Bruggemann and Scheuten v. Federal Republic of Germany

Application No. 6959/75

Before the European Commission of Human Rights

Eur Comm HR

(1981) 3 E.H.R.R. 244

(The Acting President, Mr. G. Sperduti, First Vice-President; . Messrs N

orgaard, Busuttil, Kellberg, Daver, Opsahl, Custers, Frowein, Dupuy, Tenekides,

Trechsel, Kiernan and Klecker.) [FN1]

12 July 1977

Right to respect for private life (Art. 8). Abortion. Restrictions on obtaining abortions.

FN1 Although not present when the final vote was taken, Mr. J. E. S. Fawcett, President, was permitted to express his separate opinion.

Not every restriction on the termination of an unwanted pregnancy constituted an interference with the right of respect for the private life of the mother. Article 8 (1) of the Convention could not therefore be interpreted as meaning that pregnancy and its termination were, in principle, solely a matter of the private life of the mother.

The following cases are cited in the Opinion:
1. Application No. 6825/75, X v. Iceland (1976) 5 D. & R. 86.
2. Application No. 3868/68, X v. U.K. (1970) 34 C.D. 10.
3. Application No. 5877/72, X v. U.K. (1974) 45 C.D. 90.

Representation

Rechtsanwalt K. Sojka, Hamburg, for the applicants.
Ministerialdirigent E. Bulow, Ministerialdirigentin I. Maier (Agents) and Regierungsdirektor P. Wilkitzki (Adviser), all of the Federal Ministry of Justice, for the Government.

REPORT OF THE COMMISSION [FN2]

FN2 Paragraphs 6-13, dealing with procedural matters, and 27-49, summarising the parties' submissions, have been omitted.--Ed.

I. Introduction

1. The following is an outline of the case as submitted by the parties to the European Commission of Human Rights.
2. The applicants are German citizens living in Hamburg. The first applicant, Rose Marie Bruggemann, born in 1936 and single, is a clerk. The second applicant, Adelheid Scheuten, nee Patzeld, born in 1939, divorced and mother of two children, is a telephone operator and housewife.

The substance of the applicants' complaints

3. The application concerns the criminal law on the termination of pregnancy in the Federal Republic of Germany. It was initially directed against the judgment of the Federal Constitutional Court of 25 February 1975. The Court ruled that the Fifth Criminal Law Reform Act adopted by the Bundestag on 26 April 1974 (providing for advice to be given to pregnant women and containing new provisions as to the interruption of pregnancy) was void in so far as it allowed the interruption of pregnancy during the first 12 weeks without requiring any particular reason of necessity (indication). This part of the Act therefore never entered into force.

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

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

II. Establishment of the Facts

15. This application concerns the recent development of the criminal law on the termination of pregnancy in the Federal Republic of Germany, [FN3] which has been as follows:

FN3 For a summary of the criminal law on abortion in States which are Parties to the Convention, see the Commission's Report, App. V.

1. The situation before 21 June 1974

16. Under Article 218 of the Criminal Code (Strafgesetzbuch) of 1871, as last amended in 1969, and as applied in the light of special legislation, [FN4] and the case law of the Federal Court (Bundesgerichtshof), [FN5] any abortion, except one indicated on medical grounds, i.e. to save the mother's life or health, was punishable. [FN6]

FN4 Genetic Health Act (Erbgesundheitsgesetz) 1933, s. 14 (1).

FN5 See 2 Entscheidungen des Bundesgerichtshofs in Strafsachen, 111 at 113-114, 242 at 244; Vol. 3, 7 at 8-9.

FN6 Cf. the commentary by (Schwarz-) Dreher, Strafgesetzbuch (32nd ed., 1970), pp. 814-815.

2. The Fifth Criminal Law Reform Act

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

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

Art. 218. Termination of Pregnancy.

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

(2) The penalty shall be imprisonment for a term of between six months and five years where the perpetrator
1. acts against the will of the pregnant woman, or
2. frivolously causes the risk of death or of a serious injury to the health of the pregnant woman.
The court may order the supervision of conduct (Art. 68 (1) (2)).

(3) If the act is committed by the pregnant woman herself, the penalty shall be

imprisonment for a term not exceeding one year or a fine.

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

Art 218a. No punishment for termination of pregnancy within the first 12 weeks. An abortion performed by a doctor with the pregnant woman's consent shall not be punishable under Article 218 if no more than 12 weeks have elapsed after conception.

Art. 218b. Termination of pregnancy on specific grounds (indications) after 12 weeks. An abortion performed by a doctor with the pregnant woman's consent after 12 weeks have elapsed after conception shall not be punishable under Article 218 if, according to the knowledge of medical science:

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

(2) there are strong reasons for the assumption that, as a result of a genetic trait or harmful influence prior to birth, the child would suffer from an incurable injury to its health which is so serious that the pregnant woman cannot be expected to continue the pregnancy, provided that no more than 22 weeks have elapsed after conception. Art.

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

(1) Whoever terminates a pregnancy although the pregnant woman
1. did not prior thereto consult a doctor, or a consulting agency authorised thereto, regarding the question of termination of her pregnancy, and was not informed there about the public and private assistance available to pregnant women, mothers and children, in particular about such assistance as facilitates the continuance of pregnancy and the situation of mother and child, and
2. did not obtain medical counselling
shall be punished by imprisonment for a term not exceeding one year or by a fine, unless the act is punishable under Article 218.

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

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

(1) Whoever terminates a pregnancy after 12 weeks have elapsed after conception although no competent authority certified prior to the termination that the conditions of Art. 218b (1) or (2) are fulfilled, shall be punished by imprisonment for a term not exceeding one year or by a fine, unless the act is punishable under Article 218.

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

3. The decisions of the Federal Constitutional Court

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

20. On 21 June 1974, the Fifth Criminal Law Reform Act was promulgated in the Federal Gazette. [FN7] According to Article 12 (1) of the Act, its essential provisions would have entered into force on the following day.

FN7 Bundesgesetzblatt, Pt. I, pp. 1297-1300.

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

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

2. Article 218 (b) and 219 of the Criminal Code as amended by this Act shall be applied also to abortions performed within the first 12 weeks after conception.
An abortion performed by a doctor with the pregnant woman's consent within the first 12 weeks after conception shall not be punishable under Article 218 of the Criminal Code if an unlawful act under Articles 176 (sexual abuse of children), 177 (rape) or 179 (1) (sexual abuse of persons unable to defend themselves) of the Criminal Code was committed on the pregnant woman and there are strong reasons to suggest that the pregnancy was a result of the offence.

22. After the promulgation of the Fifth Criminal Law Reform Act, 193 members of the Bundestag and the Governments of five Lander (Baden-Wurttemberg, Saarland, Bavaria, Schleswig-Holstein and Rhineland-Palatinate) instituted proceedings for a review of the Act as to its conformity with the Basic Law (Grundgesetz). They invoked in particular Article 2, [FN8] first sentence, [FN9] in conjunction with Article 1 (1) [FN10] of the Basic Law.

FN8 37 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 324, 325.

FN9 'Everyone has the right to life ...'

FN10 'The dignity of man is inviolable. To respect and protect it is the duty of all State authority.'

23. These proceedings were concluded by the judgment of the Federal Constitutional Court of 25 February 1975. [FN11] The operative part of this decision, which had the same effect as a statute, [FN12] read as follows:

FN11 39 BVerfGE 1-95.

FN12 According to Art. 31 (2) of the Act on the Federal Constitutional Court.

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

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

1. Articles 218b and 219 of the Criminal Code as amended by the Fifth Criminal Law Reform Act of 18 June 1974 ... shall be applied also to abortions performed within the first 12 weeks after conception.

2. An abortion performed by a doctor with the pregnant woman's consent within the first 12 weeks after conception shall not be punishable under Article 218 of the Criminal Code if an unlawful act under Articles 176 to 179 of the Criminal Code was committed on the pregnant woman and there are strong reasons to suggest that the pregnancy was a result of the offence.

3. Where the pregnancy was terminated by a doctor with the pregnant woman's consent within the first 12 weeks after conception in order to avert from the pregnant woman the risk of serious distress that cannot be averted in any other way she might reasonably be expected to bear, the Court may abstain from imposing punishment in accordance with Article 218 of the Criminal Code. [FN13]

FN13 39 BVerfGE 2-3.

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

1. The life of the child developing in the mother's womb constitutes an independent legal

interest protected by the Constitution (Articles 2 (2) first sentence and 1 (1) of the Basic Law). The State's duty of protection not only forbids direct State interference with the life of the developing child but also requires the State to protect and foster it.

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

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

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

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

6. The Fifth Criminal Law Reform Act of 18 June 1974 ... does not comply in a sufficient degree with the constitutional obligation to protect the unborn child. [FN14]

FN14 39 BVerfGE 1 (translated by the Council of Europe).

4. The Fifteenth Criminal Law Amendment Act

25. On 12 February 1976, the Bundestag adopted the Fifteenth Criminal Law Amendment Act (Funfzehntes Strafrechtsanderungsgesetz). The Act was promulgated on 21 May 1976, [FN15] and entered into force one month thereafter. [FN16]

FN15 Federal Gazette I, 1213.

FN16 According to Art. 6 of the Act.

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

Art 218. Termination of Pregnancy.

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

(2) In particularly serious cases the punishment shall be imprisonment for a term between six months and five years. As a rule, a case is particularly serious where the perpetrator:
1. acts against the will of the pregnant woman, or
2. frivolously causes the risk of death or of a serious injury to the health of the pregnant woman.
The court may order the supervision of conduct (Art. 68 (1) (2)).

(3) If the act is committed by the pregnant woman herself, the penalty shall be imprisonment for a term not exceeding one year or a fine. The pregnant woman is not punishable under the first sentence if the pregnancy is interrupted by a doctor after consultation (Art. 218b (1) (1)-(2)) and if not more than 22 weeks have elapsed since conception. The court may abstain from punishing the pregnant woman if at the time of the intervention she was in a situation of particular distress.

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

Art. 218a. Indications for termination of pregnancy.

(1) An abortion performed by a doctor shall not be punishable if:
1. the pregnant woman consents, and
2. in view of her present and future living conditions the termination of the pregnancy is advisable according to medical knowledge in order to avert a danger to her life or the danger of a serious prejudice to her physical or mental health, provided that the danger cannot be averted in any other way she can reasonably be expected to bear.

(2) The prerequisites of paragraph (1) (2) are also considered as fulfilled if, according to medical knowledge:
1. there are strong reasons to suggest that, as a result of a genetic trait or harmful influence prior to birth, the child would suffer from an incurable injury to its health which is so serious that the pregnant woman cannot be required to continue the pregnancy;
2. an unlawful act under Articles 176 to 179 has been committed on the pregnant woman and there are strong reasons to suggest that the pregnancy is a result of that offence; or
3. the termination of the pregnancy is otherwise advisable in order to avert the danger of a distress which
(a) is so serious that the pregnant woman cannot be required to continue the pregnancy, and
(b) cannot be averted in any other way she can reasonably be expected to bear;

(3) Provided that, in the cases envisaged in paragraph (2) (1), not more than 22 weeks

have elapsed since conception and, in the cases envisaged in paragraph (2) (2) and (3), not more than 12 weeks.

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

(1) Whoever terminates a pregnancy although the pregnant woman
1. did not at least three days before the intervention consult a counsellor (para. 2), regarding the question of termination of her pregnancy, and was not informed there about the public and private assistance available to pregnant women, mothers and children, in particular about such assistance as facilitates the continuance of pregnancy and the situation of mother and child, and
2. was not advised by a doctor on the medically significant aspects,
shall be punished by imprisonment for a term not exceeding one year or by a fine, unless the act is punishable under Article 218. The pregnant woman is not punishable under the first sentence.

(2) Counsellor within the meaning of paragraph (1) (1) is:
1. an advisory board approved by a public authority or by a corporation, institution or foundation under public law;
2. a doctor who does not himself perform the abortion and who
(a) as a member of an approved advisory board (sub-para. (1)) is charged to give advice within the meaning of paragraph (1) (1);
(b) is approved as a counsellor by a public authority or by a corporation, institution or foundation under public law; or
(c) has--by consulting a member of an approved advisory board (sub- para. (1)) who is charged with giving advice within the meaning of paragraph (1) (1), by consulting a social authority or in another appropriate way--obtained information about the assistance available in individual cases.
3. Paragraph 1 (1) does not apply where termination of pregnancy is advisable in order to avert from the pregnant woman a danger to her life or health caused by a physical disease or physical injury.

Art. 219. Termination of pregnancy without medical certificate.

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

(2) A doctor may not give a certificate under paragraph (1) if the competent authority has forbidden him to do so, on the ground that he has been finally convicted of an unlawful act under paragraph (1), or under Articles 218, 218b, 219a, 219b or 219c, or of another unlawful act which he committed in connection with an interruption of

pregnancy. The competent authority may provisionally forbid a doctor to give certificates under paragraph (1) if he has been committed for trial on suspicion of having committed such an unlawful act.

Art. 219a. False medical certificate.

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

(2) The pregnant woman is not punishable under paragraph (1).
Art. 219d. Definition. Acts, the effects of which occur before the termination of the implantation of the fertilised egg in the uterus, are deemed not to be interruptions of pregnancy within the meaning of this Code.

IV. Opinion of the Commission

1. The point at issue

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

Article 8 of the Convention provides:

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

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

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

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

to decide upon further allegations.

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

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

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

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

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

57. Thus, the Commission has held that the concept of private life in Article 8 was broader than the definition given by numerous Anglo-Saxon and French authors, namely, the 'right to live as far as one wishes, protected from publicity', in that it also comprises, 'to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality'. But it denied 'that the protection afforded by Article 8 of the Convention extends to relationships of the individual with his entire immediate surroundings'. It thus found that the right to keep a dog did not pertain to the sphere of private life of the owner because 'the keeping of dogs is by the very nature of that animal necessarily associated with certain interferences with the life of others and even

with public life'. [FN17]

FN17 App. No. 6825/75, X. v. Iceland (1976) 5 D. & R. 86, 87 (emphasis added).

58. In two further cases, the Commission has taken account of the element of public life in connection with Article 8 of the Convention. It held that subsequent communication of statements made in the course of public proceedings [FN18] or the taking of photographs of a person participating in a public incident [FN19] did not amount to interference with private life.

FN18 App. No. 3868/68, X v. U.K. (1970) 34 C.D. 10, 18.

FN19 App. No. 5877/72, X v. U.K. (1974) 45 C.D. 90, 93.

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

60. The Commission does not find it necessary to decide, in this context, whether the unborn child is to be considered as 'life' in the sense of Article 2 of the Convention, or whether it could be regarded as an entity which under Article 8 (2) could justify an interference 'for the protection of others'. There can be no doubt that certain interests relating to pregnancy are legally protected, e.g. as shown by a survey of the legal order in 13 High Contracting Parties. [FN20] This survey reveals that, without exception, certain rights are attributed to the conceived but unborn child, in particular the right to inherit. The Commission also notes that Article 6 (5) of the United Nations Covenant on Civil and Political Rights prohibits the execution of death sentences on pregnant women.

FN20 See the Commission's Report, App. VII.

61. The Commission therefore finds that not every regulation of the termination of unwanted pregnancies constitutes an interference with the right to respect for the private life of the mother. Article 8 (1) cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother. In this respect the Commission notes that there is not one member State of the Convention which does not, in one way or another, set up legal rules in this matter. The applicants complain about the fact that the Constitutional Court declared null and void the Fifth Criminal Law Reform Act, but even this Act was not based on the assumption that abortion is entirely a matter of the private life of the pregnant woman. It only provided that an abortion performed by a physician with the pregnant woman's consent

should not be punishable if no more than 12 weeks had elapsed after conception.

62. The legal solutions following the Fifth Criminal Law Reform Act cannot be said to disregard the private-life aspect connected with the problem of abortion. The judgment of the Federal Constitutional Court of 25 February 1975 not only recognised the medical, eugenic and ethical indications but also stated that, where the pregnancy was terminated by a doctor with the pregnant woman's consent within the first 12 weeks after conception 'in order to avert from the pregnant woman the risk of serious distress that cannot be averted in any other way she might reasonably be expected to bear, the Court may abstain from imposing punishment'. [FN21]

FN21 See para. 23, supra.

According to Article 218a of the Criminal Code in the version of the Fifteenth Criminal Law Reform Act of 18 May 1976, [FN22] an abortion performed by a physician is not punishable if the termination of pregnancy is advisable for any reason in order to avert from the pregnant woman the danger of a distress which is so serious that the pregnant woman cannot be required to continue the pregnancy and which cannot be averted in any other way the pregnant woman might reasonably be expected to bear. In particular, the abortion is admitted if continuation of the pregnancy would create a danger to the life or health of the woman, if it has to be feared that the child might suffer from an incurable injury to its health or if the pregnancy is the result of a crime. The woman is required also to seek advice on medically significant aspects of abortion as well as on the public and private assistance available for pregnant women, mothers and children.

FN22 See para. 26, supra.

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

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

64. Furthermore, the Commission has had regard to the fact that, when the European Convention of Human Rights entered into force, the law on abortion in all member States was at least as restrictive as the one now complained of by the applicants. In many European countries the problem of abortion is or has been the subject of heated debates on legal reform since. There is no evidence that it was the intention of the Parties to the Convention to bind themselves in favour of any particular solution under discussion--e.g. a solution of the kind set out in the Fifth Criminal Law Reform Act

(Fristenlosung--time limitation) which was not yet under public discussion at the time the Convention was drafted and adopted.

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

Conclusion

66. The Commission unanimously concludes that the present case does not disclose a breach of Article 8 of the Convention. [FN23]

> FN23 The Committee of Ministers, agreeing with the Commission's opinion, decided that there had been no violation of the Convention: Res. DH (78) 1 (17 March 1978).

Dissenting Opinion of Mr. J. E. S. Fawcett

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

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

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

3. The provisions of Article 218a of the Federal Act, which were declared by the

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

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

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

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

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

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

Separate Opinion of Mr. T. Opsahl (Mr. C. Norgaard and Mr. L. Kellberg concurring)

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

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

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

4. Under the Convention, the legal argument against the claim of the applicants can be made in various ways. Mr. Kellberg has come to the conclusion that there is an interference, but that it can be justified under Article 8 (2), taking into account the way the conditions for such interference have traditionally been understood and the margin of appreciation allowed, the legal position in Germany being in fact relatively liberal. Mr. Norgaard and Mr. Opsahl have noted the distinction between intervention and interference. One could, for instance, say that legislative intervention (even when backed by criminal sanctions) does not necessarily amount to interference in the sense of Article 8, although in various ways affecting private life. There are many example of

legislation intervening in private or family life in ways which do not represent interference with the right to respect for private or family life, e.g. by regulating relations between family members, and which therefore do not need to be justified within the limits set out in Article 8 (2). Mr. Norgaard is of the opinion that in this case there is no interference in relation to the applicants within the meaning of Article 8. Mr. Opsahl shares this opinion and in addition wishes to state, like Mr. Fawcett, that punishment for unlawful abortion, or the threat of it, cannot generally be justified on any of the grounds set out in Article 8 (2).