Preface

This volume presents a compact summary of the results of a multi-staged criminal law research project devoted to a quasi-eternal problem of humanity: the preterm termination of a pregnancy aimed at preventing birth.

Although the practices engaged in to terminate pregnancies as well as the societal debates on the subject can be traced back to the far distant past, the phenomenon of illegal abortion and legal termination of pregnancy has apparently never before been as widely practiced or as intensely discussed as it is today. The destigmatization of a once inviolable prohibition has led, in recent decades, to an unparalleled wave of reform of traditional criminal laws regulating abortion all over the world, whereby the paths to reform chosen by the various legal systems are extremely diverse. This has led to a remarkable variety of regulations, a variety that cannot, however, be explained simply in terms of conflicting ideas concerning the best way to avoid terminations of pregnancy. Instead, the very goal to be set – namely, the fundamental question regarding the degree to which unborn life should be protected, especially in relation to the right of the pregnant woman to self-determination – is obviously highly controversial. Also the subject of controversy are the effects of various regulations on the methods by which pregnancies may be terminated in practice and on the frequency with which they are in fact terminated. Although one might assume that a more or less far-reaching retreat of the criminal law in this area would lead to a corresponding increase in the number of terminations performed, this widespread assumption appears to be precipitate; for as a superficial comparison of various regulatory models has already shown, greater criminal law permissiveness does not necessarily lead to a higher frequency of terminations. Similarly, rigid prohibitory norms do not automatically lead to a smaller number of abortions.

With the role of the criminal law in reducing terminations of pregnancy thus put into question, scholars who engage in comparative legal and empirical-criminological research should recognize and respond to the need to investigate this relationship more closely. This is especially true in a country such as the Federal Republic of Germany where, on the one hand, unborn life has a fundamentally recognized right to protection but where, on the other hand, criminal law is supposed to be the 'last resort' for the protection of legal values.

This leads us to pose the following questions:

- whether and if so to what extent and under what circumstances specifically criminal law regulations and their application in practice actually influence conduct,
- whether (and if so which) other norms (co-)influence the termination of pregnancy in practice, and finally
- whether and to what extent protective mechanisms located outside the criminal

law suffice and whether they may even be more suitable than criminal law instruments.

With its research project 'The Law of Abortion: An International Comparison', the Max Planck Institute for Foreign and International Criminal Law in Freiburg took on the task of resolving these questions. The project design encompassed three stages: an international survey (1), a number of empirical-criminological implementation studies (2) and an assessment of legal policy (3).

(1) All continents were considered in the decision of which countries to include in the *international survey*. For the most part, the study was conducted on the basis of reports covering a single country; in some cases, however, it made sense to address several regionally- or culturally-related countries in one project report. The 40 reports ultimately submitted treat a total of 64 countries, 26 of them European. Thus, coverage of Europe – in terms of the political structures as they existed in the 1980s – is virtually complete. As far as the inclusion of non-European countries is concerned, we felt strongly that it was important to include representatives of all significant cultural and legal circles; a limiting factor here was the capacity of the Institute, with the participation of both internal and external scholars, to prepare country reports. In addition to a detailed overview of all relevant legal regulations, each country report also includes a basic review of existing social conditions as well as a section devoted to data on the prevalence of the termination of pregnancy and the frequency with which illegal abortion is subject to criminal prosecution. These country reports were published in two comprehensive volumes: A. Eser and H.-G. Koch (eds.), *Schwangerschaftsabbruch im internationalen Vergleich. Rechtliche Regelungen – Soziale Rahmenbedingungen – Empirische Grunddaten. Teil* [Vol.] *1: Europa* (1744 pages), *Teil* [Vol.] *2: Außereuropa* (1353 pages), (Baden-Baden, Nomos 1988 and 1989, cited in the following as E/K I and E/K II, respectively).[1] At least with regard to the Max Planck Institute – and perhaps even worldwide –, no other comparative legal project devoted to a single topic has ever achieved comparable dimensions.[2]

[1] The introductory comments [*Geleitwort*]) to E/K I and II (pp. 5-9 in both volumes) contain a description of the objectives and structure of the project as a whole.

[2] Even the otherwise still unique *Vergleichende Gesamtdarstellung des Deutschen und Ausländischen Strafrechts* (edited by K. Birkmeyer et al.) from the beginning of the last century, in which the discussion of 'abortion (§§ 218-220 RStrGB)' was undertaken by G. Radbruch (in Vol. V, *Verbrechen und Vergehen wider das Leben*, Berlin, Otto Liebmann 1905, pp. 159-183), is comparable to our project neither in scope nor in execution. The same is true for other comparative legal studies, such as the studies, published as monographs, by E. Ketting and Ph. Van Praag, *Schwangerschaftsabbruch: Gesetz und Praxis im internationalen Vergleich* (Tübingen, Deutsche Gesellschaft für Verhaltenstherapie 1985); S.J. Frankowski and G.F. Cole (eds.), *Abortion and Protection of the Human Fetus* (Dordrecht, Martinus Nijhoff 1987) and P. Sachdev (ed.), *International Handbook on Abortion* (New York, Greenwood 1988).

(2) In the *empirical stage of the project*, the Max Planck Institute's Department of Criminology under the direction of Prof. Dr. Dr. h.c. mult. *Günter Kaiser* undertook the study of three particularly important issues concerning the implementation in the Federal Republic of Germany of the criminal abortion law reform of 1976: first, the prosecution and disposition of cases by law enforcement agencies; second, the ways in which women decide whether to continue or terminate their pregnancies; and finally, the attitudes and conduct of physicians with regard to § 218 StGB.[3]

(3) An important goal of the *comparative legal stage of the project* was to identify both the common features as well as the differences among the various national laws governing the termination of pregnancy; by proceeding in this fashion, we hoped to find regulatory alternatives for a possible reform. In addition, relevant legal developments that took place in the individual countries subsequent to publication of the country reports were documented and a detailed comparative analysis undertaken. Finally, from the point of view of legal policy, recommendations with detailed reasoning were made: A. Eser and H.-G. Koch, *Schwangerschaftsabbruch im internationalen Vergleich. Teil* [Vol.] *3: Rechtsvergleichender Querschnitt – Rechtspolitische Schlußbetrachtungen – Dokumentation zur neueren Rechtsentwicklung* (932 pages), (Baden-Baden, Nomos 1999, cited in the following as E/K III).

At the time the project was planned, the sensitive nature of the topic in Germany, from a political perspective, was readily apparent. Therein lay the central impetus to dedicate comparative legal research efforts on an as yet unmatched scale to the problem of the termination of pregnancy and to integrate criminological-empirical studies focused on the German situation. During the planning phase of the project, however, there was no way to anticipate the direction that the general political developments in Germany and Europe would take. The dynamics on the national political level that were triggered by the Unification Treaty of 31 August 1990, particularly with regard to the termination of pregnancy,[4] led to a situation in which preliminary results of our studies were introduced at a quite early stage into the

[3] M. Häußler-Sczepan, *Arzt und Schwangerschaftsabbruch, Eine empirische Untersuchung zur Implementation des reformierten § 218 StGB,* Series 'Kriminologische Forschungsberichte,' Vol. 39 (Freiburg, Max-Planck-Institut für ausländisches und internationales Strafrecht 1989, 291 pages); B. Holzhauer, *Schwangerschaft und Schwangerschaftsabbruch, Die Rolle des § 218 StGB bei der Entscheidungsfindung betroffener Frauen,* Series 'Kriminologische Forschungsberichte,' Vol. 38 (Freiburg, Max-Planck-Institut für ausländisches und internationales Strafrecht 1989, 436 pages, 2nd unrevised edn. 1991); K. Liebl, *Ermittlungsverfahren, Strafverfolgungs- und Sanktionspraxis bei Schwangerschaftsabbruch*, Series 'Kriminologische Forschungsberichte,' Vol. 40, (Freiburg, Max-Planck-Institut für ausländisches und internationales Strafrecht 1990, 189 pages).

[4] See Art. 31 para. 4 of the *Einigungsvertrag* [Unification Treaty] (*BGBl.* 1990 II, p. 885 ff.).

public discussion and indeed were reflected in parliamentary consultations.[5] At the risk of appearing immodest, it would appear that the legal comparative and criminological insights won in our project were not entirely without influence on the regulation of termination of pregnancy finally adopted by unified Germany. How and to what extent this influence was exerted must, in the interest of the greatest possible neutrality, be determined by an impartial historian. A welcome development would be the clearing up by such a scholar of misjudgments currently found in this area.

After the conclusion of the norm-finding process in reunified Germany regarding the termination of pregnancy, at least as far as federal legislation was concerned, it seemed as though the political topicality of this subject was a thing of the past. This was, however, not the case, as was soon shown by events such as the withdrawal – insisted upon by Pope John Paul II – of Catholic counseling centers from the counseling system, by the debates triggered by spectacular cases involving so-called 'late-term abortions' as well as by litigation in which parents sought to obtain child maintenance payments in cases where physicians failed to perform a termination. Also, more recent debates on the legal protection of embryos created in vitro show that the discussion of such fundamental issues as the right of unborn life to protection and the nature of appropriate legal instruments is by no means over.

In light of this, we decided to prepare an abridged English-language version of the three published volumes – which encompass a total of 4000 pages – and in so doing make the project's findings accessible to an international public. The compact volume is based on Volume 3 (E/K III), since this volume presented the country reports published in E/K I and E/K II in comparative form. In order not to exceed the capacity of a paperback, we have not included the documentation of more recent legal developments contained in the appendix to E/K III. Furthermore, the comparative legal cross-section was shortened considerably; at the same time, many of the individual citations to the country reports in E/K I and E/K II were removed. Readers in search of a detailed analysis or a specific source of information are referred to the original publications (E/K I-III). Reference to these volumes is simplified by the fact that the comparative legal cross-section – both in the original and in the shortened form presented here – conforms broadly to the outline followed by the country reports in E/K I and E/K II.

The first three chapters of this volume offer a *comparative legal cross-section*: Following a summary of social conditions and historical developments (I) is a de-

[5] The arguably most important texts containing these findings, statements of opinion and reform proposals can be found in A. Eser and H.-G. Koch, *Schwangerschafts-abbruch: Auf dem Weg zu einer Neuregelung, Gesammelte Studien und Vorschläge* (Baden-Baden, Nomos 1992) and in A. Eser, *Schwangerschaftsabbruch: Auf dem verfassungsgerichtlichen Prüfstand, Rechtsgutachten im Normenkontrollverfahren zum Schwangeren- und Familienhilfegesetz von 1992* (Baden-Baden, Nomos 1994, in collaboration with Chr. Hülsmann and H.-G. Koch).

tailed comparison of legal regulations (II), which is supplemented by statistics on the termination of pregnancy (III). The final chapter (IV) contains *concluding reflections from a legal policy perspective*. These reflections, first published in E/K III, are presented here in their entirety. Important findings, insights and trends are summarized and starting points and guidelines for possible reforms pointed out; the chapter ends with a proposed regulation intended to provide those interested in optimal regulation of the termination of pregnancy with food for thought. Results of the aforementioned empirical criminological studies were taken into consideration in the writing of this chapter. The *appendix* contains a list of the countries studied in this project (A) as well as a list of publications based on earlier relevant studies or prepared in connection with the project (B). It is apparent from these publications that the intensity and coordination of cooperation in the course of this project between criminal law scholars and criminologists reached a level rarely achieved anywhere.

Even if, as mentioned above, we have chosen not to include the more recent legal developments presented in the appendix of E/K III, both smaller and larger scale legislative changes implemented in the last 10 years in numerous countries were taken into consideration in the preparation of this abridged version of our research project. Thus, this volume conveys an impression of the current legal policy dynamic that made the termination of pregnancy a 'topic of the 20th century', both in Germany as well as in numerous other countries.

The concept for this book was developed by the two authors together. Each author wrote various sections of the book by himself, whereby the content of these sections was coordinated with the other author. Responsibility for parts II.1 to II.4 as well as for the legal policy reflections (chapter IV) lies with *Albin Eser*; *Hans-Georg Koch* is responsible for the rest of the text. We are deeply grateful to *Emily Silverman*, our translator, whose legal expertise, perseverance and feel for language enabled us to publish this work in English. Thanks are also due to *Ann Marie Ackermann* and *James Cohen* for their assistance in the translation.

Completion of our project does not mean the end of the discussion, and it certainly does not mean that all questions have been answered. This is especially true in the case of an issue that is as ideologically and politically charged as is the termination of pregnancy. If we have succeeded in revealing any misconceptions, in awakening any new insights for possible reforms or in giving impetus to additional studies, we will consider ourselves richly rewarded for the not insignificant amount of time and effort we have put into this project.

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