participate in Medicaid, but if they choose to do so, they must comply with the general program requirements outlined by the federal statutes and regulations. One of the conditions for participation is the commitment to provide 'necessary medical service' for indigent persons.[200] What the term 'necessary medical service' actually means and whether abortion is included in this term was the subject of an intensive debate after the 1973 abortion decision.

In response to the *Roe* decision many states adopted laws which limited access to abortion by prohibiting Medicaid payments for abortion. State policies restricting Medicaid payment generally demanded that abortion be 'medically indicated', that is necessitated by a threat to the mother's life and health, or by other factors such as rape and incest, or the likelihood that the child would be deformed. States justified such restrictions on the grounds

199 United States Commission on Civil Rights, *Constitutional aspects of the right to limit childbearing*, Washington, 1975, p. 11-15. Mentioned are the abortion related conscience clause in the Health Programs Extension Act, an abortion funding ban in the Foreign Assistance Act of 1973, a provision in the Legal Services Corporation Act prohibiting legal services attorneys from handling abortion related cases.

200 Butler, P.A., 'Right to Medicaid payment for abortion', *Hastings Law Journal*, 28, 1977, p. 939. Stingle, K.D., 'Denial of public funds for non-therapeutic abortions – Beal v. Doe, Maher v. Roe, Poelker v. Doe', *Connecticut Law Review*, 10, 1978, p. 487-510.

that the federal Medicaid law authorized payment of federal funds only for these 'medically necessary services'.[201]

Congress amended the Medicaid Statute in 1972 to include family planning services, but it did not refer to abortion in enacting these amendments. However, at the height of the abortion discussion, reactivated by the 1973 *Roe v. Wade* decision, the Hyde Amendment was passed in 1976. This appropriations amendment to Title XIX of the Social Security Act prohibits the use of any federal funds to reimburse the costs of abortion under the Medicaid program, except in certain specific circumstances. The conference report on the amendment explained that Congress intended to limit funding of abortion to cases of 'medical necessity', which meant in cases of medical, fetal or ethical indications. At the end of the fiscal year 1976, Congress adopted the Hyde Amendment, overriding a presidential veto of the bill.[202]

Consequently, many suits which challenged the restrictive state Medicaid programs resulting from this federal restriction were filed at state level. Some lower state and federal courts struck down such regulations on the basis of the Equal Protection Clause of the 14th Amendment.[203] The matter was decided by the Supreme Court in 1977.

In *Maher v. Roe* (1977),[204] the Supreme Court ruled on the question of whether it is constitutional for a state welfare program to deny payment for non-therapeutic abortions whilst reimbursing the medical expenses of childbirth. The Supreme Court, in contrast to the lower court decisions, upheld such a welfare regulation against an equal protection challenge.

The Court ruled that the regulations challenged in this way might result in discriminatory treatment of indigent women, but according to the 'Equal Protection-doctrine' such discrimination did not require 'strict constitutional scrutiny' because it did not create a 'suspect class', nor did it impinge on a

201 Butler, *op. cit.* note 200, p. 943-944.

202 *Ibid.*, p. 942-943.

203 The Equal Protection Clause of the 14th Amendment: '...nor (shall any State) deny to any person within its jurisdiction the equal protection of the laws'.

204 *Maher v. Roe*, 97 *S.Ct.* 2376 (1977). Two companion cases dealing with public funding of abortion were decided at the same moment, *Beal v. Doe*, 97 *S.Ct.* 2366, and *Poelker v. Doe*, 97 *S.Ct.* 2391.

'fundamental right'.[205] Indigency in itself, said the Court, has never been accepted as creating a 'suspect class'.

> The indigency that may make it difficult – and in some cases perhaps, impossible – for some women to have an abortion, is neither created nor in any way affected by the Connecticut regulation.[206]

As to the woman's fundamental right to abortion, recognized in *Roe*, the Court ruled that this right protects a woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy or not. It does not imply, however, that a state can make no value judgment favoring childbirth over abortion, nor implement that judgment by the allocation of funds.

> The Connecticut regulation places no obstacles – absolute or otherwise – in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantages as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires.[207]

As no 'suspect class' was created, nor any 'fundamental right' violated, no 'strict scrutiny' was required. The Court, therefore, applied the less rigorous 'rational relationship-test' and held the Connecticut regulation to be constitutional because reasonably related to a legitimate state interest of encouraging childbirth (recognized in *Roe v. Wade*). The Court added:

> We are certainly not unsympathetic to the plight of an indigent woman who desires an abortion, but the Constitution does not provide judicial remedies for every social and economic ill ... When an issue involves policy choices as sensitive as the funding of non-therapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature.[208]

205 Under the Equal Protection Clause courts traditionally apply the 'strict scrutiny'-test or the 'rational relationship'-test to determine whether a discriminatory classification violates the Constitution. The 'strict scrutiny'-test is applied when either a 'fundamental interest' or a 'suspect classification' has been identified. In this case, the state must show a 'compelling interest' in order to justify the discriminatory classification or the violation of the fundamental right. When neither a suspect class nor a fundamental right is at stake, the Court applies the less stringent 'rational relationship-test. Under this test there need to be only some rational relation between the discriminatory classification and a legitimate state interest.

206 97 *S.Ct.* 2376.

207 *Ibid.*

208 *Ibid.*

This decision has been widely criticized for its blindness to the social reality in the US, where access to abortion for the poor is so dependent on Medicaid funding.[209] Whereas the Supreme Court in *Roe v. Wade* justified the right to abortion by pointing to the distressful life of women who are forced to have children, here it declares that the 'Constitution does not provide judicial remedies for every social and economic ill'. In expressing his dissent to the Maher judgement Justice Marshall pointed out that the Court's acceptance of governmental actions ostensibly taken to 'encourage' women to carry their pregnancies to term are in reality intended to impose a moral viewpoint that no state may constitutionally enforce.[210] The result of this decision has been that most state legislatures have limited reimbursement for abortion to abortions on medical, fetal and ethical indications. In the light of this development cases were presented in 1978 and 1979 in an attempt to gain the legal entitlement to federal Medicaid funding for non-therapeutic abortions. In some cases lower courts allowed a more liberal interpretation of the 'medical necessity' clause in the Hyde Amendment.[211] This trend, however, was completely reversed by the 1980 Supreme Court decision *Harris v. McRae*[212] on the question of whether the Hyde Amendment was constitutional. The 1977 version of the Hyde Amendment allowed federal funds to be used only if the mother's life would be endangered by the pregnancy. In 1978 and 1979 there was an additional exception made for 'instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians'.[213] This last clause was removed in 1980, but an additional exception was made for the victims of rape and incest. Thus not all medically necessary abortions were funded by Medicaid in the period 1977-1980. The appellants in *Harris v. McRae* claimed that the Hyde Amendment, by not funding

209 See Appleton, S.F., 'Abortion – funding cases and population control – imaginary law suit', *Michigan Law Review*, 77, 1979, p. 1688-1729. Butler, *op. cit.* Friedman, S.W., 'Indigent women, what right to abortion?', *New York Law School Law Review*, 1978, pp. 709-741. Lincoln, R. e.o., 'The Court, the Congress and the President: turning back the clock on the pregnant poor', *Family Planning Perspectives*, 9, 1977, pp 207-214. O'Fallon, 'Adjudication and contested concepts: the case of equal protection, *New York University Law Review*, 54, 1979, p. 19 ff.

210 Stingle, *op. cit.* note 200, p. 507.

211 See Mendelson, J.E., Domolky, S., 'The courts and elective abortion under Medicaid', *Social Service Review*, 1980, pp. 124-135.

212 *Harris v. Mc. Rae*, see note 133.

213 *bid.*, pp. 2680-2681.

all medically necessary abortions (1), impinged on the 'liberty' protected by the 14th Amendment as recognized in *Roe v. Wade*, and (2) violated the Equal Protection Clause of the 14th Amendment. As to the first claim, the Court ruled that, whether the woman's right to decide on abortion

> lies at the core or the periphery of the Due Process liberty recognized in *Roe v. Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices ... The fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care at all.[214]

Answering to the second claim, the Court repeated its Maher arguments: no fundamental right was violated, and financial need alone does not create a suspect class. The fact

> that *Maher* involved a refusal to fund non-therapeutic abortions, whereas the present case involves a refusal to fund medically necessary abortions, has no bearing at the factors that render a classification 'suspect' within the meaning of the Constitutional guarantee of equal protection ... The Hyde Amendment by encouraging childbirth except in the most urgent circumstances, is rationally related to the legitimate governmental objective of protecting potential life ... Nor is it irrational that Congress has not authorized federal reimbursement for certain medically necessary abortions. Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.[215]

The language of this decision almost reverses the ideas expressed in *Roe v. Wade*. In *Roe* the woman's right to decide on abortion was the central argument. Here, the importance of encouraging childbirth and the protection of potential life against its 'purposeful termination' seems to be the central argument. The intentions behind the Hyde Amendment were clear: to stop the liberalization of abortion in practice. As Henry Hyde announced during the defence of the amendment,

> we have decided not to fund abortion because it's killing of an innocently inconvenient pre-born child ... We are not going to stand by and be accessories to the elimination of hundreds of thousands of unborn children.[216]

214 *Ibid.*, p 2688.

215 *Ibid.*, p. 2692.

216 Perry, M.J., 'Why the Supreme Court was plainly wrong in the Hyde Amendment case: a brief comment on Harris v. McRae', *Stanford Law Review*, 1980, p. 1126.

In his comment on *McRae* Michael Perry stated that 'while *Roe* quite plainly does not forbid all government action that might have the effect of making a woman prefer childbirth to abortion, *Roe* does require that government take no action including the selective withholding of Medicaid funds, predicated on the view that abortion is *per se* morally objectionable'.[217] Judicial enquiry into the legislative motivation would show that the supporters of the Hyde Amendment were not concerned with the financial aspects of Medicaid funding for abortion, but that they sought to narrow the scope of Medicaid to reflect their moral objection to abortion.

The result of the passing of the Hyde Amendment, together with the *Maher* and *McRae* rulings, is that federal funding is limited to abortions considered 'medically necessary' in the narrow sense, and that states have the constitutional right to apply the same restrictions to state funding of abortions. What is most striking in these funding cases is the strict distinction between the right to abortion and the financial access to that right. The principle that 'indigency' does not create a 'suspect class' seems to be at the core of these decisions. Precisely this distinction shows the difference between American and European values. The fact that in Europe indigency is considered as 'suspect' has led to Health Insurance Programs in which the majority of the population is included, or even, as in Italy, to the creation of a National Health Service. The limitations on Medicaid funding for abortion therefore fit very closely into general American attitudes towards public assistance to the 'needy'.What distinguishes the US from Europe is, therefore, not the fact that abortion is not funded by Medicaid, but that health insurance in general is considered a private matter, not a public concern.[218]

Apart from this general difference in views on public health assistance, the debates on public funding of abortion have been quite similar in the US and in Europe. The viewpoint that 'non-therapeutic' abortions do not deserve the same treatment as other necessary medical acts was originally adopted by the French government, has now been adopted by the German government, and is implicitly adhered to in Austria. Italy is the only exception in this respect, but this is probably also due to the existence of a National Health Service.

217 *Ibid.*, p. 1122.

218 Although severe cuts have been made in social benefits in most European countries, this distinction is, in my view, still valid.

The question of whether abortion should be considered as a welfare right has been answered in the negative by all European governments. The passing of abortion laws coincided in most countries with the adoption of policies aimed at better contraceptive information and education, better facilities for mothers with children, etc. In France, Germany and Italy in particular, abortion was considered as a last resort to be prevented at any cost, especially by the creation of an environment more favorable to children. Instead of alleviating the social circumstances in which women live by accepting abortion as a welfare right, the policy has been to improve the social circumstances so that women can have children without worries. In this ideology, the idea of abortion as a welfare right is firmly refuted. Whether today's reality corresponds to these beliefs remains an open question, but those are the principles underlying the abortion policy. That abortion as a welfare right is rejected in the US is implicit in the view that 'indigent' people are not 'a suspect class'.

7. The Role of the Law

The original abortion prohibitions constituted a serious problem for governments. The abortion provisions were disobeyed on a large scale and created a serious health risk for women who resorted to backstreet abortionists. Any abortion law reform had at least to serve the purpose of suppressing illegal and unskilled abortions. Apart from this very general aim, which is common to all abortion reforms discussed here, governments differed substantially on the principal aims to be pursued and the ways of reaching these objectives. Some took a principled position towards the aims of the law, i.e. liberal or conservative, others took a more pragmatic view, i.e. they opted for a compromise solution. The solutions governments opted for have been discussed in this chapter, as have the objectives governments had in mind. In this section we will see how governments and courts conceived of how means and aims were connected, i.e. the role of the law therein.

It has been shown that the German Federal Constitutional Court gave priority to the protection of unborn life from the 14th day after conception. In relation to this position the question of the role of criminal law turned out to be a central issue in the debate before the Constitutional Court.

The purpose of the original German time-phase rule was to reduce the total number of (illegal and legal) abortions by relying on the pregnant

woman's sense of responsibility, developed by counselling.[219] Criminal law was not considered by the SPD/FDP majority to be the appropriate means of reducing the number of abortions, because a pregnant woman who wanted an abortion would look for a way to obtain it. This was demonstrated by the widespread practice of illegal abortion. After having been given counselling and assistance the woman's feeling of responsibility would be reinforced. In this new, the protection of unborn life could only be achieved with the co-operation of pregnant women. Furthermore, counselling would only be effective without the threat of criminal sanctions. The SPD/FDP proposal therefore contained a time-phase rule with obligatory counselling ensured through a penal sanction.[220] Strengthening the insight and the feeling of personal responsibility of the woman was considered to be more successful than building on the woman's fear of a penal sanction. The aim of the statute was not, said the Minister of Justice, the decriminalization of abortion, but rather the guaranteeing of an 'appropriate and effective protection for unborn life' even if instead of punishment for abortion an obligatory regulation was proposed which 'for the first twelve weeks of pregnancy attributes to counselling as a preventive measure a greater effectiveness than the threat of punishment'.[221] It was believed that through counselling and an appeal to the woman's feeling of responsibility the total number of abortions would eventually go down.

These arguments were firmly rejected by the Federal Constitutional Court. Although it acknowledged that a penal sanction is often ineffective, the Court stressed the general preventive function of criminal law: 'the mere existence of such a penal sanction has influence on the value concepts and the manner of conduct of the population'(see *supra* section B, under 1.). In the view of the Court, a repeal of penal sanctions would confuse the concepts of right and wrong, and abortion would no longer be morally condemned by the public. The Court also disapproved of the law's aim of reducing the total number of abortions. The achievement of a socio-political goal, said the Court, can never be more important than the individual protection of each single life. A 'socio-technical' use of the law was not permitted in this case. The indications solution was suggested as the only correct solution for the protection of every individual unborn life.

219 SPD/FDP proposal, Deutscher Bundestag, Drucksache 7/1981, p.1.

220 *Ibid.*, p. 10.

221 Gorby, *op. cit.* note 28, p. 630.

Instead of an 'ethical-pragmatic'[222] approach to the abortion problem the Court seems to have adopted a conservative and paternalistic approach. It is conservative because the right to life is the central value in its arguments, which do not give serious consideration to the ways in which this principle can be realized.[223] It is paternalistic because criminal law is used as both a punitive-corrective and an educative device.[224]

The opposite viewpoint was taken by the Austrian legislator. The drafters of the abortion law did not make any commitment to the protection of unborn life. They accepted the fact that in today's pluralistic society people's views may differ concerning the moral and legal status of the unborn.[225] The purpose of the time-phase rule, it would appear from the Parliamentary Debates, is to suppress illegal and unskilled abortions and to give women an equal position in society. The abortion decision is left to the pregnant woman, the person the most directly involved in this decision. The Constitutional Court made a conscious effort to leave this question to the legislature.

The US Supreme Court took a principled stand on the abortion question, but in a slightly different way from the Austrian legislator. Like the drafters of the Austrian law, the Supreme Court stated that the question of the beginning of human life cannot be answered, thereby suggesting that this should be left to the private morality of the citizens. As has been pointed out, however, the Court carefully avoided language which might allude to the concept of self-determination, or to the woman's right to an equal position in society. It did not base its decision on feminist principles, but rather on the concept of individual liberty. The abortion decision could therefore be seen in the light of ideological individualism, a value traditionally protected

222 Kriele, M., *Zeitschrift für Rechtspolitik*, April 1975, 8, pp. 73-74. See for a discussion of the effectiveness of penal sanctions in relation to the German abortion decision Geddert, H., 'Abtreibungsverbot und Grundgesetz (BVerfGE 39, 1ff)', in Lüderssen, K., Sack, F., *Vom Nutzen und Nachteil der Sozialwissenchaften für das Strafrecht*, Suhrkamp, Frankfurt, 1980, p. 333 ff.

223 *Ibid.*

224 Gerstein, H., Lowry, D., 'Abortion, abstract norms and social control: the decision of the West German Federal Constitutional Court', *Emory Law Journal*, 25, 1976, p. 869.

225 Parliamentary Debates, *op. cit.* note 16, p. 7997.

by the Supreme Court.[226] In this case, the right to liberty has been interpreted as the right of the individual to make for himself those fundamental decisions that shape family life, such as decisions on marriage, procreation and child-rearing. Besides the woman's right to individual liberty, much emphasis was given to the doctor's right to professional freedom (see *supra* under 5.) The time-phase rule as set out in *Roe v. Wade* should therefore further the aim of the woman's and the doctor's personal liberty against state interference.

The French and Italian legislators, on the other hand, took a more pragmatic view of the abortion issue. The objective of the French government was to make a law which would be applied, but which would at the same time dissuade women from having an abortion, in order to reduce the number of abortions.[227] The means of reducing the number of abortions is dissuasion, the means of achieving application of the law is to leave the ultimate decision to the pregnant woman. On the one hand, the law grants the woman the final decision on abortion (during the first ten weeks of pregnancy), although not on feminist grounds, and on the other hand the pregnant woman has to be dissuaded, although not on the basis of a specific concept of the legal status of the unborn. The law thus seems to seek a compromise between two opposing views. The ambiguity of the 'situation of distress' requirement, which alludes to an indications solution should be seen in this light. The law, according to the French government, should follow societal changes and should be based on social consensus, tolerance, and on a social and liberal conception of the responsible individual.[228] As Simone Veil said in defense of the law: 'la nature des lois humaines est d'être soumise à tous les accidents qui arrivent et de varier à mesure que les volontés des hommes changent'.[229] Unlike the German Federal Constitutional Court, the government did not concern itself with the ethical function of the law, but with a 'pragmatisme, raisonable et humaine'.[230] In contrast to the German and American solutions, the French law seems to have tried to minimize the so-

226 Bognetti, C., 'Esperienze straniere: la libertà di abortire, diritto delle donne, costituzionalmente garantito'. *Rivista Italiana di Diritto e Procedura Penale*, 17, 1974, p. 34.

227 Simone Veil, Parliamentary Debates, *op. cit.* note 24, p. 7000.

228 Parliamentary Debates, *op. cit.* note 24, 7027.

229 Simone Veil, Parliamentary Debates, *op. cit.* note 24, p. 7001.

230 See note 228.

cial conflicts raised by abortion, and to find a solution which was the least offensive politically.

A similarly pragmatic position was adopted by the drafters of the Italian Abortion Act. Their aim was to reduce the number of abortions by means of preventive social measures. Assistance to the pregnant woman and general information and education in birth control was considered the only way to achieve a long-term reduction in the number of abortions.[231] The abortion question was considered as a social problem to be solved by social means instead of criminal sanctions.[232] This meant that the ultimate decision was left to the pregnant woman.[233] Like the French law, the Italian law does not take a clear stand on any of the basic questions (right to life, right to self-determination). It opts for a pragmatic compromise solution in the form of a time-phase rule with dissuasion requirements.

In conclusion, all abortion reforms sought to prevent illegal and unskilled abortions. The objective of the adoption of a time-phase rule in Austria was to give women an equal position in society. In the U.S., the time-phase rule was not meant to serve egalitarian purposes, but had a more libertarian aim, that is to protect matters which affect the private and family life of the individual from government interference. Both in Austria and in the US the idea was accepted that abortion is a question of private morality. The Italian and French solutions, a time-phase rule with dissuasion requirements, tried to achieve two opposite objectives. On the one hand, abortion was considered as a problem and therefore the aim of the law was to reduce the total number of abortions. On the other hand, there was a general awareness that the only way to achieve a long-term reduction in the number of abortions was through the co-operation of pregnant women. The ultimate decision was thus left to the woman. The procedural requirements (counselling, waiting period), aimed at dissuading the pregnant woman from her decision to have an abortion. Underlying this French/Italian solution was the belief that the abortion problem could only be solved by social means, not by criminal sanctions. The German Federal Constitutional Court rejected the Italian and French way of reasoning and set two clear objectives to be achieved by the abortion law, i.e. the protection of every individual unborn life and the edu-

231 Preparatory works, Casini, *op. cit.* note 91, p. 100. 'Lavori preparatori', reported in Galli, *op. cit.* note 35, p. 402.

232 *Ibid.*, p. 99.

233 *Ibid.*, p. 63. See the criticism of Busnelli, *op. cit.* note 35, on this aspect of the law.

cation of society as to what is right and wrong. In this view the indications solution was the only suitable regulation of the abortion issue.

8. The Role of the European Convention on Human Rights

Art. 25 of the European Convention on Human Rights states:

> The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organization, or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions.

In the context of abortion this means, that any citizen of a state which has recognized the Commission's competence to receive individual petitions can file a complaint that the national abortion law violates one of the rights laid down in the European Convention.[234] The European Commission of Human Rights has twice dealt with the abortion question.

In the *Brüggeman and Scheuten* case of 1975,[235] two German women complained of the fact that their right to respect for their private life, protected by art. 8 of the European Convention ('Everyone has the right to respect for his private and family life, his home and his correspondence'), was violated by the indications solution of the amended German abortion law. Rose Marie Brüggeman was unmarried and feared the disadvantages of being an unwed mother. Adelheid Scheuten was married, had two children, and wanted no more children. They alleged that they were not free to have an unwanted child aborted. The European Commission declared the complaint admissible. In spite of the fact that neither of them was pregnant, and that they had not asked, nor had been refused an abortion, nor had been prosecuted for illegal abortion, they were considered 'victims' as defined by art. 25 of

234 The following states have ratified or made a declaration to ratify the Commission's competence to receive individual petitions under art. 24 of the Convention (up to 1-12-1983): Austria, Belgium, Denmark, France, Federal Republic of Germany, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Netherland, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom.

235 Application no 6959/75 by Rose Marie Brüggeman and Adelheid Scheuten against the Federal Republic of Germany.

the European Convention.[236] This is quite remarkable given the fact that up to 1978 only 2% of all registered complaints were declared admissible.[237]

The Commission accepted the claim that pregnancy and the interruption of pregnancy are part of private life (and also in certain circumstances of family life). It further considered that

> respect for private life comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field, for the development and fulfillment of one's own personality (Decision Application no 6825/74 X against Iceland), and that therefore sexual life is also part of private life: and in particular that the legal regulation of abortion is an intervention in private life which may or may not be justified under article 8(2).[238]

As to the examination of the merits (art. 31 of the Convention), the Commission ruled, however, that

> art. 8(1) cannot be interpreted in such a way that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother.[239]

According to the Commission in this particular case the legal norms in force in Germany (i.e. the indications solution), which allow for a social indication, did not interfere with the respect for private life as laid down in art. 8.1 of the Convention.The Commission added that the law on abortion in all Member States was at least as restrictive as the German one.

> In many European countries the problem of abortion is or has been subject of heated debates or legal reform since ... There is no evidence that it was the intention of the Parties to the Convention to bind themselves in favour of any particular solution under discussion – e.g. a solution of the kind set out in the Fifth Criminal Law Reform Act (*Fristenlösung* – time limitation)

236 See V. Dijk, P., van Hoof, G.J.H., *Theory and Practice of the European Convention on Human Rights*, Kluwer, Deventer, 1984, p. 38.

237 On Dec. 31, 1981, out of a total of 9.620 applications registered only 255 cases were ultimately declared admissible, which is less than 3%. Only about one out of five complaints is registered yearly. See V. DIJK, *op. cit.* note 236, p. 46.

238 Final decision of the Commission of 19 May 1976 as to the admissibility of application no 6959/75, the *Brüggeman and Scheuten* case, *op. cit.* note 121, p. 53.

239 Opinion of the Commission of 12 July 1977, the *Brüggeman and Scheuten* case, *op. cit.* note 137, p. 19.

which was not yet under public discussion at the time the Convention was drafted and adopted.[240]

The second claim of violation of the European Convention came from the United Kingdom, in the *Paton* case of 1978.[241] The applicant, William Paton, complained of the refusal by the British High Court of Justice to prevent his wife from having an abortion. He alleged that the British Abortion Act of 1967, under which the abortion was authorized and carried out, violated, *inter alia*, art. 2 of the European Convention, which protects the right to life.[242] The Commission accepted that the applicant, as potential father, was so closely affected by the termination of pregnancy by his wife that he could claim to be a 'victim' of the legislation in the sense of art. 25 of the Convention.

This was the first time that the Commission dealt with the meaning of art. 2 ('everyone's life shall be protected by law') in the context of abortion. The Commission first went into the question of whether 'everyone' in art. 2 included the unborn. 'Everyone' is not defined in the Convention, and in nearly all instances the use of the word can only have a postnatal application. The context of art. 2 also supports this view in that all the limitations to the right to life summed up concern persons already born.[243] Therefore, concluded the Commission, 'everyone' in art. 2 does not include the unborn.

The Commission then examined the question of whether the term 'life' in art. 2 was to be interpreted as also covering the 'unborn life' of the fetus. 'Life', too, was not defined in the Convention. The Commission quoted the decisions by the American Supreme Court and by the German and Austrian Constitutional Courts on this matter, and then proposed three alternatives:
(1) art. 2 does not cover the fetus at all,
(2) the fetus has a right to life with certain implied limitations,
(3) the fetus has an absolute right to life.

240 *Ibid.*, p. 20. The Committee of Ministers deciding on the case according to art. 32 of the Convention, agreed with the opinion expressed by the Commission and declared that there was no violation of the Convention. See Resolution DH (78)1 of the Council of Ministers adopted on 17 March 1978.

241 Application no 8416/78 by William Paton against the United Kingdom.

242 Art. 2.1 of the European Convention: 'Everyone's right to life shall be protected by law'.

243 The Commission refers here to the limitations of 'everyone's right to life' announced in par 1 and par 2 of art. 2. All these clauses concern by their nature persons already born and cannot be applied to the fetus, says the Commission. This argument is very similar to the one used by the Austrian Constitutional Court.(see Section B. 1).

The Commission stated that if the fetus had an absolute right to life it would be regarded as being of higher value than the life of the pregnant woman. Such an interpretation would be contrary to the object and purpose of the Convention. Even when the Convention was signed, all High Contracting Parties (with one possible exception) permitted abortion if necessary to save the life of the mother, and in the meantime the national abortion legislation has shown a tendency towards further liberalization. Thus, according to the Commission, the unborn does not have an absolute right to life.

The abortion in the *Paton* case was carried out at the initial stage of pregnancy (ten weeks) and on a medical indication. The Commission decided to deal only with the right to life in these, specific circumstances, i.e. when the pregnancy was at an early stage and an abortion was indicated on medical grounds. The Commission did not find it necessary to decide the broader questions of whether art. 2 applied to the fetus (1), or whether art. 2 recognized a 'right to life' of the fetus with implied limitations (2). The Commission limited itself to this narrower issue.

The Commission concluded that the authorization of the abortion in the *Paton* case was compatible with art. 2 of the Convention, because it was carried out at the initial stage of pregnancy and covered by the limitations of a medical indication. The question of other possible limitations (ethical, fetal, or social) did not arise.

> It (the Commission) finds that the authorization, by the United Kingdom authorities, of the abortion complained of is compatible with Art. 2(1), first sentence, because, if one assumes that this provision applies at the initial stage of the pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the 'right to life' of the foetus.[244]

The applicant further complained of a violation of his right to respect for his family life (art. 8.1), because
(a) the 1967 British Abortion Act did not require the husband's consent for abortion, and
(b) the 1967 Abortion Act denied the father the right to be consulted.

The Commission ruled that the decision to terminate the pregnancy of the applicant's wife 'insofar as it interfered in itself with the applicant's right to

[244] The *Paton* case, *op. cit.* note 241, p. 10.

respect for his family life, was justified under para 2 of art. 8 as being necessary for the protection of the rights of another person'.[245]

As to the father's right to be consulted, the Commission ruled that, first of all, 'the right of the pregnant woman being the person primarily concerned in the pregnancy and its continuation or termination, to respect for her private life' had to be taken into consideration. In the *Paton* case, the Commission did not find that the father's right to respect for his private and family life 'can be interpreted so widely as to embrace such procedural rights as claimed by the applicant, i.e. a right to be consulted, or a right to make applications, about an abortion which his wife intends to have performed on her'.[246] In short, the father's right to respect for his private and family life does not include the right to be consulted about his wife's decision to have an abortion.

The tone of this decision seems to leave the door open for a wide interpretation of art. 2 of the Convention. The Commission stated that the unborn does not have a right to life equal to that of living human beings, and it did not emphasize the respect for human life from the moment of conception. Of course, one should not forget that the abortion provisions challenged before the Commission were fairly liberal. In upholding the national legislation, the Commission could use therefore more liberal language. The question remains whether the Commission would make such a decision in another case which condemned a national provision. Any answer to this question is speculative because the language of the *Paton* case indicates that the Commission decided on the basis of the particularities of this case, and avoided making any generalization.[247]

So far, the Commission has remained within the 'safe' limits of abortion regulations. It has not yet dealt with the question of the social indication or the time-phase rule *vis-à-vis* the right to life of the unborn, a question much more subject to debate than abortion on a medical indication. It has to be kept in mind, however, that the grounds on which the abortion was performed in this case was a medical indication in the wide sense of the word, which could be – and was, in fact,– interpreted as also including social

245 *Ibid.*, p. 11.

246 *Ibid.*

247 This aspect was very much emphasized during a conversation I had in February 1982 with Mr. K. Rogge, the reporter of the Commission on both abortion cases.

grounds.[248] Other questions left open by this decision are those concerning late abortions and the rights of pregnant minors. No further applications have been filed with the Commission, but future questions could arise in the area of medical freedom. For example individual doctors could complain about anti-abortion rules in public or private hospitals which prohibit them from performing abortions.[249]

One interesting aspect of these abortion decisions is that the Commission follows the basic arguments used by the US Supreme Court. It accepts the view that the abortion decision is part of the pregnant woman's private life. This is all the more remarkable because it is the only instance in Europe in which this viewpoint, expressed for the first time in *Roe v. Wade*, has been adopted. The Commission also refers to *Roe* in the *Paton* case. This implies that the Commission takes a broad perspective, and looks beyond the frontiers of the Member States of the Council of Europe.

What is, or could be, the integrating force of the European Convention of Human Rights?

First of all, the fact that most European countries have recognized the competence of the Commission to receive individual petitions is significant.[250] This means that any individual can complain about a national abortion regulation. In the two cases discussed the Commission applied very flexible standards of admissibility, thus showing that it does not try to avoid the abortion issue.[251] This is a very significant fact, given the

248 The British Abortion Act, Section 1(1) permits the termination of a pregnancy by a registered medical practitioner if two registered medical practitioners find: (a)'that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, *greater than if the pregnancy were terminated*; or (b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.' In determining the risk of injury to health 'account may be taken of the pregnant woman's actual or reasonably foreseeable environment.(Section 1(2)) This last paragraph is called the 'social clause'; it applies, however, only to the *health* of the pregnant woman. See Ketting, *op. cit.* note 197, p. 32. The underlined phrase under (a) opens the door to a wide interpretation of this 'medical ground' as, given the present state of medical technology, an abortion involves in most cases less physical risk than childbirth. See Francome, C., *Abortion freedom – a worldwide movement*, George Allen & Unwin, London, 1984, p. 99.

249 This was suggested by Mr. H. Kruger, the Secretary to the European Commission of Human Rights during a conversation I had in Feb. 1982.

250 See art. 25 quoted in the text.

251 See Rogge, K., *EuGRZ*, 1981, pp 22-23.

Commission's restrictive 'policy' with regard to admissibility.[252] Any husband can, as a potential father, claim to be the victim of his wife's decision to have an abortion (invoking the right to life), and thus challenge a liberal legislation. Any woman can claim to be the victim of a restrictive abortion law (and thus invoke the right to privacy). That seems to be the implication of the two abortion cases for the admissibility of individual complaints. There are, moreover, signs that the number and importance of the cases decided by the Court and the Commission are increasing, and that the interpretation of at least some of the provisions is changing in favor of the interests of the individual as opposed to those of the state. It appears that there is a more 'constitutional' approach towards the fundamental values enclosed in the Convention.[253]

It seems unlikely, however, that the Commission or the Court will hold a national abortion legislation to be in violation of the Convention on the basis of the right to life or the right to privacy. Art. 8, which protects the right to privacy, specifically allows for restrictions on this right by a public authority (section 2) 'in accordance with the law and ... necessary in a democratic society ... for the protection of health and morals, or for the protection of the rights and freedoms of others.' The Court has in various instances expressed itself on the interpretation of such clauses (occurring in each of the articles 8-11). In the *Handyside* case of 1976,[254] concerning pornography, the Court stated that the view taken by national laws on morals varies from time to time and from place to place. The right invoked in this case was the right to freedom of expression (art. 10) which allows – like the right to privacy – for restrictions 'necessary in a democratic society ...' (section 2).[255]

The Court ruled in this case that state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements. Therefore, the Contracting States have a 'margin of appreciation', both the domestic legislature and the judiciary, in making the initial assessment of what restriction of a Convention right is 'necessary in a democratic society'.[256] The Court expanded the 'margin of appreciation'

252 See V. Dijk, *op. cit.* note 236, p. 459.

253 *Ibid.*, p. 478.

254 *Handyside* case, European Court of Human Rights, 1976, Series A, no 24.

255 *Ibid.*, p. 22. The Court refers here to par. 2 of art. 8.

256 Judgement of Oct. 22, 1981, Publ.ECHR, Series A, vol. 45.

principle to include the principle that interference with a right protected by the Convention needs to be proportionate to the legitimate aims pursued.

In the *Dudgeon* case of 1981, concerning homosexual acts between consenting adult males in private, the Court ruled that the national law prohibiting homosexual acts between consenting adults violated the right to privacy under the Convention. The Court declared that in this case the restriction imposed upon Mr. Dudgeon's 'private manifestations of the human personality' was disproportionate to the government's aim, namely the prevention of the erosion of existing moral standards.

Although the *Dudgeon* case is an important precedent in which the right to privacy was upheld against a national law, it is difficult to imagine, however, that abortion would be treated in the same way as homosexuality. Abortion is not only a question of private or public morality. It also concerns the protection of unborn life. This aspect could be considered as a restriction of the woman's right to privacy in the sense of art. 8, sub 2. Furthermore, it seems unlikely that the Court would impose its own interpretation of the 'right to life' on a national legislator, especially in countries where the abortion laws have been recently reformed. This is what the last comment in the Brüggeman case seems to suggest (see *supra*). It seems more likely that the Commission or the Court could step in on the interpretation of values contingent on the right to abortion which have not been worked out in detail by the national legislature. Some examples of this are the pregnant minor's rights *vis-à-vis* her parents, or the physician's right to freedom of action *vis-à-vis* a hospital's prohibition to perform abortions.

Conclusions

In the two-year period between 1973 and 1975 five major constitutional courts decided on the abortion issue. The US Supreme Court rulings *Roe v. Wade* and *Doe v. Bolton* resulted in a liberalization of almost all state abortion laws. Shortly after the Supreme Court decision, abortion law reforms were passed in Germany, France and Austria (1974-1975), and were subsequently presented to the respective constitutional courts for judicial review. The Italian Constitutional Court ruling on abortion of 1975 preceded the abortion law reform which was passed in 1978, and then again considered by the Constitutional Court in 1981. In this chapter an attempt has been made to evaluate the various abortion law reforms in combination with constitutional court rulings in the light of the theoretical discussion presented in chapter II. The objective has been to see how legislatures and constitutional

courts have answered the questions raised in chapter II. We have taken into consideration the fundamental values involved in the abortion decision such as the legal status of the fetus, the pregnant woman's rights, the rights of the father of the fetus, of the parents of a pregnant minor, and of the pregnant woman's doctor.

Our investigations have shown that the most important and most difficult question of the legal status of the unborn has not received a profound and coherent answer from any of the legislators or courts. The conclusion drawn at the end of chapter II, namely that there is no right or rational answer to the question of when human life begins, has been confirmed by the constitutional solutions presented.

The US Supreme Court and the German Federal Constitutional Court have taken a principled stand versus the abortion issue. The former has proclaimed the woman's right to abortion, and the latter the unborn's right to life. This contrasts with the pragmatic solutions adopted by the French and Italians, which represent a compromise between the two opposing viewpoints. The American and German Courts have not succeeded, however, in presenting their viewpoints without running into contradictions.

The US Supreme Court, although declaring that there is no need to resolve the difficult question of when human life begins, ruled in fact that only from the moment of viability does the unborn deserve protection, and that the right to life can only be claimed at the moment of birth. As has been pointed out in chapter II, more arguments are needed for taking viability and not an earlier point in pregnancy as the cut off point than the short statement that from that moment onwards the fetus can have a meaningful life outside the mother's womb. Given the wide impact of this ruling, which establishes a very rigid scheme for state legislatures to follow, one might have expected a more extensive justification for this choice. In more recent decisions the Supreme Court emphasized that the moment of viability is not fixed, but is dependent on the stage of technology in that the fetus is viable at an earlier stage of its development than the end of the second trimester. The implication of this position is that the protection of the unborn becomes more extensive as medical technology advances, and therefore contradicts the Court's own rigid division of the pregnancy into three trimesters. Furthermore, the Court's statement that the state interest in the protection of human life grows as pregnancy advances and that it becomes 'compelling' at the moment of viability, indicates that the Court uses a developmental criterion of humanness. The emphasis put on this state

interest in its more recent decisions also gives a very 'relative' significance to the proclaimed 'fundamental right to abortion'.

The German Constitutional Court took the opposite viewpoint, namely that the unborn has the right to life from the 14th day after conception. There is some controversy, however, as to why nidation marks the beginning of the right to life. The Court does not explain at all why nidation and not the moment of conception is crucial for recognizing the legal status of the unborn. Furthermore, the Court, in proclaiming the constitutional right to life of the unborn, ends up contradicting itself. By allowing for a fetal and a social indication for abortion, and by suggesting a law reform which gives more protection to the unborn as pregnancy advances, the Court no longer maintains that the unborn has the same constitutional protection as a born human being.

In reality these two courts take a more moderate stand on abortion than their principled position proclaimed. These rulings indicate that extreme positions on abortion – that is the exclusive recognition of the unborn's right to life or the woman's right to self-determination – seem to be untenable. These constitutional rulings on abortion therefore reflect the dilemmas analyzed at the theoretical level: the impossibility of defining the right to life in a coherent way leads to a compromise position, a compromise between the protection of unborn life which increases as pregnancy advances and the respect for the woman's right to self-determination which decreases during the gestation period. The Austrian abortion law expresses no concern for the protection of unborn life up to the time limit of 12 weeks. The question of when human life begins remained unanswered during the Parliamentary debates. The Constitutional Court, appealed to by the defeated minority in Parliament, also avoided this question by giving a historical interpretation of the Constitution which excluded the horizontal effect of the right to life. So although the Austrian constitutional order rejected the value of unborn life up to a certain moment, it gave no justification for its decision. The French and Italian abortion reforms have consciously avoided a principled position towards the question of unborn life and the pregnant woman's rights and have instead opted for a pragmatic solution which is a compromise between the two opposite views. No answer has been given to the question of when the fetus is considered a human being. Some protection is, however, given to the fetus, and this protection increases as pregnancy advances. Implicitly, the French and Italian legislatures have adopted a developmental criterion of

humanness. The solutions chosen by the legislatures have not been touched on by the Constitutional Courts.

All abortion reforms, except the German one, have implicitly accepted the woman's right to self-determination. The US Supreme Court declared in *Roe v. Wade* that the woman's right to privacy, based on the concept of personal liberty protected by the 14th Amendment, also encompassed the woman's decision to have an abortion. The Supreme Court avoided any language which might allude to the woman's equal position in society, and instead emphasized the libertarian principle underlying this abortion freedom, i.e. the freedom of the pregnant woman and her attending physician to decide on abortion without state interference. The Austrian time-phase rule is based on the defence of women's rights, as the Parliamentary debates indicate. The French and Italian abortion laws do recognize the woman's freedom to decide on abortion, subject however to the condition that she be counselled with the objective of dissuading her from her decision. The German Federal Constitutional Court, on the other hand, firmly rejected the woman's right to self-determination in the abortion decision.

In four out of the five countries discussed here the woman's right to self-determination has been recognized, although more expressly in the US and in Austria. However, neither the legislatures nor the constitutional courts mention this right. Furthermore, in none of the five countries except the US has the pregnant woman been granted the right to abortion. Only the US Supreme Court expressly mentions the pregnant woman's fundamental *right* to abortion; the French, Italian and Austrian abortion laws merely create the possibility of abortion on certain conditions.

The comparative analysis of these five abortion decisions teaches us the following about the validity of the claims in favour of the unborn's right to life from the moment of conception and the pregnant woman's right to self-determination throughout pregnancy. Given present moral and social values, a principled, i.e. extreme, position towards the abortion issue seems to be untenable. To recognize the right to life of the fetus from the moment of conception would mean a step backwards even with respect to the existing abortion legislation, which allowed for some medical indications. The analysis of the German Constitutional Court's decision shows that such a position leads to inconsistencies if one does not want to outlaw all abortions except the ones on a strictly medical,i.e. vital, indication. The proclamation of a woman's right to decide on abortion throughout pregnancy based on her right to self-determination, seems to be equally problematic. Although it is

difficult to define at what moment in pregnancy the fetus has a *right* to life, the *protection* of unborn life seems nevertheless to be a moral concern. Notwithstanding the fact that these five constitutional courts proclaim quite different principles, the substance of these rulings seems to point at a tendency to take a moderate position on abortion. Abortion practice seems to reconfirm this tendency. The practice of abortion in Germany, for example, is not more restrictive than in France or Italy, although the principles proclaimed by the German Constitutional Court and laid down in the new abortion reform by the legislature would suggest so.

How can such a moderate position be translated into a legal solution with a sound constitutional basis? The indications solution as proposed by the German Constitutional Court has discriminatory effects in that the reasons why women request an abortion are judged on the basis of vague and subjective criteria. The woman's right to equal treatment by the law is definitely violated by an indications solution. The alternative solution of the time phase rule, however, seems insufficient to guarantee the protection of unborn life, an essential element of a compromise solution. A time-phase rule with dissuasion requirements aims at strengthening the pregnant woman's sense of responsibility. Given the inadequacy of penal sanctions for the prevention or reduction of abortion, as demonstrated by the high number of clandestine abortions under restrictive abortion laws, the collaboration of the woman seems a necessary instrument for reducing the number of abortions. The time-phase rule with dissuasion requirements seems therefore to be the best guarantee of the protection of unborn life. At the same time it also respects the woman's right to equality.

The rights of the father of the unborn in the abortion decision have been quite unanimously rejected in all countries and have not been a real point of discussion. The French and Italian laws provide for the possibility of the partner of the pregnant woman participating in the counselling session, if the pregnant woman desires. The woman's autonomy in the abortion decision with respect to her partner has thus been respected even in the quite restrictive German abortion law. This means that the father's right to procreate or to family life has not been accepted with respect to the abortion decision, which in turn implies that in this case the separation between sexual life and procreation has been fully recognized.

That parents have the right to be consulted in the abortion decision of their minor daughter has been accepted in some cases. The French law requires parental involvement in all cases. Under the Italian law, a minor can

resort to the Juvenile Court if she does not want to consult her parents which can give the required authorization. In Germany and Austria a doctor can require the parents' consent if he thinks the minor is not mature enough to decide alone. The US Supreme Court has developed a case law which is based on a similar criterion as the one used in Austria and Germany, i.e. the level of maturity of the minor. A state can, according to the jurisprudence of the Supreme Court, only require parental consent if there is an alternative procedure open to the minor in which she can show herself to be sufficiently mature to make the abortion decision independently, or can show that an abortion is in her best interests. Only if neither of these conditions is fulfilled according to the judge do the parents have the right to be consulted. In this way the Supreme Court has abandoned the formal distinction between minority and majority age and has instead adopted a rule based on the level of maturity of the minor or on her best interests.

The doctor's freedom to refuse abortion assistance as part of his professional freedom has been largely respected in all countries discussed. In Italy the doctor's refusal can only be based on conscientious objections to abortion which have to be officially registered and which apply to all abortion requests. An Italian doctor who has raised conscientious objections cannot perform abortions at all, and a doctor who has not raised such objections must provide abortion assistance to all women who make an abortion request. In the other four countries doctors do not have to show such a consistent attitude towards abortion requests; they can give or refuse abortion assistance depending on the circumstances without having to give any reason for their position. These refusal clauses – in contrast to the conscience clause in force in Italy – add a normative aspect to the role of the medical profession in that the refusal clause can be used by doctors as an instrument of control over the woman's reasons for abortion. This makes his right to refuse abortion assistance not as much contingent bur rather part of the abortion decision. The right to refuse abortion assistance cannot be invoked by public hospitals in France and Italy, as the French and Italian abortion laws state that public hospitals are under an obligation to provide abortion assistance. A similar provision does not exist in Germany, Austria or the US. This does not imply however that the doctors employed in French or Italian public hospitals are under any obligation to perform abortions. As a result, not all public hospitals do, in fact, provide abortion assistance.

The doctor's right to professional freedom has been largely respected in all the countries discussed. Whereas in Europe the debate has centered on the

doctor's right to refuse abortion assistance, in the US the Supreme Court has emphasized the doctor's right to determine the abortion procedure and to take part in the abortion decision.

In its abortion rulings the US Supreme Court has made it clear that the physician is free to determine how the abortion intervention has to be carried out, within the time limits set out in *Roe*. Procedural requirements such as counselling, waiting period, the place of the intervention, and the determination of the moment of viability have been left exclusively to the discretion of the doctor. Only marginal requirements set by state laws, such as the registering of abortion interventions for health purposes and the prior written consent of the pregnant woman were upheld by the Supreme Court. The weight of the Court's jurisprudence seems to be that abortion has to be treated like any other medical act and has to be judged in the context of 'accepted medical practice'. As we have already seen, the Supreme Court has also made clear that, although it recognizes the woman's right to privacy with respect to the abortion decision, the decision to have an abortion has to be taken by the pregnant woman together with her physician. The woman's autonomy has been emphasized with respect to state interference, but not with respect to her attending physician.

The European abortion laws, on the other hand, -with the possible exception of the Austrian abortion law- draw a clear distinction between abortion and other medical acts, in that the abortion procedure is regulated in detail by the respective abortion laws, e.g. where the intervention has to take place, the counselling procedure to be followed, the waiting period etc. The doctor's right to professional freedom is contingent on these legal conditions. The fact that the respective laws specifically recognize the doctor's right to refuse abortion assistance supports this view. In several ways, however, the European approach to the doctor's role in the abortion procedure and the abortion decision is ambiguous. Although the decision to abort is not considered a medical decision, the doctor has nevertheless been given a role in the decision making process. The most clear example of this is the German indications solution. It is the doctor who decides whether the woman's reasons for seeking an abortion are legally justified or not, although in most cases this decision does not require medical expertise. In France and Italy the doctor has a more subtle role in the decision making process in that he has to try to dissuade the pregnant woman from her intention to have an abortion and show her alternative solutions. The fact that the French, Austrian and German laws allow the doctor to refuse

abortion assistance depending on the case before them -without having to show a consistent attitude towards abortion requests- also shows that his right to refuse is not so much contingent on, but is rather part of the decision.

On the whole, the doctor plays a key role in the abortion procedure. He has the right to refuse abortion assistance but the extend to which he takes part in the abortion decision varies depending on the country. This double role of the doctor – decision maker and executor of the decision- is natural if one views abortion as a normal medical intervention, like in the US. It is curious, however, that in Europe a distinction is made between abortion and other medical acts, yet the doctor has been assigned a role in the decision-making process as if abortion were a normal medical procedure.

Whether abortion should be funded like other medical care is a subject of discussion in some countries. In Italy, abortion is included in the National Health Service and this has never been a real issue. The Health Insurance in Germany gives a comprehensive coverage of abortion. The public funding of socially-indicated abortions is under serious attack, however, and the present government has announced that it will propose changes in this respect. The Constitutional Court had to decide on whether such funding is constitutional. In France, the opposite development has taken place. The original 1975 abortion law did not include public funding of abortion, as abortion was not considered a necessary medical act. The Mitterrand government has reversed this decision and 75% of the abortion costs – following the fixed rates – are now reimbursed out of public funds. Both in Germany and in France the funding of abortion has thus been a political issue. The Austrian Health Insurance program only covers medically indicated abortions. That the Socialist government has never made the public funding of abortion an issue should be seen against the background of the aura of taboo surrounding abortion. Up to now, the public funding of abortion has thus not been a constitutional but only a political issue in some cases in Europe.

In the US, on the other hand, the public funding of abortion has been extensively debated before the Supreme Court. In a series of decisions between 1977 and 1980, the Supreme Court made it very clear that the right to abortion did not entail the right to public – federal or state – funding of abortion. The Equal Protection challenge that Medicaid recipients seeking abortion should be funded in the same way as Medicaid recipients giving birth was rejected. The Court ruled that the refusal to fund abortions did not constitute an infringement of the fundamental right to abortion, and that poverty alone

(i.e. Medicaid recipients) does not make for a 'suspect class'. Hence, the legitimate state or federal interest in childbirth justified the limitation on federal or state funding of abortions. In these decisions the Supreme Court states the logical consequence of its position that abortion is a private matter: as state intervention has been banned in the abortion decision there is no reason why the state should be required to finance abortion assistance.

What distinguishes the American from the European discussion on the funding of abortion is not the question of whether abortion should be treated like other necessary medical acts. On both continents there is disagreement over the question of whether a non-medically indicated abortion is part of necessary medical care. The American position differs from the European one on the question of public assistance to the poor in society, i.e. on whether poverty is a private matter or a public concern. In Europe it would be considered as a basic right that the needy should receive social assistance, including such health care as abortion; that welfare recipients should have the possibility of having an abortion was therefore never disputed. In the US, on the other hand, health care is still considered to a large extent as a private matter. Although many states do give health assistance and do fund abortions, this is not based on a constitutional right but on a political decision, subject to change. The Medicaid cases should be seen in this context.

The claim that the public funding of abortion is a welfare right has been rejected in Europe and in the US. In the US, this rejection is implicit in the statement that the poor are not 'suspect'. In Europe, government policies are aimed at making abortion superfluous, rather than at accepting abortion as a welfare right. Most measures are aimed at the prevention of abortion through the promotion of contraceptive methods of birth control or by providing more assistance to unwed mothers, and a common concern of the European governments is the reduction in the number of abortions.

The legislative reforms in combination with the constitutional decisions show that the objectives governments set themselves and the means adopted to reach these objectives vary from country to country. A common objective of all countries was the suppression of illegal and unskilled abortions. The existence of abortion law reforms, and the legalization of abortion itself was seen as the means to achieve this aim.

The objective of the Austrian drafters was to give women an equal position in society. The US Supreme Court did not so much emphasize this egalitarian idea as the libertarian principle of personal freedom in matters of

family life. In both cases the time-phase rule was seen as the best way to reach these objectives. The German Constitutional Court, on the other hand, considered the protection of unborn human life as the central objective of an abortion law reform. The only way to achieve this was, in the Court's view, through an indications solution which clearly distinguished between legal and illegal reasons for abortion.

The French and Italian legislators took a more pragmatic view in that they neither proclaimed the woman's right to self- determination nor the protection of unborn life as the major objective of the law. The aims of these abortion reforms were rather the application of the law and a resultant reduction in the number of abortions. It was thought that the way to achieve application of the law was to seek the cooperation of the pregnant woman by leaving the ultimate decision to her. A reduction in the number of abortions could only be obtained by counselling and dissuading pregnant women, helping them to find solutions, and giving contraceptive advice. A time-phase rule with dissuasion requirements was thus viewed as the best way to reach these objectives. Underlying these compromise solutions was the belief that the abortion question could only be tackled by social means, not by criminal sanctions. It was in this respect that the French and Italian view differed from the German one.

In two instances the European Commission of Human Rights has responded to complaints raised by individual citizens against abortion provisions under art. 25 of the European Convention. These decisions are not very surprising as they upheld recently passed moderate abortion reforms. It could have been expected that the Commission would respect recently formed national opinion on such a basic value as the right to life. What is interesting in these rulings is that they opened up new perspectives for the future, as the Commission applied very flexible standards for the admission of individual complaints. Furthermore, it gave no definite answers on the scope of the right to life so as to leave the way open for future rulings.

Chapter IV Explanations for the Differences in Constitutional Interpretation: A Comparative Analysis

Introduction

The preceding chapter has indicated the differences in interpretation of the fundamental values involved in the abortion decision. The legislatures and constitutional courts of the five countries discussed here have not come to the same conclusions concerning the legal status of the fetus, the pregnant woman's right to decide on abortion, and the fundamental rights of parents, husbands and doctors in the abortion decision. This chapter will attempt to formulate some explanations for the divergences and convergences in interpretation of these fundamental values by the respective constitutional courts. The solutions adopted by the legislatures were based on the balance of forces existing in the respective parliaments, and hence on political conditions. The decisions made by the constitutional courts go beyond political reasons and need to be explained by reference to the set of values incorporated in the constitutional order, i.e. the constitution itself,the competences given to the constitutional court, the role of the constitutional court in the political system of the country, and the social philosophy expressed in the constitution. These factors will provide the basis for an analysis of the abortion decisions.

The first step will be to look at the texts of the various constitutions (*section A*), and at the history of these texts in relation to the history of abortion legislation (*section B*). It might be that the wording of the various fundamental rights or their history can throw some light on the interpretation given by the constitutional courts.

The role played by the various constitutional courts is not the same in all constitutional systems. The concept of democracy in the US is quite different from the one existing in France, for example. The US Supreme Court has a much more important and decisive role than the French Constitutional

Council. An analysis of the position of the constitutional court with respect to the legislature and of the selection, background, and training of the judges might throw some light on the different national outcomes of the abortion decisions. (*section C*)

The constitutional courts were subject to various constraints at the time they issued the abortion rulings. First of all, not all courts had the discretionary power to 'take or reject' the abortion issue, most of them had merely to decide on the particular case before them. Secondly, the type of abortion law under review and the political climate in which the courts had to decide may have influenced their decision. This will be discussed in *section D*.

A final factor which may have had an impact on the constitutional interpretation of the abortion issue is the difference between the social philosophies prevailing in the various countries (section E). The place of the individual in society is viewed quite differently in, for example, the US and West Germany.

Section A The Constitutional Texts

A first glance at the five constitutions discussed here shows that not all of them mention both the right to life and the right to freedom or self-determination. The French constitutional provisions do not mention the right to life, neither in the 1789 Declaration of the Rights of Man, nor in the Preambles to the 1946 and 1958 Constitutions. The French Constitutional Council nevertheless recognized in its abortion decision the 'respect for every human being from the very commencement of life',[1] as laid down in the Abortion Act. It gave a dual meaning to the right to liberty, as written down in the 1789 Declaration of the Rights of Man.[2] In the opinion of the Council, the right to freedom encompasses both the right to freedom of the person who has to perform the abortion and the right to freedom of the woman who seeks an abortion. It thus emphasized the positive and the nega-

1 Art. 1 of the French Abortion Act, Loi no 75-17 of 17-1-1975.

2 'The final end of every political institution is the preservation of the natural and imprescriptible rights of man. These rights are those of liberty, property, security and resistance to oppression', art. 2 of the Declaration of the Rights of Man and the citizen of 1789, translation by Finer, S.E., *Five Constitutions*, The Harvester Press, Sussex, 1979.

tive side of the right to freedom in the abortion context, i.e., the freedom to have an abortion and the freedom to refuse assistance at an abortion.

Art. 2 of the Italian Constitution states that the Republic recognizes and guarantees the inviolable rights of man.[3] There are two opposing views on the interpretation of art. 2. There are those who claim that it has an interpretative function for situations not foreseen by articles 13 et. seq. (enumerating the fundamental rights), and those who claim that art. 2 is merely an introduction to the fundamental rights mentioned in art. 13 et. seq.[4] In the 1975 abortion decision the Constitutional Court adhered to the first view by declaring that art. 2 also included 'the legal status of the fetus'.[5] In spite of the fact that there was no express 'right to life' provision in the Italian Constitution, the Constitutional Court did recognize the value of unborn life.

This shows that the French Constitutional Council and the Italian Constitutional Court could have rejected the whole right-to-life argument by simply referring to the absence of a specific constitutional provision. They did not do so. Although there is no clear reference point in the constitution, they both accepted the value of unborn human life, without, however, accepting that the unborn have the right to life.

The Austrian abortion law reform was challenged on the basis of two constitutional guarantees of the right to life, the Constitution (*Staatsgrundgesetz*) of 1867, and art. 2 of the European Convention on Human Rights. As has been shown in chapter III, Section B, the Constitutional Court rejected these arguments, giving a historical and grammatical interpretation of these fundamental rights which did not include the duty of the state to protect unborn life against others.[6]

The 14th Amendment to the US Constitution says that '... nor shall any State deprive any person of life, liberty, or property, without Due Process of Law'. The US Supreme Court could have used the arguments of the Austrian Constitutional Court, namely that this provision merely estab-

3 Art. 2: 'La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo, sia nelle formazioni sociali ove si svolge la sua personalità'.

4 Zagrebelsky, G., 'Object et portée de la protection des droits fondamentaux – Cour constitutionnelle italienne', *Revue Internationale de Droit Comparé*, 33, 1981, pp. 514-519.

5 Cappelletti, M., Cohen, W., eds. *Comparative Constitutional Law*: cases and materials, 1979, p. 613. *Giurisprudenza Costituzionale*, 1975, p. 119.

6 See Machacek, R., 'Das Recht auf Leben in Österreich', *EuGRZ*, 10, 1983, p. 453 ff.

lishes a defensive right against the state and does not apply to relations between individuals. The Supreme Court, however, did not reject the right-to-life argument on this basis. It accepted that the 14th Amendment applied in principle to the abortion situation, but held that the unborn were not protected by it until the moment of viability. The right to liberty, on the other hand, was given an extensive interpretation. The right to liberty was seen to include the right to privacy which encompasses the woman's right to have an abortion (up to the third month of pregnancy).

The German Constitution (*Grundgesetz*) of 1949 contains very specific 'life' and 'liberty' provisions. Art. 2.2 guarantees the right to life and art. 2.1 proclaims the right to the free development of one's personality.[7] Of the five countries discussed, the German Constitution makes the most specific provisions for the rights relevant to the abortion decision. The balancing of these two fundamental rights by the Federal Constitutional Court resulted in an absolute priority being given to the right to life of the unborn for the whole duration of pregnancy, and consequently, in the denial of the woman's right to a free development of her personality as far as the abortion decision was concerned.

Considering these five decisions together, we conclude that the constitutional texts have been rather irrelevant to the abortion decisions. The absence of 'life' provisions has not prevented courts from recognizing the value of unborn life, and the presence of 'liberty' provisions has not always led to the recognition of the woman's right to decide on abortion. Given the wording of the relevant fundamental rights, the constitutional courts could have come to quite different conclusions. The abortion cases illustrate therefore once again the 'vagueness' of constitutional rights and the importance of judicial interpretation in determining their content.

Section B The Legal History

The US Supreme Court, the German Federal Constitutional Court and the Austrian Constitutional Court used historical arguments in their abortion

7 Art. 2(1): 'Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.' Art. 2(2): 'Everyone shall have the right to life and to the inviolability of his person. The liberty of the individual shall be inviolable. These rights may only be encroached upon pursuant to a law'. Translation by Finer, S., *Five Constitutions*, Harvester Press, Sussex, 1979.

rulings. In all three of these constitutional decisions, the history of the 'right to life' provisions was taken into consideration. The fact that 'abortion practices in the 19th century were far freer than they are today'[8] led the US Supreme Court to the conclusion that the protection of life by the Due Process Clause, added to the Constitution in that time, did not include unborn life. The Austrian Constitutional Court, too, went back to the period when the Constitution of 1867 was drafted , and held that the fundamental rights contained in it had to be seen in the light of 19th century legal thinking, and, therefore, were merely defensive rights against state action. Both the US Supreme Court and the Austrian constitutional court hence used historical arguments for limiting the scope of the 'right to life'-provisions. They both interpreted the fundamental right to life in question as it was conceived by the drafters of the Constitution.

The German Federal Constitutional Court arrived at the opposite conclusion on the basis of a historical interpretation of the right to life contained in the Constitution of 1949. The core of the Court's argument is that the Constitution of 1949 was a reaction against the historical experience of National Socialism. Firstly, the fundamental rights laid down in the Basic Law were not merely defensive rights, but guidelines for all branches of government, the legislature included. The Austrian view was hereby rejected. Secondly, the Constitutional Court maintained that the drafters of the Constitution intended to protect unborn life. In this respect the situation in Germany differed from the situation in the U.S.

There are valid arguments for maintaining that the 'life'-provision of the 14th Amendment to the US Constitution has a different meaning, historically, from the 'right to life' protected by the German Constitution. When the 14th Amendment was added to the Constitution (after the Civil War of 1868-1870), the common law applied in most of the States. As the common law did not consider the fetus to be a human being until the moment of quickening, and in many cases not until the moment of birth, 'life' in the 14th Amendment was therefore not meant to cover 'unborn life'.[9] In Germany, on the other hand, the question of the protection of unborn life was discussed more than once during the preparatory work for the Constitution. A proposal was made to expressly mention the protection of unborn life in art. 2. In the light of the National-Socialist experience, pro-

8 *Roe. v. Wade*, 35 *LEd* 2d, p. 180.

9 *ibid.*, p. 165-167. See chapter I, section B. 1.

tection of life without mentioning unborn life was not considered sufficient. The proposal was not adopted, however.[10] There is some disagreement on the question of why this proposal was not adopted. Some argue that an express provision was superfluous, as the protection of unborn life was naturally included in the 'right to life' provision.[11] Others hold that the proposal was rejected because no agreement was reached, due to the opposition of SPD members, on the protection of unborn life.[12] The fact remains, however, that the question of the protection of unborn life was discussed during the drafting of the Constitution, and that a substantial number of the drafters (the CDU/CSU members) supported the view that unborn life was protected by the Constitution.

Another difference between the US and Germany is that the protection of unborn life from the moment of conception has an older legal history in Germany than in the U.S. The history of abortion legislation in Germany shows that the view that life begins at the moment of quickening was abandoned much earlier than in the US.[13] Even the law of the Prussian State of 1794 and the general civil code for the *Krönländer* of the Austrian Empire of 1811 established that all law applies equally to the unborn from the moment of conception.[14]

On the basis of these historical arguments for the protection of unborn life it seems justified that art. 2.2 of the German Constitution should establish a duty for the state also to guarantee the protection of unborn life. The next question is whether the state should impose a penal sanction for the protection of unborn life. Two decisions taken after World War II on the use of euthanasia indicate that the right to life is considered a fundamental right of the first order. The prohibition of the arbitrary killing of innocent people is considered of such fundamental importance, in these decisions, that the

10 Reis, H., 'Rechtsprechung des US-Supreme Court zum Schwangerschaftsabbruch und die deutsche Rechtstradition', in *Menschenwürde und freiheitliche Rechtsordnung. Festschrift für Willi Geiger zum 65. Geburtstag*, J.C.B. Mohr, Tübingen, 1974, p. 121.

11 *Ibid.*, pp. 118-121.

12 Kommentar zum Bonner Grundgesetz, art. 2, p. 3. See also Kriele, M., *Juristenzeitung*, 1975, p. 225; Ortino, S., 'Riforma del par. 218 CP della Repubblica Federale Tedesco sull'aborto', *Giurisprudenza Costituzionale*, 23, 1978, p. 381; REIS, *op. cit.* note 10, p. 133.

13 Reis, *op. cit.* note 10, p. 125-127.

14 *Ibid.*, p. 126.

penal sanctions for the protection of life cannot be abridged by law.[15] Such seems to be the principle expressed as well in the abortion decision.

The difference between the American and the German 'life'-provisions seems therefore to be twofold. Whereas the view that human life begins at the moment of quickening was commonly held in the US up to the middle of the 19th century, this position was abandoned much earlier in Germany. Secondly, the 'right to life' laid down in art. 2.2 of the German Constitution has to be seen as a reaction against the arbitrary killing of human life during the Nazi period. The drafters of the Constitution were very anxious to give the broadest possible scope to the right to life. Whether there was a consensus on the inclusion of unborn life in the protection of art. 2.2 is not clear. However, this question was discussed during the preparatory works and there was considerable support for the protection of unborn life.

There is no doubt that the National Socialist experience has deeply conditioned the German abortion debate, not, however, because that historical period was marked by abortion excesses. On the contrary, as has been pointed out in chapter I (section B, under 2), abortion was strictly prohibited to all women of the German 'race' during the nazi period. The most marked feature of this period was that the value of human life as such was largely ignored. The protection of fundamental human rights against the legislature (the *Rechtsstaat*-principle) was therefore of primary importance after the war. The primacy of art. 1 of the Constitution which protects man's dignity, is central to the jurisprudence of the Constitutional Court.[16] The fact that in the abortion issue the court emphasized the value of the 'individual human being and his dignity' is therefore not surprising. The fact that the Constitutional Court made sure of being on 'the safe side' with the application of art. 2.2 to the abortion issue should therefore be seen in the light of the German historical experience.

It is curious to see that in the Italian abortion debate too the Fascist experience played a role although with very different results. The Italian Constitution, too, represents a reaction against the Fascist experience,[17] and

15 *Ibid.*, pp. 143-145.

16 Kommers, D.P., *Judicial politics in West Germany, a study of the Federal Constitutional Court*, Sage, London, 1976, p. 216.

17 The Italian Constitution adopted in 1948 is 'rigid' in contrast to the previous 'flexible' Statuto Albertino which could be changed by the legislature at any time by ordinary statute. See Cappelletti, M. *Judicial review in the contemporary world*, Bobbs-Merrill, Indianapolis, 1971, pp. viii and 24.

the major task of the Constitutional Court after the war was to clear Fascist legislation from Italian law. As the abortion prohibition existing up to 1978 was part of Fascist legislation, the striking down of this provision and the liberalization of abortion was seen as a reaction against Fascism.[18] What the difference between the Italian and German constitutional response to abortion shows is that it is the disregard for 'human values' experienced in both countries during the Second World War that has a direct bearing on the abortion issue. The different outcome of the German and Italian abortion rulings should be seen in the light of a different interpretation of what is represented by 'human values'.

The history of art. 2 of the European Convention on Human Rights, drafted in the same period in reaction to the Second World War experience, does not give any clarification on the question of the protection of unborn life. No clear decision was taken by the drafters about the protection of unborn life. It seems that the question was not even discussed.[19]

One important question remains, however, and that is whether a constitutional decision on abortion should be based on historical arguments. The reason why abortion became an issue in the 1960's and the 1970's was that the old values regarding procreation and childbearing were no longer accepted. Given the vague wording of constitutional provisions, and given their dynamic nature, it seems rather strange to judge a new problem such as abortion on the basis of the intentions of the drafters of a constitution which dates back to 1867, 1879 or 1949. If this line were to be adopted, similar issues such as capital punishment, suicide, and euthanasia could not be given a 'new' solution. From this viewpoint it was in fact rather easy for the US Supreme Court and the Austrian Constitutional Court to say that unborn life was not protected by the drafters of the Constitution back in the 19th century. Similarly, it is indeed understandable that the drafters of art. 2 of the European Convention did not consider unborn life, as the abortion issue did not exist at the time.

18 Casini has pointed out that the Fascist penal code did in fact not alter the legal status of abortion. The only novelty introduced by Fascism was that abortion became a crime against offspring ('stirpe'). The law did not make a racial distinction, however, as in the German case. The only concern of this law was to stimulate population growth, and therefore prohibit abortion, without a racial connotation. See Casini, C., Cieri, F., *La nuova disciplina dell'aborto*, Cedam, Padova, 1978, p. 8-9.

19 De Blois, M., 'Abortus en art. 2 van de Europese Conventie voor de Rechten van de Mens', *Nederlands Juristenblad*, 1981, p. 146.

This raises the question of whether the historical arguments were an essential part of the constitutional rulings. It seems rather strange that the US Supreme Court first used historical arguments in the interpretation of the 'life' provision of the 14th Amendment, and then gave a very modern interpretation to the right to liberty laid down in the same Amendment. It is tempting to assume that the Supreme Court used these historical arguments to make its radical ruling more acceptable.

The historical interpretation given by the Austrian Constitutional Court should be seen in the light of the Court's positivist view on constitutional interpretation. (see *infra* Section C) Although one might have expected arguments which were more related to contemporary social reality from the German Court, it still appears that the historical aspect did play a role in the German decision.

Section C The Judiciary versus the Legislature: the Concept of Democracy

1. Selection, Background and Training of the Judges

A great deal has been written on the differences between the common law and the civil law judge. In the common law world, a judge is a

> cultural hero, even something of a father figure. Many of the great names of the common law are those of judges: Coke, Mansfield, Marshall, Story , Holmes, Brandeis, Cardozo. We know that there is an abundance of legislation in force, and we recognize that there is a legislative function. But to us common law means the law created and molded by the judges, and we still think (often quite inaccurately) of legislation as serving a supplementary function. We also know where our judges come from. We know that they attend law school and then have successful careers either in private practice or in government, frequently as district attorneys. They are appointed or elected to judicial positions on the basis of a variety of factors, including success in practice, their reputation among fellow lawyers, and political influence.
> If he (the judge) sits on the highest court of a state or is high in the federal judiciary, his name may be a household word. His opinions will be discussed in the newspapers and dissected and criticized in legal periodicals. He is a very important person.[20]

20 Merryman, J.H. *The civil law tradition*, Stanford Un. Press, Stanford, 1969, pp 35-36.

In a common law system, where the case and the judge are central to the legal life of society, the judge is encouraged to leave his mark on the law in a way his continental colleagues are not.[21] Many of the US Supreme Court Justices lack practical judicial experience when they come into office, but the list of totally inexperienced Justices contains many of the greatest names, such as Chief Justice Earl Warren.[22] All of the present Justices on the Supreme Court have had considerable experience in public life. This public exposure makes for forceful personalities.[23]

Cautiousness, self-restraint, anonymity and a high degree of professionalism are common characteristics of most continental judges.[24]

> ... in the civil law world ... a judge is ... a civil servant, a functionary ... A judicial career is one of several possibilities open to a student graduating from a university law school. Shortly after graduation, if he wishes to follow a judicial career, he will take a state examination for aspirant to the judiciary and, if successful, will be appointed as a junior judge ... In time, he will rise in the judiciary at a rate dependent on some combination of demonstrated ability and seniority. He will receive salary increases according to pre-established schedules, and will belong to an organization of judges that has improvement of judicial salaries, working conditions, and tenure as principal objectives.[25]
>
> The picture of the judicial process that emerges is one of fairly routine activity. The judge becomes a kind of expert clerk. He is presented with a factual situation to which a ready legislative response will be readily found in all except the extraordinary case ... The whole process of judicial decision is made to fit into the formal syllogism of scholastic logic.[26]
>
> The great names of the civil law are not those of judges ... but those of legislators (Justinian, Napoleon) and scholars ... The image of a civil law judge is that of a civil servant who performs important but essentially uncreative functions.[27]

21 Ehrmann, H.W., *Comparative legal cultures*, Prentice Hall, Englewood Cliffs, New Jersey, 1976, p. 108.

22 Abraham, H.J., *The judicial process*, Oxford Un. Press., New York, 1980, 54 ff.

23 Ehrmann, *op. cit.* note 21, p. 77. Abraham, *op. cit.* note 22, pp. 54 ff.

24 Ehrmann, *op. cit.* note 21, pp 76-78. Similar comments are made by Bognetti, G., on account of the Italian Constitutional Court, in 'The political role of the Italian Constitutional Court', *Notre Dame Lawyer*, 49, 1974, p. 991.

25 Merryman, *op cit.* note 20, p. 36.

26 *Ibid.*, p. 37.

27 *Ibid.*, p. 38.

> The continental mentality of a civil servant, long prevalent among continental judges, will wish to do a little more than preserve at least the outward appearance of being a faithful mouthpiece.[28]

The description given here of the differences between American and European continental judges is a quite caricature, although it does serve the purpose of pointing out the cultural differences between the two groups. Many of the contrasts between the common law and the civil law systems have been blurred in recent times. The creation of constitutional courts after World War II on the European continent has had the biggest impact on the evolution of civil law. Not all European constitutional court judges are career judges, they are mostly appointed by political organs, not for life, and they have more freedom in the exercise of their function than other judges.

The French Constitutional Council consists of nine members and all ex-Presidents of the Republic. Three members are appointed by the President of the Republic, three by the President of the Senate and three by the President of the National Assembly. They are appointed for nine years, and there is no professional requirement for becoming a judge.[29] In practice most of the judges are politicians, very few are lawyers.[30] The average age is over 72.[31] Due to the system of appointment which means that the governing party can appoint the judges, the Conservatives on the Council are in the majority.

The Austrian Constitutional Court has 14 members (and six substitute members) who are appointed for life and obliged to retire at age 70. The President, vice-President and six members are appointed on government recommendation. Three members are appointed on the recommendation of the National Assembly, and three on the recommendation of the Federal Council.[32] Constitutional Court judges are selected from among judges, law lecturers and professors, and lawyers and must have at least ten years of professional experience. The minimum age is 35.[33] In practice, the seats on the Constitutional Court are equally divided between the two major parties, who

28 Ehrmann, *op. cit.* note 21, p. 108.

29 See Luchaire, F., Le conseil Constitutionnel, *Economica*, Paris, 1980, p. 60.

30 At the moment only Vedel.

31 Luchaire, *op cit.* note 29, pp. 62-63.

32 Art. 147(2) *Bundesverfassungsgesetz*.

33 Art. 147 Abs. 2,3, B-VG.

have 7 each,[34] and a candidate presented by one party is usually accepted by the other. In 1973, however, the Socialist government claimed an additional seat in order to reflect the changed power balance, the Socialist Party having obtained an absolute majority in Parliament in 1972.[35] There is no public discussion of the appointment of a constitutional court judge. It is difficult to form an idea of how the parties make their choice. This has led to reform proposals aimed at guaranteeing the high professional quality of the judges.[36]

The Italian Constitutional Court has 15 members who are appointed for nine years. There is no age limit. Five members are appointed by the President of the Republic, five by the Parliament voting with a two-thirds majority, and five by the high magistrature (*Corte di Cassazione, Consiglio di Stato, Corte dei Conti*). The judges are selected from among magistrates, law professors and practising lawyers with at least 20 years of experience.[37]

The German Federal Constitutional Court consists of two Senates of eight members each. The judges must be at least 40 years of age, they are appointed for 12 years and have to retire at 68. In order to hold judicial office, members must have German legal qualifications.[38] This means that prospective judges must have passed the first and second major state examination in law.[39] Three judges in each Senate are selected from the ranks of the federal judges. The other judges come from the political arena and there is a small quota of law professors and civil servants from the federal and state administration.[40]

The *Bundestag* elects half of the judges, the *Bundesrat* the other half, each with a two-thirds majority.[41] Because of this two-thirds majority requirement, majority and opposition in the two Houses have to come to a compromise on the choice of the candidate. In practice, the posts of judges are

34 Austria has practically got a two-party system. Öhlinger, T., 'La giurisdizione costituzionale in Austria', *Quaderni Costituzionali*, 2, 1982, pp. 554-555.

35 *Ibid.*, pp. 554-555.

36 *Ibid.*, p. 555.

37 Art. 135 of the Italian Constitution.

38 *Gesetz über das Bundesverfassungsgericht* vom 12.3.1951 (BGBl I 243), par. 3 and 4.

39 Kommers, *op. cit.* note 16, p. 87.

40 Constitutional Court Act, see note 34, par. 2.3. See Schlaich, K., 'Procédures et techniques de protection des droits fondamentaux, le Tribunal constitutionnel fédéral allemand', *Revue Internationale de Droit Comparé*, 33, 1981, p. 343.

41 Constitutional Court Act, see note 34, par. 5, 6, and 7.

more or less equally divided between the two major party coalitions in the two Houses, the CDU/CSU and the SPD. Each party has the prerogative to propose a new candidate to replace each judge who leaves. The candidate proposed is usually accepted by the other party.[42]

The proportional representation of each party has played a dominant role in the thinking and acting of the election bodies in Germany. Although an outside candidate can be appointed, there is very little chance of this actually happening. The qualified-majority requirement has prevented the election of radicals, but has at the same time blocked the election of prominent personalities and instead favored the more mediocre candidates. The selection process has been subject to extensive criticism – as it has in most other countries. What has never been disputed, however, is the qualified-majority requirement for fear of a party-oriented division within the Court. Nevertheless, the concept of proportionate representation is, in practice, a basic principle in the election process.[43]

The Justices of the US Supreme Court are appointed by the President with approval by the Senate.[44] They are appointed for life and there are no professional requirements. There seem to be four predominant factors which influence a President's choice of a particular candidate: objective merit, personal friendship, the balancing of 'representation' (of minorities, e.g. Catholics, blacks, women etc.) on the Court, and political and ideological compatibility.[45] The overriding concern, however, seems to be the candidate's 'real' politics.[46] The selection of the Supreme Court judges is a very important presidential prerogative and in fact all Presidents have, to a greater or lesser extent, tried to 'pack the Court'.

This short description shows that the selection procedure is quite different in the five countries discussed. The American system of appointment by the President with approval by the Senate is in accordance with the doctrine of 'separation of powers' and 'checks and balances'. The continental European

42 Schlaich, *op. cit.* note 40, p. 343.

43 Billing, W., *Das Problem der Richterwahl zum Bundesverfassungsgericht*, Duncker & Humblot, Berlin, 1969, p. 130 and 220. Dopotka, F.W., *Das Bundesverfassungsgericht und seine Umwelt*, Duncker & Humblot, Berlin, 1982, p. 73, suggests that the Court should decide every case with a two thirds majority in order to avoid 'proportionality thinking'.

44 Article two, Section 2, par. 1 of the US Constitution.

45 Abraham, *op. cit.* note 22, p. 66.

46 *Ibid.*, p. 77.

tradition of 'sovereignty of Parliament' was reconsidered in the light of the experience of the Second World War and constitutional courts were set up (in Italy and Germany) precisely to guarantee respect for fundamental values by the legislature. Although the American model was widely adopted, some of the features of American judicial review were consciously avoided on the European continent. Instead of the decentralized system of judicial review which existed in the US, the European countries opted for a centralized system of constitutional control. Furthermore, attempts were made to guarantee the juridical nature of the Constitutional Court, in reaction to the American Supreme Court's role, which was regarded as too political. The concern in Europe was that the constitutional court should be 'above the parties', that is, politically neutral. That is the reason why the German Constitution prescribes a qualified majority for the selection of a judge, and why the Italian selection process aims at a 'mixed composition' of the Constitutional Court by having the judges selected by different state powers. The history of the Austrian Constitutional Court and of the French Constitutional Council differs from the German and Italian one in that it is not directly related to the experience of the Second World War. The creation of the Austrian Court dates back to 1920, and was originally aimed at the solution of disputes between federal and state powers. Although its powers were extended in 1929 to judicial review *incidenter*, it was only in 1975 that the scope of its competence of judicial review was extended to a level comparable to that of the German or Italian Constitutional Court. The selection procedure, although in theory biased towards the governing majority, is in practice similar to the procedure in Germany. The French Constitutional Council was not intended to deal with fundamental rights, a task assumed by the Council only in 1972. It was in fact intended to function as a political organ. The fact that the selection process heavily favors the governing majority again shows the importance of the concept of the sovereignty of Parliament in France.

The most important common feature of the selection process is that, in spite of all the differences, all constitutional court judges are appointed by political organs, except for one-third of the Italian Constitutional Court which is selected by the judiciary itself. Although the German, Italian, and Austrian systems in particular have unbuilt checks on the selection of a politically-biased court, part of the criticism directed at constitutional courts is aimed at the way they are selected. The outcome of certain decisions is blamed on the political background of the judges. The German Federal Constitutional Court was severely attacked for its abortion ruling which was

perceived as a CDU/CSU manipulation of the constitutional process, the CDU/CSU appointees in the first Senate being in the majority.[47]

Experience shows, however, that it is difficult to judge a constitutional court's behaviour on the basis of the political background of its members.The American experience in particular disproves such a theory. Many Justices have turned against the beliefs of the President who elected them. The American abortion decision is a clear example of the unpredictability of the Supreme Court's action. President Nixon appointed four Justices when he was in power and carefully selected those he thought to be 'strict constructionists', i.e. people who would operate within the strict limits of the Constitution. Nixon had also made his anti-abortion feelings very clear. Nevertheless, three out of the four Justices appointed by him voted with the majority in the *Roe*-decision of 1973. A recent study on the case selection process of the US Supreme Court shows that 'power politics' did not play a central role in case selection.[48] The study disproves the 'political agency' interpretation which assumes that the Justices see case selection as an opportunity to implement their liberal or conservative views. The study concludes that a shared conception of the proper role of a judge prevents the Justices from power-oriented voting in case selection.[49]

Donald Kommers arrives at a similar conclusion for the German Federal Constitutional Court.

> The Justices as a whole, are a very mixed group, not easily classifiable, some are liberal, some are conservative, but their liberalism or conservatism varies from issue to issue, which seems to depend more on personality and general experience than on any single background characteristic.[50]

Even the French Constitutional Council, which was dominated by conservative appointments, has shown self-restraint in judging the Socialist reforms. Although it has slowed down certain radical reforms, it has not totally blocked them.(see *infra*, under 2)

47 Gerstein, H., Lowry, D., 'Abortion, abstract norms and social control: the decision of the West German Federal Constitutional Court', *Emory Law Journal*, 25, 1976, p. 861.

48 See section D. 1 *infra*.

49 Provine, H., *Case selection in the United States Supreme Court*, Un. of Chicago Press, Chicago, 1980, pp. 131-172.

50 Kommers, *op. cit.* note 16, p. 155.

Therefore it does not seem very convincing to explain the constitutional decisions on abortion by reference to the political background of the judges. The judges form an independent body which operates as a whole. The collective task the judges have before them seems to take precedence over their political beliefs.

Could the training of the judges, in particular the difference in training between American and continental European judges described at the beginning of this section, give some insight into the way of reasoning of the American and the German Courts with regard to the political decision on abortion? Kötz has highlighted the differences in opinion-writing of the highest courts of various European countries.[51] The French style is still based on the idea of Montesquieu that the judge is merely a 'mouthpiece' of the law. French judgments are therefore very concise and short, no references are made to the doctrine, and they are based only on legal provisions.

> Denn viele dieser Urteile sind ... an Geschliffenheit und Ausgefeiltheit, an stilistischer Eleganz, an formaler Klarheit nicht zu übertreffen; sie sind auch, weil es den Richtern stets auf ein äußerstes Maß an Verdichtung und Verknappung des Textes ankommt, selten länger als vier bis fünf Schreibmaschinenseiten. In der Tat gibt es da keine Abschweifungen, keine gelehrten Demonstrationen der Belesenheit; da dient alles dem Zweck, das gerichtliche Urteil in schlackenloser Reinheit als Ergebnis eines von Subjektivismen freien, mit innerer Notwendigkeit ablaufenden Subsumtionsprozesses in die äußere Erscheinung treten zu lassen.[52]

The German jurisprudential tradition, although more creative than the French one, still has a very legalistic approach ...

> Aber man darf nicht übersehen, das die Blütezeit des Gesetzespositivismus und des Kodifikationsdenkens in Deutschland noch nicht lange genug zurückliegt, als daß sich bei uns schon Regeln über den Umgang mit case law hätten entwickeln können, die sich an Klarheit und Ausgefeiltheit mit denen des Common Law vergleichen ließen ... bei der Veröffenlichung von Gerichtsentscheidungen in Zeitschriften und Urteilssammlungen (besteht) immer noch die charakteristische Neigung..., gerade den Sachverhalt, der der Entscheidung zugrunde gelegen hat, nur in verstümmelter Form abzudrucken oder ihn ganz zu streichen.[53]

51 Kötz, H., 'Die Begründung höchstrichterlicher Urteile', *Preadvies voor de Nederlandse Vereniging voor Rechtsvergelijking*, Kluwer, Deventer, 1982, pp. 5-22.

52 *Ibid.*, p. 9.

53 *Ibid.*, p. 13.

This characterization of German jurisprudence again shows the contrast with the common law tradition where the judges are the lawmakers and the case is central to the decision, as we saw at the beginning of this section.

The American and German abortion decisions clearly reflect this contrast. The American Supreme Court adopted a sociological approach to the abortion problem, basing its decision on legal and non-legal arguments and showing a strong concern for the social problems underlying the abortion issue. The German Constitutional Court, on the other hand, took a legalistic approach by limiting its examination to the Constitution which is regarded as the sole source of constitutional values.[54] The French and Austrian decisions, too, were very much in line with the training of the respective Courts. The French decision was very short and concise, limiting the interpretation of the Constitution to a minimum. The Austrian abortion ruling followed the Kelsenian ideas of constitutional interpretation prevalent in Austria and did not go beyond a historical and grammatical interpretation of the Constitution. The Italian abortion decision is also based on purely legal reasoning and therefore reflects the training of Italian judges in legal positivism.

2. The Role of the Constitutional Court in Society

Although the selection, background and training of Constitutional Court judges gives us some insight into their characteristics and style, the real character of a constitutional court is determined by the perception it has of itself, by the role it assumes towards the legislature, by the limits it imposes on itself in interfering in the political process. The legitimacy of a constitutional court in a democratic society is viewed differently in Europe and in the US, and there are also variations between the different European countries. How can the principle of the 'sovereignty of Parliament', based on the concept of a representative democracy, be reconciled with the principle of judicial review rooted in the concept of 'checks and balances'? And if judicial review is considered necessary in order to protect the individual's fundamental rights, what are the limits on the power of constitutional courts? These seem to be the dilemmas facing European constitutional courts.

54 Kommers, D.P., 'Abortion and Constitution: United States and West-Germany', *American Journal of Comparative Law*, 25, 1977, pp. 276-278.

The US initiated the era of 'constitutionalism', i.e., the notion of the supremacy of the Constitution over ordinary laws.[55] The American Bill of Rights of 1791 was the outgrowth of liberal democratic ideas and of a natural rights philosophy. The fundamental rights protected by it were considered to be pre-existing natural rights.[56] The principle of the supremacy of constitutional law was asserted by the Supreme Court itself, by Chief Justice Marshall in his famous decision *Marbury v. Madison* of 1803.[57]

Although the American Bill of Rights repeats the classical liberties of the French Declaration of the Rights of Man of 1789, France did not adopt the concept of constitutionalism in the American sense. In the ideology of the French Revolution, the legislature as the voice of popular sovereignty was the most important protector of fundamental rights, the judge was merely the 'mouthpiece' of the law.[58] This view was predominant on the European continent up to the Second World War.

The notion of fundamental rights as pre-existing natural rights arose in Europe only after 1945. The atrocities committed by governments strengthened the view that the protection of fundamental rights had to be guaranteed. This resulted in the Universal Declaration of Human Rights of 1948 and the European Convention on Human Rights of 1950.[59] The Italian Constitution of 1948 and the German Constitution of 1949 are 'rigid' Constitutions which declare the supremacy of constitutional over ordinary law. They developed in this way as a reaction to Fascist and Nazi experiences. The German and Italian Constitutional Court were created in order to exercise this constitutional control over legislation. The French Constitution followed the post-war movement in that the Preamble to the 1946 French Constitution reaffirmed the fundamental rights of the 1789 Declaration and added new ones without however accepting the supremacy of constitutional law. Constitutional control of legislation was only granted in France in 1958, and in practice the protection of fundamental rights through constitu-

55 Cappelletti, *op. cit.* note 17, p. 25.

56 See Gorby, J.D., Jonas, R.E., 'West German abortion decision: a contrast to Roe v. Wade', *John Marshall Journal of Practice and Procedure*, 9, 1976, p. 564.

57 5 U.S. (1 Cranch) 137 (1803).

58 Cappelletti, *op. cit.* note 17, p. 35.

59 Gorby, *op. cit.* note 56, p. 564.

tional control of legislation did not start until 1971, on the Constitutional Council's own initiative.[60]

The Austrian Constitutional Court is a special case in that judicial review of legislation was established much earlier. Austria has the oldest centralized system of constitutional control of legislation in Europe, dating back to 1920. Austria's reaction to World War II was to restore the constitutional setting of 1920 and 1929 and to declare all constitutional changes enacted after 1929 null and void. Some fundamental rights were added in the constitutional reform of 1955 as a response to the Nazi experience. Its powers of judicial review, however, remained the same until 1975 when the powers of the Court were considerably enlarged. (see *infra*, section D under 1)

The role these European constitutional courts had to play in the political life of their countries was – and still is – subject to extensive debate, particularly in the light of the American experience. The part the respective courts play in political life will be sketched briefly for every country. Both in the US and in Germany, the constitutional court judges were accused of judicial activism because of their abortion decisions, of having issued 'judicial legislation'. In this paragraph an attempt will be made to establish whether the abortion decisions can be explained in terms of a tradition of judicial activism or self-restraint on the part of the constitutional courts.

U.S. The American Supreme Court decides on constitutional matters within the context of concrete adversary litigation to the extent that is necessary for the disposition of the case before it. It is therefore the prototype of judicial review *incidenter*.[61] The primary task of the Court is appellate. Cases or controversies normally reach the Supreme Court for purposes of review under its appellate jurisdiction on a writ of appeal, as a matter of right, on a writ of *certiorari*, as a matter of Court discretion, or by certification. The Court has reduced its obligatory appellate responsibilities to a minimum, and about 90% of its case load now consists of *certiorari* cases. Any disappointed litigant in a suit involving a 'federal question of substance' can petition the Supreme Court to grant him a writ of *certiorari*. In this way the Supreme Court can decide on a wide range of constitutional questions.[62]

60 See *infra* Section C. 2.

61 See Cappelletti, *op. cit.* note 17, p. 69-70.

62 Abraham, *op. cit.* note 22, p. 179 ff. See also section D, par. 1 *infra*.

The American Supreme Court has played an active role in government. The American constitutional principles of 'separation of powers' and 'checks and balances' have legitimated such a role, but it has mostly been the Court itself which has asserted this position. Through the interpretation of Chief Justice John Marshall in *Marbury v. Madison* (1803),[63] the supremacy of the Constitution over other laws, and the judicial power to disregard unconstitutional law, were affirmed. The Supreme Court provided itself in this way with the tool of judicial review.

The Court has adopted principles of judicial self-restraint such as the 'political question doctrine' (political issues should be referred to the legislature or the executive) and the principle of *stare decisis* (the court is bound by its precedent). The interpretation of these principles has changed over time, however. The meaning of a 'political question' was narrowed down in the early 1960s. Beginning with *Baker v. Carr* (1961),[64] the Court intervened in the political process in disapportionment and desegregation cases. The Supreme Court has also never held itself absolutely bound by its precedent. The 'felt necessities of the time' are compelling facts of governmental life, as Justice Stone said, which justify a change of direction in the jurisprudence of the Court.[65] It is possible to distinguish periods in which the Supreme Court was more active and was able to impose its will to a large extent on the executive. The most well-known examples are the New Deal period and the Warren era.[66]

What are the guiding principles of the Supreme Court and can the abortion decisions be deduced from such principles? Justice Stone indicated two national objectives to be guaranteed by the Supreme Court: 'government by the people, and government for the whole people'.[67] He pointed at two situations in which legislative miscalculations of the public welfare are likely to remain uncorrected unless the Court steps in: 1. when the legislature insulates itself from demands for change in the law by hampering political expression, political organization, or voting, and 2., when the political processes are fully operative, but prejudices against socially-insulated minorities

63 See note 57 *supra*.

64 *Baker v. Carr*, 368 US 804 (1961).

65 Abraham, *op. cit.* note 22, p. 384.

66 *Ibid.*, pp. 358-359. Abraham has made a scheme of the periods in which one branch tended towards supremacy over another or over the other two branches.

67 Lusky, L., *By what right?*, Michie Company, Virginia, 1975, p. 109.

may render the legislature unresponsive to their grievances.[68] In Ely's words, the Supreme Court has interfered with political decisions in order to clear the channels of political change when the political process was blocked, or to facilitate the representation of minorities.[69]

The protection of personal freedoms through the 14th Amendment to the Constitution has been one of the Supreme Court's major concerns and has often led to 'judicial activism'. The 14th Amendment[70] protects two aspects of 'due process', the substantive and the procedural. The Court has intervened when it judged that governmental action was arbitrary, capricious, unreasonable, irrelevant or irrational, either in content or in procedure.[71] The meaning of 'substantive due process' has been considerably extended over time. Originally, substantive due process only protected the property interests of individuals. Between the beginning of the century and 1937 (the Lochner-era),[72] most of the statutes which interfered with persons' property rights, in particular their freedom of contract, were held unconstitutional by the Supreme Court. On these grounds a total of 16 New Deal laws were struck down between 1934 and 1936.[73] After 1937 the Supreme Court switched its attention from property rights to non-economic, personal rights, which are called 'basic human freedoms' or 'cultural freedoms'. The case *Palko v. Connecticut* (1937)[74] laid down the foundation for the interpretation of these basic human rights. The *Palko*-opinion distinguished between those basic rights viewed as 'of the very essence of a scheme of ordered liberty', and those without which 'justice would not perish'.[75] Justice Cardozo,

68 *Ibid.*, p. 110.

69 Ely, J.H., *Democracy and distrust*, Harvard Un. Press, Cambridge, 1980, p. 181 ff.

70 See *infra* Section A, par. 5.

71 Abraham, H.J., *Freedom and the court, civil rights and liberties in the United States*, 4th ed., Oxford University Press, New York, 1982, p. 96.

72 Called after the case *Lochner v. New York*, (198 US 45)(1908). The Supreme Court voiced here the 'due process' – doctrine in the following way. 'The act (i.e. setting the maximum number of working hours for bakers) must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his labor'. See Vanderveeren, C., 'De ontwikkeling van het recht op privacy in the U.S.A.', *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 39, 1984, p. 178.

73 Abraham, *op. cit.* note 71, p. 9.

74 *Palko v. Connecticut*, 302 US 319 (1937).

75 Abraham, *op. cit.* note 71, p. 57.

who wrote the opinion, explained that 'those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' belonged to the first category, and principles of justice 'so rooted in the traditions and conscience of our people as to be ranked fundamental'.[76] This concept of 'preferred freedoms' introduced a 'double standard' of constitutional adjudication. If a dispute between an individual and state power touched upon one of these 'fundamental rights', state action would be subjected to 'strict judicial scrutiny'. This meant that the state had to show a 'compelling state interest' in order to justify the violation of the fundamental right at stake. If on the other hand the personal right at stake did not belong to the category of 'fundamental rights' (e.g. property rights), the state had to prove only that there was a rational relation between the state action violating this personal right and the valid state interest pursued by this action.

Which rights would be considered 'fundamental' and would therefore be included in the 14th Amendment's 'concept of ordered liberty'[77] was subject to interpretation and changed over time. Cardozo had a limited view of the 'fundamental rights', which he took to refer mainly to the freedom of thought and speech, discarding procedural rights.[78] Up to 1961 Cardozo's line was more or less maintained, and that period is therefore characterized by judicial self-restraint on the part of the Supreme Court.[79] As from 1961 there is a new period of judicial activism in which most procedural rights stated in the first eight Amendments to the Constitution are incorporated in the Due Process Clause of the 14th Amendment.[80] This 'incorporation' implied that the federal rights contained in the first ten Amendments were held

76 *Ibid.*

77 *Ibid.*, p. 59.

78 *Ibid.*, p. 58.

79 *Ibid.*, p. 60.

80 The most famous 'incorporation'-decision since *Palko* is probably *Gideon* v. *Wainwright*, 392 US 335 (1963) in which the right to counsel in criminal cases generally was recognized under the Due Process Clause of the 14th Amendment. In effect the Supreme Court nationalized the right to counsel in all criminal cases, except for some cases of misdemeanors, be they capital or non-capital. See Abraham, *op. cit.* note 71, p. 64.

valid also against the states through the 14th Amendment, which is directed to the states.[81]

The fact that the Supreme Court did not hesitate to go beyond the wording of these federal rights to be incorporated in the 14th Amendment is shown by the 1965 decision *Griswold v. Connecticut*,[82] which dealt with contraceptive freedom and was the precedent to the abortion cases. The state statute under review had made it a crime for any person, married or single, to use any drug or other article or device for the purpose of preventing conception. This law was held unconstitutional by the Supreme Court because it violated the 'zone of privacy created by several fundamental guarantees'.[83] Although the Constitution does not mention any right to privacy, Justice Douglas stated in his majority opinion 'that specific guarantees in the Bill of Rights have penumbras, formed of emanations from those guarantees that help give them life and substance',[84] penumbras that reached areas not specifically mentioned in the Bill. The Amendments which created through their penumbras 'zones of privacy' were the First, Third, Fourth, Fifth and Ninth.[85] The Court stated in *Griswold* that 'the right to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected' by the Constitution.[86] The Connecticut statute involved dealing with 'a particularly important and sensitive area of privacy – that of the marital relation and the marital home'[87] and was declared unconstitutional as it infringed upon 'the right of privacy in the marital relation', considered to be fundamental within the sense of the Ninth Amendment.[88] The aim of this argument was to show that the right to privacy was protected by the Bill of Rights and that it could be imposed on

81 See Abraham, *op. cit.* note 71, p. 59 ff. for a summary of the process of incorporation.

82 *Griswold v. Connecticut*, 381 US 479 (1965), 85 SCt 1678, 14 *LEd* 2d 510.

83 14 *LEd* 2d at 515.

84 *Ibid.* at 514.

85 Namely the right to association (First Amendment), prohibition of quartering of soldiers in homes (Third Am.), guarantee against unreasonable searches and seizures (Fourth Am.), compulsory self-incrimination (Fifth Am.).

86 14 *LEd* 2d at 522.

87 *Ibid.* at 521.

88 *Ibid.* at 524.

state legislatures through the Fourteenth Amendment.[89] Justice Black warned in his dissenting opinion that 'privacy is a broad, abstract, and ambiguous concept' that can be readily expanded and contracted in later decisions.[90]

Through the 'penumbra-theory' voiced in the *Griswold* decision the Supreme Court had created an enormous subjective and discretionary competence to extend the number of 'fundamental rights' beyond the ones written in the Constitution. The direct result of Griswold was that the 'right to privacy' had become a 'fundamental right', which included the freedom of marriage and family relations. Any law limiting this freedom would from now on be subjected to 'strict scrutiny'. In the next privacy-case, *Eisenstadt v. Baird*[91] the Court again emphasized the importance of the right to privacy stating that

> if the right to privacy means anything it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[92]

Here the Court gives a much wider interpretation of the right to privacy than the one set out in *Griswold*. Privacy is no longer limited to the marital relationship, but extended to include the individual. Furthermore, the phrase 'the decision whether to bear or beget a child' leaves space for something more than contraceptive freedom.

What these jurisprudential references have tried to show is that the recognition of the 'right to privacy' in *Roe v. Wade* was not new. After having recognized in *Griswold* and *Eisenstadt* that there existed a fundamental right to privacy related to the use of contraceptives, it was only a small step to extend the meaning of privacy in such a way as to cover abortion. The new elements are that the Supreme Court in *Roe* based the right to privacy directly on the 14th Amendment and that the Court went as far as determining in detail the content of abortion law reforms. The abortion decisions have

89 See Vanderveeren, *op. cit.* note 72, p. 245.

90 Dissenting opinion of Justice Black, 14 *LEd* 2d at 530.

91 *Eisenstadt v Baird*, 405 US 438 (1972), 92 SCt 1029, 31 *LEd* 2d 517. In this case the Supreme Court struck down a law which prohibited the distribution of contraceptives to unmarried persons as being in violation of the right to privacy. The Court based its decision this time on the Equal Protection Clause, stating that the law made an unjustified distinction between married and unmarried persons.

92 *Eisenstadt* v. *Baird*, 31 *LEd* 2d, p. 362.

therefore been heavily criticized for being a transgression of the limits of judicial power.[93]

Is there a way to justify the *Roe*-decision under the general constitutional principles mentioned before, that is in terms of the 'felt necessities of the time' (Stone) or the 'clearing of the channels of political change'? Michael Perry and Laurence Tribe have claimed that the Supreme Court based its decision on an evolving moral consensus on the abortion issue.[94] The crucial element of the abortion debate is, however, that there is no moral consensus on abortion. Furthermore, at the time the *Roe* decision was delivered the abortion issue was highly debated and most states were in the process of reforming their laws. It would therefore be difficult to explain the Court's intervention by the argument that the political channels for a change in the law were blocked. In short, although 'judicial activism' is by no means new in the jurisprudence of the US Supreme Court, the extent to which the Court imposed its will on the state legislatures in the abortion decisions was quite unexpected and unprecedented.

Austria was the first country in Europe to have a constitutional court. The Constitution of 1920 created the *Verfassungsgerichtshof* which had the power to control the constitutionality of legislation, but only *principaliter*, that is by way of direct action (abstract review). The Federal Executive could challenge laws of the *Länder*, and the *Länder* governments could challenge federal legislation before the Court. The Court therefore only dealt with questions concerning the division of powers between the federal government and the *Länder*, and the protection of fundamental rights remained outside its jurisdiction.

The constitutional reform of 1929 granted judicial review *incidenter* (concrete review): the highest civil and criminal court and the central admin-

93 Ely, J.H., 'The wages of crying wolf', *Yale Law Journal*, 82, 1973, p. 920 ff. COX, A., *The role of the Supreme Court in American government*, Clarendon Press, Oxford, 1976, p. 113-114. Bickel, A., *The morality of consent, Yale* Un. Press, New Haven, 1975, p. 28. Epstein, R.A., 'Substantive due process by any other name: the abortion cases', *Supreme Court Review*, 1973, pp. 159 ff. A different opinion is voiced by Heymann, P. Barzelay, D., 'The forest and the trees: Roe v. Wade and its critics', *Boston University Law Review*, 53, 1973, p. 765ff. who argue that Roe is amply justified by precedent and by those principles that have long guided the Court in matters of individual rights.

94 Tribe, L.H., in Gunther, G., *Cases and materials on constitutional law*, 9th ed., p. 652. Perry, M.J., 'Abortion, the public morals and the police power: the ethical function of substantive due process', *UCLA Law Review*, 23, 1976, p. 689 ff.

istrative court had the right and the duty to refer to the Constitutional Court constitutional questions which arose in the course of a judicial proceeding. The jurisdiction of the Court was thus extended to the area of fundamental rights, but limited in the sense that only the highest courts could refer constitutional questions to the Court.

The constitutional reform of 1975 extended the powers of the Court in the field of fundamental rights. Any appeal court can now initiate proceedings before the Constitutional Court, and one third of the National Assembly or one third of the Federal Council can refer a law to the Court for judicial review. In this way the power of abstract review has been established and the power of concrete review enlarged. The most salient feature of the constitutional reform is that it is now possible for an individual citizen to make a direct constitutional complaint to the Court.[95]

In contrast to the natural law concept of fundamental rights in the other countries discussed here, Austrian constitutional doctrine has a positivistic conception of fundamental rights. The idea that fundamental rights are superior to positive law is not accepted.

> ... nicht das Naturrecht sondern die durch die Fälle der einzelnen Vorschriften durchleutenden allgemeinen Grundsätze, sind die Baugesetze des positiven Rechts.[96]

The Austrian Constitutional Court views constitutional law as strictly formal law which is to be interpreted in strict conformity with the constitutional text, and the application of which has to be limited to the concrete case. As Adamovich states,

> ... der für ihn geltende Maßstab sind ausschließlich die Verfassungsgesetze und keinerlei aus welchen Gründen immer gewonnene rechtliche Erwägungen anderer Art.[97]

95 Art. 140 Abs. 1 B-VG: 'Der Verfassungsgerichtshof erkennt ferner über Verfassungswidrigkeit von Gesetzen auf Antrag einer Person, die unmittelbar durch diese Verfassungswidrigkeit in ihren Rechten verletzt zu sein behauptet, sofern das Gesetz ohne Füllung einer gerichtlichen Entscheidung oder ohne Erlassung eines Bescheides für diese Person wirksam geworden ist.' See Mayer, H., *Neuerungen im Verfassungsrecht*, Manzsche Verlag, Wien, 1976, pp. 92-97; Ermacora, F., *Österreichische Verfassungslehre II*, Wilhelm Braunmüller, Wien, pp. 90-93, 1980.

96 Antoniolli, *Österreichische Juristen-Zeitung*, 1956, quoted in Spanner, H., 'Aufgaben und Stil der deutschen und der österreichischen Verfassungsgerichtbarkeit', in Ermacora e.o. ed., *Hundert Jahre Verfassungsgerichtbarkeit, fünfzig Jahre Verfassungsgerichtshof in Österreich*, Europa Verlag, Wien, 1968, p. 161.

97 *Juristische Blätter*, 1950, p. 74, quoted in Spanner, *op. cit.*, p. 159, note 47.

Constitutional provisions, in the Court's view, have to be interpreted in the way they were conceived by the drafters of the Constitution, and the Court therefore rejects the evolutive character of constitutional law.[98] The grammatical and historical interpretation of constitutional law adopted by the Court – the so-called 'Versteinerungstheorie'[99] – has prohibited a modern, up-to-date interpretation of fundamental rights, and has therefore often failed to solve actual problems.[100]. Many of the fundamental rights are to be found in the Constitution of 1867 which has constitutional force according to art. 149.1 of the Constitution. In the light of the Court's historical approach, these fundamental rights are still conceived of as merely defensive rights against the state, just as they were in the classical, liberal ideology of the 19th century. The Court has been reluctant to consider fundamental rights to be binding among individuals i.e. to view them as horizontal rights.[101] Thus the view of mankind held more than 100 years ago is still prevalent in the jurisprudence of the Court.[102]

Apart from its formalistic view of fundamental rights, the Court has also been reluctant to impose its views on the legislature. Many of the fundamental rights the Court has to take into consideration include 'legislative reserve clauses', which means that the legislature has been given some discretion in giving substance to these rights. The Court has exercised no strict control on the concretization of these fundamental values by the legislature, but has interpreted these reserve-clauses in such a way as to leave it almost completely up to the legislature to define the content of these constitutional provisions. It has imposed the same conditions as for the validity of normal statutory law, i.e. that they have to be clearly defined.[103] The Court has

98 Öhlinger, T., 'Objet et portée de la protection des droits fondamentaux, la cour constitutionnelle autrichienne', *Revue Internationale de Droit Comparé*, 33, 1981, pp. 543-544. Favoreu, L., 'Rapport général introductif', *Revue Internationale de Droit Comparé*, 33, 1981, p. 275. Walter, R., 'Grundrechtsverständnis und Normenkontrolle in Österreich', in *Grundrechtsverständnis und Normenkontrolle*, Springer, Wien, 1979, pp. 2-3. Schambeck, H., 'Möglichkeiten und Grenzen der Verfassungsinterpretation in Österreich', *Juristische Blätter*, May 1980, pp. 225-236.

99 Mayer, H., 'Entwicklungstendenzen in der Rechtsprechung des Verfassungsgerichtshofes', *Österreichische Juristen-Zeitung*, 35, 1980, p. 338.

100 *Ibid.*, p. 337 ff. See also Machacek, *op. cit.* note 6, p. 456.

101 Öhlinger, *op. cit.* note 77, pp. 552-553.

102 Machacek, *op. cit.* note 6, p. 457.

103 Öhlinger, *op. cit.* note 77, pp. 552-553.

shown self-restraint in particular with respect to the social and political questions tackled by the socialist government in power since 1970. Whenever a law which dealt with social or political questions has been referred to it, the Court has tended to interpret the legislation in conformity with the Constitution.[104]

This Kelsenian view of constitutional law which allows only for a marginal control of legislative actions, has left the Constitutional Court with a very limited role in Austrian society. Due to this tradition of self-restraint the Constitutional Court has great respect among the population.[105] The abortion decision, which emphasizes the classical liberal meaning of the right to life, fits into the formalistic approach of the Court towards constitutional law. The Court's refusal to deal in depth with any of the questions presented to it reconfirms its tendency to judicial self-restraint.

Germany. The Constitution of 1949 created the Federal Constitutional Court and provided it with ample powers of judicial review. All ordinary judges have the power and the duty to refer constitutional questions to the Constitutional Court (concrete review). The Federal government, the government of the *Länder* or one third of the members of the *Bundestag* have the right to challenge a law before the Constitutional Court (abstract review). Finally, every citizen has the right to file a constitutional complaint with the Court.[106]

The German Constitutional Court does not have a positivistic concept of constitutional law. As early as 1951, the Court decided that constitutional law has a higher rank than statutory law and that it is not a limited set of principles. The constitutional judge has the task of 'Wertverwirklichung', i.e., he has to give substance to fundamental values not just for the individual in the particular case but for society as a whole.[107] The Constitution is not regarded as the sum of single provisions, but as a unity, as 'ein von bestimmten Wertentscheidungen, besonders den Grundrechten und den

104 Ermacora, F., 'Politische Aspekte der Verfassungsentwicklung in Österreich seit 1970', *Österreichisches Jahrbuch für Politik*, 1978, p. 82 ff. Ermacora, F., 'Procédures et techniques de protection des droits fondamentaux, la cour constitutionnelle autrichienne', *Revue Internationale de Droit Comparé*, 33, 1981, p. 426 ff.

105 Öhlinger, *op. cit.* note 34, p. 553.

106 Art. 93. of the German Constitution. See Cappelletti, *op. cit.* note 17, p. 76.

107 Hahn, H.J., 'Trends in the jurisprudence of the German Federal Constitutional Court', *American Journal of Comparative Law*, 11978, 26, pp. 634-635.

Rechtsstaatprinzip geprägtes System'.[108] This value-oriented interpretation of the Constitution goes beyond the classical conception of fundamental rights as individually-developed guarantees against actions of the executive. In the German legal order, fundamental rights are objective legal values which are to be guiding principles for every branch of government, including the legislature.[109] The Constitutional Court has given a certain order of priority to fundamental rights in its jurisprudence. The most important provisions of the Basic Law are art. 1 ('the dignity of man shall be inviolable. To respect it shall be the duty of all state authorities), and art. 2.1 ('Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code').[110]

Judicial self-restraint is a basic legal principle in Germany. This is expressed by the 'doctrine of compatibility',[111] or the 'supposition of the constitutionality of statutes'[112] (*Verfassungskonforme Auslegung*), i.e. where there are several interpretations possible, priority is given to that interpretation of the legislative act which is consistent with the Constitution, and a law may only be declared unconstitutional and void if an interpretation consistent with the Constitution is absolutely impossible. The case law on the Equality Clause, for example, shows the Court's tendency to judicial self-restraint. In its decisions the Court has often stressed that it is beyond its powers to examine whether the legislature has used its margin of political discretion wisely or not.[113]

Few legal and constitutional principles, however, are the subject of invariable application over a longer period of time. The same applies to the principle of *Verfassungskonforme Auslegung*. It is possible to distinguish periods characterized by self-restraint and periods characterized more by ac-

108 Constitutional Court judge Rupp-von Brünneck, W., 'Verfassungsgerichtbarkeit und gesetzgebende Gewalt', *Archiv des öffentlichen Rechts*, 102, 1977, p. 13. See also Kommers, *op. cit.* note 54, p. 278.

109 Par. 31.1 of the Constitutional Court Act of 1951.

110 Kommers, *op. cit.* note 16, p. 211.

111 Hahn, *op. cit.* note 107, p. 634.

112 Bachof, O., 'the West German Constitutional judge between law and politics', *Texas International Law Journal*, 11, 1976, pp. 403-419.

113 Hahn, *op. cit.* note 107, p. 635.

tivism.[114] The abortion decision was issued in a period when the Court was subject to extensive criticism for its renewed activism. Three cases were presented to the Court in the early seventies which raised highly controversial questions (*Hochschulurteil, Grundvertragsurteil, Abtreibungsurteil*),[115] and in all three cases the Constitutional Court declared the law under review unconstitutional. As the Court upheld the new co-determination law and the divorce reform in the late seventies, the debate around the Court calmed down again.[116]

The overall picture of the German Federal Constitutional Court's attitude towards fundamental rights is in sharp contrast to the Austrian Constitutional Court's approach, although both Courts have similar powers of judicial review. The prevailing attitude on fundamental rights has been expressed by the Constitutional Court in the following way:

> The Basic law views the fundamental rights as valid per se, preexistent to and binding upon both the constitutional legislator and the ordinary legislator. Even though by virtue of provisions in its text it authorized the ordinary legislator, in varying degrees, to derogate from the fundamental rights, it is an unacceptable interpretation, in law at any rate, that the legislator is entirely free, by virtue of these provisions, to tamper with the fundamental rights.[117]

The Court has increased its impact on political life by extending the possibilities of interpretation and by increasing the binding effect of its rulings. One of the principles contained in the jurisprudence of the Court, but not expressly mentioned in the Constitution, is the principle of 'proportionality', which allows the Court to check whether a law is 'indispensable', 'appropriate' or 'necessary'.[118] This functional conception of constitutional law implies that the Court does not limit its control to the

114 From 1951 to 1957, the Court followed a policy of judicial self-restraint. After 1957 the Court moved into a period of activism, especially in the field of social and economic rights. Since 1968 the Court has been less innovative manifesting a greater tendency to sustain government policy. See Kommers, *op. cit.* note 16, pp. 212 and 244.

115 Hochschulurteil, 29-5-1973, 35 BVerfGE 79. Grundlagenvertragsurteil, 31-7-1973, 36 BVerfGE 1.

116 Ebsen, I., 'Das Bundesverfassungsgericht im politischen System der Bundesrepublik Deutschland', *Neue Politische Literatur*, 23, 1978, p. 177. Schlaich., L, 'Corte Costituzionale e controllo sulle norme nella Repubblica Federale di Germania', *Quaderni Costituzionali*, 2, 1982, p. 579.

117 Kommers, *op. cit.* note 16, p. 216., decision of Jan. 25 1953, BGHZ 11 (appendix).

118 Schlaich, *op. cit.* note 116, p. 567.

law as the final product of the legislative process, but that it also exercises a control over the parliamentary process itself in order to test the 'rationality' of a certain legislative solution. In the co-determination case, for example,[119] the Court studied the preparatory works in order to make sure that the recommendations made by the committee on co-determination were in line with the solution finally adopted in the statute.[120] On important questions, like abortion, life imprisonment and military service, the Court has exercised such control on the legislative process.[121] In this way the Court imposes on the legislature 'une rationalité controllable de la préparation et de l'adoption de sa décision'.[122] This raises the question of what the limits on the Court's powers are and whether the Court does not in fact enter into the legislative process. Is the Court in a better position than the legislator to weigh all the factual circumstances and to decide on the appropriateness of a certain solution? This extended control of the Court has been criticized in the following way:

> L'oggetto della verifica sulla costituzionalità delle leggi non è il legislatore, bensì la legge. Il legislatore non rende conto che della legge. Il dovere costituzionale del metodo ottimale non è deducibile dalla legge fondamentale. E la legge fondamentale non fa menzione di un legislatore obbligato a ben utilizzare i dati empirici e a soppesare le questioni in modo serio. Legislazione non è amministrazione, il controllo sulla legittimità costituzionele delle leggi non può imporre al legislatore degli oneri che falserebbero la procedura parlamentare.[123]

Another field in which the Constitutional Court has extended its powers is in the binding effect of its decisions. Par. 31.1 of the law on the Constitutional Court states that the decisions of the Court 'bind all the or-

119 Decision of 1-3-1979, 50 BVerfGE 290.

120 SCHLAICH, K., 'Procédures et techniques de protection des droits fondamentaux, le tribunal constitutionnel fédéral allemand', *Revue Internationale de Droit Comparé*, 33, 1981, pp. 390-391.

121 Schlaich, *op. cit.* note 116, p. 587.

122 Schlaich, *op. cit.* note 109, p. 391.

123 Schlaich, *op. cit.* note 116, p. 590. Translation (my own): 'The object of control of the constitutionality of laws is not the legislature, but the law. The legislature refers only to the law. A constitutional duty of the best method cannot be derived from the Constitution. And the Constitution does not mention that the legislature should utilize well all empirical data and weigh questions in a serious manner. Legislation is not administration, the control of the constitutional legitimacy of the laws cannot impose duties on the legislature which could distort the parliamentary procedure'.

gans of the state'. The Court has interpreted this provision so as to include not only the decision itself but also the reasons ('*tragende Gründe*') for its decisions. It is clear that the binding effect of the reasons can condition the legislature in the drafting of a new law.[124]The decisions which declare a law unconstitutional apply *ex tunc* and have force of law.[125] The idea is that a constitutional decision merely declares the validity or invalidity of a law. In order to avoid the legislative gaps left by the declaration of unconstitutionality, the Court has recently adopted a variant by which it only establishes the unconstitutionality of a law without declaring it null.[126] It usually fixes a time-period for which the norm remains valid. The Court also has the possibility (par. 32.1) of issuing a temporary solution to give the legislator time to respond. These temporary rulings, although permitting smoother collaboration between the constitutional court and the legislature, have at the same time been an important instrument enabling the Court to push the legislative process in a certain direction. The extension of the binding effect of its decisions together with the issuing of temporary rulings have given the Court more grip on the legislature.[127]

The abortion decision is a clear example of the trend just described. The Constitutional Court did not simply declare the abortion law null and void. It elaborated a provisional alternative regulation together with precise instructions as to what the content of the new law should be. Because of the binding effect of a ruling on all organs of the state, the legislature could not ignore these instructions. The abortion decision, although heavily criticized, therefore seems to fit in with the jurisprudential trends of the German Constitutional Court. The 'activist' role of the Court in the abortion decision reviewing as it did not only the law as such but also the underlying rationale, and conditioning the legislative process by giving indications as to what should be the content of a new abortion law, may have come as a surprise, but is certainly not a new element in the jurisprudence of the Court.

Italy. The setting up of the Italian Constitutional Court caused some difficulties. The drafting after the Second World War of a new 'rigid' constitution which would embody a set of superior fixed values, and which provided for a

124 *Ibid.*, pp. 580-582.

125 Par. 31.2 of the Constitutional Court Act (1951). See Schlaich, *op. cit.* note 116, p. 574.

126 Schlaich, *op. cit.* note 116, p. 575.

127 *Ibid.*, pp. 574-579.

constitutional court, did not encounter particular opposition. The establishment of a constitutional court, however, was a new feature in Italian government and had to overcome the differences in ideology of the various political currents.[128] Due to ideological differences and to the political debate over the appointment of the judges,[129] the Court only started its work in 1956.

The drafters opted for a centralized system of constitutional control of legislation granting the Constitutional Court the power of judicial review *incidenter* (concrete review) in the area of fundamental rights.[130] Its institutional powers are, therefore, more limited than the powers of the German and Austrian Courts, in that it has no powers of abstract review as far as fundamental rights are concerned or of hearing individual citizens' constitutional complaints. The only way a private citizen can claim the violation of a fundamental right before the Constitutional Court is indirectly, that is through the lower judges. As it is the lower judge who decides whether a private party has raised a valid constitutional objection to be adjudicated by the Constitutional Court, it is clear that the collaboration of the lower judges is indispensable for the functioning of judicial review of legislation.[131]

The intention of the drafters was to establish a constitutional court on the Kelsenian model, that is to give it only the power of a 'negative legislature'

> ... tutti i costituenti si incontrarono nell'adesione ... ai dogmi della certezza del diritto, della rigida sottoposizione dei guidici e degli operatori in genere alle norme di legge, ... alla riduzione massima possibile della libertà interpretativa degli operatori, da applicare ai casi concreti.[132]

128 Modugno, F., 'Corte Costituzionale e potere legislativo', in Barile, P., Cheli, E., Grassi, S., eds. *Corte Costituzionale e sviluppo della forma di governo in Italia*, il Mulino, Bologna, 1982, p. 20.

129 Zagrebelsky, G., *La Giustizia Costituzionale*, Il Mulino, Bologna, 1977, p. 318 ff. Kommers, D.P., 'Judicial review in Italy and West Germany', *Jahrbuch des öffentliches Rechts*, 20, 1971, p. 120.

130 Law of 1953, March 11.

131 Kommers, *op. cit.* note 129, p. 128. Zagrebelsky, *op. cit.* note 129, p. 356 ff.

132 Modugno, *op. cit.* note 128, p. 23. Translation (my own): '... the drafters of the Constitution all agreed ... on the dogma of the clarity of the law, of the rigid subordination of the judges and executors in general to the norm of the law, ... on the greatest possible reduction of interpretative freedom for those who apply the law, to be used in concrete cases'.

The Constitution itself, however, made such a restrictive role impossible.[133] The Kelsenian idea presupposed a Constitution with clearly defined norms. The Italian Constitution, in contrast, is an enumeration of imprecisely defined social and political principles open to various interpretations. It is precisely these elastic norms that constitute the 'political' character of an important part of the Constitution.[134]

The Constitutional Court has affirmed and consolidated its role with regard to both the legislature and the judiciary. In the initial period the Court has been quite active in striking down legislation – criminal and civil law – promulgated prior to the 1948 Constitution. It has exercised, for example, great vigilance over the administration of criminal justice.[135] It has to be noted, however, that the abolition of Fascist legislation corresponded to government needs, or at least did not interfere with questions of a political nature.[136]

The Court has availed itself of methods of interpretation which have enabled it to have an impact on the political process, going beyond the Kelsenian vision of merely striking off unconstitutional legislation. The Court introduced a category of decisions in between the striking down and the upholding of a law, the so-called 'sentenze interpretative'. In these interpretative rulings, the Court gives an interpretation which partially adapts the statute under review according to constitutional principles. Instead of striking it down altogether, the Court points out the conditions under which the law will be constitutional. In practice, the Court has often ended up by indicating the provisions of the law which were compatible with the Constitution and those which were unconstitutional. The 'sentenze interpretative' or 'sentenze manipolative' as they have been sometimes called, were born out of fear of the legislative gaps which would be created by striking down legislation as a whole.[137] Faced with the reluctance of the legislature to follow up constitutional decisions with legislative proposals, the Court has tended 'rather to uphold the law than to strike it down, and to strike it

133 See Elia, L., 'La Corte Costituzionale nel quadro dei poteri costituzionali', in Barile e.o., *op. cit.* note 128, p. 524.

134 Modugno, *op. cit.* note 128, p. 28.

135 Kommers, *op. cit.* note 129, p. 122.

136 Zagrebelsky, *op. cit.* note 129, 1977, pp. 335-338.

137 Occhiocupo, N., *La Corte Costituzionale tra norma giuridica e realtà sociale*, Il Mulino, Bologna, 1978, p. 29 ff. Zagrebelsky, *op. cit.* note 129, p. 338 ff.

down partially rather than to strike it down completely'.[138] This 'horror vacui' has definitely had a great impact on the direction of the Court's jurisprudence.[139]

In recent times, the Court has extended the scope of the 'sentenze interpretative' by giving indications to the legislature as to the principles a new law should embody in order to be constitutional.[140] These instructions, suggestions, indications, directives and sometimes even warnings have clearly conditioned the legislative process, and are therefore called in the literature 'sentenze delega' or 'sentenze legge'.[141]

The Court, however, has been cautious not to 'upset' the system, and has been aware of the constraints on its constitutional powers. External factors which have conditioned the Court are the inertia of Parliament in following the Court's admonitions,[142] the general inefficiency of the institutions in response to new demands,[143] the unstable political situation ,[144] and an ideologically and religiously divided society.[145] It has been reluctant to take a stand in a political conflict, i.e. has tended to compromise.[146] It has also preferred to collaborate from the inside with the legislature and the executive,[147] rather than substitute its views for theirs. On the whole, the role of the Italian Constitutional Court has been a pragmatic one. On the one hand, it has intervened in the most important and urgent questions which have been the subject of political and legislative debate, and in some recent cases it has even anticipated possible solutions[148] through a creative interpretation of the Constitution. On the other hand, it has contributed to the stabilization

138 President Branca, quoted in Occhiocupo, *op. cit.* note 137, p. 29.

139 Occhiocupo, *op. cit.* note 137, p. 32.

140 Pizzorusso, A., 'Procédures et techniques de protection des droits fondamentaux, la cour constitutionnelle italienne', *Revue Internationale de Droit Comparé*, 33, 1981, p. 408 ff.

141 Modugno, *op. cit.* note 128, p. 50.

142 Bognetti, G., *op. cit.* note 24, p. 997. Occhiocupo, *op. cit.* note 137, p. 32. Zagrebelsky, *op. cit.* note 129, p. 363.

143 Zagrebelsky, *op. cit.* note 129, 1977, p. 363.

144 Kommers, *op cit.* note 129, p. 132. Occhiocupo, *op. cit.* note 137, p. 43.

145 Bognetti, *op. cit.* note 24, p. 993. Kommers, *op. cit.* note 129, p. 132.

146 Occhiocupo, *op. cit.* note 137, p. 32. Zagrebelsky, *op. cit.* note 129, p. 363.

147 Zagrebelsky, *op. cit.* note 129, p. 352. Tranfaglia, N., *Dallo stato liberale al regime fascista*, Feltrinelli, Milano, 1976, p. 277.

148 Modugno, *op. cit.* note 128, p. 53.

of the political system.[149] This had led to the Italian Constitutional Court being described as 'supremo regolatore degli equilibri' (Crisafrulli), 'moderatrice' (Elia), e 'mediatrice di conflitti' (Modugno).[150]

The Court has also served as an alternative channel for social and political demands.

> ... la crescita di una domanda, rivolta necessariamente alle forze politiche, di interventi idonei a fronteggiare, sul piano economico e sociale, i gravi problemi di arretratezza e di squilibrio accummulatisi in tanti anni e non risolti, e facilmente spiegabile come una siffatta domanda cerchi canali alternativi rispetto a quelli politico-partitico-parlamentari nei casi in cui i conflitti sociali non riescano ad essere mediati e risolti attraverso i meccanismi ordinari della formazione della volontà politica.[151]

The Court has not rejected these appeals and has assumed the role of mediator of conflicting interests. Recently the Court has not only been called upon to judge legislation passed by Parliament, but also to intervene in the political discussions preceding a law reform,[152] and has thus been invited to become involved in the legislative process.

> ... ciò ha portato ad una situazione in cui la Corte si trova, in misura sconosciuta nel passato, inserita in un processo legislativo circolare nel quale la sua attività si imposta strettamente con quella del legislatore, in un rapporto in cui non sempre appaiono con chiarezza i profili del moli rispettivi.[153]

149 Cheli, E., 'Introduzione', in Barile e.o., *op. cit.* note 128, p. 16.

150 Reported in Rodotà, S., 'La Corte, la politica, l'organizzazione sociale', in Barile e.o., *op. cit.* note 128, p. 470.

151 Modugno, *op. cit.* note 128, p. 99. Translation (my own): '...the growing demand, directed necessarily to the political forces, of appropriate interventions to face, on the economic and social level, the serious problems of backlog and disequilibrium, accumulated and not resolved in so many years,... looks for alternative channels with respect to the political-party-parliamentary ones, in those cases in which social conflicts are not mediated and resolved through the normal mechanisms of political expression'. Cheli and Rodotà arrive at the same conclusion, see Barile e.o., *op. cit.* note 128, pp. 17 and 504 resp.

152 Zagrebelsky, G., 'La Corte Costituzionale e il legislatore', in Barile e.o., *op. cit.* note 128, p. 103.

153 Franceschi, P., Zagrebelsky, G., 'Corte Costituzionale – il colegislatore e il Parlamento', *Quaderni Costituzionali*, 1, 1981, pp. 164-165.

The role of the Court has also been reinforced by the enormous load of questions presented to it, increasing every year, due partially to rather lax screening by the lower judges.[154]

On the whole, it is undeniable that the Italian Constitutional Court has had a considerable influence on political life. It has not, however, been activist in the American sense.[155] This is partly due to the external constraints mentioned above, and partly to the respect for the legislature as the expression of the popular will.[156]It has not kept aloof, however, from political and social demands, and has unblocked the channels of political change with its interpretative methods. Although the drafters envisaged a Kelsenian model of constitutional adjudication, the Italian Court has certainly not followed the Austrian example.

The mediating role of the Court seems to be clearly reflected in the abortion decisions. The Court did not refrain from striking down the old legislation, nor from giving instructions to the legislator as to the content of a new abortion law. The content of the abortion decisions shows, however, that it acted as moderator between two opposing views. It neither granted the right to life to the unborn, nor did it recognize the woman's right to self-determination. It left the ultimate decision to the legislature, striking down a Fascist law which was anyway considered to be outdated. And once the legislature had passed a new law – which did not fully correspond with the Court's suggestions – the Court withdrew, and showed self-restraint with respect to the majority decision taken in Parliament. Its role in the abortion issue seems, therefore, to be one rather of collaboration with the legislature and the executive than of opposition or polarization. This is in line with its jurisprudential tradition. It is quite likely that the outcome of the referendum on abortion was also taken into consideration in the 1981 decision, as the Court published its decision after the referendum had taken place.

France. The constitutional protection of fundamental rights is relatively new in France. Although France was the first country to proclaim the rights and liberties of man, liberty was identified above all with democracy.[157] The

154 *Ibid.*, p. 162.

155 Elia, *op. cit.* note 133, p. 535.

156 Occhiocupo, *op. cit.* note 137, p. 32.

157 Luchaire, F., 'Procédures et techniques de protection des droits fondamentaux, le conseil constitutionnel français', *Revue Internationale de Droit Comparé*, 33, 1981, p. 285.

ideology of the French Revolution embodied in the works of Rousseau and Montesquieu emphasized the superiority of statutory law, the equality of men before the law, and the rigid separation of powers in which the judge was to be only the 'mouthpiece' of the law. As the voice of popular sovereignty the legislature was considered the best guarantor of fundamental rights.[158] The French Constitutions up to 1958, although reaffirming fidelity to the Declaration of the Rights of Man of 1789, did not provide any judicial mechanism for ensuring the protection of these rights against the legislature. Only acts of the executive were under judicial control.[159]

The experience of the Second World War showed the weakness of the concept of the law as an expression of the popular will. The Preamble to the 1946 Constitution reaffirms the rights and liberties of 1789 and adds others, but still does not give the power of judicial review of legislation. Only the Constitution of 1958 provides for a Constitutional Council which has the task of constitutional control of legislative acts. This control is limited, however, to the period between the approval of a law by Parliament and its promulgation (approximately one month). Originally the right to convene the Council was reserved to a few political figures – the President of the Republic, the Prime Minister, and the President of the National Assembly or the Senate – who would usually belong to the same majority that passed the challenged statute.[160] This was an important limitation upon the functioning of the Constitutional Council.

It was not until 1971 that the Council was convened for the first time in the field of fundamental rights. The President of the Senate appealed to the Council to adjudicate the compatibility of a law with the fundamental rights laid down in the Constitution, in this case the freedom of association. Although judicial review of the Preamble (which enumerates the fundamental rights) was not intended by the drafters of the 1958 Constitution, the Council declared the law unconstitutional as being in violation of the free-

158 Cappelletti, *op. cit.* note 17, p. 35.

159 Luchaire, *op. cit.* note 157, p. 285.

160 Because of these aspects (preventive control limited to political initiative) some claim that it is more a political than a juridical organ. See Cappelletti, *op. cit.* note 17, p. 4-6, and Abraham, *op. cit.* note 22, p. 315. Pizzorusso would call it a political organ because it has only the power of abstract control of legislation. See Pizzorusso, A., 'I sistemi di giustizia costituzionale: dai modelli alla prassi', *Quaderni Costituzionali*, 2, 1982, pp. 521-533. There is an ongoing debate between those who claim it to be a political (Chenot, Hanon) and those who claim it to be a juridical (Waline, Luchaire, both judges of the CC) organ.

dom of association laid down in the Preamble. In 1973, again on the initiative of the President of the Senate, the Council struck down a law violating the Declaration of 1789.[161] With these decisions the Constitutional Council established its competence in the field of fundamental rights, i.e. it decided to include the Preambles to the 1946 and 1958 Constitutions in the review of legislation. Through its decisions the Council gradually drafted a charter of rights and liberties, and the constitutional reform of 1974 enabled it to further develop the protection of fundamental rights.

Since 1974, 60 Deputies or 60 Senators have the right to refer a law to the Council for review. This is an important instrument enabling the opposition in Parliament to challenge decisions taken by the government. In the period between 1974 and 1981, it was convened about 60 times by members of Parliament, and in 12 of these cases it struck down the law presented to it. In almost all cases the laws were quite important ones.[162] Since the Mitterrand government has been in power, the Constitutional Council has made about 20 rulings. In a limited number of cases, including the important nationalization law, a law has been declared unconstitutional.[163]

It is clear that the French Constitutional Council has very limited powers in comparison with the Constitutional Courts discussed here. It cannot be convened on the initiative of private parties, its control is merely preventive, it is no more than 'one stage in the legislative process'[164] (i.e. limited to the period between the approval and the promulgation of a law), and it is limited to a very short time period. The fact that the Council only has the power of abstract control of legislation emphasizes its political function. As has been pointed out, the German and the Austrian Constitutional Courts, too, have this power of abstract review but they also have ample powers of concrete review of legislation. This does not, however, automatically imply that the French Constitutional Council is more political than, for example, the Italian Constitutional Court. There are many ways to turn a political issue into a constitutional issue and to present it to a constitutional court, even within a system of concrete review. The American experience is a good example in this respect. Whether a Constitutional Court can be described as

161 Luchaire, F., *op. cit.*, note 157, p. 287 ff.

162 Ehrmann, *op. cit.* note 21, p. 82.

163 Favoreu, L., 'Il Conseil Constitutionnel e l'altemanza', ZZI, 2, 1982, p. 612.

164 Cappelletti, *op. cit.* note 17, pp. 4-5.

a political organ or not does not depend on the model of judicial review, i.e. abstract or concrete, but on the level of self-restraint it imposes on itself.

Up to 1985, the French Constitutional Council has shown a considerable amount of self-restraint in the exercise of its control. It has generally shown a more rigid attitude in interpreting the Constitution when it has struck off a law than when it has reaffirmed the constitutionality of a legislative act. Every time it has declared a law unconstitutional it has taken care to make specific reference to the constitutional provisions on which its decisions are based. When it has reaffirmed an act of Parliament it has shown a much more liberal attitude towards the interpretation of the Constitution, often not even mentioning the constitutional basis of its decision.[165] On the whole, the Council has shown the deeply rooted respect of the French for the principle of the sovereignty of Parliament. The abortion decision seems to follow this tradition.[166] The Council very summarily reaffirmed the constitutionality of the statute without giving a detailed justification.

The Constitutional Council consolidated its position during the initial period of the Mitterrand government. It did not obstruct the reforms proposed by the Socialist government as much as was expected. Although it made profound reforms impossible, the reform process as a whole was not been hindered. It operated rather as a filter, as a channeling process for reforms. Furthermore, the Council is increasingly more precise in the references it makes in its decisions, and the decisions themselves are longer. In spite of a general mistrust of its activities, its decisions are applied and respected by the public authorities. It has thus succeeded in imposing its jurisdiction.[167]

Conclusions

This short outline of the five constitutional courts covered by this study shows that they each have quite a different role in their respective countries. If we look at the European Courts, the German Court's position seems to be the closest to the American one, in that it has availed itself of ample powers of judicial review, besides the extensive powers given by law, and has not hesitated to play a decisive role in the political life of the country. The French and the Austrian Courts, on the other hand, are for different historical

165 Luchaire, *op. cit.* note 157, p. 312-327.

166 See Robert, J., 'Décision du Conseil Constitutionnel du 15 janvier 1975 sur l'interruption volontaire de la grossesse', *Revue Internationale de Droit Comparé*, 27, 1975, p. 885 ff.

167 Favoreu, *op. cit.* note 163, pp. 606-618.

reasons marked by self-restraint. The role of the Italian Court is more difficult to evaluate in a comparative perspective, largely because of the way it is conditioned by national political factors. There is no doubt that it has not followed the French or Austrian pattern of judicial review. On the other hand its role is not as decisive as that of the German Court, partially because of its more limited powers.

The abortion decisions seem to follow the respective traditions of the jurisprudence of the Courts. The American and German Courts did not hesitate to oppose their views to that of the legislature. The French and Austrian Courts carefully respected the will of Parliament, and the Italian Court tended to cooperate with the legislature in order to reform the outdated abortion provisions.

Section D Jurisdictional and Political Context of the Abortion Decisions

We have already examined the general aspects of the functioning of the constitutional courts. In this section the focus will be on the specific context of the abortion issue. In a very short period (Jan. 1973-Feb. 1975), five major constitutional courts decided on abortion.[168] There are a couple of questions which arise from this. First of all, what were the jurisdictional competences of the Courts in the case of abortion? Did they have any discretionary power in deciding the issue? Secondly, what was the political climate like when the abortion decisions were issued? And thirdly, what type of law did the Courts have to review? An old or a new one? A conservative, liberal or compromise solution? It might be that the way in which the abortion issue reached the Courts, the political climate in which the decisions had to be delivered and/or the particular law under review, had an impact on the outcome of the decisions. These factors could clarify the role of the constitutional courts in the general abortion debate.

168 The US Supreme Court on Jan. 17, 1973, the Austrian Constitutional Court on Oct. 11, 1974, the French Constitutional Council on Jan. 15, 1975, the Italian Constitutional Court on Feb. 18, 1975, and the German Federal Constitutional Court on Feb. 25, 1975.

1. Jurisdictional Competences

The US Supreme Court has wide discretionary powers in hearing cases. Since the Judiciary Act of 1925, which drastically reduced the Court's obligatory appellate responsibilities[169] and greatly increased the Court's discretionary *certiorari* jurisdiction, the Court has tried to maximize its institutional independence from Congress, litigants and other courts. At present, 90% of the case load of the Supreme Court consists of *certiorari* cases.[170] The Court has now worked itself into the position of no longer being expected to decide any case as a matter of course.[171] Because of the extension of its *certiorari* jurisdiction, the work load of the Court has dramatically increased over the years due to the increasing number of filings. In particular the *in forma pauperis* cases[172] have multiplied at a much faster rate than paid cases[173] In short, the Supreme Court has intentionally made itself open to the widest possible range of petitions.

The Supreme Court denies review for 85-90% of all *certiorari* applications.[174] This shows the importance of the case selection process. The Court has developed a series of procedural standards for taking a case. It only reviews a 'case or controversy', and the parties bringing suit must have 'standing', there must be a 'substantial' federal question etc.[175] These are formal conditions. In this case, too, interpretation is needed, and a broad interpretation of the 'standing' requirement can give access to more litigants, as in the *Roe* and *Doe* decisions. The Supreme Court accepted in *Roe v. Wade* that Jane *Roe* had 'standing' notwithstanding the fact that she was no longer pregnant. In *Doe v. Bolton* some physicians, nurses and clergymen presented themselves as appellants together with Mary Doe. The Supreme

169 The Supreme Court dismisses over 90% of the appeals. See Abraham, *op. cit.* note 22, p. 183.

170 Abraham, *op. cit.* note 22, p.183. PROVINE, *op. cit.* note 49, p. 13.

171 Provine, *op cit.* note 49, p. 44.

172 These are layman-drafted petitions submitted without legal assistance and without payment of filing fees or printing costs.

173 The number of these petitions went up from 951 in 1941 to 4102 in 1976. See Provine, *op cit.* note 49, p. 18.

174 Provine, *op. cit.* note 49, p.18.

175 Abraham, *op. cit.* note 22, p. 373 ff.

Court recognized in this case that the physicians had standing although no criminal procedure had been initiated against them.[176]

Very little is known, however, about the substantive criteria the Court applies in reviewing a case. In practice, the votes of four Justices are needed for accepting a case, which is not a majority.[177] Rule 19 [178] is the Court's only published guideline as to its criteria for case selection. Rule 19 basically states that the existence of a conflict between the holdings of the Supreme Court and lower courts or among lower courts is a reason for review. Rule 19 does not give a clear answer as to the relevance of the merits of the petitioner's argument for granting review. The Justices have taken pains to point out that a lower court's erroneous ruling alone, i.e a ruling which conflicts with other court decisions, is not a sufficient reason for review. The Court's reaction to the merits of the cases which it accepts for review does provide an indication of the relevance of 'error' and of the 'merits' in case-selection decisions. The Court's pattern has been to reverse about two-thirds of the cases it decides. This means that at least one-third of the cases are accepted for review for reasons other than 'dispute-resolving', i.e. 'error'. The Court seems to differentiate between cases it believes deserve extensive consideration regardless of the outcome in a lower court, and cases in which the lower court decision simply seems so wrong that the Court feels compelled to redress the damage.[179] What can be concluded is that some of

176 See *Doe* v. *Bolton*, 35 *LEd* 2d, p. 210: 'The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief'.

177 See Koopmans, T., *Constitutional protection of equality*, Sijthoff, Leyden, 1975, p. 231.

178 See Provine, *op. cit.* note 49, p. 37. Rule 19 (1932) lists the following as 'character of reasons which will be considered' in granting or considering certiorari: '(a) Where a state court has decided a federal question of substance not therefore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court. (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court, or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power or supervision'.

179 Provine, *op. cit.* note 49, p. 41. Abraham, *op. cit.* note 22, pp. 186-187.

the cases are selected on their merits. With respect to the abortion decisions, it is fair to state that the Supreme Court could have avoided the question by rejecting the case which was presented to it by a writ of *certiorari*. Therefore it cannot be excluded that the Court took up the abortion case because it wanted to decide it on its merits.[180]

The competence of the German Federal Constitutional Court to hear constitutional complaints (*Verfassungsbeschwerde*) is very similar to the US Supreme Court's power of review on *certiorari*.[181] It gives wide discretionary powers to the German Court to hear and reject cases. The abortion case, however, was presented to the Court as a case for abstract review. The admissibility of a constitutional challenge by the Federal government, by the government of one of the *Länder*, or by one third of the *Bundestag* neither requires a 'case or controversy' nor that the complainants' rights have been violated by a challenge to the law. The only condition is that there are disagreements or doubts about the formal and actual compatibility of the law with the Constitution.[182] The Constitutional Court has no means of rejecting a constitutional challenge presented to it under this power of abstract review. Although petitions of abstract review are very rare,[183] they are usually of great political significance. They are mostly controversial questions on which no agreement could be reached during the legislative process.[184] In fact, abstract review is a powerful instrument of the opposition in

180 A majority of the Justices was in favor of striking down the laws under review. It appears, however, that the *Roe* and *Doe* cases were accepted for review in order to determine whether to expand a series of recent rulings which limited the intervention of federal courts in state court proceedings, i.e. for jurisdictional reasons. Another case which was decided just before the abortion cases posed the same jurisdictional question. Since the Court decided this case in favor of the federal jurisdiction, the Court had effectively also decided the jurisdictional question of the abortion cases. Quite as a surprise to some of the Justices, it could then proceed to decide on the merits of the abortion case. See *Woodward, B., Armstrong, S., The Brethren*, Avon, New York, 1979, pp. 193-200.

181 Koopmans, *op. cit.* note 177, p. 231.

182 Rupp-von Brunneck, *op. cit.* note 108, p. 118 ff.

183 20 up to 1982. See Schlaich, *op. cit.* note 116, p. 568.

184 *Ibid.*

Parliament, often used to force the majority to come to a compromise.[185] Abortion was such a highly controversial and emotional issue with which the Court was presented and on which it had to decide.

The French and Austrian Constitutional Courts were confronted with the abortion issue in the same way as the German Court. The opposition to the new abortion laws resorted to the instrument abstract review as an instrument for reinforcing its viewpoint. In Italy the situation was different. There the abortion decisions were issued in the context of concrete judicial review. In this procedure the lower judge decides whether a question is constitutional, and if so refers it to the Constitutional Court. The Constitutional Court can only refuse a case on procedural grounds.[186] Whether a case will receive constitutional adjudication depends on the lower judge. It has to be borne in mind, however, that there are many ways for individual citizens to phrase a question in constitutional terms, and this is certainly true of the abortion issue. The idea of an individual citizen filing a complaint is often rather unrealistic. The American case *Doe v. Bolton*, for example, was a group action supported by pro-abortion organizations.[187] Although abstract review permits a more direct political attack on a law, cases heard under the power of concrete review are also very often supported by political or social forces.

What can be concluded at this point is that none of the European constitutional courts was able to avoid a ruling on the abortion question, since they had no discretionary power to hear or reject the abortion case. The US Supreme Court was the only court which actually chose to decide the issue. This is not to say that the European Courts did not want to rule on abortion.

185 In fact, when the CDU/CSU coalition decided to present the abortion question to the Constitutional Court, the Prime Minister and the federal government proposed to reopen the debate with the CDU/CSU on the abortion reform. It is felt as a danger that Parliament resorts too easily to the Constitutional Court with questions it cannot resolve itself. This could create a situation of the 'politicization of the judiciary'. See Gerontas, A., 'Der Grundsatz des 'political self-restraint' untersucht am Beispiel der Bundesrepublik Deutschland', *EuGRZ*, 1982, p. 149; Melichar, E., 'Zum Spannungsverhältnis zwischen Verfassungsgericht und Gesetzgeber', *Salzburg Symposium zum Jubiläum 60 Jahre Bundesverfassung*, Kiesel, Salzburg, 1980, p. 96.

186 See Pizzorusso, *op. cit.* note 140, pp. 401-404: in some cases it has refused to adjudicate cases because the constitutional question was not deemed relevant for the decision of the case.

187 Nine licensed physicians, seven nurses, five clergymen, two social workers and two non-profit corporations that advocate abortion reform instituted this federal action together with Mary Doe. See 35 *LEd* 2d, p. 208 (1973).

What is certain, however, is that in Germany, France and Austria the Court was required to solve a political dispute between majority and opposition in Parliament. It was the Court's power of abstract review that made this possible.

2. The Political Climate

One of the reasons why these five abortion decisions were issued within such a short period of time seems to be that this period coincided with the height of the political debate on abortion.[188] Although there is some doubt whether the American Supreme Court had to rule on abortion in 1973, when many states were still in the stage of reforming their laws, the issue was certainly 'live' at that moment. In Europe the political force of the abortion movement was so strong by 1974/1975 that governments and Parliaments had to decide on an abortion law reform. As the French, Austrian and German constitutional decisions were a kind of epilogue to the parliamentary debates, there can be no doubt that the political discussion was taken into consideration by the Courts. The Italian decision, although issued before the abortion reform was passed, is a product of the same political climate which urged for a reform of abortion legislation. In this case, the constitutional court decision served as an admonition to the legislature as to its duties in the field of abortion reform.

What can be concluded on the timing of the abortion decisions is that these five constitutional courts issued their rulings in a period when the abortion debate was at its height, and when the French, German and Austrian Parliaments had just passed a new abortion law. Although it is difficult to estimate the direct impact of this political context on the constitutional decisions, it has to be kept in mind that these decisions were issued in a tense political climate.

3. The Type of Legislation under Review

The content of the various laws reviewed by the constitutional courts has been described in chapter III, Section A. One of the reasons why constitutional courts arrived at particular decisions can be found in the type of legislation they had to judge. It seems understandable that the judges' attitude towards an old, outdated law differed from that towards a new law passed by a

188 See chapter I section D.

clear majority in Parliament. Judicial activism in the field of recent legislation might more easily be considered anti-democratic. The fact that the Italian Constitutional Court struck down a law dating from the Fascist era seems, therefore, less astonishing. The striking off of an old restrictive abortion law by the US Supreme Court in the *Roe v. Wade* decision can be regarded in the same way. This type of explanation does not apply, however, to the companion case *Doe v. Bolton* which concerned a recently reformed abortion law based on the 1962 Model Penal Code.[189] The German Court might have felt justified in intervening in terms of political representation in the sense that the abortion reform did receive a 51% majority of those 'present and voting', but not an absolute majority of all the deputies in Parliament. It has been suggested that the Court's interference can be explained by the lack of democratic legitimacy of the reform.[190] Another concern of the German Court might have been that the recommendations of the *Sixth Bundestag*, which were moderate and offered greater protection for unborn life, were not taken into consideration in the abortion reform passed by the *Seventh Bundestag*.[191] It has to be added that the Austrian and Italian abortion reforms also obtained a marginal majority in Parliament.[192] The difference, however, between the original German law and the Italian one is that the former was definitely quite liberal, the latter more moderate. Would the German Court have acted in the same way if the law presented to it had been a compromise solution along the lines of the French and Italian laws?

Although no clear conclusion can be drawn from the type of legislation under review, it can be stated that the Italian and French Courts, in upholding a recently passed compromise solution, had an easier task than the German Court, which was faced with a quite radical solution to the abortion question passed with a marginal majority in Parliament. The *Roe* decision by the US Supreme Court and the 1975 decision by the Italian Constitutional Court can be viewed in the same way, as they both concerned old, outdated legislation. There seems to be no similar explanation for the American *Doe* decision or the Austrian decision, i.e., for the fact that the US

189 See 35 *LEd* 2d, pp. 206-207 (1973).

190 Kommers, *op cit.* note 54, p. 285.

191 *Ibid.* Sixth Bundestag, 1969-1972, Seventh Bundestag, 1972-1976.

192 In France the abortion reform was passed with 284 against 189 votes in the Assemblée Nationale, and with 182 against 82 votes in the Sénat. In Austria, the abortion reform was adopted with 93 against 88 votes in the Nationalrat and with 29 against 28 votes in the Bundesrat.

Supreme Court did not hesitate to strike down a recently passed moderate abortion reform, and that the Austrian Constitutional Court upheld a quite radical reform which had received a marginal majority in Parliament.

Section E The Social Philosophies

One of the explanations for the different types of judicial activism exercised in the American and the German Courts lies in a difference in social ideology. The value of ideological individualism has roots in American history and in American constitutionalism. The Supreme Court traditionally emphasizes the principle of individual liberty in the exercise of personal freedom.[193] German constitutionalism, on the other hand, has a larger collective thrust with a corresponding limitation of the exercise of political freedom.[194]As has been pointed out in chapter III, section B, under 2, the Supreme Court put greater emphasis on the right to individual liberty in the sense of freedom from state interference than on the woman's right to self-determination in the abortion cases. On the other hand, the German Court's view of criminal law as a force of social cohesion, as expressed in the abortion decision, reflects a communitarian ideology.

Louis Henkin has given a clear synthesis of the differences between American and European views on fundamental or human rights.

> Rights theory, in the United States, supports rights deriving from, and vindicating, individual freedom and autonomy, but not claims upon society to do for the individual what he cannot do for himself. It tells governments only what not to do, not what it must do. The explosion of rights in the United States in the past decades have all been 'freedoms from', not 'rights to'. They still imply the purpose of government to respect and safeguard the right to be let alone, not to assure that no one will be left alone and abandoned when he/she lacks basic human needs. The equality guaranteed by the Constitution is the equal protection of the law and equality of opportunity. It gives no guarantee against other unequalities in fact, however gross, against failure in

193 Bognetti, G., 'Esperienze straniere: la libertà di abortire delle donne, costituzionalmente garantito', *Rivista Italiana di Diritto e Procedura Penale*, 17, 1974, p. 34. He draws attention to the fact that the Supreme Court used to emphasize individualism in economic life, and now, since 20 years, individualism in the activities of the free time. See also Heymann, P.B. Barzelay, D., 'The forest and the trees. Roe v. Wade and its critics', *Boston University Law Review*, 53, 1973, pp. 765-766.

194 Kommers, *op. cit.* note 54, pp. 281-282. He gives the example of free speech case law in the US and Germany in order to illustrate this point.

> the pursuit of happiness or even of necessities. Let there be no doubt. The United States is, and will remain, a welfare State. Commitment to public education made its way into State constitutions early. Commitment to other minimum levels of individual welfare came much later but is deeply imbedded in national life and is increasingly expressed in language of societal obligation and individual right. But in constitutional principle the United States is a welfare State not by constitutional mandate but by grace of Congress and State legislatures.[195]

This passage not only clarifies the concept of liberty in American constitutional doctrine as voiced in *Roe v. Wade*, but also gives a clear explanation of the net distinction made by the Supreme Court in the funding cases between the right to abortion and the right to have access to abortion. The principle of public health assistance in Europe is part of the Welfare State ideology. The public health service in Germany is based on the constitutional *Sozialstaat*-principle. The state is bound by a rule of social responsibility; it cannot constitutionally ignore the demands of social justice when making laws.[196] As the passage quoted illustrates, there is no such constitutional principle of social justice in the US.

The American abortion decisions emphasize the individual's liberty to decide for herself whether to have an abortion, the freedom from government intrusion into the woman's privacy, i.e. into decisions concerning her private and family life. How little abortion has to do with social values is shown very clearly in the Medicaid decisions which reject the idea that social concern for the poor is a constitutional principle. The German Federal Constitutional Court, on the other hand, viewed the pregnant woman as part of society, a society which has to uphold the value of unborn life. Abortion is not considered as a private matter, as in the US, but as a public affair which has to be regulated with penal sanctions. Although the German Court recognizes the woman's right to self-determination, the social concern for the protection of unborn life is given priority.

Conclusions

The five constitutional decisions on the abortion question raise some basic questions. Why is it that in such a short time (1973-1975) five major constitutional courts decided on the abortion issue? Why did the French, the

195 Henkin, L., 'Economic-social rights as 'rights': a United States perspective', *Human Rights Law Journal*, 2, 1981, pp. 228-229.

196 Kommers, *op. cit.* note 16, p. 210.

Austrian and the Italian Courts respect the legislature's decision on abortion and why did the German and American Courts impose their will on the legislator, not only by striking down abortion legislation but also by giving detailed instructions as to the abortion reform to be passed by the legislator? And why did the American and German Courts, although both intervening in the legislative process, issue such different decisions on the abortion issue? This chapter has been an attempt to give answers to these questions by looking at the set of values enclosed in the constitutional order, by examining the wording of the various constitutions and their history, and by investigating the position of the constitutional court versus the legislature, and the selection, training, and background of the judges. We have also considered the context in which the abortion issue arose, and the social philosophies embodied in the respective constitutional doctrines.

The constitutional courts issued their abortion rulings at the height of the abortion debate. At the time of the American Supreme Court 1973 abortion decision, about one third of the states had reformed their abortion legislation. In the other states the abortion issue was still highly debated. In Europe, the French, Austrian and German Courts decided on abortion shortly after abortion reforms had been passed by Parliament. These new legislations had not dampened down the debate, however. The abortion issue remained controversial. The Italian Constitutional Court's ruling was given in the same period, although no legislative reform had yet taken place. The European courts had no discretionary power in deciding the issue; they were simply presented with it and had to give a ruling. In Germany, France and Austria, the courts were seized under their power of abstract review, and as such they served as a political instrument for the defeated opposition in Parliament.

The constitutional court decisions on abortion thus coincided with the height of the abortion debate. They were issued in a period when the political forces urged for a reform, or a reform had just taken place but had not eliminated the controversy. These five decisions show how a constitutional court can be called into a political debate irrespective of the position it actually occupies in the political life of the country, and irrespective of whether it wants to intervene in the debate or not.

The positions taken by the French, Austrian and Italian Constitutional Courts towards the legislature are very much in line with the jurisprudential tradition of these Courts. In the French tradition the judge has a limited role as he is still considered as 'la bouche de la loi'. The French Constitutional Council was not intended as a Constitutional Court in the American or

German sense, and in fact its competences are limited to abstract review. The jurisprudence of the Council is characterized by self-restraint. Its decisions are short, and only give a detailed interpretation of the Constitution when it strikes down a law. The abortion decision follows this tradition

The Austrian Constitutional Court, although equipped with quite extensive powers of judicial review also follows the positivist tradition of judicial interpretation. This Court still adheres to the Kelsenian view of the constitutional judge as a 'negative legislator', someone who finds but does not interpret the law. The jurisprudence of the Court is characterized by a historical-grammatical interpretation of the Constitution. In addition, the Court has been reluctant to impose its view on the legislator, in particular with respect to socio-political questions.The role of the Austrian Constitutional Court in the political life of the country is, therefore, a limited one. The abortion decision is very much in line with this tradition. Although presented with a liberal law, the Court succeeded on the basis of a historical interpretation of the Constitution to uphold the abortion law. The tendency of judicial self-restraint turned out to be predominant.

The Italian Constitutional Court has played a more active role than the French and Austrian ones. Through the development of new methods of interpretation it has tried to influence the legislative process. It has never been totally opposed to the views adopted by the legislature, and has always preferred collaboration. The Italian Court has always been concerned with the effect of its decisions and has therefore adopted more a pragmatic than a radical stance. The abortion decisions are very much in line with this pragmatic tradition. In the decision of 1975 the Court did not refrain from striking down an outdated law and suggesting the content of a new law. When the abortion reform was passed, however, the Court showed respect in its 1981 rulings for the decision of the legislator, although the new law is more liberal than the Court suggested in its first ruling.

The French, Austrian and Italian abortion rulings can, on the whole, be explained quite well by the respective positions the Courts take towards the legislature. It has to be added, however, that the substance of the French and Italian abortion reforms facilitated the task of the respective Courts. Both laws are pragmatic solutions to the abortion question as they reflect a compromise between the political forces. Such laws were easier to uphold, from a point of view of political representation, than the German abortion reform which was more radical and reflected only the views of one party coalition in Parliament.

The jurisprudential tradition of the American Supreme Court and of the German Federal Constitutional Court is more characterized by judicial activism than of the courts just mentioned. Both courts have extensive powers of judicial review including the possibility to 'take or reject' cases at their discretion. The American Supreme Court has enlarged its influences, amongst others, by expanding the meaning of the Due Process Clause of the 14th Amendment and by giving a narrower interpretation of what is a 'political question', its criterion for self-restraint. Although interventions of the Supreme Court are justified with the argument that the channels for political change are blocked or that minorities are underrepresented, they sometimes go beyond these principles. It is, for example, not always clear what the constitutional basis is for calling something a 'fundamental right'. This applies in particular to the 'neo-privacy' cases , including the abortion decisions.

The German Constitutional Court has enlarged the scope of its jurisprudence by extending both the object and the effect of its rulings. Besides the law as the product of the legislative process, it has also made the legislative process itself subject of its control, thus checking the rationality of a certain solution. Furthermore, the Court has been able to condition the legislature by extending the binding force of its rulings to the motivations of its decisions and by issuing temporary rulings which indicate the direction the legislature has to follow.

Both the American and the German Courts have, therefore, not hesitated to impose at times their will on the legislature in quite a radical manner. Although the intervention of these Courts in the abortion issue might not have been expected, it was not the first time they took such a step. On the whole the abortion decisions fit quite well into the jurisprudential tradition of the respective Courts, although the radical impact of these decisions definitely came as a surprise. On both occasions the courts clearly did not act as a negative legislature, simply striking down the law. On the contrary, their decisions contained precise instructions to the legislature as to the content of the future abortion legislation, leaving very little legislative freedom.

A surprising fact is that the American and German Court took such opposite views on the abortion issue. An explanation for the principled opposition of these Courts can be found in the historical arguments they themselves put forward, and in the differences in social ideology which underlay these decisions.

The American Supreme Court used a historical argument for rejecting the unborn's right to life, and the German Court used similar arguments for affirming it. As has already been pointed out, it seems strange that a historical interpretation of the Constitution should play a role in the adjudication of the abortion issue, as this issue has only appeared in recent times. This argument is especially true for the American Supreme Court as this Court did not refrain from giving a very modern interpretation to the woman's right to liberty. The historical arguments used by the Supreme Court do not therefore seem to give a full explanation of the American viewpoint. In the German decision, on the other hand, the historical reference seems to be of substantive importance, not because abortion was an issue during the Nazi period, but because abortion seems to recall the almost total disregard of innocent human life during that historical period. The Constitution was developed as a reaction against that experience, and should, therefore, in the view of the Court, be interpreted so as to give the largest possible scope to the protection of human life. Abortion thus seems to stand as a symbol for 'innocent human life' which, given this historical experience, should be protected at all stages of development. Although it is questionable whether abortion should be presented in this historical context, this emotional factor seems to have played a role in the Court's reasoning. It is interesting to note in this respect that in the Italian case it was not the prohibition but the liberalization of abortion that was seen as a reaction against Fascism.

Another explanation of the different outcomes of the American and the German decisions is provided by the social ideologies prevalent in the two countries, as reflected in the abortion decisions. The American Supreme Court emphasizes the right to liberty of the individual in the sense of freedom from government interference. In German jurisprudence, on the other hand, the individual as part of society is central, a principle founded on the *Sozialstaat*-clause in the Constitution. This difference is very clear in the abortion issue. The American Supreme Court stresses the woman's and the doctor's right to liberty in the sense of autonomy in the abortion decision. The state is not allowed to interfere in this decision, and consequently does not have to make financial contributions toward the effectuation of this right. In the German decision, on the other hand, the emphasis is on the social role of the woman, and on the moral education of society. Abortion is not seen as a private matter but a public affair, thus reflecting the communitarian values as opposed to the libertarian values proclaimed by the American Supreme Court.

One reason for the German Court's intervention might have been that the abortion reform received such a marginal majority in Parliament. It did not even have the absolute majority of all Deputies, and thus could not be considered to represent the popular will.

The abortion decisions reaffirm the vagueness of constitutional provisions and the importance of the constitutional judge for giving substance to the values embodied in the Constitution. As has already been pointed out, the respective constitutional courts could have come to quite different solutions on the basis of the wording of the relevant fundamental rights.

It is easy to assume that the political background of the judges determines to some extent controversial decisions such as abortion rulings. This theory has been disproved, however, both by the jurisprudence of the constitutional courts in general and by the abortion decisions in particular. The jurisprudence of the American and the German Courts – the two most interventionist Courts – has shown that judges do not merely act as political agents. If political background had played a role in abortion decisions, the four Nixon appointees on the Supreme Court would have voted against the *Roe* opinion. Although political factors might have played a role for individual judges, this does not seem a sufficient explanation for the outcome of the abortion decisions.

Conclusions

The dilemma of abortion is often described in terms of a counterbalance between the right to life of the fetus and the pregnant woman's right to self-determination. This study has treated the abortion issue from this fundamental-rights perspective. Through a comparative analysis of the constitutional adjudication of abortion in five countries belonging to the Western liberal-democratic tradition (United States, West Germany, France, Italy and Austria), an attempt has been made to evaluate the soundness of the various constitutional arguments used by constitutional courts and legislators, and, finally, to formulate a possible constitutional solution to the abortion issue.

Our first observation concerns the relevance of the constitutional arguments presently used in the debate on abortion within the historical context of abortion legislation. The religious, social, political and medical reasons which led to the abortion restrictions existing up to the beginning of the 1970s, and the ones which subsequently resulted in a liberalization of abortion legislation, certainly show that not only the concern with the fundamental right to life of the fetus and with the fundamental right to self-determination of the pregnant woman have played a role in this historical process. Although the protection of unborn life was one of the reasons for prohibiting abortion in the 19th century, certain ideas on sexual morality, voiced in particular by the Catholic Church, and the medical risks involved in the performing of abortions also played an important role in the developments leading up to restrictive abortion legislation. In the same way, the abortion reforms passed in the 1970s were not only a response to the women's call for self-determination and personal autonomy. The call for free choice in matters of procreation and parental responsibility, on the one hand, and for a division of sexual activity and procreation on the other hand, led to a demand for freedom of abortion as a complement to existing methods of contraception. This demand was not only voiced by women as individuals, but also by couples and by society as a whole. The advances in medical technology made the widescale practice of safe abortions possible, and some

members of the medical profession became interested in a liberalization of the abortion laws. Furthermore, government concerns with overpopulation did not directly further the abortion cause, but certainly resulted in the promotion of birth control in general. The opposition to the existing abortion restrictions was thus based on a new vision of the family and child rearing, on a new sexual morality, and on a new concept of women's role in society. The opposition grew as abortion became safer, and governments were increasingly concerned with the problem of overpopulation. The demand for self-determination of the women's movements with respect to abortion has therefore to be viewed in the wider context of these social and medical developments.

The theoretical discussion of the fundamental values at the basis of the abortion decision has shown the impossibility of coming up with sound moral arguments in defence of a certain type (liberal, moderate or conservative) of abortion regulation. The dilemma lies in the difficulty of defining the beginning of human life, i.e. the point in fetal development at which the unborn can be considered human beings and should therefore be given the same rights as born persons. Any position on the right to life of the fetus, from conservative to liberal, seems to result in contradictions. The discussion of the pregnant woman's claims in the abortion decision, on the other hand, not only highlights the difficulty of balancing the fetus' and the woman's claims, but clearly shows that concerns other than the protection of human life, (in particular certain views on sexual morality), influence views on abortion. Both a principled and a compromise solution to the question of abortion turn out to be problematic. A principled position, i.e. recognizing the right to life from the moment of conception, or recognizing the woman's right to abortion throughout pregnancy, has consequences which are untenable given today's social and moral values. A compromise solution might intuitively seem the most appropriate, but by its very nature lacks a sound theoretical basis. The conclusion seems to be that all of the solutions proposed to the abortion issue lack a solid conceptual basis.

Although the respective constitutional courts and legislators have offered different solutions to the abortion question, some taking a principled stand, others proposing a compromise solution, the dilemmas signalled at the theoretical level reappear in full strength. The United States Supreme Court and the German Federal Constitutional Court had a principled view on the fundamental rights to life and to self-determination, but could not avoid contradictions in their arguments which undermined the principles they pro-

claimed. The Italian, French and Austrian courts expressed themselves more cautiously and refrained from taking a stand on the fundamental rights at stake.

Only the German Constitutional Court recognized the right to life of the fetus, as from the 14th day after conception. The other courts put less emphasis on the claim to life of the unborn by declaring it a duty, or an interest, of the the state to protect unborn life. The pregnant woman's right to self-determination, on the other hand, was implicitly recognized by all courts except the German one. No court, however, mentioned explicitly the right to self-determination, and only the US Supreme Court declared the woman's *right* to abortion.

The most striking aspect of these five constitutional rulings is that although the respective courts seem to take quite different stands on the fundamental rights to life and to self-determination, in actual fact their positions are much closer than the wording of their decisions seems to suggest. The German Federal Constitutional Court, although proclaiming the fetus' right to life as from the 14th day after conception, implicitly allows for a violation of this right by recognizing an indications solution which includes more than just a strictly medical indication for abortion. By allowing for a fetal, ethical, and particularly a social indication, the Court abandoned in reality the position that the fetus has a right to life from an early stage in its development. The American Supreme Court, on the other hand, actually took a more moderate stand than the radical wording of its *Roe*-ruling declaring the woman's fundamental right to abortion would imply. The Court's statement that the states have an important interest in the protection of the potentiality of human life, which grows in substance during pregnancy and becomes compelling so as to prohibit abortion from the moment of viability, indicates that the Court in fact adopts a developmental criterion of humanness.

What can be concluded is that, although the respective courts emphasized different aspects of, and expressed divergent views on the fundamental rights to life and to self-determination, in the end they all adopted a compromise solution. The German and American courts made a very serious attempt to take a principled stand, but could not avoid contradictions in their arguments which implied a more moderate stand than the ones declared. The outcome was very similar in the French and Italian court decisions. What this comparative analysis shows is that it seems impossible to defend either the position that the unborn have the right to life from the moment of conception or

the position that the pregnant woman should have the right to decide on abortion throughout pregnancy. The findings of chapter II, namely that there does not seem to be a sound way to define the right to life are therefore reconfirmed by the constitutional practice. The tendency to find a compromise between the protection of the value of unborn life and the respect for the mother's right to self-determination is a common trait of these constitutional decisions.

Given the fact that it turns out to be impossible to define the right to life in a principled way, a compromise solution which avoids the question of the right to life still needs a sound legal and constitutional basis. This poses the question of the validity of the time-phase rule and of the indications solution, the legal answers given to the dilemma of abortion in these five countries.

The arguments used by the German Court for imposing an indications solution were that this would further the aim of the protection of unborn life and would reduce the incidence of abortion. A major objection, however, against the indications solution (including a social indication) passed by the German legislator is that it gives the impression of being an objective standard which in reality it is not. The content of the very vague standard of the social indication will depend on the personal views of the individual doctor and on the ability of the pregnant woman to convince her doctor of the validity of her arguments. In contrast to the medical, fetal and ethical indications, which can be ascertained in quite an objective way by a doctor on the basis of his medical knowledge, the rightness or validity of social justifications for abortion do not require medical expertise and cannot be checked in an objective way by one or even two doctors. This type of indications solution will, therefore, result in a liberal or restrictive abortion practice depending on the attitude of the individual doctor. This creates an unfair situation in which women are able to obtain an abortion more or less easily depending on the particular circumstances and not on objective criteria. The indications solution thus seems to lack a sound constitutional basis in that it violates the fundamental principle of fairness and the fundamental right to equality, and because, as has already been pointed out, it does not guarantee the fetus' right to life.

In this light the French and Italian approach seem to offer a better solution. The time-phase rule does not create the inequalities that the indications solution brings about: a woman is not judged on the basis of vague, subjective standards; the decision is left to her. The argument against the time-

phase rule is that it does not guarantee even a minimal protection of unborn life, a basic element of a compromise solution on abortion. A time-phase rule with dissuasion requirements, as adopted in France and Italy, seems to take away part of this objection. The procedure the pregnant woman has to go through is aimed at dissuading her or making her reflect on her decision. This gives a greater guarantee than the indications solution that she will take a responsible decision. Strengthening the sense of responsibility of the pregnant woman through counselling is perhaps the most effective way of protecting unborn life and does not affect the woman's right to equal protection by the law. This is not to say that the time-phase rule with dissuasion requirements is the only solution to the abortion issue. However, from a constitutional viewpoint it is the least objectionable of the legal options presently available.

The fundamental rights contingent on the right to abortion have created less problems for constitutional courts and legislators. There is also a greater consensus of opinion on these values.

The father of the fetus was unanimously denied a role in the abortion decision of his partner by all constitutional courts and legislators. The more delicate problem of the role of the parents in the decision of their pregnant daughter of minority age was handled rather differently in the different countries under review. However, in no instance was the minor granted an unconditional right to decide on abortion.

A very striking feature of these five legislations and constitutional court decisions is the central and at the same time ambiguous role that has been assigned to the medical profession in the abortion procedure. The doctor's right to professional freedom has been fully recognized in all the countries discussed. The difference between the American and European debates on the doctor's freedom of profession is that in the US there has been greater emphasis on the doctor's right to determine the abortion procedure, whereas in Europe the focus has been on his right to refuse abortion assistance. The reason for this distinction seems to be that in the US abortion has been treated to a large extent as a medical act and the abortion procedure has been left mostly in the hands of the medical profession. European courts and legislators, on the other hand, have refused to treat abortion is this way. On the European continent the abortion procedure is closely defined by law, which often imposes penal sanctions, and doctors too are bound by these procedural rules. Abortion is therefore not treated on a par with other medical interventions.

The ambiguity of the European laws, with the exception of the Italian law, lies in the fact, however, that the medical profession is free to provide or refuse abortion assistance at its own discretion. Although the medical profession is bound by certain procedural rules, the doctor's freedom of profession is guaranteed. It is on the basis of this freedom that the medical profession may come to an independent decision on abortion. In the German situation the medical profession has been given the additional task of deciding on the soundness of a woman's abortion request. In Austria, France, Italy and Germany the doctor also has a role in the counselling (and dissuading) of the pregnant woman before the intervention can take place. This means that doctors not only perform abortions but also take part – directly or indirectly – in the decision making process. This raises the question of whether doctors are the most suitable persons to decide or counsel on abortions requested for non-medical reasons.

The discussion on the woman's right to subsidized abortion shows a clear divergence in outcome between Europe and the US. Public funding of abortion has been generally accepted in Europe but has been clearly rejected in the US both by the Supreme Court and by the federal government. The limitations on Medicaid funding of abortion in the US should, however, be seen in the context of a generally different attitude towards public assistance to the needy. In Europe health care is considered a public concern, in the US, however, health insurance is mostly seen as a private matter. The reason why abortion is paid for out of public funds in most cases in Europe and not in the U.S. is to be found more in the European welfare-state ideology rather than in a particular divergence in views on the underlying principles of subsidized abortion between the US and Europe.

The view that abortion should be funded because abortion and childbirth deserve the same treatment was rejected on both continents. A distinction has been made between voluntary and medically necessary abortions. The view that non-therapeutic abortions do not deserve the same treatment as other necessary medical acts was originally adopted by the French government, and is now finding support in the German government. It is also implicitly adhered to in Austria. Italy is the only European country where abortions are funded like other medical interventions, but this fact can largely be explained by the existence of a national health service. In the US, after the passing of the Hyde Amendment and after a series of Supreme Court decisions, the federal funding of abortion interventions is limited to 'medically

necessary' abortions in the narrow sense. The states also have the constitutional right to apply the same restrictions to the state funding of abortions.

The second claim on which the right to subsidized abortion could be based, the idea of abortion as a welfare right, has been rejected by all five countries. All abortion rules have as an objective the reduction of the incidence of abortion and regard abortion as a 'last resort'. The promotion of contraception was an integral part of the Italian, French and German abortion law reforms. Instead of accepting abortion as a welfare right, the policy has been to improve the social circumstances in which women live so as to take away the difficulties connected with childbirth. The American rejection of abortion as a welfare right is implicit in the Supreme Court's view that the right to abortion does not include the financial access to that right.

In the space of two years five constitutional courts belonging to the same Western liberal-democratic tradition ruled on the abortion issue. The debate presented itself in very similar terms in these five countries. This study has attempted to come up with explanations for the divergences in the respective constitutional rulings on abortion within the context of the national legal orders. A first observation to be made is that – except for the US Supreme Court – the constitutional courts simply had to decide the abortion question presented to them;they had no choice. In the French, German and Austrian case, the recourse to the constitutional court served as a political instrument of the defeated opposition in Parliament to block the liberalization of abortion. The two decisions by the Italian Constitutional Court were responses to political demands for an abortion reform and for the repeal of the abortion reform respectively. The US Supreme Court was the only court which had the discretionary power to refuse to rule on the abortion question, although in fact the question might have been deemed 'ripe' for judicial review.

The outcome of the decisions in terms of the language used and the respect shown for the legislation under review seems to fit into the respective jurisprudential traditions, which are characterized by different degrees of judicial self-restraint and activism. The outcome seems also to have been influenced by the type of legislation under review, and by its 'representativeness of the popular will'. This is particularly the case in Germany and Italy.

Irrespective of the impact they had on the legislation under review, the American and German constitutional rulings were the most dissimilar. These differences could be explained by the different social philosophies prevailing in the jurisprudence of the respective courts, and by the constitutional and legal history of the respective abortion provisions. In spite of the fact that

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Irrespective of the impact they had on the legislation under review, the American and German constitutional rulings were the most dissimilar. These differences could be explained by the different social philosophies prevailing in the jurisprudence of the respective courts, and by the constitutional and legal history of the respective abortion provisions. In spite of the fact that

legal and constitutional history have few contributions to make to such a 'new' problem as abortion, the Second World War experience seems to have conditioned the German court's position on abortion. The symbolic meaning of abortion as the killing of 'innocent human life' recalled the total disregard of human life during that period.

Finally, the constitutional decisions on abortion once again show that neither the wording of the constitutional norms nor the political background of the judges are relevant factors for explaining the outcome of certain rulings.